COURT FILE: CR-19-16; CR-19-020; CR-21-08;
CR-19-1190; CR-20-1353; CR-20-8332; CR-21-1202;
CR-21-1203; CR-22-12570MO

ONTARIO SUPERIOR COURT OF JUSTICE
(Northeast Region)

BETWEEN

REGINA

Applicant

-and-

DAVID BRENNAN, CLAYTON HILL, HARLEY HILL, NOBLE BOUCHER, LUKE KLINK, CHADWICK MCGREGOR, SARAH MCQUABBIE, MICHAEL NOLAN, DENNIS WIGMORE, DEREK ROQUE

Respondents

RESPONDENT'S FACTUM

(Responding to Crown's Application for Summary Dismissal, i.e. a "Vukelich" Application)

Amanda Hauk and Althea Francis
Jeannine Plamondon & Brian Bencze
Public Prosecution Service of Canada
130 King Street West, Suite 2400
Toronto, ON M5X2A2

Tel: 416-456-4514
Fax: 416-952-2116
amanda.hauk@ppsc-sppc.gc.ca
Counsel for Applicant

Michael Swinwood
EWB Professional Corporation
P.O. Box 83010
Ottawa, Ontario
K1V 1A3
T: (613) 852-8384
E:spiritualelders@hotmail.com
per: Michael Swinwood
LSO#14587R
Lawyer for the Respondents

Jack Lloyd
Lloyd Law Professional Co.
Barrister & Solicitor
750 Scarlett Road
Etobicoke, ON M9P2V1
Tel: 647-235-3972
Fax: 416-352-5524
jacklloydman@gmail.com
Counsel for Respondents

BOOK OF AUTHORITIES

1. *R v. Chapman and Honeyman,* 2016 BCPC 275
2. R v Van der Peet 1196 Carswell BC 2309
3. R v Sparrow 1990 Carswell BC 105
4. R v Howell 2020 ABQB 385 2020 Carswell ALTA 1176
5. R v Smith 2015 SCC SCE 34 Carswell BC 1587
6. Quebec v. 9147-0732 Quebec Inc 2020 SCC 32
7. International Covenant on Civil and Political Rights
8. Universal Declaration of Human Rights
9. United Nations Declaration on the Rights of Indigenous Peoples
10. R v. Desautel 2021 Carswell BC 1185
11. Beaver v. Hill 2018 ONCA Carswell ONT 16797
12. Nevsun Resources Ltd. v. Araya 2020 Carswell BC 447 17
13. R v. Hape 2007 SCC 26 Carswell ONT 3563

1.

R v. Chapman and Honeyman, 2016 BCPC 275

Most Negative Treatment: Check subsequent history and related treatments.

2016 BCPC 275

British Columbia Provincial Court

R. v. **Chapman**

2016 CarswellBC 2608, 2016 BCPC 275, [2016] B.C.W.L.D. 7303, [2016] B.C.J. No. 1958, 133 W.C.B. (2d) 272

REGINA v. KYLE DAVID CHAPMAN and CHAD HONEYMAN

R. Hewson Prov. J.

Heard: April 14,
2016
Judgment: May 16,
2016
Docket: Vernon 49741-1

Counsel: A. Bayliss, for Crown
J. Avis, for Defendant, Kyle **Chapman**

Subject: Constitutional; Criminal; Evidence; Human Rights
Related Abridgment Classifications
Criminal law
IV Charter of Rights and Freedoms
IV.13 Unreasonable search and seizure [s. 8]
IV.13.e Warrant requirements
Headnote
Criminal law --- Charter of Rights and Freedoms — Unreasonable search and seizure [s. 8] — Warrant requirements
Accused, C and H were charged with production of marijuana following discovery of marihuana grow operation on execution of search warrant at residence — C applied for Vukelich hearing to challenge admissibility of evidence to be used against him pursuant to Canadian Charter of Rights and Freedoms (Charter) — Application granted — C sought to cross-examine constable with respect to number of issues, but primarily about steps taken to identify source of odours of marijuana and weight to be given to those observations — Observations of odours varied depending on date and person observing or not observing smell — Reasonable explanation was possible, however, evidence with respect to presence of odour may be in dispute, if one officer could smell odour and officer standing next to him could not — In absence of evidence of odours, it was possible that warrant could still have been issued, but there could also be reasonable basis on which to find Charter violation — Time required to challenge sufficiency of information to obtain was not substantial, particularly since H was not joining application — There was reasonable likelihood that hearing C's Charter application could assist in determining issues to be decided on trial.
Table of Authorities
Cases considered by *R. Hewson Prov. J.*:
R. v. Vukelich (1996), 108 C.C.C. (3d) 193, 37 C.R.R. (2d) 237, 78 B.C.A.C. 113, 128 W.A.C. 113, 1996 CarswellBC 1611 (B.C. C.A.) — considered
Statutes considered:
Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
Generally — referred to

APPLICATION by accused C, pursuant to *Canadian Charter of Rights and Freedoms*, for Vukelich hearing be declared to challenge admissibility of evidence to be used against him.

***R. Hewson Prov. J.*:**

INTRODUCTION

1 The police executed a search warrant at a house in Spallumcheen B.C. on November 19, 2014. They discovered a marijuana grow operation, and charged Kyle David **Chapman** and Chad **Honeyman** with production of marijuana. Mr. **Chapman** now applies under the *Charter of Rights* to have a *voir dire* declared so that he can challenge the admissibility of evidence to be used against him. Mr. **Chapman** says that there is a reasonable basis upon which the Court could find a breach of the *Charter*, and that there is a reasonable likelihood that the evidentiary hearing can assist in determining the issues before the court.

2 The Crown is opposed to Mr. **Chapman's** application to have a *voir dire* declared. The Crown takes the position that the Information to Obtain was detailed and complete, and will inevitably be upheld upon review.

3 Mr. **Honeyman** is taking no position on this application, and has said that he would not join Mr. **Chapman's** *Charter* application if a *voir dire* was declared.

4 Following the submissions of counsel, I ordered that a *voir dire* be declared at the trial, with reasons to follow.

THE BASIS OF THE WARRANT TO SEARCH

5 The search of the residence was authorized by a search warrant granted by a Judicial Justice of the Peace on November 19, 2014. The application was based on an Information to Obtain sworn by Constable Tyler Jackson. In his Information to Obtain, Constable Jackson pointed to a number of facts which he said supported his belief that there was a marijuana grow operation in the residence to be searched. The most significant facts were:

> 1. About four months earlier, an anonymous person told police that he or she thought marijuana was being grown at the residence because of an odor of skunk, and vehicles coming and going.
>
> 2. An odor of marijuana was detected near the residence. Ten days earlier, on November 9, Constable Jackson detected the slight odor of marijuana when standing 7-10 m from the residence. Constable Jackson and a second officer detected a light but steady odor of marijuana on November 16. A third officer detected an odor of marijuana on November 18.
>
> 3. On November 12, Mr. **Chapman** was detained in a traffic stop. The officer conducting the traffic stop smelled the odor of marijuana on Mr. **Chapman's** clothes and person.
>
> 4. The electrical consumption and use of air conditioning at the residence was inconsistent with Constable Jackson's personal experience as a homeowner. The amount of electricity being used, and the manner in which the air conditioning was used, appeared to Constable Jackson to be consistent with the presence of a marijuana grow operation.
>
> 5. The wall above the foundation on the northeast side of the residence was unusually warm, and there were signs of unusual warmth along the eastern and southern sides of the residence, where the structure of the dwelling connected to the foundation. The unusual warmth was consistent with the presence of a marijuana grow operation.

6 Constable Jackson included other observations in his Information to Obtain. He referred to seven occasions on which he had conducted surveillance at the residence, and had not detected any unusual odor. He also referred to occasions on which surveillance had been conducted by a team of two officers, and only one had detected an odor of marijuana while the other had not.

APPLICATION TO DECLARE A VOIR DIRE: THE "VUKELICH APPLICATION"

7 The law is clear that trial judges have the authority to declare a *voir dire* in which the accused can challenge the admissibility of evidence to be used against him or her, or to decline to embark upon an evidentiary enquiry when the accused is unable

to show a reasonable likelihood that the hearing can assist in determining the issues before the court. The decision is made following what in British Columbia is known as a "Vukelich Hearing". The hearing is so named for the leading case in the area, *R. v. Vukelich* (1996), 108 C.C.C. (3d) 193 (B.C. C.A.).

8 The rigour with which the law in *R. v. Vukelich* is applied and the way in which a trial judge exercises his or her discretion in relation to an application for a *voir dire* is case-specific and highly contextual. At least three factors will shape the exercise of the trial judge's discretion:

1. the extent to which the anticipated evidence underlying the alleged *Charter* breach is legitimately in dispute;

2. the state and clarity of the law on the issue sought to be litigated, and

3. the infinite number of practical considerations that will arise in any particular case.

9 An accused person is not entitled as of right to a *voir dire* to challenge the admissibility of evidence on constitutional grounds. However, the threshold for embarking on a *voir dire* is low. The Vukelich hearing itself was never intended as a mechanism to prevent investigation of alleged *Charter* breaches where a sufficient foundation for the alleged breach could be demonstrated, nor was the Vukelich hearing itself intended to be a protracted examination of the precise details of the accused's proposed *Charter* application.

10 What underlies the Vukelich enquiry is the need to balance the accused's fair trial interests against the public interest in the efficient management of criminal trials by avoiding lengthy and unnecessary pretrial applications in circumstances where the remedy sought could not reasonably be granted.

11 A review of rulings following Vukelich hearings suggests that the following procedural steps should be observed:

1. The Vukelich application must be made before or at the time when the evidence is tendered. Counsel may provide a copy of the Information to Obtain in question to the trial judge, in advance of the application.

2. The procedure should be flexible and should be adapted to the circumstances of the case.

3. The onus is on the accused applying to have a *voir dire* declared.

4. The application should be determined upon the statements of counsel, if possible.

5. Counsel for the accused should summarize the facts that the accused is relying on in support of his or her submission that there has been a *Charter* breach.

6. The Court should assume for the purposes of the Vukelich application that the facts as alleged by counsel are true.

7. If the trial judge declines to declare a *voir dire* on the basis of the statements of counsel, counsel for the accused must either choose to go further, or to accept the Court's ruling, subject to his or her eventual right of appeal.

8. When counsel for the accused chooses to go further, a more formal approach will be required. That may include the filing of affidavits or an undertaking to adduce evidence. In essence, there must be some factual basis supporting the application before the trial judge can declare a *voir dire*.

9. The accused is not required to file an affidavit, as it may expose him or her to cross-examination.

10. Ultimately, if the statement of counsel or the evidence adduced on the Vukelich application do not disclose a basis on which the court could reasonably make the order sought, the application to declare a *voir dire* should be dismissed.

APPLICATION TO THE CASE AT BAR

12 In the case at bar, counsel for Mr. **Chapman** has stated that he seeks to cross-examine Constable Jackson with respect to a number of issues, but primarily about the steps taken to identify the source of the odors of marijuana and the weight to be given to those observations. The observations of odors vary depending on the date and the person observing or not observing the smell. There may be a reasonable explanation. However, the evidence with respect to the presence of an odor may be in dispute, if one officer could smell an odor and an officer standing next to him could not. In the absence of the evidence of odors, it is possible that the warrant could still have been issued, but there could also be a reasonable basis on which to find a violation of the *Charter*.

13 I note as well that the time required for a challenge to the sufficiency of an Information to Obtain is not substantial, particularly since Mr. **Honeyman** is not joining in the application. This is a practical consideration that militates in favour of declaring a *voir dire*.

14 In all the circumstances, there is a reasonable likelihood that a hearing of Mr. **Chapman's** *Charter* application could assist in determining the issues to be decided on the trial, and I order that a *voir dire* be declared.

Application granted.

2.

R v Van der Peet 1196 Carswell BC 2309

Most Negative Treatment: Distinguished
Most Recent Distinguished: Samson Indian Nation & Band v. Canada | 2001 CarswellNat 5261, 2001 CarswellNat 68, 102 A.C.W.S. (3d) 1104, 199 F.T.R. 125, [2001] 2 C.N.L.R. 353, [2001] F.C.J. No. 50 | (Fed. T.D., Jan 18, 2001)

1996 CarswellBC 2309
Supreme Court of Canada

R. v. Van der Peet

1996 CarswellBC 2309, 1996 CarswellBC 2310, [1996] 2 S.C.R. 507, [1996] 4 C.N.L.R. 177, [1996] 9 W.W.R. 1, [1996] B.C.W.L.D. 2398, [1996] S.C.J. No. 77, 109 C.C.C. (3d) 1, 130 W.A.C. 81, 137 D.L.R. (4th) 289, 200 N.R. 1, 23 B.C.L.R. (3d) 1, 31 W.C.B. (2d) 518, 50 C.R. (4th) 1, 80 B.C.A.C. 81, EYB 1996-67132

Dorothy Marie Van der Peet (sic) (Appellant) v. Her Majesty the Queen (Respondent) and The Attorney General of Quebec, the Fisheries Council of British Columbia, the British Columbia Fisheries Survival Coalition and the British Columbia Wildlife Federation, the First Nations Summit, Delgamuukw, et al., Howard Pamajewon, Roger Jones, Arnold Gardner, Jack Pitchenese and Allan Gardner (Interveners)

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

Heard: November 27, 28 and 29, 1995
Judgment: August 22, 1996
Docket: 23803

Counsel: *Louise Mandell* and *Leslie J. Pinder*, for appellant.
S. David Frankel, Q.C., and *Cheryl J. Tobias*, for respondent.
René Morin, for intervenor Attorney General of Quebec.
J. Keith Lowes, for intervenor Fisheries Council of British Columbia.
Christopher Harvey, Q.C., and *Robert Lonergan*, for intervenors British Columbia Fisheries Survival Coalition and British Columbia Wildlife Federation.
Harry A. Slade, Arthur C. Pape and *Robert C. Freedman*, for intervenor First Nations Summit.
Stuart Rush, Q.C., and *Michael Jackson*, for intervenors Delgamuukw et al.
Arthur C. Pape and *Clayton C. Ruby*, for intervenors Howard Pamajewon, Roger Jones, Arnold Gardner, Jack Pitchenese and Allan Gardner.

Subject: Natural Resources; Public
Related Abridgment Classifications
Aboriginal and Indigenous law
V Indigenous rights to natural resources and environmental protections
V.1 Rights to protection and consultation
V.1.b Fishing
Aboriginal and Indigenous law
V Indigenous rights to natural resources and environmental protections
V.2 Right of access to natural resources
V.2.b Fishing
V.2.b.ii Application of federal statutes
Aboriginal and Indigenous law
V Indigenous rights to natural resources and environmental protections

V.2 Right of access to natural resources
V.2.b Fishing
V.2.b.iv Licences

Headnote

Aboriginal and indigenous law --- Indigenous rights to natural resources and environmental protections — Right of access to natural resources — Fishing — Application of federal statutes

Accused charged with selling fish caught under Indian food fish licence contrary to federal regulations — Accused claiming aboriginal right to sell fish — Trial judge rejecting claim and convicting accused — Summary appeal judge accepting accused's argument and overturning conviction — Court of Appeal reinstating trial judge's verdict and accused appealing to Supreme Court of Canada — Majority concluding accused not having aboriginal right to exchange fish for money or other goods — Constitution Act, 1982, s. 35(1) Constitution Act, 1982, R.S.C. 1985, App. II, No. 44, s 35(1).

The accused sold ten salmon caught under an Indian food fish licence and was charged with selling fish caught under such a licence contrary to federal regulations. At trial, she argued that the regulations infringed her existing aboriginal right to sell fish and, accordingly, violated s. 35(1) of the Constitution Act,1982. The trial judge rejected the accused's argument, concluding that, historically, the accused's people fished for food and ceremonial purposes and that any trade in salmon was not in any regularized or market sense but was only incidental and occasional. The accused was convicted and appealed. The summary appeal judge found that the trial judge erred in analyzing the issue in a market system of exchange context rather than considering whether the right to fish included the right to sell, barter or exchange. He concluded that the accused had an aboriginal right to sell fish, allowed the appeal and set aside the conviction.

The Crown's appeal before the Court of Appeal was successful and the guilty verdict was restored. The majority found that an aboriginal right was protected by s. 35(1) where the evidence established that the right had been exercised at the time sovereignty was asserted for a sufficient length of time to become integral to the aboriginal society and where the practice was not prevalent merely because of European influences but had arisen from the aboriginal society itself. The majority determined that the accused did not have a right to sell fish allocated for food purposes on a commercial basis. The dissenting judge found that a court should look not to the purpose for which the aboriginal people fished, but rather at the social significance of fishing to the aboriginal society. He concluded that the social significance of fishing for the accused's people was that fishing was the means by which they provided themselves with a moderate livelihood and the right to sell sufficient fish to provide for such a livelihood was protected by s. 35(1). The accused appealed to the Supreme Court of Canada.

Held:

Appeal dismissed.

Per Lamer C.J.C. (La Forest, Sopinka, Gonthier, Cory, Iacobucci and Major JJ. concurring):

The scope of s. 35(1) is determined by a purposive approach in light of the general principles which apply to the legal relationship between the Crown and aboriginal people. The fiduciary relationship existing between those parties requires s. 35(1) to be given a generous and liberal interpretation in which any ambiguity or doubt must be resolved in favour of aboriginal people. In order for an aboriginal right to be protected under s. 35(1), an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.

Several factors must be considered in the application of that test to a set of facts. Courts must consider the perspective of aboriginal people, as considered within the general Canadian legal system, and must identify precisely the nature of the claim being made. The claim must be adjudicated on a specific rather than a general basis and the rules of evidence and the interpretation given to that evidence should be approached with a consciousness of the special nature of such claims and the evidentiary difficulties arising in proving such claims. In order to be integral, a practice, custom or tradition must be of central significance to the aboriginal society in question and must be distinctive, as opposed to distinct. It must be of independent significance to the aboriginal culture and not exist merely as an incident to another practice. The practice, custom and tradition must have continuity, though not necessarily an unbroken chain of continuity, with the traditions, customs and practices existing before the arrival of Europeans. Conclusive evidence from pre-contact times is not required. The pre-contact requirement is not inconsistent with the inclusion of the Canadian Métis people in the Act. The influence of European culture will only be relevant to the inquiry if it is demonstrated that the practice, custom or tradition is only integral because of that influence. Finally, courts must take into account both the relationship of aboriginal peoples to the land and the distinctive societies and cultures of aboriginal peoples.

The Court of Appeal erred in determining the nature of the claim. The accused's claim was that she had an aboriginal right to exchange fish for money or for other goods, not that she had a right to sell fish commercially. The fundamental question was thus whether the practice of exchanging fish for money or other goods was an integral part of the specific distinctive culture of the accused's people before contact with Europeans. While the trial judge's legal analysis of the facts was not entirely correct, there was no clear and palpable error in his review of the evidence and his subsequent findings of fact. The accused failed to prove that the exchange of salmon for money or other goods was an aboriginal right recognized and affirmed by s. 35(1). As such, it was unnecessary to consider the tests for extinguishment, infringement and justification and laid out by *R. v. Sparrow*.

Per L'Heureux-Dubé J. (dissenting):

A better approach to that advocated by the majority is to examine the question of the nature and extent of aboriginal rights from a certain level of abstraction and generality. Section 35(1) should be viewed as protecting the distinctive culture of which aboriginal activities are manifestations, not a catalogue of individualized practices, traditions and customs. Defining existing aboriginal rights by reference to pre-contact practices, traditions and customs should not be adopted. Rather, the determining factor should be whether the activity in question has been sufficiently significant and fundamental to the culture and social organization of the aboriginal group for a substantial continuous period of time. The substantial continuous period of time should be assessed based on the type of aboriginal practices, traditions and customs, the particular aboriginal culture and society, and a reference period of 20 to 50 years. When defining the nature of the claim, the purposes for which the aboriginal activity is undertaken should be considered highly relevant.

The trial judge and Court of Appeal majority erred in framing the claim in commercial terms. The accused's arguments only referred to the right to sell, trade and barter fish for her livelihood, support and sustenance. Consequently, when assessing the historical evidence before him, the trial judge asked himself the wrong questions and erred as to the proper evidentiary basis necessary to establish an aboriginal right. He made no, or insufficient, findings of fact regarding the accused's people's distinctive aboriginal culture relating to the sale, trade and barter of fish for livelihood, support and sustenance purposes. That palpable and overriding error justified the substitution, by both the summary appeal judge and dissenting appeal court judge, of their own assessments of the trial evidence. They correctly found that the accused and her people possessed an aboriginal right protected under s. 35(1) to sell, trade and barter fish for her livelihood, support and sustenance. There was insufficient evidence to determine the extinguishment, infringement and justification issues. Accordingly, the matter should be remitted to trial.

Per McLachlin J. (dissenting):

A court approaching the question of whether a practice is the exercise of an aboriginal right under s. 35(1) must adopt an approach which recognizes the dual purposes of s. 35(1), is liberal and generous towards aboriginal interests, considers the claim in the context of the historical way of life of the people asserting it and is true to the Crown's position as a fiduciary to aboriginal peoples. When one person sells something to another, whether on a large or small basis, that is commerce. Accordingly, the accused was selling fish commercially. However, the critical question was not whether the sale of fish was commerce or not, but whether the sale could be defended as the exercise of a more basic aboriginal right to continue the people's historic use of a resource. One must distinguish between an aboriginal right and the exercise of that right. Rights are cast in broad terms while the exercise of a right may take many forms and vary from place to place and from time to time. The right may be ancestral but the exercise of it may take a modern form. The question thus becomes whether the activity may be seen as the exercise of a right which has either been recognized or which so resembles a recognized right that it should also be recognized. The party must then establish continuity or a link between the modern practice and the traditional law or custom of the native people.

Neither of the other opinions put forward a workable test for determining the extent to which aboriginal fishing constitutes an aboriginal right. The better approach to defining aboriginal rights is the empirical approach. The courts should look to history to see what sort of practices have been identified as aboriginal rights in the past. Where aboriginal people can demonstrate that they historically have drawn a moderate livelihood from the fishery, the aboriginal right to a moderate livelihood from the fishery may be established. The evidence here conclusively established that over many centuries the accused's people used the fishery not only for food and ceremonial purposes, but also to satisfy a variety of other needs. To the extent that trade is required to achieve that end, it falls within that right. The accused's aboriginal right to fish for sustenance was not extinguished and the evidence supported the conclusion of a prima facie infringement of that right.

The majority's broader view of justification deviates from the approach taken in *R. v. Sparrow* and should not be adopted. The justifiable limitation of aboriginal rights should be confined to regulation to ensure that their exercise conserves the resources and ensures responsible use. Subject to those limitations, aboriginal people have a priority to fish for food, ceremony and

supplementary sustenance defined in the basic needs that the fishery provided to the people in ancestral times. Under that test, there was no compelling justification for the regulation preventing the accused and her people from selling fish.

Table of Authorities

Cases considered:

Per Lamer C.J.C. (La Forest, Sopinka, Gonthier, Cory, Iacobucci and Major JJ. concurring):

Beaudoin-Daigneault v. Richard, 37 R.F.L. (2d) 225, 51 N.R. 288, [1984] 1 S.C.R. 2 — *referred to*

Calder v. British Columbia (Attorney General), [1973] S.C.R. 313, 1983 CarswellNat 123, [1973] 4 W.W.R. 1, 34 D.L.R. (3d) 145 — *considered*

Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc., [1984] 2 S.C.R. 145, 33 Alta. L.R. (2d) 193, 41 C.R. (3d) 97, [1984] 6 W.W.R. 577, 27 B.L.R. 297, 84 D.T.C. 6467, *(*sub nom. *Hunter v. Southam Inc.)* 14 C.C.C. (3d) 97, 2 C.P.R. (3d) 1, 55 A.R. 291, 55 N.R. 241, 9 C.R.R. 355, 11 D.L.R. (4th) 641 — *considered*

Guerin v. R., [1984] 2 S.C.R. 335, [1984] 6 W.W.R. 481, 59 B.C.L.R. 301, 36 R.P.R. 1, 20 E.T.R. 6, [1985] 1 C.N.L.R. 120, *(*sub nom. *Guerin v. Canada)* 55 N.R. 161, 13 D.L.R. (4th) 321 — *considered*

Hodgkinson v. Simms, [1994] 9 W.W.R. 609, 97 B.C.L.R. (2d) 1, 22 C.C.L.T. (2d) 1, 117 D.L.R. (4th) 161, 171 N.R. 245, 6 C.C.L.S. 1, 57 C.P.R. (3d) 1, 16 B.L.R. (2d) 1, 5 E.T.R. (2d) 1, 49 B.C.A.C. 1, 80 W.A.C. 1, [1994] 3 S.C.R. 377, 95 D.T.C. 5135 — *referred to*

Johnson v. McIntosh, 8 Wheat. 543, 21 U.S. 240, 5 L. Ed. 681 (1823) — *considered*

Laurentide Motels Ltd. c. Beauport (Ville), 45 M.P.L.R. 1, 94 N.R. 1, [1989] 1 S.C.R. 705, 23 Q.A.C. 1 — *referred to*

Mabo v. Queensland (1992), 175 C.L.R. 1 (Aust. H.C.) — *considered*

N.V. Bocimar, S.A. v. Century Insurance Co. of Canada, 17 C.P.C. (2d) 204, 76 N.R. 212, 27 C.C.L.I. 51, [1987] 1 S.C.R. 1247, 39 D.L.R. (4th) 465 [application for rehearing refused (1987), 26 C.P.C. (2d) l (S.C.C.)] — *referred to*

Nowegijick v. R., [1983] 1 S.C.R. 29, [1983] 2 C.N.L.R. 89, 144 D.L.R. (3d) 193, 46 N.R. 41, [1983] C.T.C. 20, 83 D.T.C. 5042 — *referred to*

R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, [1985] 3 W.W.R. 481, 37 Alta. L.R. (2d) 97, 58 N.R. 81, 13 C.R.R. 64, 18 C.C.C. (3d) 385, 60 A.R. 161, 18 D.L.R. (4th) 321, 85 C.L.L.C. 14,023 — *considered*

R. v. Derriksan, [1976] 6 W.W.R. 480, 31 C.C.C. (2d) 575, 71 D.L.R. (3d) 159 (S.C.C.) — *referred to*

R. v. George, [1966] S.C.R. 267, 47 C.R. 382, [1966] 3 C.C.C. 137, 55 D.L.R. (2d) 386 — *referred to*

R. v. Gladstone, [1996] 9 W.W.R. 149 (S.C.C.) — *referred to*

R. v. Horseman, [1990] 4 W.W.R. 97, 73 Alta. L.R. (2d) 193, 55 C.C.C. (3d) 353, [1990] 1 S.C.R. 901, 108 N.R. 1, 108 A.R. 1, [1990] 3 C.N.L.R. 95 — *referred to*

R. v. Kruger (1977), [1978] 1 S.C.R. 104, [1977] 4 W.W.R. 300, 14 N.R. 495, 34 C.C.C. (2d) 377, 75 D.L.R. (3d) 434 — *considered*

R. v. N.T.C. Smokehouse Ltd., [1996] 9 W.W.R. 114 (S.C.C.) — *referred to*

R. v. Oakes, 65 N.R. 87, [1986] 1 S.C.R. 103, 50 C.R. (3d) 1, 24 C.C.C. (3d) 321, 14 O.A.C. 335, 26 D.L.R. (4th) 200, 19 C.R.R. 308 — *referred to*

R. v. Simon, [1985] 2 S.C.R. 387, 62 N.R. 366, 23 C.C.C. (3d) 238, 71 N.S.R. (2d) 15, 171 A.P.R. 15, [1986] 1 C.N.L.R. 153, 24 D.L.R. (4th) 390 — *referred to*

R. v. Sparrow, [1990] 4 W.W.R. 410, 46 B.C.L.R. (2d) 1, 56 C.C.C. (3d) 263, 70 D.L.R. (4th) 385, [1990] 1 S.C.R. 1075, 111 N.R. 241, [1990] 3 C.N.L.R. 160 — *considered*

R. v. Sutherland, [1980] 2 S.C.R. 451, [1980] 5 W.W.R. 456, 7 Man. R. (2d) 359, 53 C.C.C. (2d) 289, 113 D.L.R. (3d) 374, 35 N.R. 361, [1980] 3 C.N.L.R. 71 — *considered*

Schwartz v. R., 17 C.C.E.L. (2d) 141, 96 D.T.C. 6103, 10 C.C.P.B. 213, [1996] 1 C.T.C. 303, *(*sub nom. *Minister of National Revenue v. Schwartz)* 193 N.R. 241, *(*sub nom. *Schwartz v. Canada)* 133 D.L.R. (4th) 289, [1996] 1 S.C.R. 254 — *considered*

Sioui v. Quebec (Attorney General), *(*sub nom. *R. v. Sioui)* [1990] 1 S.C.R. 1025, 109 N.R. 22, 56 C.C.C. (3d) 225, 70 D.L.R. (4th) 427, [1990] 3 C.N.L.R. 127, 30 Q.A.C. 280 — *referred to*

Stein v. "Kathy K." (The) ("Storm Point" (The)) (1975), [1976] 2 S.C.R. 802, 6 N.R. 359, 62 D.L.R. (3d) 1 — *considered*

Washington v. Washington State Commercial Passenger Fishing Vessel Assn., 443 U.S. 658 (1979) — *referred to*

Worcester v. Georgia, 6 Peters 515, 31 U.S. 530, 8 L. Ed. 483 (1832) — *considered*

Per L'Heureux-Dubé J. (dissenting):

Baker Lake (Hamlet) v. Canada (Minister of Indian Affairs & Northern Development) (1979), [1980] 1 F.C. 518, [1980] 5 W.W.R. 193, 107 D.L.R. (3d) 513, [1979] 3 C.N.L.R. 17 [additional reasons at [1981] 1 F.C. 266, [1982] C.N.L.R. 139] (T.D.) — *referred to*

Beaudoin-Daigneault v. Richard, 37 R.F.L. (2d) 225, 51 N.R. 288, [1984] 1 S.C.R. 2 — *referred to*

Blaikie c. Quebec (Attorney General) (1978), [1979] 2 S.C.R. 1016, 49 C.C.C. (2d) 359, 101 D.L.R. (3d) 394, 30 N.R. 225 — *referred to*

Calder v. British Columbia (Attorney General), [1973] S.C.R. 313, 1983 CarswellNat 123, [1973] 4 W.W.R. 1, 34 D.L.R. (3d) 145 — *considered*

Canada v. Pharmaceutical Society (Nova Scotia), 15 C.R. (4th) 1, *(*sub nom. *R. v. Nova Scotia Pharmaceutical Society)* 43 C.P.R. (3d) 1, 93 D.L.R. (4th) 36, 74 C.C.C. (3d) 289, 10 C.R.R. (2d) 34, [1992] 2 S.C.R. 606, 139 N.R. 241, 114 N.S.R. (2d) 91, 313 A.P.R. 91 — *referred to*

Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc., [1984] 2 S.C.R. 145, 33 Alta. L.R. (2d) 193, 41 C.R. (3d) 97, [1984] 6 W.W.R. 577, 27 B.L.R. 297, 84 D.T.C. 6467, *(*sub nom. *Hunter v. Southam Inc.)* 14 C.C.C. (3d) 97, 2 C.P.R. (3d) 1, 55 A.R. 291, 55 N.R. 241, 9 C.R.R. 355, 11 D.L.R. (4th) 641 — *referred to*

Cherokee Nation v. Georgia, 5 Peters 1, 30 U.S. 1, 8 L. Ed. 25 (1831) — *referred to*

Comité pour la République du Canada — Committee for the Commonwealth of Canada v. Canada, *(*sub nom. *Committee for the Commonwealth of Canada v. Canada)* 120 N.R. 241, 77 D.L.R. (4th) 385, [1991] 1 S.C.R. 139, 4 C.R.R. (2d) 60 [application for rehearing refused (May 8, 1991), Doc. 20334 (S.C.C.)] — *referred to*

Delgamuukw v. British Columbia, [1993] 5 W.W.R. 97, 104 D.L.R. (4th) 470, 30 B.C.A.C. 1, 49 W.A.C. 1 — *considered*

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

Edwards v. Canada (Attorney General) (1929), [1930] A.C. 124, *(*sub nom. *Reference re s. 24 of the Constitution Act, 1867)* [1929] 3 W.W.R. 479, [1930] 1 D.L.R. 98 (P.C.) — *referred to*

Ford c. Québec (Procureur général), 90 N.R. 84, 10 C.H.R.R. D/5559, [1988] 2 S.C.R. 712, 54 D.L.R. (4th) 577, 36 C.R.R. 1, *(*sub nom. *Chaussure Brown's Inc. v. Québec (Procureur général))* 19 Q.A.C. 69 — *referred to*

Guerin v. R., [1984] 2 S.C.R. 335, [1984] 6 W.W.R. 481, 59 B.C.L.R. 301, 36 R.P.R. 1, 20 E.T.R. 6, [1985] 1 C.N.L.R. 120, *(*sub nom. *Guerin v. Canada)* 55 N.R. 161, 13 D.L.R. (4th) 321 — *referred to*

Hodgkinson v. Simms, [1994] 9 W.W.R. 609, 97 B.C.L.R. (2d) 1, 22 C.C.L.T. (2d) 1, 117 D.L.R. (4th) 161, 171 N.R. 245, 6 C.C.L.S. 1, 57 C.P.R. (3d) 1, 16 B.L.R. (2d) 1, 5 E.T.R. (2d) 1, 49 B.C.A.C. 1, 80 W.A.C. 1, [1994] 3 S.C.R. 377, 95 D.T.C. 5135 — *referred to*

Irwin Toy Ltd. c. Québec (Procureur général), 94 N.R. 167, [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577, 24 Q.A.C. 2, 25 C.P.R. (3d) 417, 39 C.R.R. 193 — *referred to*

Johnson v. McIntosh, 8 Wheat. 543, 21 U.S. 240, 5 L. Ed. 681 (1823) — *referred to*

Lapointe c. Hôpital Le Gardeur, 10 C.C.L.T. (2d) 101, [1992] 1 S.C.R. 351, 9 C.P.C. (3d) 78, 90 D.L.R. (4th) 27, *(*sub nom. *Lapointe v. Chevrette)* 133 N.R. 116, 45 Q.A.C. 262 — *referred to*

Laurentide Motels Ltd. c. Beauport (Ville), 45 M.P.L.R. 1, 94 N.R. 1, [1989] 1 S.C.R. 705, 23 Q.A.C. 1 — *referred to*

Lensen v. Lensen (1987), 23 C.P.C. (2d) 33, [1988] 1 W.W.R. 481, [1987] 2 S.C.R. 672, 79 N.R. 334, 44 D.L.R. (4th) 1, 64 Sask. R. 6 — *referred to*

Mabo v. Queensland (1992), 175 C.L.R. 1 (Aust. H.C.) — *referred to*

Mitchell v. Sandy Bay Indian Band, *(*sub nom. *Mitchell v. Peguis Indian Band)* [1990] 5 W.W.R. 97, 71 D.L.R. (4th) 193, [1990] 2 S.C.R. 85, [1990] 3 C.N.L.R. 46, 3 T.C.T. 5219, 110 N.R. 241, 67 Man. R. (2d) 81 — *referred to*

Nowegijick v. R., [1983] 1 S.C.R. 29, [1983] 2 C.N.L.R. 89, 144 D.L.R. (3d) 193, 46 N.R. 41, [1983] C.T.C. 20, 83 D.T.C. 5042 — *referred to*

Ontario (Attorney General) v. Bear Island Foundation, 20 R.P.R. (2d) 50, 4 O.R. (3d) 133, [1991] 3 C.N.L.R. 79, 127 N.R. 147, 83 D.L.R. (4th) 381, 46 O.A.C. 396, [1991] 2 S.C.R. 570 [application for reconsideration refused (1995), 46 R.P.R. (2d) 91 (S.C.C.)] — *referred to*

R. v. B. (R.H.), 29 C.R. (4th) 113, 165 N.R. 374, [1994] 1 S.C.R. 656, 42 B.C.A.C. 161, 67 W.A.C. 161, 89 C.C.C. (3d) 193 — *referred to*

R. v. Badger, [1996] 4 W.W.R. 457, 37 Alta. L.R. (3d) 153, 195 N.R. 1, 105 C.C.C. (3d) 289, 133 D.L.R. (4th) 324, [1996] 2 C.N.L.R. 77, [1996] 1 S.C.R. 771, 181 A.R. 321, 116 W.A.C. 321 — *referred to*

R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, [1985] 3 W.W.R. 481, 37 Alta. L.R. (2d) 97, 58 N.R. 81, 13 C.R.R. 64, 18 C.C.C. (3d) 385, 60 A.R. 161, 18 D.L.R. (4th) 321, 85 C.L.L.C. 14,023 — *referred to*

R. v. Canadian Pacific Ltd., 41 C.R. (4th) 147, 17 C.E.L.R. (N.S.) 129, 99 C.C.C. (3d) 97, 125 D.L.R. (4th) 385, 183 N.R. 325, 24 O.R. (3d) 454, 82 O.A.C. 243, 30 C.R.R. (2d) 252, [1995] 2 S.C.R. 1031 — *referred to*

R. v. Denny (1990), 94 N.S.R. (2d) 253, 247 A.P.R. 253, 55 C.C.C. (3d) 322, [1990] 2 C.N.L.R. 115 (C.A.) — *referred to*

R. v. Frank (1977), [1978] 1 S.C.R. 95, [1977] 4 W.W.R. 294, 34 C.C.C. (2d) 209, 4 A.R. 271, 15 N.R. 487, 75 D.L.R. (3d) 481 — *referred to*

R. v. Fraser, [1994] 3 C.N.L.R. 139 (B.C. Prov. Ct.) — *referred to*

R. v. George, [1966] S.C.R. 267, 47 C.R. 382, [1966] 3 C.C.C. 137, 55 D.L.R. (2d) 386 — *referred to*

R. v. Gladstone, [1996] 9 W.W.R. 149 (S.C.C.) — *referred to*

R. v. Horseman, [1990] 4 W.W.R. 97, 73 Alta. L.R. (2d) 193, 55 C.C.C. (3d) 353, [1990] 1 S.C.R. 901, 108 N.R. 1, 108 A.R. 1, [1990] 3 C.N.L.R. 95 — *considered*

R. v. Jack (1979), 28 N.R. 162, [1979] 5 W.W.R. 364, [1980] 1 S.C.R. 294, 48 C.C.C. (2d) 246, 100 D.L.R. (3d) 193, [1979] 2 C.N.L.R. 25 — *referred to*

R. v. Jones, [1993] 3 C.N.L.R. 182, 14 O.R. (3d) 421 (Ont. Prov. Div.) — *considered*

R. v. Keegstra (1990), 1 C.R. (4th) 129, 77 Alta. L.R. (2d) 193, [1991] 2 W.W.R. 1, 61 C.C.C. (3d) 1, 117 N.R. 1, 114 A.R. 81, 3 C.R.R. (2d) 193, [1990] 3 S.C.R. 697 — *referred to*

R. v. King, [1993] O.J. 1794 (Prov. Ct.) — *referred to*

R. v. Kruger (1977), [1978] 1 S.C.R. 104, [1977] 4 W.W.R. 300, 14 N.R. 495, 34 C.C.C. (2d) 377, 75 D.L.R. (3d) 434 — *referred to*

R. v. Lewis, [1996] 5 W.W.R. 348, 19 B.C.L.R. (3d) 244, 105 C.C.C. (3d) 523, 133 D.L.R. (4th) 700, 196 N.R. 165, [1996] 1 S.C.R. 921, 75 B.C.A.C. 1, 123 W.A.C. 1 — *considered*

R. v. Moosehunter, [1981] 1 S.C.R. 282, 9 Sask. R. 149, 36 N.R. 437, 59 C.C.C. (2d) 193, 123 D.L.R. (3d) 95 — *referred to*

R. v. N.T.C. Smokehouse Ltd., [1996] 9 W.W.R. 114 (S.C.C.) — *referred to*

R. v. Nikal, [1996] 5 W.W.R. 305, 19 B.C.L.R. (3d) 201, 105 C.C.C. (3d) 481, 196 N.R. 1, 133 D.L.R. (4th) 658, 74 B.C.A.C. 161, 121 W.A.C. 161, [1996] 1 S.C.R. 1013 — *considered*

R. v. Sikyea, [1964] S.C.R. 642, 44 C.R. 266, 49 W.W.R. 306, [1965] 2 C.C.C. 129, 50 D.L.R. (2d) 80 — *referred to*

R. v. Simon, [1985] 2 S.C.R. 387, 62 N.R. 366, 23 C.C.C. (3d) 238, 71 N.S.R. (2d) 15, 171 A.P.R. 15, [1986] 1 C.N.L.R. 153, 24 D.L.R. (4th) 390 — *referred to*

R. v. Sparrow, [1990] 4 W.W.R. 410, 46 B.C.L.R. (2d) 1, 56 C.C.C. (3d) 263, 70 D.L.R. (4th) 385, [1990] 1 S.C.R. 1075, 111 N.R. 241, [1990] 3 C.N.L.R. 160 — *considered*

R. v. Sutherland, [1980] 2 S.C.R. 451, [1980] 5 W.W.R. 456, 7 Man. R. (2d) 359, 53 C.C.C. (2d) 289, 113 D.L.R. (3d) 374, 35 N.R. 361, [1980] 3 C.N.L.R. 71 — *referred to*

R. v. Taylor (1981), 34 O.R. (2d) 360, 62 C.C.C. (2d) 227 (C.A.) — *referred to*

RJR-Macdonald Inc. c. Canada (Procureur général), 127 D.L.R. (4th) 1, 100 C.C.C. (3d) 449, 62 C.P.R. (3d) 417, [1995] 3 S.C.R. 199, 31 C.R.R. (2d) 189, 187 N.R. 1 — *referred to*

Reference re Residential Tenancies Act (Ontario), (sub nom. *Re Residential Tenancies Act of Ontario)* [1981] 1 S.C.R. 714, 123 D.L.R. (3d) 554, 37 N.R. 158 — *referred to*

Schwartz v. R., 17 C.C.E.L. (2d) 141, 96 D.T.C. 6103, 10 C.C.P.B. 213, [1996] 1 C.T.C. 303, (sub nom. *Minister of National Revenue v. Schwartz)* 193 N.R. 241, (sub nom. *Schwartz v. Canada)* 133 D.L.R. (4th) 289, [1996] 1 S.C.R. 254 — *referred to*

Sioui v. Quebec (Attorney General), (sub nom. *R. v. Sioui)* [1990] 1 S.C.R. 1025, 109 N.R. 22, 56 C.C.C. (3d) 225, 70 D.L.R. (4th) 427, [1990] 3 C.N.L.R. 127, 30 Q.A.C. 280 — *referred to*

St. Catherine's Milling & Lumber Co. v. R. (1888), 14 App. Cas. 46 (P.C.) — *referred to*

Stein v. "Kathy K." (The) ("Storm Point" (The)) (1975), [1976] 2 S.C.R. 802, 6 N.R. 359, 62 D.L.R. (3d) 1 — *referred to*

Worcester v. Georgia, 6 Peters 515, 31 U.S. 530, 8 L. Ed. 483 (1832) — *considered*

Per McLachlin J. (dissenting):

Calder v. British Columbia (Attorney General), [1973] S.C.R. 313, 1983 CarswellNat 123, [1973] 4 W.W.R. 1, 34 D.L.R. (3d) 145 — *considered*
Guerin v. R., [1984] 2 S.C.R. 335, [1984] 6 W.W.R. 481, 59 B.C.L.R. 301, 36 R.P.R. 1, 20 E.T.R. 6, [1985] 1 C.N.L.R. 120, (sub nom. *Guerin v. Canada)* 55 N.R. 161, 13 D.L.R. (4th) 321 — *considered*
Mabo v. Queensland (1992), 175 C.L.R. 1 (Aust. H.C.) — *considered*
Oyekan v. Adele, [1957] 1 W.L.R. 876, [1957] 2 All E.R. 785 (P.C.) — *considered*
R. v. Gladstone, [1996] 9 W.W.R. 149 (S.C.C.) — *considered*
R. v. Jack (1979), 28 N.R. 162, [1979] 5 W.W.R. 364, [1980] 1 S.C.R. 294, 48 C.C.C. (2d) 246, 100 D.L.R. (3d) 193, [1979] 2 C.N.L.R. 25 — *considered*
R. v. N.T.C. Smokehouse Ltd., [1996] 9 W.W.R. 114 (S.C.C.) — *considered*
R. v. Sparrow, [1990] 4 W.W.R. 410, 46 B.C.L.R. (2d) 1, 56 C.C.C. (3d) 263, 70 D.L.R. (4th) 385, [1990] 1 S.C.R. 1075, 111 N.R. 241, [1990] 3 C.N.L.R. 160 — *considered*
Southern Rhodesia, Re, [1919] A.C. 211 (P.C.) — *considered*
Tanistry Case (1608), Dav. Ir. 28, 80 E.R. 516 — *considered*
Tijani v. Secretary, Southern Nigeria, [1921] 2 A.C. 399 (P.C.) — *considered*
United States v. Dion, 476 U.S. 734 (1986) — *considered*

Statutes considered:

Alberta Natural Resources Act, S.A. 1930, c. 21

Sched.*considered*

British Columbia Terms of Union, R.S.C. 1985, App. II, No. 10 — *considered*

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

s. 1*considered*

s. 2(*b*)*considered*

Constitution Act, 1867

s. 91(24)*considered*

Constitution Act, 1930

Sched. 2 (Natural Resources Transfer Agreement)*considered*

Constitution Act, 1982

Pt. II*referred to*

s. 35*considered*

s. 35(1)*considered*

s. 35(2)*considered*

s. 52*considered*

Fisheries Act, R.S.C. 1970, c. F-14

s. 61(1)*referred to*

Fisheries Act, R.S.C. 1985, c. F-14 — *referred to*

Indian Act, R.S.C. 1985, c. I-5

s. 81*considered*

s. 82*referred to*

s. 88*considered*

Loi sur la protection du consommateur, L.R.Q. 1977, c. P-40.1 — *referred to*

Royal Proclamation, 1763, R.S.C. 1985, App. II, No. 1 — *considered*

United States Bill of Rights — *referred to*

Wildlife Act, R.S.A. 1980, c. W-9

s. 1(*s*) "traffic"*referred to*

s. 42*referred to*

Regulations considered:

Fisheries Act, R.S.C. 1952, c. 119 —

British Columbia Fishery Regulations, SOR/54-659

Fisheries Act, R.S.C. 1970, c. F-14 —

British Columbia Fishery (General) Regulations, SOR/84-248

s. 27(1)

s. 27(5) [en. SOR/85-290, s. 5(2)]

Fisheries Act, R.S.C. 1985, c. F-14 —

Ontario Fishery Regulations, 1989, SOR/89-93

Treaties and conventions considered:

Oregon Boundary Treaty, 1846

Treaty 8

Words and phrases considered:

ABORIGINAL RIGHT LANDS

. . . aboriginal right lands are those lands on which only specific aboriginal rights exist (e.g., the right to hunt for food, social and ceremonial purposes) because the occupation and use by the particular group of aboriginal people is too limited and, as a result, does not meet the criteria for the recognition, at common law, of aboriginal title.

ABORIGINAL TITLE LANDS

Aboriginal title lands are lands which the natives possess for occupation and use at their own discretion, subject to the Crown's ultimate title . . . federal and provincial legislation applies to aboriginal title lands, pursuant to the governments' respective general legislative authority. Aboriginal title of this kind is founded on the common law and strict conditions must be fulfilled for such title to be recognized . . . aboriginal title exists when the bundle of aboriginal rights is large enough to command

the recognition of a sui generis proprietary interest to occupy and use the land.Aboriginal title can also be founded on treaties concluded between natives and the competent government . . . Where this occurs, the aboriginal rights crystallized in the treaty become treaty rights and their scope must be delineated by the terms of the agreement . . . A treaty . . . does not exhaust aboriginal rights; and such rights continue to exist apart from the treaty, provided that they are not substantially connected to the rights crystallized in the treaty or extinguished by its terms.

COMMERCE

When one person sells something to another, that is commerce. Commerce may be large or small, but commerce it remains.

DISTINCT

While "distinct" mandates comparison and evaluation from a separate vantage point, "distinctive" requires the object to be observed on its own. While describing an object's "distinctive" qualities may entail describing how the object is different from others (i.e., "distinguishing"), there is nothing in the term that requires it to be plainly different. In fact, all that "distinctive culture" requires is the characterization of aboriginal culture, not its differentiation from non-aboriginal cultures.

DISTINCTIVE

The standard which a practice, custom or tradition must meet in order to be recognized as an aboriginal right is not that it must be distinct to the aboriginal culture in question; the aboriginal claimants must simply demonstrate that the practice, custom or tradition is distinctive. A tradition or custom that is distinct is one that is unique — "different in kind or quality, unlike" . . . A culture with a distinct tradition must claim that in having such a tradition it is different from other cultures; a claim of distinctness is, by its very nature, a claim relative to other cultures or traditions. By contrast, a culture that claims a practice, custom or tradition is distinctive — "distinguishing, characteristic" — makes a claim that is not relative; the claim is rather one about the culture's own practices, customs or traditions considered apart from the practices, customs or traditions of any other culture. It is a claim that this tradition or custom makes the culture what it is, not that the practice, custom or tradition is different from the practices, customs or traditions of another culture.

DYNAMIC RIGHT

The "dynamic right" approach to interpreting the nature and extent of aboriginal rights starts from the proposition that "the phrase `existing aboriginal rights' must be interpreted flexibly so as to permit their evolution over time" . . . According to this view, aboriginal rights must be permitted to maintain contemporary relevance in relation to the needs of the natives as their practices, traditions and customs change and evolve with the overall society in which they live.

FROZEN RIGHT

The "frozen right" approach would recognize practices, traditions and customs — forming an integral part of a distinctive aboriginal culture — which have long been in existence at the time of British sovereignty . . . This requires the aboriginal right claimant to prove two elements: (1) that the aboriginal activity has continuously existed for "time immemorial", and (2) that it predated the assertion of sovereignty.

RESERVE LANDS

Reserve lands are those lands reserved by the Federal Government for the exclusive use of Indian people; such lands are regulated under the *Indian Act*, R.S.C. 1985, c. I-5.

TRADITIONAL LAWS

. . . "traditional laws" and "traditional customs" are those things passed down, and arising, from the pre-existing culture and customs of aboriginal peoples.

Appeal by accused from judgment of British Columbia Court of Appeal, 80 B.C.L.R. (2d) 75, [1993] 5 W.W.R. 459, [1993] 4 C.N.L.R. 221, (sub nom. R. v. Van der Peet) 83 C.C.C. (3d) 289, 29 B.C.A.C. 209, 48 W.A.C. 209, allowing appeal by Crown from judgment of Selbie J., [1991] 3 C.N.L.R. 161, 58 B.C.L.R. (2d) 392, allowing appeal by accused (1990), [1991] 3 C.N.L.R. 155, from conviction for unlawfully selling salmon caught under Indian food fish licence, contrary to federal regulations.

***Lamer C.J.C. (La Forest, Sopinka, Gonthier, Cory, Iacobucci and Major JJ. concurring)*:**

I. Introduction

1 This appeal, along with the companion appeals in R. v. N.T.C.Smokehouse Ltd., S.C.C., No. 23800 [[1996] 9 W.W.R. 114], and R. v. Gladstone, S.C.C.No. 23801 [[1996] 9 W.W.R. 149], raises the issue left unresolved by this Court in its judgment in R. v. Sparrow[1990] 1 S.C.R. 1075 [[1990] 4 W.W.R. 41046 B.C.L.R. (2d) 1]: how are the aboriginal rights recognized and affirmed by s.35(1) of the Constitution Act, 1982 to be defined?

2 In *Sparrow*, Dickson C.J. and La Forest J., writing for a unanimous Court, outlined the framework for analysing s. 35(1) claims. First, a court must determine whether an applicant has demonstrated that he or she was acting pursuant to an aboriginal right. Second, a court must determine whether that right has been extinguished. Third, a court must determine whether that right has been infringed. Finally, a court must determine whether the infringement is justified. In *Sparrow*, however, it was not seriously disputed that the Musqueam had an aboriginal right to fish for food, with the result that it was unnecessary for the Court to answer the question of how the rights recognized and affirmed by s. 35(1) are to be defined. It is this question and, in particular, the question of whether s.35(1) recognizes and affirms the right of the Sto:lo to sell fish, which must now be answered by this Court.

3 In order to define the scope of aboriginal rights, it will be necessary first to articulate the purposes which underpin s. 35(1), specifically the reasons underlying its recognition and affirmation of the unique constitutional status of aboriginal peoples in Canada. Until it is understood why aboriginal rights exist, and are constitutionally protected, no definition of those rights is possible. As Dickson J. (as he then was) said in R. v. Big M Drug Mart Ltd.[1985] 1 S.C.R. 295 [[1985] 3 W.W.R. 481], at p. 344, a constitutional provision must be understood "in the light of the interests it was meant to protect". This principle, articulated in relation to the rights protected by the *Canadian Charter of Rights and Freedoms*, applies equally to the interpretation of s. 35(1).

4 This judgment will thus, after outlining the context and background of the appeal, articulate a test for identifying aboriginal rights which reflects the purposes underlying s. 35(1), and the interests which that constitutional provision is intended to protect.

II. Statement of Facts

5 The appellant Dorothy Van der Peet was charged under s. 61(1) ofthe Fisheries Act, R.S.C. 1970, c. F-14, with the offence of selling fish caught under the authority of an Indian food fish licence, contrary to s. 27(5) of the British Columbia Fishery (General) Regulations,SOR/84-248. At the time at which the appellant was charged s. 27(5) read:

> 27. ...
>
> (5) No person shall sell, barter or offer to sell or barter any fish caught under the authority of an Indian food fish licence.

6 The charges arose out of the sale by the appellant of ten salmon on September 11, 1987. The salmon had been caught by Steven and Charles Jimmy under the authority of an Indian food fish licence. Charles Jimmy is the common law spouse of the appellant. The appellant, a member of the Sto:lo, has not contested these facts at any time, instead defending the charges against her on the basis that in selling the fish she was exercising an existing aboriginal right to sell fish. The appellant has based her defence on the position that the restrictions imposed by s. 27(5) of the Regulations infringe her existing aboriginal right to sell fish and are therefore invalid on the basis that they violate s. 35(1) of the Constitution Act, 1982.

III. Judgments Below

Provincial Court (1990), [1991] 3 C.N.L.R. 155

7 Scarlett Prov. Ct. J. rejected the appellant's argument that she sold fish pursuant to an aboriginal right. On the basis of the evidence from members of the appellant's band, and anthropological experts, he found that, historically, the Sto:lo people clearly fished for food and ceremonial purposes, but that any trade in salmon that occurred was incidental and occasional only. He found, at p. 160, that there was no trade of salmon "in any regularized or market sense" but only "opportunistic exchanges taking place on a casual basis". He found that the Sto:lo could not preserve or store fish for extended periods of time and that the Sto:lo were a band rather than a tribal culture; he held both of these facts to be significant in suggesting that the Sto:lo did not engage in a market system of exchange. On the basis of these findings regarding the nature of the Sto:lo trade in salmon, Scarlett Prov. Ct. J. held that the Sto:lo's aboriginal right to fish for food and ceremonial purposes does not include the right to sell such fish. He therefore found the accused guilty of violating s. 61(1)of the Fisheries Act.

Supreme Court of British Columbia199158 B.C.L.R. (2d) 392

8 Selbie J. of the Supreme Court of British Columbia held that Scarlett Prov. Ct. J. erred when he looked at the evidence in terms of whether or not it demonstrated that the Sto:lo participated in a market system of exchange. The evidence should not have been considered in light of "contemporary tests for 'marketing'" (at para. 15) but should rather have been viewed so as to determine whether it "is more consistent with the aboriginal right to fish including the right to sell, barter or exchange than otherwise" (at para. 16). He held, at para. 16, that the evidence in this case was consistent with an aboriginal right to sell fish because it suggested that aboriginal societies had no stricture or prohibition against the sale of fish, with the result that "when the first Indian caught the first salmon he had the 'right' to do anything he wanted with it — eat it, trade it for deer meat, throw it back or keep it against a hungrier time". Selbie J. therefore held that the Sto:lo had an aboriginal right to sell fish and that the trial judge's verdict against the appellant was inconsistent with the evidence. He remanded for a new trial on the questions of whether this right had been extinguished, whether the regulations infringed the right and whether any infringement of the right had been justified.

The Court of Appeal (1993)80 B.C.L.R. (2d) 75 [[1993] 5 W.W.R. 459]

9 The British Columbia Court of Appeal allowed the Crown's appeal and restored the guilty verdict of Scarlett Prov. Ct. J. Macfarlane J.A. (Taggart J.A. concurring) held, at para. 20, that a practice will be protected as an aboriginal right under s. 35(1) of the Constitution Act,1982 where the evidence establishes that it had "been exercised, at the time sovereignty was asserted for a sufficient length of time to become integral to the aboriginal society". To be protected as an aboriginal right, however, the practice cannot have become "prevalent merely as a result of European influences" (at para. 21) but must rather arise from the aboriginal society itself. On the basis of this test Macfarlane J.A. held that the Sto:lo did not have an aboriginal right to sell fish. The question was not, he held at para. 30, whether the Sto:lo could support a right to dispose of surplus food fish on a casual basis but was rather whether they had a right to "sell fish allocated for food purposes on a commercial basis" which should be given constitutional priority in the allocation of the fishery resource. Given that this was the question, Macfarlane J.A. held that the assessment of the evidence by the trial judge was correct. The evidence, while indicating that surplus fish would have been disposed of or traded, did not establish that the "purpose of fishing was to engage in commerce" (at para. 41). While the Sto:lo did trade salmon with the Hudson's Bay Company prior to the British assertion of sovereignty in a manner that could be characterized as commercial, this trade was "not of the same nature and quality as the aboriginal traditions disclosed by the evidence" and did not, therefore, qualify for protection as an aboriginal right under s. 35(1).

10 In his concurring judgment Wallace J.A. articulated a test for aboriginal rights similar to that of Macfarlane J.A. in so far as he too held, at para. 78, that the practices protected as aboriginal rights by s.35(1) are those "traditional and integral to the native society pre-sovereignty". Wallace J.A. emphasized that s. 35(1) should not be interpreted as having the purpose of enlarging the pre-1982 concept of aboriginal rights; instead it should be seen as having the purpose of protecting from legislative encroachment those aboriginal rights that existed in 1982. Section 35(1) was not enacted so as to facilitate the current objectives of the aboriginal community but was rather enacted so as to protect (at para. 78) "traditional aboriginal practices integral to the culture and traditional way of life of the native community". Wallace J.A. held, at para. 102, that rights should not be

"determined by reference to the economic objectives of the rights-holders". He concluded from this analytical framework that the trial judge was correct in determining that the commercial sale of fish is different in nature and kind from the aboriginal right of the Sto:lo to fish for sustenance and ceremonial purposes, with the result that the appellant could not be said to have been exercising an aboriginal right when she sold the fish.

11 Lambert J.A. dissented. While he agreed that aboriginal rights are those aboriginal customs, traditions and practices which are an integral part of a distinctive aboriginal culture, he added to that proposition the proviso that to determine whether a practice is in fact integral it is necessary first to describe it correctly. In his view, the appropriate description of a right or practice is one based on the significance of the practice to the particular aboriginal culture. As such, in determining the extent to which aboriginal fishing is a protected right under s. 35(1) a court should look not to the purpose for which aboriginal people fished, but should rather look at the significance of fishing to the aboriginal society; it is the social significance of fishing which is integral to the distinctive aboriginal society and which is, therefore, protected by s. 35(1) of the ConstitutionAct, 1982. Lambert J.A. found support for this proposition in this Court's judgment in Sparrow, , in the American case law arising out of disputes over the terms of treaties signed with aboriginal people in the Pacific northwest (see, e.g., Washington v.Washington State Commercial Passenger Fishing Vessel Assn.443 U.S. 658 (1979)) and in the general principle that the definition of aboriginal rights must take into account the perspective of aboriginal people. Lambert J.A. held that the social significance of fishing for the Sto:lo was that fishing was the means by which they provided themselves with a moderate livelihood; he therefore held at para. 150 that the Sto:lo had an aboriginal right protected by s. 35(1)

> *to catch and, if they wish, sell, themselves and through other members of the Sto:lo people, sufficient salmon to provide all the people who wish to be personally engaged in the fishery, and their dependent families, when coupled with their other financial resources, with a moderate livelihood*. ... (Emphasis in original.)

Lambert J.A. rejected the position of the majority that the commercial dimension of the fishery was introduced by Europeans and therefore outside of the protection of s. 35(1). The key point, he suggested, is not that the Europeans introduced commerce, but is rather that as soon as the Europeans arrived the Sto:lo began trading with them. In doing so the Sto:lo were not breaking with their past; the trade with the Hudson's Bay Company "represented only a response to a new circumstance in the carrying out of the existing practice". Lambert J.A. went on to hold that the Sto:lo right to fish for a moderate livelihood had not been extinguished and that it had been infringed by s. 27(5) of the Regulations in a manner not justified by the Crown. He would thus have dismissed the appeal of the Crown and entered a verdict of acquittal.

12 Hutcheon J.A. also dissented. He did so on the basis that there is no authority for the proposition that the relevant point for identifying aboriginal rights is prior to contact with Europeans and European culture. Hutcheon J.A. held that the relevant historical time is instead 1846, the time of the assertion of British sovereignty in British Columbia. Since it is undisputed that by 1846 the Sto:lo were trading commercially in salmon, the Sto:lo can claim an aboriginal right to sell fish protected by s. 35(1) ofthe Constitution Act, 1982. Hutcheon J.A. held further that this right had not been extinguished prior to 1982. In the result, he would have remanded for a new trial on the issues of infringement and justification.

IV. Grounds of Appeal

13 Leave to appeal to this Court was granted on March 10, 1994. The following constitutional question was stated:

> Is s. 27(5) of the *British Columbia Fishery (General) Regulations*, SOR/84-248, as it read on September 11, 1987, of no force or effect with respect to the appellant in the circumstances of these proceedings, in virtue of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982*, invoked by the appellant?

The appellant appealed on the basis that the Court of Appeal erred in defining the aboriginal rights protected by s. 35(1) as those practices integral to the distinctive cultures of aboriginal peoples. The appellant argued that the Court of Appeal erred in holding that aboriginal rights are recognized for the purpose of protecting the traditional way of life of aboriginal people. The

appellant also argued that the Court of Appeal erred in requiring that the Sto:lo satisfy a long-time use test, in requiring that they demonstrate an absence of European influence and in failing to adopt the perspective of aboriginal peoples themselves.

14 The First Nations Summit intervened in support of the appellant as did Delgamuukw et al. and Pamajewon et al. The Fisheries Council of British Columbia, the Attorney General of Quebec, the British Columbia Fisheries Survival Coalition and the British Columbia Wildlife Federation intervened in support of the respondent Crown.

V. Analysis

Introduction

15 I now turn to the question which, as I have already suggested, lies at the heart of this appeal: how should the aboriginal rights recognized and affirmed by s. 35(1)of the Constitution Act, 1982 be defined?

16 In her factum the appellant argued that the majority of the Court of Appeal erred because it defined the rights in s. 35(1) in a fashion which "converted a Right into a Relic"; such an approach, the appellant argued, is inconsistent with the fact that the aboriginal rights recognized and affirmed by s. 35(1) are *rights* and not simply aboriginal practices. The appellant acknowledged that aboriginal rights are based in aboriginal societies and cultures, but argued that the majority of the Court of Appeal erred because it defined aboriginal rights through the identification of pre-contact activities instead of as pre-existing legal rights.

17 While the appellant is correct to suggest that the mere existence of an activity in a particular aboriginal community prior to contact with Europeans is not, in itself, sufficient foundation for the definition of aboriginal rights, the position she would have this Court adopt takes s. 35(1) too far from that which the provision is intended to protect. Section 35(1), it is true, recognizes and affirms existing aboriginal *rights*, but it must not be forgotten that the rights it recognizes and affirms are *aboriginal*.

18 In the liberal enlightenment view, reflected in the AmericanBill of Rights and, more indirectly, in the Charter, rights are held by all people in society because each person is entitled to dignity and respect. Rights are general and universal; they are the way in which the "inherent dignity" of each individual in society is respected: R. v. Oakes[1986] 1 S.C.R. 103, at p. 136; Big M Drug Mart Ltd., .

19 *Aboriginal* rights cannot, however, be defined on the basis of the philosophical precepts of the liberal enlightenment. Although equal in importance and significance to the rights enshrined in theCharter, aboriginal rights must be viewed differently from *Charter* rights because they are rights held only by aboriginal members of Canadian society. They arise from the fact that aboriginal people are *aboriginal*. As academic commentators have noted, aboriginal rights "inhere in the very meaning of aboriginality", Michael Asch and Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*" (1991), 29 *Alta. Law Rev.* 498, at p. 502; they are the rights held by "Indians *qua* Indians", Brian Slattery, "Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727, at p. 776.

20 The task of this Court is to define aboriginal rights in a manner which recognizes that aboriginal rights are *rights* but which does so without losing sight of the fact that they are rights held by aboriginal people because they are *aboriginal*. The Court must neither lose sight of the generalized constitutional status of what s. 35(1) protects, nor can it ignore the necessary specificity which comes from granting special constitutional protection to one part of Canadian society. The Court must define the scope of s. 35(1) in a way which captures *both* the aboriginal and the rights in aboriginal rights.

21 The way to accomplish this task is, as was noted at the outset, through a purposive approach to s. 35(1). It is through identifying the interests that s. 35(1) was intended to protect that the dual nature of aboriginal rights will be comprehended. In *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.*, *(*sub nom. *Hunter v. Southam Inc.)* [1984] 2 S.C.R. 145 [[1984] 6 W.W.R. 577], Dickson J. explained the rationale for a purposive approach to constitutional documents. Courts should take a purposive approach to the Constitution because constitutions are, by their very nature, documents aimed at a country's future as well as its present; the constitution must be interpreted in a manner which renders it "capable of growth and development over time to meet new social, political and historical realities often unimagined by the framers": Hunter, . A purposive approach to s. 35(1), because ensuring that the provision is not viewed as static and only

relevant to current circumstances, will ensure that the recognition and affirmation it offers are consistent with the fact that what it is recognizing and affirming are "rights". Further, because it requires the Court to analyze a given constitutional provision "in light of the interests it was meant to protect" (Big M Drug MartLtd.,), a purposive approach to s. 35(1) will ensure that that which is found to fall within the provision is related to the provision's intended focus: aboriginal people and their rights in relation to Canadian society as a whole.

22 In Sparrow, , Dickson C.J. and La Forest J. held at p. 1106 that it was through a purposive analysis that s. 35(1) must be understood:

> The approach to be taken with respect to interpreting the meaning of s. 35(1) is derived from general principles of constitutional interpretation, principles relating to aboriginal rights, and *the purposesbehind the constitutional provision itself*. [Emphasis added.]

In that case, however, the Court did not have the opportunity to articulate the purposes behind s. 35(1) as they relate to the scope of the rights the provision is intended to protect. Such analysis is now required to be undertaken.

General Principles Applicable to Legal Disputes Between Aboriginal Peoples and the Crown

23 Before turning to a purposive analysis of s. 35(1), however, it should be noted that such analysis must take place in light of the general principles which apply to the legal relationship between the Crown and aboriginal peoples. In Sparrow, , this Court held at p. 1106 that s. 35(1) should be given a generous and liberal interpretation in favor of aboriginal peoples:

> When the purposes of the affirmation of aboriginal rights are considered, *it is clear that a generous and liberal interpretation of the words in the constitutional provision is demanded*. [Emphasis added].

24 This interpretive principle, articulated first in the context of treaty rights — R. v. Simon[1985] 2 S.C.R. 387, at p. 402; Nowegijick v. R.[1983] 1 S.C.R. 29, at p. 36; R. v.Horseman[1990] 1 S.C.R. 901 [[1990] 4 W.W.R. 97], at p. 907; *Sioui v. Quebec (Attorney General)*R. v. Sioui[1990] 1 S.C.R. 1025, at p. 1066 — arises from the nature of the relationship between the Crown and aboriginal peoples. The Crown has a fiduciary obligation to aboriginal peoples with the result that in dealings between the government and aboriginals the honour of the Crown is at stake. Because of this fiduciary relationship, and its implication of the honour of the Crown, treaties, s. 35(1), and other statutory and constitutional provisions protecting the interests of aboriginal peoples, must be given a generous and liberal interpretation: R. v. George[1966] S.C.R. 267, at p. 279. This general principle must inform the Court's analysis of the purposes underlying s. 35(1), and of that provision's definition and scope.

25 The fiduciary relationship of the Crown and aboriginal peoples also means that where there is any doubt or ambiguity with regards to what falls within the scope and definition of s. 35(1), such doubt or ambiguity must be resolved in favor of aboriginal peoples. In R. v. Sutherland[1980] 2 S.C.R. 451 [[1980] 5 W.W.R. 456], at p. 464, Dickson J. held that paragraph 13 of the Memorandum of Agreement between Manitoba and Canada, a constitutional document, "should be interpreted so as to resolve any doubts in favor of the Indians, the beneficiaries of the rights assured by the paragraph". This interpretive principle applies equally to s. 35(1) ofthe Constitution Act, 1982 and should, again, inform the Court's purposive analysis of that provision.

Purposive Analysis of Section 35(1)

26 I now turn to a purposive analysis of s. 35(1).

27 When the court identifies a constitutional provision's purposes, or the interests the provision is intended to protect, what it is doing in essence is explaining the rationale of the provision; it is articulating the reasons underlying the protection that the provision gives. With regards to s. 35(1), then, what the court must do is explain the rationale and foundation of the recognition and affirmation of the special rights of aboriginal peoples; it must identify the basis for the special status that aboriginal peoples have within Canadian society as a whole.

28 In identifying the basis for the recognition and affirmation of aboriginal rights it must be remembered that s. 35(1) did not create the legal doctrine of aboriginal rights; aboriginal rights existed and were recognized under the common law: Calder

v. British Columbia (Attorney General)[1973] S.C.R. 313 [[1973] 4 W.W.R. 1]. At common law aboriginal rights did not, of course, have constitutional status, with the result that Parliament could, at any time, extinguish or regulate those rights: R. v. Kruger1977[1978] 1 S.C.R. 104 [[1977] 4 W.W.R. 300], at p. 112; *R. v. Derricksan* (1976), 71 D.L.R. (3d) 159, [1976] S.C.R. x [[1976] 6 W.W.R. 480]; it is this which distinguishes the aboriginal rights recognized and affirmed in s. 35(1) from the aboriginal rights protected by the common law. Subsequent to s. 35(1) aboriginal rights cannot be extinguished and can only be regulated or infringed consistent with the justificatory test laid out by this Court in *Sparrow*, *supra*.

29 The fact that aboriginal rights pre-date the enactment of s.35(1) could lead to the suggestion that the purposive analysis of s. 35(1) should be limited to an analysis of why a pre-existing legal doctrine was elevated to constitutional status. This suggestion must be resisted. The pre-existence of aboriginal rights is relevant to the analysis of s. 35(1) because it indicates that aboriginal rights have a stature and existence prior to the constitutionalization of those rights and sheds light on the reasons for protecting those rights; however, the interests protected by s.35(1) must be identified through an explanation of the basis for the legal doctrine of aboriginal rights, not through an explanation of why that legal doctrine now has constitutional status.

30 n my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples *were already here*, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.

31 More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s.35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.

32 That the purpose of s. 35(1) lies in its recognition of the prior occupation of North America by aboriginal peoples is suggested by the French version of the text. For the English "existing aboriginal and treaty rights" the French text reads "Les droits existants — ancestraux ou issus de traités". The term "ancestral", which Le *Petit Robert* dictionary defines as "[q]ui a appartenu aux ancêtres, qu'on tient des ancêtres", suggests that the rights recognized and affirmed by s. 35(1) must be temporally rooted in the historical presence — the ancestry — of aboriginal peoples in North America.

33 This approach to s. 35(1) is also supported by the prior jurisprudence of this Court. In Calder, , the Court refused an application by the Nishga for a declaration that their aboriginal title had not been extinguished. There was no majority in the Court as to the basis for this decision; however, in the judgments of both Judson J. and Hall J. (each speaking for himself and two others) the existence of aboriginal title was recognized. Hall J. based the Nishga's aboriginal title in the fact that the land to which they were claiming title had "been in their possession from time immemorial" *Calder*, *supra*, at p. 375. Judson J. explained the origins of the Nishga's aboriginal title as follows, at p. 328:

> Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, *the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means* and it does not help one in the solution of this problem to call it a "personal or usufructuary right". What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished. [Emphasis added.]

The position of Judson and Hall JJ. on the basis for aboriginal title is applicable to the aboriginal rights recognized and affirmed by s. 35(1). Aboriginal title is the aspect of aboriginal rights related specifically to aboriginal claims to land; it is the way in which the common law recognizes aboriginal land rights. As such, the explanation of the basis of aboriginal title in Calder, , can be applied equally to the aboriginal rights recognized and affirmed by s. 35(1). Both aboriginal title and aboriginal rights arise from the existence of distinctive aboriginal communities occupying "the land as their forefathers had done for centuries".

34 The basis of aboriginal title articulated in *Calder*, *supra* was affirmed in Guerin v. R.[1984] 2 S.C.R. 335 [[1984] 6 W.W.R. 481, 59 B.C.L.R. 301]. The decision in *Guerin* turned on the question of the nature and extent of the Crown's fiduciary obligation to aboriginal peoples; because, however, Dickson J. based that fiduciary relationship, at p. 376, in the "concept of aboriginal, native or Indian title", he had occasion to consider the question of the existence of aboriginal title. In holding that such title existed, he relied on Calder, for the proposition that "aboriginal title as a legal right *derived from the Indians' historic occupation and possession of their tribal lands*" (emphasis added).

35 The view of aboriginal rights as based in the prior occupation of North America by distinctive aboriginal societies, finds support in the early American decisions of Marshall C.J. Although the constitutional structure of the United States is different from that of Canada, and its aboriginal law has developed in unique directions, I agree with Professor Slattery both when he describes the Marshall decisions as providing "structure and coherence to an untidy and diffuse body of customary law based on official practice" and when he asserts that these decisions are "as relevant to Canada as they are to the United States", "Understanding Aboriginal Rights", supra, at p. 759. I would add to Professor Slattery's comments only the observation that the fact that aboriginal law in the United States is significantly different from Canadian aboriginal law means that the relevance of these cases arises from their articulation of general principles, rather than their specific legal holdings.

36 In Johnson v. McIntoshJohnson v. M'Intosh8 Wheat. 54321 U.S. 240 (1823), the first of the Marshall decisions on aboriginal title, the Supreme Court held that Indian land could only be alienated by the U.S. government, not by the Indians themselves. In the course of his decision (written for the court), Marshall C.J. outlined the history of the exploration of North America by the countries of Europe and the relationship between this exploration and aboriginal title. In his view, aboriginal title is the right of aboriginal people to land arising from the intersection of their pre-existing occupation of the land with the assertion of sovereignty over that land by various European nations. The substance and nature of aboriginal rights to land are determined by this intersection:

> On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.
>
> The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.
>
> Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.
>
> *In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it*.

> While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy. [*Johnson*, *supra*, at pp. 572-74, emphasis added.]

It is, similarly, the reconciliation of pre-existing aboriginal claims to the territory that now constitutes Canada, with the assertion of British sovereignty over that territory, to which the recognition and affirmation of aboriginal rights in s. 35(1) is directed.

37 In Worcester v. Georgia6 Peters 51531 U.S. 530 (1832), the U.S. Supreme Court invalidated the conviction under a Georgia statute of a non-Cherokee man for the offence of living on the territory of the Cherokee Nation. The court held that the law under which he was convicted was *ultra vires* the State of Georgia. In so doing the court considered the nature and basis of the Cherokee claims to the land and to governance over that land. Again, it based its judgment on its analysis of the origins of those claims which, it held, lay in the relationship between the pre-existing rights of the "ancient possessors" of North America and the assertion of sovereignty by European nations:

> America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.
>
> After lying concealed for a series of ages, the enterprise of Europe, guided by nautical science, conducted some of her adventurous sons into this western world. They found it in possession of a people who had made small progress in agriculture or manufactures, and whose general employment was war, hunting, and fishing.
>
> Did these adventurers, by sailing along the coast, and occasionally landing on it, acquire for the several governments to whom they belonged, or by whom they were commissioned, a rightful property in the soil, from the Atlantic to the Pacific; or rightful dominion over the numerous people who occupied it? Or has nature, or the great Creator of all things, conferred these rights over hunters and fishermen, on agriculturists and manufacturers?
>
> But power, war, conquest, give rights, which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend. We proceed, then, to the actual state of things, having glanced at their origin; because holding it in our recollection might shed some light on existing pretensions.
>
> *The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discover of the coast of the particular region claimed*. [*Worcester*, *supra*, at pp. 542-43 and 559, emphasis added.]

Marshall C.J.'s essential insight that the claims of the Cherokee must be analyzed in light of their pre-existing occupation and use of the land — their "undisputed" possession of the soil "from time immemorial" — is as relevant for the identification of the interests s. 35(1) was intended to protect as it was for the adjudication of Worcester's claim.

38 The High Court of Australia has also considered the question of the basis and nature of aboriginal rights. Like that of the United States, Australia's aboriginal law differs in significant respects from that of Canada. In particular, in Australia the courts have not as yet determined whether aboriginal fishing rights exist, although such rights are recognized by statute: *Halsbury's Laws of Australia*, Vol. 1, paras. 5-2250, 5-2255, 5-2260 and 5-2265. Despite these relevant differences, the analysis of the basis of aboriginal title in the landmark decision of the High Court in Mabo v. Queensland1992175 C.L.R. 1, is persuasive in the Canadian context.

39 The *Mabo* judgment resolved the dispute between the Meriam people and the Crown regarding who had title to the Murray Islands. The islands had been annexed to Queensland in 1879 but were reserved for the native inhabitants (the Meriam) in 1882. The Crown argued that this annexation was sufficient to vest absolute ownership of the lands in the Crown. The High Court disagreed, holding that while the annexation did vest radical title in the Crown, it was insufficient to eliminate a claim for native title; the court held at pp. 50-51 that native title can exist as a burden on the radical title of the Crown: "there is no reason why land within the Crown's territory should not continue to be subject to native title. It is only the fallacy of equating sovereignty and beneficial ownership of land that gives rise to the notion that native title is extinguished by the acquisition of sovereignty".

40 From this premise, Brennan J., writing for a majority of the Court, went on at p. 58 to consider the nature and basis of aboriginal title:

> *Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory*. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs. The ascertainment may present a problem of considerable difficulty, as Moynihan J. perceived in the present case. It is a problem that did not arise in the case of a settled colony so long as the fictions were maintained that customary rights could not be reconciled "with the institutions or the legal ideas of civilized society", *In re Southern Rhodesia*, [1919] A.C., at p. 233, that there was no law before the arrival of the British colonists in a settled colony and that there was no sovereign law-maker in the territory of a settled colony before sovereignty was acquired by the Crown. These fictions denied the possibility of native title recognized by our laws. But once it is acknowledged that an inhabited territory which became a settled colony was no more a legal desert than it was "desert uninhabited" in fact, it is necessary to ascertain by evidence the nature and incidents of native title. [Emphasis added.]

This position is the same as that being adopted here. "[T]raditional laws" and "traditional customs" are those things passed down, and arising, from the pre-existing culture and customs of aboriginal peoples. The very meaning of the word "tradition" — that which is "handed down from ancestors to posterity", *Concise Oxford Dictionary* (9th ed.), — implies these origins for the customs and laws that the Australian High Court in *Mabo* is asserting to be relevant for the determination of the existence of aboriginal title. To base aboriginal title in traditional laws and customs, as was done in *Mabo*, is, therefore, to base that title in the pre-existing societies of aboriginal peoples. This is the same basis as that asserted here for aboriginal rights.

41 Academic commentators have also been consistent in identifying the basis and foundation of the s. 35(1) claims of aboriginal peoples in aboriginal occupation of North America prior to the arrival of Europeans. As Professor David Elliott, at p. 25, puts it in his compilation *Law and Aboriginal Peoples of Canada* (2nd ed.), the "prior aboriginal presence is at the heart of the concept of aboriginal rights". Professor Macklem has, while also considering other possible justifications for the recognition of aboriginal rights, described prior occupancy as the "familiar" justification for aboriginal rights, arising from the "straightforward conception of fairness which suggests that, all other things being equal, a prior occupant of land possesses a stronger claim to that land than subsequent arrivals": Patrick Macklem, "Normative Dimensions of an Aboriginal Right of Self-Government" (1995), 21 *Queen's L.J.* 173, at p. 180. Finally, I would note the position of Professor Pentney who has described aboriginal rights as collective rights deriving "their existence from the common law's recognition of [the] prior social organization" of aboriginal peoples: William Pentney, "The Rights of the Aboriginal Peoples of Canada in the Constitution Act, 1982 Part II—Section35: The Substantive Guarantee" (1988), 22 U.B.C. Law Rev. 207,at p. 258.

42 I would note that the legal literature also supports the position that s. 35(1) provides the constitutional framework for reconciliation of the pre-existence of distinctive aboriginal societies occupying the land with Crown sovereignty. In his comment on Delgamuukw v.British Columbia ("British Imperial Constitutional Law andAboriginal Rights: A Comment on Delgamuukw v. British Columbia"(1992), 17 Queen's L.J. 350), Mark Walters suggests at pp. 412-13 that the essence of aboriginal rights is their bridging of aboriginal and non-aboriginal cultures:

> *The challenge of defining aboriginal rights stems from the fact that they are rights peculiar to the meeting of two vastly dissimilar legal cultures*; consequently there will always be a question about which legal culture is to provide the vantage

> point from which rights are to be defined. ... a morally and politically defensible conception of aboriginal rights will incorporate both legal perspectives. [Emphasis added.]

Similarly, Professor Slattery has suggested that the law of aboriginal rights is "neither English nor aboriginal in origin: it is a form of intersocietal law that evolved from long-standing practices linking the various communities," Brian Slattery, "The Legal Basis of Aboriginal Title", in Frank Cassidy (ed.), *Aboriginal Title in British Columbia: Delgamuukw v. the Queen* (1992), at pp. 121-22, and that such rights concern "the status of native peoples living under the Crown's protection, and the position of their lands, customary laws, and political institutions". "Understanding Aboriginal Rights", *supra*, at p. 737.

43 The Canadian, American and Australian jurisprudence thus supports the basic proposition put forward at the beginning of this section: the aboriginal rights recognized and affirmed by s. 35(1) are best understood as, first, the means by which the Constitution recognizes the fact that prior to the arrival of Europeans in North America the land was already occupied by distinctive aboriginal societies, and as, second, the means by which that prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory. The content of aboriginal rights must be directed at fulfilling both of these purposes; the next section of the judgment, as well as that which follows it, will attempt to accomplish this task.

The Test for Identifying Aboriginal Rights In Section 35(1)

44 In order to fulfil the purpose underlying s. 35(1) — i.e., the protection and reconciliation of the interests which arise from the fact that prior to the arrival of Europeans in North America aboriginal peoples lived on the land in distinctive societies, with their own practices, customs and traditions — the test for identifying the aboriginal rights recognized and affirmed by s. 35(1) must be directed at identifying the crucial elements of those pre-existing distinctive societies. It must, in other words, aim at identifying the practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans.

45 In Sparrow, , this Court did not have to address the scope of the aboriginal rights protected by s. 35(1); however, in their judgment at p. 1099 Dickson C.J. and La Forest J. identified the Musqueam right to fish for food in the fact that

> The anthropological evidence relied on to establish the existence of the right suggests that, for the Musqueam, the salmon fishery has always constituted an *integral part of their distinctive culture*. Its significant role involved not only consumption for subsistence purposes, but also consumption of salmon on ceremonial and social occasions. The Musqueam have always fished for reasons connected to their cultural and physical survival. [Emphasis added.]

The suggestion of this passage is that participation in the salmon fishery is an aboriginal right because it is an "integral part" of the "distinctive culture" of the Musqueam. This suggestion is consistent with the position just adopted; identifying those traditions, customs and practices that are integral to distinctive aboriginal cultures will serve to identify the crucial elements of the distinctive aboriginal societies that occupied North America prior to the arrival of Europeans.

46 In light of the suggestion of Sparrow, supra, and the purposes underlying s. 35(1), the following test should be used to identify whether an applicant has established an aboriginal right protected by s. 35(1): in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.

47 I would note that this test is, in large part, consistent with that adopted by the judges of the British Columbia Court of Appeal. Although the various judges disagreed on such crucial questions as how the right should be framed, the relevant time at which the aboriginal culture should be examined and the role of European influences in limiting the scope of the right, all of the judges agreed that aboriginal rights must be identified through the traditions, customs and practices of aboriginal cultures. Macfarlane J.A. held at para. 20 that aboriginal rights exist where "the right has been exercised ... for a sufficient length of time to become *integral to the aboriginal society*" (emphasis added); Wallace J.A. held at para. 78 that aboriginal rights are those practices "traditional and *integral to the native society*" (emphasis added); Lambert J.A. held at para. 31 that aboriginal rights are those "customs, traditions and practices ... which formed an *integral part of the distinctive culture of the aboriginal people in question*" (emphasis added). While, as will become apparent, I do not adopt entirely the position of any of the judges at the

Court of Appeal, their shared position that aboriginal rights lie in those traditions, practices and customs that are *integral* is consistent with the test I have articulated here.

Factors to be Considered in Application of the Integral to a Distinctive Culture Test

48 The test just laid out — that aboriginal rights lie in the practices, traditions and customs integral to the distinctive cultures of aboriginal peoples — requires further elaboration with regards to the nature of the inquiry a court faced with an aboriginal rights claim must undertake. I will now undertake such an elaboration, concentrating on such questions as the time period relevant to the court's inquiry, the correct approach to the evidence presented, the specificity necessary to the court's inquiry, the relationship between aboriginal rights and the rights of aboriginal people as Canadian citizens, and the standard that must be met in order for a practice, custom or tradition to be said to be "integral".

Courts must take into account the perspective of aboriginal peoples themselves

49 In assessing a claim for the existence of an aboriginal right, a court must take into account the perspective of the aboriginal people claiming the right. In Sparrow, Dickson C.J. and La Forest J. held at p. 1112 that it is "crucial to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake". It must also be recognized, however, that that perspective must be framed in terms cognizable to the Canadian legal and constitutional structure. As has already been noted, one of the fundamental purposes of s. 35(1) is the reconciliation of the pre-existence of distinctive aboriginal societies with the assertion of Crown sovereignty. Courts adjudicating aboriginal rights claims must, therefore, be sensitive to the aboriginal perspective, but they must also be aware that aboriginal rights exist within the general legal system of Canada. To quote again Walters, at p. 413: "a morally and politically defensible conception of aboriginal rights will incorporate both [aboriginal and non-aboriginal] legal perspectives". The definition of an aboriginal right must, if it is truly to reconcile the prior occupation of Canadian territory by aboriginal peoples with the assertion of Crown sovereignty over that territory, take into account the aboriginal perspective, yet do so in terms which are cognizable to the non-aboriginal legal system.

50 It is possible, of course, that the Court could be said to be "reconciling" the prior occupation of Canada by aboriginal peoples with Crown sovereignty through either a narrow or broad conception of aboriginal rights; the notion of "reconciliation" does not, in the abstract, mandate a particular content for aboriginal rights. However, the only fair and just reconciliation is, as Walters suggests, one which takes into account the aboriginal perspective while at the same time taking into account the perspective of the common law. True reconciliation will, equally, place weight on each.

Courts must identify precisely the nature of the claim being made in determining whether an aboriginal claimant has demonstrated the existence of an aboriginal right

51 Related to this is the fact that in assessing a claim to an aboriginal right a court must first identify the nature of the right being claimed; in order to determine whether a claim meets the test of being integral to the distinctive culture of the aboriginal group claiming the right, the court must first correctly determine what it is that is being claimed. The correct characterization of the appellant's claim is of importance because whether or not the evidence supports the appellant's claim will depend, in significant part, on what, exactly, that evidence is being called to support.

52 I would note here by way of illustration that, in my view, both the majority and the dissenting judges in the Court of Appeal erred with respect to this aspect of the inquiry. The majority held that the appellant's claim was that the practice of selling fish "on a commercial basis" constituted an aboriginal right and, in part, rejected her claim on the basis that the evidence did not support the existence of such a right. With respect, this characterization of the appellant's claim is in error; the appellant's claim was that the practice of selling fish was an aboriginal right, not that selling fish "on a commercial basis" was. It was however, equally incorrect to adopt, as Lambert J.A. did, a "social" test for the identification of the practice, tradition or custom constituting the aboriginal right. The social test casts the aboriginal right in terms that are too broad and in a manner which distracts the court from what should be its main focus — the nature of the aboriginal community's traditions, customs or practices themselves. The nature of an applicant's claim must be delineated in terms of the particular practice, tradition or custom under which it is claimed; the significance of the practice, tradition or custom to the aboriginal community is a factor to

be considered in determining whether the practice, tradition or custom is integral to the distinctive culture, but the significance of a practice, tradition or custom cannot, itself, constitute an aboriginal right.

53 To characterize an applicant's claim correctly, a court should consider such factors as the nature of the action which the applicant is claiming was done pursuant to an aboriginal right, the nature of the governmental regulation, statute or action being impugned, and the tradition, custom or practice being relied upon to establish the right. In this case, therefore, the Court will consider the actions which led to the appellant's being charged, the fishery regulation under which she was charged and the customs, practices and traditions she invokes in support of her claim.

54 It should be acknowledged that a characterization of the nature of the appellant's claim from the actions which led to her being charged must be undertaken with some caution. In order to inform the court's analysis the activities must be considered at a general rather than at a specific level. Moreover, the court must bear in mind that the activities may be the exercise in a modern form of a practice, tradition or custom that existed prior to contact, and should vary its characterization of the claim accordingly.

In order to be integral a practice, custom or tradition must be of central significance to the aboriginal society in question

55 To satisfy the integral to a distinctive culture test the aboriginal claimant must do more than demonstrate that a practice, tradition or custom was an aspect of, or took place in, the aboriginal society of which he or she is a part. The claimant must demonstrate that the practice, tradition or custom was a central and significant part of the society's distinctive culture. He or she must demonstrate, in other words, that the practice, tradition or custom was one of the things which made the culture of the society distinctive — that it was one of the things that truly *made the society what it was*.

56 This aspect of the integral to a distinctive culture test arises from fact that aboriginal rights have their basis in the prior occupation of Canada by distinctive aboriginal societies. To recognize and affirm the prior occupation of Canada by distinctive aboriginal societies it is *to what makes those societies distinctive* that the court must look in identifying aboriginal rights. The court cannot look at those aspects of the aboriginal society that are true of every human society (e.g., eating to survive), nor can it look at those aspects of the aboriginal society that are only incidental or occasional to that society; the court must look instead to the defining and central attributes of the aboriginal society in question. It is only by focusing on the aspects of the aboriginal society that make that society distinctive that the definition of aboriginal rights will accomplish the purpose underlying s. 35(1).

57 Moreover, the aboriginal rights protected by s. 35(1) have been said to have the purpose of reconciling pre-existing aboriginal societies with the assertion of Crown sovereignty over Canada. To reconcile aboriginal societies with Crown sovereignty it is necessary to identify the distinctive features of those societies; it is precisely those distinctive features which need to be acknowledged and reconciled with the sovereignty of the Crown.

58 As was noted earlier, Lambert J.A. erred when he used the significance of a practice, tradition or custom as a means of identifying what the practice, tradition or custom is; however, he was correct to recognize that the significance of the tradition, practice or custom is important. The significance of the tradition, practice or custom does not serve to identify the nature of a claim of acting pursuant to an aboriginal right; however, it is a key aspect of the court's inquiry into whether a tradition, practice or custom has been shown to be an integral part of the distinctive culture of an aboriginal community. The significance of the practice, tradition or custom will inform a court as to whether or not that practice, tradition or custom can be said to be truly integral to the distinctive culture in question.

59 A practical way of thinking about this problem is to ask whether, without this practice, tradition or custom, the culture in question would be fundamentally altered or other than what it is. One must ask, to put the question affirmatively, whether or not a practice, tradition or custom is a defining feature of the culture in question.

The practices, customs and traditions which constitute aboriginal rights are those which have continuity with the traditions, customs and practices that existed prior to contact.

60 The time period that a court should consider in identifying whether the right claimed meets the standard of being integral to the aboriginal community claiming the right is the period prior to contact between aboriginal and European societies. Because

it is the fact that distinctive aboriginal societies lived on the land prior to the arrival of Europeans that underlies the aboriginal rights protected by s. 35(1), it is to that pre-contact period that the courts must look in identifying aboriginal rights.

61 The fact that the doctrine of aboriginal rights functions to reconcile the existence of pre-existing aboriginal societies with the sovereignty of the Crown does not alter this position. Although it is the sovereignty of the Crown that the pre-existing aboriginal societies are being reconciled with, it is to those pre-existing societies that the court must look in defining aboriginal rights. It is not the fact that aboriginal societies existed prior to Crown sovereignty that is relevant; it is the fact that they existed *prior to the arrival of Europeans in North America*. As such, the relevant time period is the period prior to the arrival of Europeans, not the period prior to the assertion of sovereignty by the Crown.

62 That this is the relevant time should not suggest, however, that the aboriginal group claiming the right must accomplish the next to impossible task of producing conclusive evidence from pre-contact times about the practices, customs and traditions of their community. It would be entirely contrary to the spirit and intent of s. 35(1) to define aboriginal rights in such a fashion so as to preclude in practice any successful claim for the existence of such a right. The evidence relied upon by the applicant and the courts may relate to aboriginal practices, customs and traditions post-contact; it simply needs to be directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact. It is those practices, customs and traditions that can be rooted in the pre-contact societies of the aboriginal community in question that will constitute aboriginal rights.

63 I would note in relation to this point the position adopted by Brennan J. in *Mabo*, *supra*, where he holds, at p. 60, that in order for an aboriginal group to succeed in its claim for aboriginal title it must demonstrate that the connection with the land in its customs and laws has continued to the present day:

> ... when the tide of history has washed away any real acknowledgement of traditional law and any real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition.

The relevance of this observation for identifying the rights in s. 35(1) lies not in its assertion of the effect of the disappearance of a practice, custom or tradition on an aboriginal claim (I take no position on that matter) but rather in its suggestion of the importance of considering the continuity in the practices, customs and traditions of aboriginal communities in assessing claims to aboriginal rights. It is precisely those present practices, customs and traditions which can be identified as having continuity with the practices, customs and traditions that existed prior to contact that will be the basis for the identification and definition of aboriginal rights under s.35(1). Where an aboriginal community can demonstrate that a particular practice, custom or tradition is integral to its distinctive culture today, and that this practice, custom or tradition has continuity with the practices, customs and traditions of pre-contact times, that community will have demonstrated that the practice, custom or tradition is an aboriginal right for the purposes of s. 35(1).

64 The concept of continuity is also the primary means through which the definition and identification of aboriginal rights will be consistent with the admonition in Sparrow, , that "the phrase 'existing aboriginal rights' must be interpreted flexibly so as to permit their evolution over time". The concept of continuity is, in other words, the means by which a "frozen rights" approach to s. 35(1) will be avoided. Because the practices, traditions and customs protected by s. 35(1) are ones that exist today, subject only to the requirement that they be demonstrated to have continuity with the practices, customs and traditions which existed pre-contact, the definition of aboriginal rights will be one that, on its own terms, prevents those rights from being frozen in pre-contact times. The evolution of practices, customs and traditions into modern forms will not, provided that continuity with pre-contact practices, customs and traditions is demonstrated, prevent their protection as aboriginal rights.

65 I would note that the concept of continuity does not require aboriginal groups to provide evidence of an unbroken chain of continuity between their current practices, traditions and customs, and those which existed prior to contact. It may be that for a period of time an aboriginal group, for some reason, ceased to engage in a practice, tradition or custom which existed prior to contact, but then resumed the practice, tradition or custom at a later date. Such an interruption will not preclude the establishment of an aboriginal right. Trial judges should adopt the same flexibility regarding the establishment of continuity

that, as is discussed, infra, they are to adopt with regards to the evidence presented to establish the prior-to-contact practices, customs and traditions of the aboriginal group making the claim to an aboriginal right.

66 Further, I would note that basing the identification of aboriginal rights in the period prior to contact is not inconsistent with the fact that s. 35(2) of the Constitution Act, 1982 includes within the definition of "aboriginal peoples of Canada" the Métis people of Canada.

67 Although s. 35 includes the Métis within its definition of "aboriginal peoples of Canada", and thus seems to link their claims to those of other aboriginal peoples under the general heading of "aboriginal rights", the history of the Métis, and the reasons underlying their inclusion in the protection given by s. 35, are quite distinct from those of other aboriginal peoples in Canada. As such, the manner in which the aboriginal rights of other aboriginal peoples are defined is not necessarily determinative of the manner in which the aboriginal rights of the Métis are defined. At the time when this Court is presented with a Métis claim under s. 35 it will then, with the benefit of the arguments of counsel, a factual context and a specific Métis claim, be able to explore the question of the purposes underlying s. 35's protection of the aboriginal rights of Métis people, and answer the question of the kinds of claims which fall within s. 35(1)'s scope when the claimants are Métis. The fact that, for other aboriginal peoples, the protection granted by s. 35 goes to the practices, traditions and customs of aboriginal peoples prior to contact, is not necessarily relevant to the answer which will be given to that question. It may, or it may not, be the case that the claims of the Métis are determined on the basis of the pre-contact practices, traditions and customs of their aboriginal ancestors; whether that is so must await determination in a case in which the issue arises.

Courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims

68 In determining whether an aboriginal claimant has produced evidence sufficient to demonstrate that her activity is an aspect of a practice, custom or tradition integral to a distinctive aboriginal culture, a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case.

Claims to aboriginal rights must be adjudicated on a specific rather than general basis

69 Courts considering a claim to the existence of an aboriginal right must focus specifically on the traditions, customs and practices of the particular aboriginal group claiming the right. In the case of *Kruger*, *supra*, this Court rejected the notion that claims to aboriginal rights could be determined on a general basis. This position is correct; the existence of an aboriginal right will depend entirely on the traditions, customs and practices of the *particular aboriginal community claiming the right*. As has already been suggested, aboriginal rights are constitutional rights, but that does not negate the central fact that the interests aboriginal rights are intended to protect relate to the specific history of the group claiming the right. Aboriginal rights are not general and universal; their scope and content must be determined on a case by case basis. The fact that one group of aboriginal people has an aboriginal right to do a particular thing will not be, without something more, sufficient to demonstrate that another aboriginal community has the same aboriginal right. The existence of the right will be specific to each aboriginal community.

For a practice, tradition or custom to constitute an aboriginal right it must be of independent significance to the aboriginal culture in which it exists

70 In identifying those practices, customs and traditions that constitute the aboriginal rights recognized and affirmed by s. 35(1), a court must ensure that the practice, custom or tradition relied upon in a particular case is independently significant to the aboriginal community claiming the right. The practice, custom or tradition cannot exist simply as an incident to another practice, custom or tradition but must rather be itself of integral significance to the aboriginal society. Where two customs exist, but one is merely incidental to the other, the custom which is integral to the aboriginal community in question will qualify as

an aboriginal right, but the custom that is merely incidental will not. Incidental practices, customs and traditions cannot qualify as aboriginal rights through a process of piggybacking on integral practices, customs and traditions.

The integral to a distinctive culture test requires that a practice, custom or tradition be distinctive; it does not require that that practice, custom or tradition be distinct

71 The standard which a practice, custom or tradition must meet in order to be recognized as an aboriginal right is *not* that it be *distinct* to the aboriginal culture in question; the aboriginal claimants must simply demonstrate that the practice, custom or tradition is *distinctive*. A tradition or custom that is *distinct* is one that is unique — "different in kind or quality, unlike" (*Concise Oxford Dictionary*, 9th ed.). A culture with a distinct tradition must claim that in having such a tradition it is different from other cultures; a claim of distinctness is, by its very nature, a claim relative to other cultures or traditions. By contrast, a culture that claims that a practice, custom or tradition is *distinctive* — "distinguishing, characteristic" — makes a claim that is not relative; the claim is rather one about the culture's own practices, customs or traditions considered apart from the practices, customs or traditions of any other culture. It is a claim that this tradition or custom makes the culture *what it is*, not that the practice, custom or tradition is different from the practices, customs or traditions of another culture. The person or community claiming the existence of an aboriginal right protected by s. 35(1) need only show that the particular practice, custom or tradition which it is claiming to be an aboriginal right is distinctive, not that it is distinct.

72 That the standard an aboriginal community must meet is distinctiveness, not distinctness, arises from the recognition in *Sparrow*, *supra*, of an aboriginal right to fish for food. Certainly no aboriginal group in Canada could claim that its culture is "distinct" or unique in fishing for food; fishing for food is something done by many different cultures and societies around the world. What the Musqueam claimed in Sparrow, , was rather that it was fishing for food which, in part, made Musqueam culture what it is; fishing for food was characteristic of Musqueam culture and, therefore, a *distinctive part* of that culture. Since it was so it constituted an aboriginal right under s.35(1).

The influence of European culture will only be relevant to the inquiry if it is demonstrated that the practice, custom or tradition is only integral because of that influence.

73 The fact that Europeans in North America engaged in the same practices, customs or traditions as those under which an aboriginal right is claimed will only be relevant to the aboriginal claim if the practice, custom or tradition in question can only be said to exist because of the influence of European culture. If the practice, custom or tradition was an integral part of the aboriginal community's culture prior to contact with Europeans, the fact that that practice, custom or tradition continued after the arrival of Europeans, and adapted in response to their arrival, is not relevant to determination of the claim; European arrival and influence cannot be used to deprive an aboriginal group of an otherwise valid claim to an aboriginal right. On the other hand, where the practice, custom or tradition arose solely as a response to European influences then that practice, custom or tradition will not meet the standard for recognition of an aboriginal right.

Courts must take into account both the relationship of aboriginal peoples to the land and the distinctive societies and cultures of aboriginal peoples

74 As was noted in the discussion of the purposes of s. 35(1), aboriginal rights and aboriginal title are related concepts; aboriginal title is a sub-category of aboriginal rights which deals solely with claims of rights to land. The relationship between aboriginal title and aboriginal rights must not, however, confuse the analysis of what constitutes an aboriginal right. Aboriginal rights arise from the prior occupation of land, but they also arise from the prior social organization and distinctive cultures of aboriginal peoples on that land. In considering whether a claim to an aboriginal right has been made out, courts must look at both the relationship of an aboriginal claimant to the land *and* at the practices, customs and traditions arising from the claimant's distinctive culture and society. Courts must not focus so entirely on the relationship of aboriginal peoples with the land that they lose sight of the other factors relevant to the identification and definition of aboriginal rights.

75 With these factors in mind I will now turn to the particular claim made by the appellant in this case to have been acting pursuant to an aboriginal right.

Application of the Integral to a Distinctive Culture Test to the Appellant's Claim

76 The first step in the application of the integral to a distinctive culture test requires the court to identify the precise nature of the appellant's claim to have been exercising an aboriginal right. In this case the most accurate characterization of the appellant's position is that she is claiming *an aboriginal right to exchange fish for money or for other goods*. She is claiming, in other words, that the practices, customs and traditions of the Sto:lo include as an integral part the exchange of fish for money or other goods.

77 That this is the nature of the appellant's claim can be seen through both the specific acts which led to her being charged and through the regulation under which she was charged. Mrs. Van der Peet sold ten salmon for $50. Such a sale, especially given the absence of evidence that the appellant had sold salmon on other occasions or on a regular basis, cannot be said to constitute a sale on a "commercial" or market basis. These actions are instead best characterized in the simple terms of an exchange of fish for money. It follows from this that the aboriginal right pursuant to which the appellant is arguing that her actions were taken is, like the actions themselves, best characterized as an aboriginal right to exchange fish for money or other goods.

78 Moreover, the regulations under which the appellant was charged prohibit all sale or trade of fish caught pursuant to an Indian food fish licence. As such, to argue that those regulations implicate the appellant's aboriginal right requires no more of her than that she demonstrate an aboriginal right to the exchange of fish for money (sale) or other goods (trade). She does not need to demonstrate an aboriginal right to sell fish commercially.

79 The appellant herself characterizes her claim as based on a right "to sufficient fish to provide for a moderate livelihood". In so doing the appellant relies on the "social" test adopted by Lambert J.A. at the British Columbia Court of Appeal. As has already been noted, however, a claim to an aboriginal right cannot be based on the significance of an aboriginal practice, custom or tradition to the aboriginal community in question. The definition of aboriginal rights is determined through the process of determining whether a particular practice, custom or tradition is integral to the distinctive culture of the aboriginal group. The *significance* of the practice, custom or tradition is relevant to the determination of whether that practice, custom or tradition is integral, but cannot itself constitute the claim to an aboriginal right. As such, the appellant's claim cannot be characterized as based on an assertion that the Sto:lo's use of the fishery, and the practices, customs and traditions surrounding that use, had the significance of providing the Sto:lo with a moderate livelihood. It must instead be based on the actual practices, customs and traditions related to the fishery, here the custom of exchanging fish for money or other goods.

80 Having thus identified the nature of the appellant's claim, I turn to the fundamental question of the integral to a distinctive culture test: was the practice of exchanging fish for money or other goods an integral part of the specific distinctive culture of the Sto:lo prior to contact with Europeans? In answering this question it is necessary to consider the evidence presented at trial, and the findings of fact made by the trial judge, to determine whether the evidence and findings support the appellant's claim that the sale or trade of fish is an integral part of the distinctive culture of the Sto:lo.

81 It is a well-settled principle of law that when an appellate court reviews the decision of a trial judge that court must give considerable deference to the trial judge's findings of fact, particularly where those findings of fact are based on the trial judge's assessment of the testimony and credibility of witnesses. In *Stein v. "Kathy K." (The) ("Storm Point" (The))* (1975), [1976] 2 S.C.R. 802 , Ritchie J., speaking for the Court, held at p. 808 that absent a "palpable and overriding error" affecting the trial judge's assessment of the facts, an appellate court should not substitute its own findings of fact for those of the trial judge:

> These authorities are not to be taken as meaning that the findings of fact made at trial are immutable, but rather that they are not to be reversed unless it can be established that the learned trial judge made some palpable and overriding error which affected his assessment of the facts. While the Court of Appeal is seized with the duty of re-examining the evidence in order to be satisfied that no such error occurred, it is not, in my view, a part of its function to substitute its assessment of the balance of probability for the findings of the judge who presided at trial.

This principle has also been followed in more recent decisions of this Court:Beaudoin-Daigneault v. Richard[1984] 1 S.C.R. 2, at pp. 8–9; Laurentide Motels Ltd. c. Beauport (Ville)[1989] 1 S.C.R. 705, at p.794; Hodgkinson v. Simms[1994] 3 S.C.R. 377 [[1994] 9 W.W.R. 60997 B.C.L.R. (2d) 1], at p. 426. In the recently released decision of *Schwartz v. R.*, *(*sub nom. *Schwartz v.*

Canada) [1996] 1 S.C.R. 254, La Forest J. made the following observation at para. 32, with which I agree, regarding appellate court deference to findings of fact:

> Unlimited intervention by appellate courts would greatly increase the number and the length of appeals generally. Substantial resources are allocated to trial courts to go through the process of assessing facts. The autonomy and integrity of the trial process must be preserved by exercising deference towards the trial courts' findings of fact. ... This explains why the rule applies not only when the credibility of witnesses is at issue, although in such a case it may be more strictly applied, but also to all conclusions of fact made by the trial judge.

I would also note that the principle of appellate court deference has been held to apply equally to findings of fact made on the basis of the trial judge's assessment of the credibility of the testimony of expert witnesses, N.V. Bocimar, S.A. v. Century Insurance Co. of Canada[1987] 1 S.C.R. 1247, at pp. 1249–1250.

82 In the case at bar, Scarlett Prov. Ct. J., the trial judge, made findings of fact based on the testimony and evidence before him, and then proceeded to make a determination as to whether those findings of fact supported the appellant's claim to the existence of an aboriginal right. The second stage of Scarlett Prov. Ct. J.'s analysis — his determination of the scope of the appellant's aboriginal rights on the basis of the facts as he found them — is a determination of a question of law which, as such, mandates no deference from this Court. The first stage of Scarlett Prov. Ct. J.'s analysis, however — the findings of fact from which that legal inference was drawn — do mandate such deference and should not be overturned unless made on the basis of a "palpable and overriding error". This is particularly the case given that those findings of fact were made on the basis of Scarlett Prov. Ct. J.'s assessment of the credibility and testimony of the various witnesses appearing before him.

83 In adjudicating this case Scarlett Prov. Ct. J. obviously did not have the benefit of direction from this Court as to how the rights recognized and affirmed by s. 35(1) are to be defined, with the result that his legal analysis of the evidence was not entirely correct; however, that Scarlett Prov. Ct. J. was not entirely correct in his legal analysis of the facts as he found them *does not mean that he made a clear and palpable error in reviewing the evidence and making those findings of fact*. Indeed, a review of the transcript and exhibits submitted to this Court demonstrate that Scarlett Prov. Ct. J. conducted a thorough and compelling review of the evidence before him and committed no clear and palpable error which would justify this Court, or any other appellate court, in substituting its findings of fact for his. Moreover, I would note that the appellant, while disagreeing with Scarlett Prov. Ct. J.'s legal analysis of the facts, made no arguments suggesting that in making findings of fact from the evidence before him Scarlett Prov. Ct. J. committed a palpable and overriding error.

84 Scarlett Prov. Ct. J. carefully considered all of the testimony presented by the various witnesses with regards to the nature of Sto:lo society and came to the following conclusions at p. 160:

> Clearly, the Sto:lo fish for food and ceremonial purposes. Evidence presented did not establish a regularized market system in the exchange of fish. Such fish as were exchanged through individual trade, gift, or barter were fish surplus from time to time. Natives did not fish to supply a market, there being no regularized trading system, nor were they able to preserve and store fish for extended periods of time. A market as such for salmon was not present but created by European traders, primarily the Hudson's Bay Company. At Fort Langley the Sto:lo were able to catch and deliver fresh salmon to the traders where it was salted and exported. This use was clearly different in nature and quantity from aboriginal activity. Trade in dried salmon with the fort was clearly dependent upon Sto:lo first satisfying their own requirements for food and ceremony.
>
> This court was not satisfied upon the evidence that aboriginal trade in salmon took place in any regularized or market sense. Oral evidence demonstrated that trade was incidental to fishing for food purposes. Anthropological and archaeological evidence was in conflict. This Court accepts the evidence of Dr. Stryd and John Dewhurst [sic] in preference to Dr. Daly and therefore, accepts that the Sto:lo were a band culture as opposed to tribal. While bands were guided by siem or prominent families, no regularized trade in salmon existed in aboriginal times. Such trade as took place was either for ceremonial purposes or opportunistic exchanges taking place on a casual basis. Such trade as did take place was incidental only. Evidence led by the Crown that the Sto:lo had no access to salt for food preservation is accepted.

> Exchange of fish was subject to local conditions of availability, transportation and preservation. It was the establishment by the Hudson's Bay Company at the fort at Langley that created the market and trade in fresh salmon. Trade in dried salmon in aboriginal times was, as stated, minimal and opportunistic.

I would add to Scarlett Prov. Ct. J.'s summation of his findings only the observation, which does not contradict any of his specific findings, that the testimony of the experts appearing before him indicated that such limited exchanges of salmon as took place in Sto:lo society were primarily linked to the kinship and family relationships on which Sto:lo society was based. For example, under cross-examination Dr. Daly described trade as occurring through the "idiom" of maintaining family relationships:

> The medium or the idiom of much trade was the idiom of kinship, of providing hospitality, giving gifts, reciprocating in gifts. ...

Similarly, Mr. Dewhurst testified that the exchange of goods was related to the maintenance of family and kinship relations.

85 The facts as found by Scarlett Prov. Ct. J. do not support the appellant's claim that the exchange of salmon for money or other goods was an integral part of the distinctive culture of the Sto:lo. As has already been noted, in order to be recognized as an aboriginal right, an activity must be of central significance to the culture in question — it must be something which makes that culture what it is. The findings of fact made by Scarlett Prov. Ct. J. suggest that the exchange of salmon for money or other goods, while certainly taking place in Sto:lo society prior to contact, was not a significant, integral or defining feature of that society.

86 First, Scarlett Prov. Ct. J. found that, prior to contact, exchanges of fish were only "incidental" to fishing for food purposes. As was noted above, to constitute an aboriginal right, a custom must itself be integral to the distinctive culture of the aboriginal community in question; it cannot be simply incidental to an integral custom. Thus, while the evidence clearly demonstrated that fishing for food and ceremonial purposes was a significant and defining feature of the Sto:lo culture, this is not sufficient, absent a demonstration that the exchange of salmon was *itself* a significant and defining feature of Sto:lo society, to demonstrate that the exchange of salmon is an integral part of Sto:lo culture.

87 For similar reasons, the evidence linking the exchange of salmon to the maintenance of kinship and family relations does not support the appellant's claim to the existence of an aboriginal right. Exchange of salmon as part of the interaction of kin and family is not of an independent significance sufficient to ground a claim for an aboriginal right to the exchange of fish for money or other goods.

88 Second, Scarlett Prov. Ct. J. found that there was no "regularized trading system" amongst the Sto:lo prior to contact. The inference drawn from this fact by Scarlett Prov. Ct. J., and by Macfarlane J.A. at the British Columbia Court of Appeal, was that the absence of a market means that the appellant could not be said to have been acting pursuant to an aboriginal right because it suggests that there is no aboriginal right to fish commercially. This inference is incorrect because, as has already been suggested, the appellant in this case has only claimed a right to exchange fish for money or other goods, not a right to sell fish in the commercial marketplace; the significance of the absence of regularized trading systems amongst the Sto:lo arises instead from the fact that it indicates that the exchange of salmon was not widespread in Sto:lo society. Given that the exchange of salmon was not widespread it cannot be said that, prior to contact, Sto:lo culture was defined by trade in salmon; trade or exchange of salmon took place, but the absence of a market demonstrates that this exchange did not take place on a basis widespread enough to suggest that the exchange was a defining feature of Sto:lo society.

89 Third, the trade engaged in between the Sto:lo and the Hudson's Bay Company, while certainly of significance to the Sto:lo society of the time, was found by the trial judge to be qualitatively different from that which was typical of the Sto:lo culture prior to contact. As such, it does not provide an evidentiary basis for holding that the exchange of salmon was an integral part of Sto:lo culture. As was emphasized in listing the criteria to be considered in applying the "integral to" test, the time relevant for the identification of aboriginal rights is prior to contact with European societies. Unless a post-contact practice, custom or tradition can be shown to have continuity with pre-contact practices, customs or traditions, it will not be held to be an aboriginal right. The trade of salmon between the Sto:lo and the Hudson's Bay Company does not have the necessary continuity with Sto:lo culture pre-contact to support a claim to an aboriginal right to trade salmon. Further, the exchange of salmon between the Sto:lo

and the Hudson's Bay Company can be seen as central or significant to the Sto:lo primarily as a result of European influences; activities which become central or significant because of the influence of European culture cannot be said to be aboriginal rights.

90 Finally, Scarlett Prov. Ct. J. found that the Sto:lo were at a band level of social organization rather than at a tribal level. As noted by the various experts, one of the central distinctions between a band society and a tribal society relates to specialization and division of labour. In a tribal society there tends to be specialization of labour — for example, specialization in the gathering and trade of fish — whereas in a band society division of labour tends to occur only on the basis of gender or age. The absence of specialization in the exploitation of the fishery is suggestive, in the same way that the absence of regularized trade or a market is suggestive, that the exchange of fish was not a central part of Sto:lo culture. I would note here as well Scarlett Prov. Ct. J.'s finding that the Sto:lo did not have the means for preserving fish for extended periods of time, something which is also suggestive that the exchange or trade of fish was not central to the Sto:lo way of life.

91 For these reasons, then, I would conclude that the appellant has failed to demonstrate that the exchange of fish for money or other goods was an integral part of the distinctive Sto:lo society which existed prior to contact. The exchange of fish took place, but was not a central, significant or defining feature of Sto:lo society. The appellant has thus failed to demonstrate that the exchange of salmon for money or other goods by the Sto:lo is an aboriginal right recognized and affirmed under s. 35(1) of theConstitution Act,1982.

The Sparrow Test

92 Since the appellant has failed to demonstrate that the exchange of fish was an aboriginal right of the Sto:lo, it is unnecessary to consider the tests for extinguishment, infringement and justification laid out by this Court in Sparrow,

VI. Disposition

93 Having concluded that the aboriginal rights of the Sto:lo do not include the right to exchange fish for money or other goods, I would dismiss the appeal and affirm the decision of the Court of Appeal restoring the trial judge's conviction of the appellant for violating s. 61(1) of theFisheries Act. There will be no order as to costs.

94 For the reasons given above, the constitutional question must be answered as follows:

> Question "Is s. 27(5) of the British ColumbiaFishery (General) Regulations, SOR/84-248, as it read on September 11, 1987, of no force or effect with respect to the appellant in the circumstances of these proceedings, in virtue of s. 52 of the ConstitutionAct, 1982, by reasons of the aboriginal rights within the meaning of s.35 of the Constitution Act, 1982, invoked by the appellant?"
>
> Answer No.

***L'Heureux-Dubé J. (dissenting)*:**

95 This appeal, as well as the appeals in R. v. N.T.C.Smokehouse Ltd., S.C.C., No. 23800 [[1996] 9 W.W.R. 114], and R. v. Gladstone, S.C.C.,No. 23801 [[1996] 9 W.W.R. 149], in which judgment is handed down concurrently, and the appeal in R. v. Nikal[1996] 1 S.C.R. 1013 [[1996] 5 W.W.R. 30519 B.C.L.R. (3d) 201], concern the definition of aboriginal rights as constitutionally protected under s. 35(1) of theConstitution Act, 1982.

96 While the narrow issue in this particular case deals with whether the Sto:lo, of which the appellant is a member, possess an aboriginal right to fish which includes the right to sell, trade and barter fish for livelihood, support and sustenance purposes, the broader issue is the interpretation of the nature and extent of constitutionally protected aboriginal rights.

97 The Chief Justice concludes that the Sto:lo do not possess an aboriginal right to exchange fish for money or other goods and that, as a result, the appellant's conviction under the Fisheries Act, R.S.C.1970, c. F-14, should be upheld. Not only do I disagree with the result he reaches, but I also diverge from his analysis of the issue at bar, specifically as to his approach to defining aboriginal rights and as to his delineation of the aboriginal right claimed by the appellant.

98 The Chief Justice has set out the facts and judgments and I will only briefly refer to them for a better understanding of what follows.

99 Dorothy Van der Peet, the appellant, was charged with violating s. 27(5) of the British Columbia Fishery (General) Regulations,SOR/84-248, and, thereby, committing an offence contrary to s. 61(1) of theFisheries Act. These charges arose out of the appellant's sale of 10 salmon caught by her common law spouse and his brother under the authority of an Indian food fish licence, issued pursuant to s. 27(1) of the Regulations. Section 27(5) of the British Columbia Fishery (General) Regulations, is the provision here under constitutional challenge; it provides:

> 27. ...
>
> (5) No person shall sell, barter or offer to sell or barter any fish caught under the authority of an Indian food fish licence.

100 The appellant, her common law husband and his brother are all members of the Sto:lo Band, part of the Coast Salish Nation. Both parties to this dispute accept that the appellant sold the fish, that the sale of the fish was contrary to the Regulations and that the fish were caught pursuant to a recognized aboriginal right to fish. The parties disagree, however, as to the nature of the Sto:lo's relationship with the fishery, particularly whether their right to fish encompasses the right to sell, trade and barter fish.

101 Scarlett Prov. Ct. J., the trial judge found on the evidence (1990), [1991] 3 C.N.L.R. 155, that trade by the Sto:lo was incidental to fishing for food and was either for ceremonial purposes or opportunistic exchanges taking place on a casual basis. He held, therefore, that the aboriginal right to fish for food and ceremonial purposes did not include the right to sell and found the appellant guilty as charged.

102 On appeal to the British Columbia Supreme Court 199158 B.C.L.R. (2d) 392, Selbie J., the summary appeal judge, gave a different interpretation to the oral testimony, expert evidence and archaeological records. In his view, the evidence demonstrated that the Sto:lo's relationship with the fishery was broad enough to include the trade of fish since the Sto:lo who caught fish in their original aboriginal society could do whatever they wanted with that fish. He overturned the appellant's conviction and entered an acquittal.

103 At the British Columbia Court of Appeal (1993)80 B.C.L.R. (2d) 75 [[1993] 5 W.W.R. 459], the findings and verdict of the trial judge were restored. The majority of the Court of Appeal, *per* Macfarlane J.A. (Taggart J.A. concurring) and Wallace J.A., found that the Sto:lo engaged only in casual exchanges of fish and that this was entirely different from fishing for commercial and market purposes. Lambert J.A., dissenting, held that the best description of the aboriginal practices, traditions and customs of the Sto:lo was one which included the sale, trade and barter of fish. Also dissenting, Hutcheon J.A. focused on the evidence demonstrating that by 1846, the date of British sovereignty, trade in salmon was taking place in the Sto:lo community.

104 Leave to appeal was granted by this Court and the Chief Justice stated the following constitutional question:

> Is s. 27(5) of the *British Columbia Fishery (General) Regulations*, SOR/84-248, as it read on September 11, 1987, of no force or effect with respect to the appellant in the circumstances of these proceedings, in virtue of s. 52 of the *Constitution Act, 1982*, by reasons of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982*, invoked by the appellant?

105 In my view, the definition of aboriginal rights as to their nature and extent must be addressed in the broader context of the historical aboriginal reality in Canada. Therefore, before going into the specific analysis of aboriginal rights protected under s. 35(1), a review of the legal evolution of aboriginal history is in order.

I. Historical and General Background

106 It is commonly accepted that the first aboriginal people of North America came from Siberia, over the Bering terrestrial bridge, some 12,000 years ago. They found a *terra nullius* and gradually began to explore and populate the territory. These people have always enjoyed, whether as nomadic or sedentary communities, some kind of social and political structure. Accordingly,

it is fair to say that prior to the first contact with the Europeans, the native people of North America were independent nations, occupying and controlling their own territories, with a distinctive culture and their own practices, traditions and customs.

107 In that regard, it is useful to acknowledge the findings of Marshall C.J. of the United States Supreme Court in the so-called trilogy, comprised of Johnson v. McIntoshJohnson v. M'Intosh8 Wheat. 54321 U.S. 240 (1823); Cherokee Nation v. Georgia5 Peters 130 U.S. 1 (1831); and, Worcester v. Georgia6 Peters 51531 U.S. 530 (1832). Particularly in *Worcester*, Marshall C.J.'s general description of aboriginal societies in North America is apropos (at pp. 542–43):

> America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws.

This passage was quoted, with approval, by Hall J. in Calder v.British Columbia (Attorney General)[1973] S.C.R. 313 [[1973] 4 W.W.R. 1], at p. 383. Also in *Calder*, Judson J., for the majority in the result, made the following observations at p. 328:

> Although I think it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that *when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries*. [Emphasis added.]

See also, regarding the independent character of aboriginal nations, the remarks of Lamer J. (as he then was) in *Sioui v. Quebec (Attorney General)*R. v. Sioui[1990] 1 S.C.R. 1025, at p. 1053.

108 At the time of the first formal arrival of the Europeans, in the sixteenth century, most of the territory of what is now Canada was occupied and used by aboriginal people. From the earliest point, however, the settlers claimed sovereignty in the name of their home country. Traditionally, there are four principles upon which states have relied to justify the assertion of sovereignty over new territories: see Brian Slattery, *The Lands Rights of Indigenous Canadian Peoples, as Affected by the Crown's Acquisition of Their Territories*. These are: (1) conquest, (2) cession, (3) annexation, and (4) settlement, i.e., acquisition of territory that was previously unoccupied or is not recognized as belonging to another political entity.

109 In the eyes of international law, the settlement thesis is the one rationale which can most plausibly justify European sovereignty over Canadian territory and the native people living on it (see Patrick Macklem,"Normative Dimensions of an Aboriginal Right of Self-Government"(1995), 21 Queen's L.J. 173) although there is still debate as to whether the land was indeed free for occupation. See Brian Slattery, "Aboriginal Sovereignty and Imperial Claims" (1991), 29 *Osgoode Hall L.J.* 681, and Michael Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution*.

110 In spite of the sovereignty proclamation, however, the early practices of the British recognized aboriginal title or rights and required their extinguishment by cession, conquest or legislation: see André Émond, "Existe-t-il un titre indien originaire dans les territoires cédés par la France en1763?" (1995), 41 McGill L. J. 59, at p. 62. This tradition of the British imperial power (either applied directly or after French capitulation) was crystallized in the *Royal Proclamation* of 1763, R.S.C. 1985, App. II, No. 1.

111 In R. v. Sparrow[1990] 1 S.C.R. 1075 [[1990] 4 W.W.R. 41046 B.C.L.R. (2d) 1], Dickson C.J. and La Forest J. wrote the following regarding Crown sovereignty and British practices *vis-à-vis* aboriginal people at p. 1103:

> It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown. ...

See also André Émond, "Le sable dans l'engrenage du droit inhérent des autochtones à l'autonomie gouvernementale" (1996),30 R.J.T. 1, at p. 1.

112 As a result, it has become accepted in Canadian law that aboriginal title, and aboriginal rights in general, derive from *historic occupation and use of ancestral lands by the natives* and do not depend on any treaty, executive order or legislative

enactment: see Calder v.British Columbia (Attorney General), supra, at p. 390, *per* Hall J., confirmed in Guerin v. R.[1984] 2 S.C.R. 335 [[1984] 6 W.W.R. 481, 59 B.C.L.R. 301], at p. 379, *per* Dickson J. (as he then was); and, *Sparrow*, *supra*; see also the decision of the High Court of Australia in Mabov. Queensland1992175 C.L.R. 1. See also Brian Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1983), 8 Queen's L.J. 232, at p. 242; and, Peter W. Hogg, *Constitutional Law of Canada* (3rd ed. 1992) at p. 679. This position is known as the "inherent theory" of aboriginal rights, as contrasted with the "contingent theory" of aboriginal rights: see Michael Asch and Patrick Macklem, “Aboriginal Rights and CanadianSovereignty: An Essay on R. v. Sparrow” (1991), 29 Alta. L.Rev. 498, Patrick Macklem, “First Nations Self-Government and theBorders of the Canadian Legal Imagination” (1991), 36 McGillL.J. 382, and, Kent McNeil, *Common Law Aboriginal Title* (1989).

113 Aboriginal people's occupation and use of North American territory was not static, nor, as a general principle, should be the aboriginal rights flowing from it. Natives migrated in response to events such as war, epidemic, famine, dwindling game reserves, etc. Aboriginal practices, traditions and customs also changed and evolved, including the utilisation of the land, methods of hunting and fishing, trade of goods between tribes, and so on. The coming of Europeans increased this fluidity and development, bringing novel opportunities, technologies and means to exploit natural resources: see Brian Slattery, "Understanding Aboriginal Rights" (1987), 66 Can. Bar Rev. 727, at pp.741–42. Accordingly, the notion of aboriginal rights must be open to fluctuation, change and evolution, not only from one native group to another, but also over time.

114 Aboriginal interests arising out of natives' original occupation and use of ancestral lands have been recognized in a body of common law rules referred to as the doctrine of aboriginal rights: see Brian Slattery, "Understanding Aboriginal Rights" supra, at p. 732. These principles define the terms upon which the Crown acquired sovereignty over native people and their territories.

115 The traditional and main component of the doctrine of aboriginal rights relates to aboriginal title, i.e. the *sui generis* proprietary interest which gives native people the right to occupy and use the land at their own discretion, subject to the Crown's ultimate title and exclusive right to purchase the land: see St. Catherine's Milling &Lumber Co. v. R.188814 App. Cas. 46(P.C.), at p. 54; Calder v.British Columbia (Attorney General), supra, at p. 328, *per* Judson J., and at p. 383, *per* Hall J.; and, *Guerin*, supra, at pp. 378 and 382, *per* Dickson J. (as he then was).

116 The concept of aboriginal title, however, does not capture the entirety of the doctrine of aboriginal rights. Rather, as its name indicates, the doctrine refers to a broader notion of aboriginal rights arising out of the historic occupation and use of native ancestral lands, which relate not only to aboriginal title, but also to the component elements of this larger right — such as aboriginal rights to hunt, fish or trap, and their accompanying practices, traditions and customs — as well as to other matters, not related to land, that form part of a distinctive aboriginal culture: see W. I. C. Binnie, “The Sparrow Doctrine: Beginning of theEnd or End of the Beginning?” (1990), 15 Queen's L.J. 217; and, Douglas Sanders, "The Rights of the Aboriginal Peoples of Canada" (1983), 61 Can. Bar Rev. 314.

117 This brings me to the different type of lands on which aboriginal rights can exist, namely reserve lands, aboriginal title lands, and aboriginal right lands: see Brian Slattery, "Understanding Aboriginal Rights", *supra*, at pp. 743-744. The common feature of these lands is that the Canadian Parliament and, to a certain extent, provincial legislatures have a general legislative authority over the activities of aboriginal people, which is the result of the British assertion of sovereignty over Canadian territory. There are, however, important distinctions to draw between these types of lands with regard to the legislation applicable and claims of aboriginal rights.

118 Reserve lands are those lands reserved by the Federal Government for the exclusive use of Indian people; such lands are regulated under the Indian Act, R.S.C. 1985, c. I-5. On reserve lands, federal legislation, pursuant to s. 91(24) of the Constitution Act, 1867, as well as provincial laws of general application, pursuant to s. 88 of theIndian Act, are applicable. However, under s. 81 of the IndianAct, band councils can enact by-laws, for particular purposes specified therein, which supplant incompatible provincial legislation — even that enacted under s. 88 of the Act — as well as incompatible federal legislation — in so far as the Minister of Indian Affairs has not disallowed the by-laws pursuant to s. 82 of the Act. The latter scenario was the foundation of the claims in R. v. Lewis[1996] 1 S.C.R. 921 [[1996] 5 W.W.R. 34819 B.C.L.R. (3d) 244], and partly in *R. v. Nikal*, [1996] 1 S.C.R. 1013.

119 Aboriginal title lands are lands which the natives possess for occupation and use at their own discretion, subject to the Crown's ultimate title (see *Guerin v. R.*, supra, at p. 382); federal and provincial legislation applies to aboriginal title lands, pursuant to the governments' respective general legislative authority. Aboriginal title of this kind is founded on the common law and strict conditions must be fulfilled for such title to be recognized: *see* Calder v. British Columbia (Attorney General), supra; and, Baker Lake (Hamlet) v. Canada (Minister of Indian Affairs& Northern Development)1979[1980] 1 F.C. 518 [[1980] 5 W.W.R. 193]. In fact, aboriginal title exists when the bundle of aboriginal rights is large enough to command the recognition of a *sui generis* proprietary interest to occupy and use the land. It follows that aboriginal rights can be incidental to aboriginal title but need not be; these rights are severable from and can exist independently of aboriginal title. As I have already noted elsewhere, the source of these rights is the historic occupation and use of ancestral lands by the natives.

120 Aboriginal title can also be founded on treaties concluded between the natives and the competent government: see *R. v. Simon*, [1985] 2 S.C.R. 387, and R. v. Horseman[1990] 1 S.C.R. 901 [[1990] 4 W.W.R. 97]. Where this occurs, the aboriginal rights crystallized in the treaty become treaty rights and their scope must be delineated by the terms of the agreement. The rights arising out of a treaty are immune from provincial legislation — even that enacted under s. 88 of the IndianAct—unless the treaty incorporates such legislation, as in *R. v.* Badger[1996] 1 S.C.R. 771 [[1996] 4 W.W.R. 457]. A treaty, however, does not exhaust aboriginal rights; such rights continue to exist apart from the treaty, provided that they are not substantially connected to the rights crystallized in the treaty or extinguished by its terms.

121 Finally, aboriginal right lands are those lands on which only specific aboriginal rights exist (e.g., the right to hunt for food, social and ceremonial purposes) because the occupation and use by the particular group of aboriginal people is too limited and, as a result, does not meet the criteria for the recognition, at common law, of aboriginal title. In these cases, the aboriginal rights on the land are restricted to residual portions of the aboriginal title — such as the rights to hunt, fish or trap — or to other matters not connected to land; they do not, therefore, entail the full *sui generis* proprietary right to occupy and use the land.

122 Both the Canadian Parliament and provincial legislatures can enact legislation, pursuant to their respective general legislative competence, that affect native activities on aboriginal right lands. As Cory J. puts it in Nikal, (at para. 92): "[t]he government must ultimately be able to determine and direct the way in which these rights [of the natives and of the rest of Canadian society] should interact". See also, Calder v. British Columbia (Attorney General), supra, at pp. 328–29, *per* Judson J., and at p. 401, *per* Hall J; *Guerin*, supra, at pp. 377–78; Sparrow, ; and, *Mitchell v. Sandy Bay Indian Band*, *(*sub nom. *Mitchell v. Peguis Indian Band)* [1990] 2 S.C.R. 85 [[1990] 5 W.W.R. 97], at p. 109.

123 These type of lands are not static or mutually exclusive. A piece of land can be conceived of as aboriginal title land and later become reserve land for the exclusive use of Indians; such land is then, reserve land on aboriginal title land. Further, aboriginal title land can become aboriginal right land because the occupation and use by the particular group of aboriginal people has narrowed to specific activities. The bottom line is this: on every type of land described above, to a larger or smaller degree, aboriginal rights can arise and be recognized.

124 This being said, the instant case is confined to the recognition of an aboriginal right and does not involve by-laws on a reserve or claims of aboriginal title, nor does it relate to any treaty rights. The contention of the appellant is simply that the Sto:lo, of which she is one, possess an aboriginal right to fish — arising out of the historic occupation and use of their lands — which includes the right to sell, trade and barter fish for livelihood, support and sustenance purposes.

125 Prior to 1982, the doctrine of aboriginal rights was founded only on the common law and aboriginal rights could be extinguished by treaty, conquest and legislation as they were "dependent upon the good will of the Sovereign": see *St. Catherine's Milling & Lumber Co. v. R.*, supra, at p. 54; also *R. v. George*, [1966] S.C.R. 267; *R. v. Sikyea*, [1964] S.C.R. 642 [49 W.W.R. 306]; and, Calder v.British Columbia (Attorney General), supra; see also, regarding the mode of extinguishing aboriginal rights, Kenneth Lysyk, "The Indian Title Question in Canada: An Appraisal in the Light of Calder" (1973),51 Can. Bar Rev. 450.

126 Since then, however, s. 35(1) of the Constitution Act,1982 provides constitutional protection to aboriginal interests arising out of the native historic occupation and use of ancestral lands through the recognition and affirmation of "existing aboriginal

and treaty rights of the aboriginal peoples of Canada": see Brian Slattery, "First Nations and the Constitution: A Question of Trust" (1992), 71 Can.Bar Rev. 261, at p. 263. Consequently, as I shall examine in some detail, the general legislative authority over native activities is now limited and legislation which infringes upon existing aboriginal or treaty rights must be justified.

127 The general analytical framework developed under s. 35(1) will now be outlined before proceeding with the interpretation of the nature and extent of constitutionally protected aboriginal rights.

II. Section 35(1) of the Constitution Act, 1982 and the Sparrow Test

128 The analysis of the issue before us must start with s. 35(1) ofthe Constitution Act, 1982, found in Part II of that Act entitled "Rights of the Aboriginal Peoples of Canada", which provides:

> *35.* (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

129 The scope of s. 35(1) was discussed in *Sparrow*, *supra*. In that case, a member of the Musqueam Band, Ronald Edward Sparrow, was charged under s. 61(1) of the Fisheries Act with the offence of fishing with a drift-net in excess of the 25-fathom depth permitted by the terms of the band's Indian food fishing licence. The fishing occurred in a narrow channel of the Fraser River, a few miles upstream from Vancouver International Airport. Sparrow readily admitted having fished as alleged, but he contended that, because the Musqueam had an aboriginal right to fish, the attempt to regulate net length was inconsistent with s. 35(1) and was thus rendered of no force or effect by s. 52 of the ConstitutionAct, 1982.

130 I pause here to note that in *Sparrow*, Dickson C.J. and La Forest J. stressed the importance of taking a case-by-case approach to the interpretation of the rights involved in s. 35(1). They stated at p. 1111:

> We wish to emphasize the importance of context and a case-by-case approach to s. 35(1). Given the generality of the text of the constitutional provision, and especially in light of the complexities of aboriginal history, society and rights, the contours of a justificatory standard must be defined in the specific factual context of each case.

See also R. v. Kruger1977[1978] 1 S.C.R. 104 [[1977] 4 W.W.R. 300]; and, *R. v. Taylor* (1981), 62 C.C.C. (2d) 227(Ont. C.A.).

131 The Court, nevertheless, developed a basic analytical framework for constitutional claims of aboriginal right protection under s. 35(1). The test set out in *Sparrow* includes three steps, namely: (1) the assessment and definition of an existing aboriginal right (including extinguishment); (2) the establishment of a *prima facie* infringement of such right; and (3) the justification of the infringement. I shall briefly discuss each of them in turn.

132 The rights of aboriginal people constitutionally protected in s. 35(1) are those *in existence* at the time of the enactment of the *Constitution Act, 1982*. However, the manner in which they were regulated in 1982 is irrelevant to the definition of aboriginal rights because they must be assessed in their contemporary form; aboriginal rights are *not frozen* in time: see Sparrow, at p. 1093; see also Brian Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1983), 8 Queen's L.J. 232; Kent McNeil, "The constitutional Rights of the Aboriginal Peoples of Canada" (1982), 4 *Supreme Court L. Rev.* 218; and, William Pentney, "The Rights of the Aboriginal Peoples of Canada in the Constitution Act, 1982, Part II—Section 35: The SubstantiveGuarantee" (1988), 22 U.B.C. L. Rev. 207. The onus is on the claimant to prove that he or she benefits from an existing aboriginal right. I will return later to this first step to elaborate on the interpretation of the nature and extent of aboriginal rights.

133 Also, the Crown could extinguish aboriginal rights by legislation prior to 1982, but its intention to do so had to be *clear and plain*. Therefore, the regulation of an aboriginal activity does not amount to its extinguishment (Sparrow, at p. 1097) and legislation necessarily inconsistent with the continued enjoyment of aboriginal rights is not sufficient to meet the test. The "clear and plain" hurdle for extinguishment is, as a result, quite high: see Simon, The onus of proving extinguishment is on the party alleging it, that is, the Crown.

134 As regards the second step of the *Sparrow* test, when an existing aboriginal right has been established, the claimant must demonstrate that the impugned legislation constitutes a *prima facie* infringement of the right. Put another way, the question

becomes whether the legislative provision under scrutiny is in conflict with the recognized aboriginal right, either because of its object or its effects. In *Sparrow*, Dickson C.J. and La Forest J. provided the following guidelines, at p. 1112, regarding infringement:

> To determine whether the fishing rights have been interfered with such as to constitute a *prima facie* infringement of s. 35(1), certain questions must be asked. First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a *prima facie* infringement lies on the individual or group challenging the legislation. In relation to the facts of this appeal, the regulation would be found to be a *prima facie* interference if it were found to be an adverse restriction on the Musqueam exercise of their right to fish for food. We wish to note here that the issue does not merely require looking at whether the fish catch has been reduced below that needed for the reasonable food and ceremonial needs of the Musqueam Indians. Rather the test involves asking whether either the purpose or the effect of the restriction on net length unnecessarily infringes the interests protected by the fishing right.

135 Thirdly, after the claimant has demonstrated that the legislation in question constitutes a *prima facie* infringement of his or her aboriginal right, the onus then shifts again to the Crown to prove that the infringement is justified. Courts will be asked, at this stage, to balance and reconcile the conflicting interests of native people, on the one hand, and of the rest of Canadian society, on the other. Specifically, this last step of the *Sparrow* test requires the assessment of both the validity of the objective of the legislation and the reasonableness of the limitation.

136 As to the objective, there is no doubt that a legislative scheme aimed at conservation and management of natural resources will suffice (Sparrow, at p. 1113). Other legislative objectives found to be substantial and compelling, such as the security of the public, can also be valid, depending on the circumstances of each case. The notion of public interest, however, is too vague and broad to constitute a valid objective to justify the infringement of an aboriginal right (Sparrow, at p. 1113).

137 With respect to the reasonableness of the limits upon the existing aboriginal right, the special trust relationship and the responsibility of the Crown vis-à-vis aboriginal people have to be contemplated. At a minimum, this fiduciary duty commands that *some priority* be afforded to the natives in the regulatory scheme governing the activity recognized as aboriginal right: see Sparrow, at pp.1115–1117; also R. v. Jack1979[1980] 1 S.C.R. 294 [[1979] 5 W.W.R. 364]; and, *R. v. Denny* (1990), 55 C.C.C. (3d) 322(N.S.C.A.).

138 A number of other elements may have to be weighed in the assessment of justification. In *Sparrow*, Dickson C.J. and La Forest J. drew up the following non-exhaustive list of factors relating to justification at p. 1119:

> Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented. The aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries.

139 In the case at bar, the issue relates only to the interpretation of the nature and extent of the Sto:lo's aboriginal right to fish and whether it includes the right to sell, trade and barter fish for livelihood, support and sustenance purposes; i.e., the very first step of the *Sparrow* test, dealing with the assessment and definition of aboriginal rights. If it becomes necessary to proceed to extinguishment or to the questions of *prima facie* infringement and justification, the parties agreed that the case should be remitted to trial, as the summary appeal judge did, given that there is insufficient evidence to enable this Court to decide those issues.

140 In order to determine whether the Sto:lo benefit from an existing aboriginal right to fish which includes the right to sell, trade and barter fish for livelihood, support and sustenance purposes, it is necessary to elaborate on the appropriate approach to interpreting the nature and extent of aboriginal rights in general. That I now propose to do.

III. Interpretation of Aboriginal Rights

141 While I am in general agreement with the Chief Justice on the fundamental interpretative canons relating to aboriginal law which he discussed, the application of those rules to his definition of aboriginal rights under s. 35(1) of the Constitution Act, 1982 does not, in my view, sufficiently reflect them. For the sake of convenience, I will summarize them here.

142 First, as with all constitutional provisions, s. 35(1) must be given a generous, large and liberal interpretation in order to give full effect to its purposes: see, regarding the *Constitution Act, 1867*, Edwards v. Canada (Attorney General)1929[1930] A.C. 124 [[1929] 3 W.W.R. 479] (P.C.); *Blaikie c. Quebec (Attorney General)* (1978), [1979] 2 S.C.R. 1016; *Reference re Residential Tenancies Act (Ontario)*, [1981] 1 S.C.R. 714; in the context of the *Charter*, *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.*, *(*sub nom. *Hunter v. Southam Inc.)* [1984] 2 S.C.R. 145 [[1984] 6 W.W.R. 577]; R.v. Big M Drug Mart Ltd.[1985] 1 S.C.R. 295 [[1985] 3 W.W.R. 481]; R. v. Keegstra[1990] 3 S.C.R. 697 [[1991] 2 W.W.R. 1]; and, particular to aboriginal rights in s. 35(1), Sparrow, , where Dickson C.J. and La Forest J. wrote that "s. 35(1) is a solemn commitment that must be given meaningful content".

143 Further, the very nature of ancient aboriginal records, such as treaties, agreements with the Crown and other documentary evidence, commands a generous interpretation, and uncertainties, ambiguities or doubts should be resolved in favour of the natives: see R. v. Sutherland[1980] 2 S.C.R. 451 [[1980] 5 W.W.R. 456]; *R. v. Moosehunter*, [1981] 1 S.C.R. 282; *Nowegijick v. R.*, [1983] 1 S.C.R. 29; *Simon*, supra; ; Sioui, ; Sparrow, *;* and Mitchell, ; see also William Pentney, "The Rights of the Aboriginal Peoples of Canada in theConstitution Act, 1982, Part II — Section 35: The Substantive Guarantee", supra, at p. 255.

144 Second, aboriginal rights must be construed in light of the special trust relationship and the responsibility of the Crown *vis-à-vis* aboriginal people: see *Taylor*, *supra*; and, *Guerin*, *supra*. This fiduciary obligation attaches because of the historic power and responsibility assumed by the Crown over aboriginal people. In Sparrow, , the Court succinctly captured this obligation at p. 1108:

> That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and *contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship*. [Emphasis added.]

See also Alain Lafontaine, "La coexistence de l'obligation de fiduciaire de la Couronne et du droit à l'autonomie gouvernementale des peuples autochtones" (1995), 36 C. de D. 669.

145 Finally, but most importantly, aboriginal rights protected under s. 35(1) have to be interpreted in the context of the history and culture of the specific aboriginal society and in a manner that gives the rights meaning to the natives. In that respect, the following remarks of Dickson C.J. and La Forest J. in Sparrow, at p. 1112, are particularly apposite:

> While it is impossible to give an easy definition of fishing rights, it is possible, and, indeed, *crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake*. [Emphasis added.]

Unlike the Chief Justice, I do not think it appropriate to qualify this proposition by saying that the perspective of the common law matters as much as the perspective of the natives when defining aboriginal rights.

146 These principles of interpretation are important to keep in mind when determining the proper approach to the question of the nature and extent of aboriginal rights protected in s. 35(1) of the Constitution Act,1982, to which I now turn.

147 The starting point in contemplating whether an aboriginal practice, tradition or custom warrants constitutional protection under s.35(1) was hinted at by this Court in Sparrow, Dickson C.J. and La Forest J. made this observation, at p. 1099, regarding the role of the fishery in Musqueam life:

> The scope of the existing Musqueam right to fish must now be delineated. The anthropological evidence relied on to establish the existence of the right suggests that, for the Musqueam, *the salmon fishery has always constituted an integral part of their distinctive culture*. [Emphasis added.]

148 The crux of the debate at the British Columbia Court of Appeal in the present appeal, and in most of the appeals heard contemporaneously, lies in the application of this standard of "integral part of their distinctive culture" to defining the nature and extent of the particular aboriginal right claimed to be protected in s. 35(1) of theConstitution Act, 1982. This broad statement of what characterizes aboriginal rights must be elaborated and made more specific so that it becomes a defining criterion. In particular, two aspects must be examined in detail, namely (1) what are the necessary characteristics of aboriginal rights, and (2) what is the period of time relevant to the assessment of such characteristics.

Characteristics of aboriginal rights

149 The issue of the nature and extent of aboriginal rights protected under s. 35(1) is fundamentally about characterization. Which aboriginal practices, traditions and customs warrant constitutional protection? It appears from the jurisprudence developed in the courts below (see the reasons of the British Columbia Court of Appeal and the decision in Delgamuukw v. British Columbia1993104 D.L.R. (4th) 470 [[1993] 5 W.W.R. 97]) that two approaches to this difficult question have emerged. The first one, which the Chief Justice endorses, focuses on the particular aboriginal practice, tradition or custom. The second approach, more generic, describes aboriginal rights in a fairly high level of abstraction. For the reasons that follow, I favour the latter approach.

150 The approach based on aboriginal practices, traditions and customs considers only discrete parts of aboriginal culture, separating them from the general culture in which they are rooted. The analysis turns on the *manifestations* of the "integral part of [aboriginals'] distinctive culture". Further, on this view, what makes aboriginal culture distinctive is that which differentiates it from non-aboriginal culture. The majority of the Court of Appeal adopted this position, as the following passage from Macfarlane J.A.'s reasons reveals (at para. 37):

> What was happening in the aboriginal society before contact with the Europeans is relevant in identifying the unique traditions of the aborigines which deserved protection by the common law. *It is also necessary to separate those traditions from practices which are not a unique part of Indian culture, but which are common to Indian and non-Indian alike*. [Emphasis added.]

Accordingly, if an activity is integral to a culture other than that of aboriginal people, it cannot be part of aboriginal people's distinctive culture. This approach should *not* be adopted for the following reasons.

151 First, on the pure terminology angle of the question, this position misconstrues the words "distinctive culture", used in the above excerpt of *Sparrow*, by interpreting it as if it meant "distinct culture". These two expressions connote quite different meanings and must not be confused. The word *distinctive* is defined in *The Concise Oxford Dictionary* (1995) as "distinguishing, characteristic" where the word *distinct* is described as "*1* (often foll. by *from*) *a* not identical; separate; individual. *b* different in kind or quality; unlike". While "distinct" mandates comparison and evaluation from a separate vantage point, "distinctive" requires the object to be observed on its own. While describing an object's "distinctive" qualities may entail describing how the object is different from others (i.e., "distinguishing"), there is nothing in the term that requires it to be plainly different. In fact, all that "distinctive culture" requires is the characterization of aboriginal culture, not its differentiation from non-aboriginal cultures.

152 While the Chief Justice recognizes the difference between "distinctive" and "distinct", he applies it only as regards the manifestations of the distinctive aboriginal culture, i.e., the individualized practices, traditions and customs of a particular group of aboriginal people. As I will examine in more detail in a moment, the "distinctive" aboriginal culture has, in my view, a generic and much broader application.

153 Second, holding that what is common to both aboriginal and non-aboriginal cultures must necessarily be non-aboriginal and thus *not* aboriginal for the purpose of s. 35(1) is, to say the least, an overly majoritarian approach. This is diametrically opposed to the view propounded in Sparrow, , that the interpretation of aboriginal rights be informed by the fiduciary responsibility of the Crown *vis-à-vis* aboriginal people as well as by the aboriginal perspective on the meaning of the rights. Such considerations command that practices, traditions and customs which characterize aboriginal societies as the original occupiers and users of Canadian lands be protected, despite their common features with non-aboriginal societies.

154 Finally, an approach based on a dichotomy between aboriginal and non-aboriginal practices, traditions and customs literally amounts to defining aboriginal culture and aboriginal rights as that which is left over after features of non-aboriginal cultures have been taken away. Such a strict construction of constitutionally protected aboriginal rights flies in the face of the generous, large and liberal interpretation of s. 35(1) of theConstitution Act, 1982 advocated in *Sparrow*.

155 A better approach, in my view, is to examine the question of the nature and extent of aboriginal rights from a certain level of abstraction and generality.

156 A generic approach to defining the nature and extent of aboriginal rights starts from the proposition that the notion of "integral part of [aboriginals'] distinctive culture" introduced in Sparrow, , constitutes a general statement regarding the purpose of s. 35(1). Instead of focusing on a particular practice, tradition or custom, this conception refers to a more abstract and profound concept. In fact, similar to the values enshrined in the *Canadian Charterof Rights and Freedoms*, aboriginal rights protected under s. 35(1) should be contemplated on a multi-layered or multi-faceted basis: see Andrea Bowker, "*Sparrow's* Promise: Aboriginal Rights in the B.C. Court of Appeal" (1995), 53 *Toronto Fac. L. Rev.* 1, at pp. 28-29.

157 Accordingly, s. 35(1) should be viewed as protecting, not a catalogue of individualized practices, traditions or customs, as the Chief Justice does, but the "distinctive culture" of which aboriginal activities are manifestations. Simply put, the emphasis would be on the *significance* of these activities to natives rather than on the activities themselves.

158 Although I do not claim to examine the question in terms of liberal enlightenment, an analogy with freedom of expression guaranteed in s.2(b) of the Charter will illustrate this position. Section2(b) of the Charter does not refer to an explicit catalogue of protected expressive activities, such as political speech, commercial expression or picketing, but involves rather the protection of the ability to express: see *Ford c. Québec (Procureur général)*, [1988] 2 S.C.R. 712; *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927; Edmonton Journal v. Alberta (Attorney General)[1989] 2 S.C.R. 1326 [[1990] 1 W.W.R. 577]; Keegstra, supra; Comité pour la République du Canada— Committee for the Commonwealth of Canada v. Canada[1991] 1 S.C.R. 139; and, *RJR-Macdonald Inc. c. Canada (Procureur général)*, [1995] 3 S.C.R. 199. In other words, the constitutional guarantee of freedom of expression is conceptualized, not as protecting the possible manifestations of expression, but as preserving the fundamental purposes for which one may express oneself, i.e., the rationales supporting freedom of expression.

159 Similarly, aboriginal practices, traditions and customs protected under s. 35(1) should be characterized by referring to the fundamental purposes for which aboriginal rights were entrenched in the *Constitution Act, 1982*. As I have already noted elsewhere, s. 35(1) constitutionalizes the common law doctrine of aboriginal rights which recognizes aboriginal interests arising out of the historic occupation and use of ancestral lands by natives. This, in my view, is how the notion of "integral part of a distinctive aboriginal culture" should be contemplated. The "distinctive aboriginal culture" must be taken to refer to the reality that, despite British sovereignty, aboriginal people were the original organized society occupying and using Canadian lands: *Calder v. British Columbia (Attorney General),* supra, at p. 328, *per* Judson J.; and, *Guerin*, *supra*, at p. 379, *per* Dickson J. (as he then was).

160 This rationale should inform the characterization of aboriginal activities which warrant constitutional protection as aboriginal rights. *The practices, traditions and customs protected under s. 35(1) should be those that are sufficiently significant and fundamental to the culture and social organization of a particular group of aboriginal people*. See *Delgamuukw v. British Columbia, supra*, at pp. 646-647, *per* Lambert J.A., dissenting; see also Asch and Macklem, "Aboriginal Rights and Canadian

Sovereignty: An Essay on *R. v. Sparrow", supra*, at p. 505; and, Pentney, "The Rights of theAboriginal Peoples of Canada in the Constitution Act, 1982, PartII — Section 35: The Substantive Guarantee", *supra*, at pp. 258-259.

161 Put another way, the aboriginal practices, traditions and customs which form the core of the lives of native people and which provide them with a way and means of living as an organized society will fall within the scope of the constitutional protection under s. 35(1). This was described by Lambert J.A., dissenting at the Court of Appeal, as the "social" form of description of aboriginal rights (see para.140), a formulation the Chief Justice rejects. Lambert J.A. distinguished these aboriginal activities from the practices or habits which were merely incidental to the lives of a particular group of aboriginal people and, as such, would not warrant protection under s. 35(1) of the Constitution Act,1982. I agree with this description which, although flexible, provides a defining criterion for the interpretation of the nature and extent of aboriginal rights and, contrary to what my colleague McLachlin J. suggests, does not suffer from vagueness or overbreath, as defined by this Court (see *Canada v. Pharmaceutical Society (Nova Scotia)*, *(*sub nom. *R. v. Nova Scotia Pharmaceutical Society)* [1992] 2 S.C.R. 606; and, *R. v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031.

162 Further comments regarding this approach are in order. The criterion of "distinctive aboriginal culture" should not be limited to those activities that only aboriginal people have undertaken or that non-aboriginal people have not. Rather, all practices, traditions and customs which are connected enough to the self-identity and self-preservation of organized aboriginal societies should be viewed as deserving the protection of s. 35(1). Further, a generous, large and liberal construction should be given to these activities in order to give full effect to the constitutional recognition of the distinctiveness of aboriginal culture. Finally, it is almost trite to say that what constitutes a practice, tradition or custom distinctive to native culture and society must be examined through the eyes of aboriginal people, not through those of the non-native majority or the distorting lens of existing regulations.

163 It is necessary to discuss at this point the period of time relevant to the assessment of the practices, traditions and customs which form part of the distinctive culture of a particular group of aboriginal people.

Period of time relevant to aboriginal rights

164 The question of the period of time relevant to the recognition of aboriginal rights relates to whether the practice, tradition or custom has to exist prior to a specific date, and also to the length of time necessary for an aboriginal activity to be recognized as a right under s. 35(1). Here, again, two basic approaches have been advocated in the courts below (see the decisions of the British Columbia Court of Appeal in this case, and in *Delgamuukw v. British Columbia, supra*), namely the "frozen right" approach and the "dynamic right" approach. An examination of each will show that the latter view is to be preferred.

165 The "frozen right" approach would recognize practices, traditions and customs — forming an integral part of a distinctive aboriginal culture — which have long been in existence at the time of British sovereignty: see Slattery, "Understanding Aboriginal Rights", supra, at pp. 758–59. This requires the aboriginal right claimant to prove two elements: (1) that the aboriginal activity has continuously existed for "time immemorial", and (2) that it predated the assertion of sovereignty. Defining existing aboriginal rights by referring to pre-contact or pre-sovereignty practices, traditions and customs implies that aboriginal culture was crystallized in some sort of "aboriginal time" prior to the arrival of Europeans. Contrary to the Chief Justice, I do not believe that this approach should be adopted, for the following reasons.

166 First, relying on the proclamation of sovereignty by the British imperial power as the "cut-off" for the development of aboriginal practices, traditions and customs overstates the impact of European influence on aboriginal communities: see Bowker, "*Sparrow's* Promise: Aboriginal Rights in the B.C. Court of Appeal", supra, at p. 22. From the native people's perspective, the coming of the settlers constitutes one of many factors, though a very significant one, involved in their continuing societal change and evolution. Taking British sovereignty as the turning point in aboriginal culture assumes that everything that the natives did after that date was not sufficiently significant and fundamental to their culture and social organization. This is no doubt contrary to the perspective of aboriginal people as to the significance of European arrival on their rights.

167 Second, crystallizing aboriginal practices, traditions and customs at the time of British sovereignty creates an arbitrary date for assessing existing aboriginal rights: see Sébastien Grammond, "La protection constitutionnelle des droits ancestraux des peuples autochtones et l'arrêt *Sparrow*" (1991), 36 McGill L. J. 1382, at pp.1403–1404. In effect, how would one determine the crucial date of sovereignty for the purpose of s. 35(1)? Is it the very first European contacts with native societies, at the time of the Cabot, Verrazzano and Cartier voyages? Is it at a later date, when permanent European settlements were founded in the early seventeenth century? In British Columbia, did sovereignty occur in 1846 — the year in which the *OregonBoundary Treaty, 1846* was concluded — as held by the Court of Appeal for the purposes of this litigation? No matter how the deciding date is agreed upon, it will not be consistent with the aboriginal view regarding the effect of the coming of Europeans.

168 As a third point, in terms of proof, the "frozen right" approach imposes a heavy and unfair burden on the natives: the claimant of an aboriginal right must prove that the aboriginal practice, tradition or custom is not only sufficiently significant and fundamental to the culture and social organization of the aboriginal group, but has also been continuously in existence, but as the Chief Justice stresses, even if interrupted for a certain length of time, for an indeterminate long period of time prior to British sovereignty. This test embodies inappropriate and unprovable assumptions about aboriginal culture and society. It forces the claimant to embark upon a search for a pristine aboriginal society and to prove the continuous existence of the activity for "time immemorial" before the arrival of Europeans. This, to say the least, constitutes a harsh burden of proof, which the relaxation of evidentiary standards suggested by the Chief Justice is insufficient to attenuate. In fact, it is contrary to the interpretative approach propounded by this Court in *Sparrow*, *supra*, which commands a purposive, liberal and favourable construction of aboriginal rights.

169 Moreover, when examining the wording of the constitutional provisions regarding aboriginal rights, it appears that the protection should not be limited to pre-contact or pre-sovereignty practices, traditions and customs. Section 35(2) of the Constitution Act, 1982 provides that the "'aboriginal peoples of Canada' includes the Indian, Inuit and *Métis* peoples of Canada" (emphasis added). Obviously, there were no Métis people prior to contact with Europeans as the Métis are the result of intermarriage between natives and Europeans: see Pentney, "The Rights of the Aboriginal Peoples of Canada in the ConstitutionAct, 1982, Part II — Section 35: The Substantive Guarantee", supra, at pp. 272–74. Section 35(2) makes it clear that aboriginal rights are indeed guaranteed to Métis people. As a result, according to the text of the Constitution of Canada, it must be possible for aboriginal rights to arise after British sovereignty, so that Métis people can benefit from the constitutional protection of s. 35(1). The case by case application of s. 35(2) of the Constitution Act, 1982 proposed by the Chief Justice does not address the issue of the interpretation of s. 35(2).

170 Finally, the "frozen right" approach is *inconsistent* with the position taken by this Court in *Sparrow*, *supra*, which refused to define existing aboriginal rights so as to incorporate the manner in which they were regulated in 1982. The following passage from Dickson C.J. and La Forest J.'s reasons makes this point (at p. 1093):

> Far from being defined according to the regulatory scheme in place in 1982, *the phrase "existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time*. To use Professor Slattery's expression, in "Understanding Aboriginal Rights," *supra*, at p. 782, the word "existing" suggests that those rights are "affirmed in a contemporary form rather than in their primeval simplicity and vigour". Clearly, then, an approach to the constitutional guarantee embodied in s. 35(1) which would *incorporate "frozen rights" must be rejected*. [Emphasis added.]

This broad proposition should be taken to relate, not only to the meaning of the word "existing" found in s. 35(1), but also to the more fundamental question of the time at which the content of the rights themselves is determined. Accordingly, the interpretation of the nature and extent of aboriginal rights must "permit their evolution over time".

171 The foregoing discussion shows that the "frozen right" approach to defining aboriginal rights as to their nature and extent involves several important restrictions and disadvantages. A better position, in my view, would be evolutive in character and give weight to the perspective of aboriginal people. As the following analysis will demonstrate, a "dynamic right" approach to the question will achieve these objectives.

172 The "dynamic right" approach to interpreting the nature and extent of aboriginal rights starts from the proposition that "the phrase 'existing aboriginal rights' must be interpreted flexibly so as to permit their evolution over time" (Sparrow,). According to this view, aboriginal rights must be permitted to maintain contemporary relevance in relation to the needs of the natives as their practices, traditions and customs change and evolve with the overall society in which they live. This generous, large and liberal interpretation of aboriginal rights protected under s. 35(1) would ensure their continued vitality.

173 Distinctive aboriginal culture would not be frozen as of any particular time but would evolve so that aboriginal practices, traditions and customs maintain a continuing relevance to the aboriginal societies as these societies exist in the contemporary world. Instead of considering it as the turning point in aboriginal culture, British sovereignty would be regarded as having *recognized and affirmed* practices, traditions and customs which are sufficiently significant and fundamental to the culture and social organization of aboriginal people. This idea relates to the "doctrine of continuity", founded in British imperial constitutional law, to the effect that when new territory is acquired the *lex loci* of organized societies, here the aboriginal societies, continues at common law.

174 See, on the doctrine of continuity in general, Sir William Blackstone, *Commentaries on the Laws of England* (1765), Vol. 2, at p. 51; Joseph Chitty, A *Treatise on the Law of the Prerogatives of the Crown* (1820), at p. 119; and Sir William Searle Holdsworth, *History of English Law* (1938), Vol. 11, at pp. 3-274. See also, in the context of Canadian aboriginal law, Brian Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title* (1983); Kent McNeil, *Common Law Aboriginal Title* (1989); Mark Walters, “British ImperialConstitutional Law and Aboriginal Rights: A Comment on Delgamuukw v.British Columbia” (1992), 17 Queen's L.J. 350; Lafontaine, "La coexistence de l'obligation de fiduciaire de la Couronne et du droit à l'autonomie gouvernementale des peuples autochtones", supra, at p. 719; and André Émond, "Le sable dans l'engrenage du droit inhérent des autochtones à l'autonomie gouvernementale", supra, at p. 96.

175 Consequently, in order for an aboriginal right to be recognized and affirmed under s. 35(1), it is *not* imperative for the practices, traditions and customs to have existed prior to British sovereignty and, *a fortiori*, prior to European contact, which is the cut-off date favoured by the Chief Justice. Rather, the determining factor should only be that the aboriginal activity has formed an integral part of a distinctive aboriginal culture — i.e., to have been sufficiently significant and fundamental to the culture and social organization of the aboriginal group — *for a substantial continuous period of time* as defined above.

176 Such a temporal requirement is less stringent than the "time immemorial" criterion developed in the context of aboriginal title: see *Calder v. British Columbia (Attorney General), supra*; and, *Baker Lake (Hamlet) v. Canada (Minister of Indian Affairs & Northern Development), supra*; see also Grammond, "La protection constitutionnelle des droits ancestraux des peuples autochtones et l'arrêt *Sparrow*", supra, at p. 1394. This qualification of the time immemorial test finds support in the *obiter dicta* of this Court in Sparrow, , regarding the Musqueam Band's aboriginal right to fish:

> It is true that for the period from 1867 to 1961 the evidence is scanty. But the evidence was not disputed or contradicted in the courts below and *there is evidence of sufficient continuity of the right* to support the Court of Appeal's finding, and we would not disturb it. [Emphasis added.]

177 The substantial continuous period of time for which the aboriginal practice, tradition or custom must have been engaged in will depend on the circumstances and on the nature of the aboriginal right claimed. However, as proposed by Professor Slattery, in "Understanding Aboriginal Rights", supra, at p. 758, in the context of aboriginal title, "in most cases a period of some twenty to fifty years would seem adequate". This, in my view, should constitute a reference period to determine whether an aboriginal activity has been in existence for long enough to warrant constitutional protection under s. 35(1).

178 In short, the substantial continuous period of time necessary to the recognition of aboriginal rights should be assessed based on (1) the type of aboriginal practices, traditions and customs, (2) the particular aboriginal culture and society, and (3) the reference period of 20 to 50 years. Such a time frame does not minimize the fact that in order to benefit from s. 35(1) protection, aboriginal activities must still form the core of the lives of native people; this surely cannot be characterized as an extreme position, as my colleague McLachlin J. affirms.

179 The most appreciable advantage of the "dynamic right" approach to defining the nature and extent of aboriginal rights is the proper consideration given to the perspective of aboriginal people on the meaning of their existing rights. It recognizes that distinctive aboriginal culture is not a reality of the past, preserved and exhibited in a museum, but a characteristic that has evolved with the natives as they have changed, modernized and flourished over time, along with the rest of Canadian society. This, in the aboriginal people's perspective, is no doubt the true sense of the constitutional protection provided to aboriginal rights through s. 35(1) of the Constitution Act, 1982.

Summary

180 In the end, the proposed general guidelines for the interpretation of the nature and extent of aboriginal rights constitutionally protected under s. 35(1) can be summarized as follows. The characterization of aboriginal rights should refer to the rationale of the doctrine of aboriginal rights, i.e., the historic occupation and use of ancestral lands by the natives. Accordingly, aboriginal practices, traditions and customs would be recognized and affirmed under s. 35(1) of theConstitution Act, 1982 if they are sufficiently significant and fundamental to the culture and social organization of a particular group of aboriginal people. Furthermore, the period of time relevant to the assessment of aboriginal activities should not involve a specific date, such as British sovereignty, which would crystallize aboriginal's distinctive culture in time. Rather, as aboriginal practices, traditions and customs change and evolve, they will be protected in s. 35(1) provided that they have formed an integral part of the distinctive aboriginal culture for a substantial continuous period of time.

181 This approach being set out, I will turn to the specific issue raised by this case, namely whether the Sto:lo's aboriginal right to fish includes the right to sell, trade and barter fish for livelihood, support and sustenance purposes. Before examining the distinctive aboriginal culture of the Sto:lo people in that respect, a brief review of the case law on aboriginal trade activities, which shows that aboriginal practices, traditions and customs can have different purposes, will be helpful to delineate the issue at bar.

IV. Case Law on Aboriginal Trade Activities

182 At the British Columbia Court of Appeal, the majority framed the issue as being whether the Sto:lo possess an aboriginal right to fish which includes the right to make *commercial* use of the fish. Macfarlane J.A. put the question that way because "[i]n essence, [this case] is about an asserted Indian right to sell fish allocated for food purposes on a commercial basis" (see para. 30). I leave aside for the moment the delineation of the aboriginal right claimed in this case in order, first, to examine the case law on treaty and aboriginal rights regarding trade to demonstrate that there is an important distinction to be drawn between, on the one hand, the sale, trade and barter of fish for livelihood, support and sustenance purposes and, on the other, the sale, trade and barter of fish for purely commercial purposes.

183 This Court, in *Sparrow*, *supra*, proposed to leave to another day the discussion of commercial aspects of the right to fish, since (at p. 1101) "the case at bar was not presented on the footing of an *aboriginal right to fish for commercial or livelihood purposes*" (emphasis added). Accordingly, Dickson C.J. and La Forest J. confined their reasons to the aboriginal right to fish for food, social and ceremonial purposes. In so doing, however, it appears that they implicitly distinguished between (1) the right to fish for food, social and ceremonial purposes (which was recognized for the Musqueam Band), (2) the right to fish for livelihood, support and sustenance purposes, and (3) the right to fish for purely commercial purposes (see Sparrow, at pp. 1100–1101). The differentiation between the last two classes of purposes, which is of key interest here, was discussed and elaborated upon by Wilson J. in *Horseman*, *supra*.

184 In *Horseman*, this Court examined the scope of the Horse Lakes Indian Band's right to hunt under *Treaty 8*, 1899, as amended by the *Natural Resources Transfer Agreement*, 1930 (Alberta) ("*NRTA*"). In that case, the Appellant, Bert Horseman, was charged with the offence of unlawfully "trafficking" in wildlife, contrary to s. 42 of the Wildlife Act, R.S.A. 1980, c. W-9, which was defined as "any single act of selling, offering for sale, buying, bartering, soliciting or trading". The appellant had killed a grizzly bear in self-defence, while legally hunting moose for food, and he sold the bear hide because he was in need

of money to support his family. Horseman argued that the *Wildlife Act* did not apply to him because he was within his *Treaty 8* rights when he sold the grizzly hide.

185 Cory J. (Lamer, La Forest and Gonthier JJ. concurring), for the majority, held that the *Treaty 8* right to hunt generally has been circumscribed by the *NRTA* to the right to hunt for "food" only. He made it clear, however, that before the *NRTA* (1930), the Horse Lakes people had the right to hunt for commercial purposes under *Treaty 8* (at pp. 928-29):

> The economy of the Indian population at the time of the Treaty had clearly *evolved to such a degree that hunting and fishing for commercial purposes was an integral part of their way of life*.
>
> . . . . .
>
> I am in complete agreement with the finding of the trial judge that *the original Treaty right clearly included hunting for purposes of commerce*. The next question that must be resolved is whether or not that right was in any way limited or affected by the Transfer Agreement of 1930. [Emphasis added.]

This passage recognizes that the practices, traditions and customs of the Horse Lakes people were not frozen at the time of British sovereignty and that when *Treaty 8* was concluded in 1899, their activities had evolved so that commercial hunting and fishing formed an "integral part" of their culture and society.

186 Furthermore, Cory J. upheld the findings of the courts below that the sale of the grizzly hide constituted a commercial hunting activity which, as a consequence, fell outside the ambit of the treaty rights to hunt. He wrote at p. 936:

> It has been seen that the Treaty No. 8 hunting rights have been limited by the provisions of the 1930 Transfer Agreement to the right to hunt for food, *that is to say, for sustenance for the individual Indian or the Indian's family*. In the case at bar the sale of the bear hide was part of a "multi-stage process" whereby the product was sold to obtain funds for purposes which might include purchasing food for nourishment. The courts below correctly found that *the sale of the bear hide constituted a hunting activity that had ceased to be that of hunting "for food" but rather was an act of commerce*. As a result it was no longer a right protected by Treaty No. 8, as amended by the 1930 Transfer Agreement. [Emphasis added.]

Cory J. concluded that the *Wildlife Act* applied and found the appellant guilty of unlawfully trafficking in wildlife.

187 Wilson J. (Dickson C.J. and L'Heureux-Dubé J. concurring), dissenting, was of the view that, from an aboriginal perspective, a simple dichotomy between hunting for domestic use and hunting for commercial purposes should not be determinative of the treaty rights. Rather, *Treaty 8* and the *NRTA* should be interpreted so as to preserve the Crown's commitment to respecting the lifestyle of the Horse Lakes people and the way in which they had traditionally pursued their livelihood.

188 Contrary to Cory J., Wilson J. held that the words "for food" in the *NRTA* did not have the effect of placing substantial limits on the range of hunting activities permitted under *Treaty 8*. After reviewing the decisions of this Court in *R. v. Frank* (1977), [1978] 1 S.C.R. 95 [[1977] 4 W.W.R. 294], and Moosehunter, , Wilson J. found that the treaty right to hunt "for food" amounted to a right to hunt for *support and sustenance*. She explained her view as follows, at p. 919:

> And if we are to give para. 12 [of the *NRTA*] the "broad and liberal" construction called for in *Sutherland*, a construction that reflects the principle enunciated in *Nowegijick* and *Simon* that statutes relating to Indians must be given a "fair, large and liberal construction", then we should be prepared to accept that the range of activity encompassed by the term "for food" extends to *hunting for "support and subsistence", i.e. hunting not only for direct consumption but also hunting in order to exchange the product of the hunt for other items as was their wont, as opposed to purely commercial or sport hunting*.
>
> And, indeed, when one thinks of it this makes excellent sense. The whole emphasis of Treaty No. 8 was on the preservation of the Indian's traditional way of life. But this surely did not mean that the Indians were to be forever consigned to a diet of meat and fish and were to have no opportunity to share in the advances of modern civilization over the next one hundred years. Of course, the Indians' hunting and fishing rights were to be preserved and protected; the Indians could not have survived otherwise. *But this cannot mean that in 1990 they are to be precluded from selling their meat and fish to buy other items necessary for their sustenance and the sustenance of their children*. Provided the purpose of their hunting is

> either to consume the meat or to exchange or sell it in order to support themselves and their families, I fail to see why this is precluded by any common sense interpretation of the words "for food". *It will, of course, be a question of fact in each case whether a sale is made for purposes of sustenance or for purely commercial profit*. [Emphasis added.]

Wilson J. concluded that the *Wildlife Act* could not forbid the activities which fall within the aboriginal traditional way of life and that are linked to the Horse Lakes people's support and sustenance. Consequently, she would have acquitted the appellant because he sold the grizzly hide to buy food for his family, not for commercial profit.

189 As far as this case is concerned, there are two points which stand out from the foregoing review of the reasons in *Horseman*, *supra*. First, the Horse Lakes people's original practices, traditions and customs regarding hunting were held to have evolved to include, at the time *Treaty 8* was concluded, the right to make some commercial use of the game. Second, and more importantly, when determining whether a treaty right exists (which no doubt extends to aboriginal rights), there should be a distinction drawn between, on the one side, activities relating to the support and sustenance of the natives and, on the other, ventures undertaken purely for commercial profit. Such a differentiation is far from being artificial, as McLachlin J. seems to suggest, and, in fact, this distinction ought to be used in the context of s. 35(1) of the Constitution Act, 1982 as in other contexts; in short, there are sales which do not qualify as commercial sales (see, for example, *Loi sur la protection du consommateur*, L.R.Q. 1977, c. P-40.1).

190 This differentiation was adopted by the Ontario Court (Prov.Div.) in R. v. Jones199314 O.R. (3d) 421. In that case, the defendants, members of the Chippewas of Nawash, were charged with the offence of taking more lake trout than permitted by the band's commercial fishing licence, contrary to the *Ontario Fishery Regulations, 1989*, authorized by the *Fisheries Act*. The defendants argued that the quota imposed by the Band's licence interfered with their protected aboriginal right or treaty right to engage in commercial fishing. After referring to both the reasons of Cory J. and of Wilson J. in Horseman, , Fairgrieve Prov. Ct. J. reached the following conclusions at pp. 440–441:

> Consideration of the historical, anthropological and archival evidence leaves an existing aboriginal right to fish for commercial purposes that essentially coincides with the treaty right already stated: the Saugeen have a collective ancestral right to fish for sustenance purposes in their tradition fishing grounds. Apart from the waters adjacent to the two reserves and their unsurrendered islands, the aboriginal commercial fishing right is not exclusive, but does allow them to fish throughout their traditional fishing grounds on both sides of the peninsula. To use Ms. Blair's language [for the Defendants], the nature of the aboriginal right exercised is one directed *"to a subsistence use of the resource as opposed to a commercially profitable enterprise"*. It is the band's continuing communal right to continue deriving *"sustenance"* from the fishery resource which has always been an essential part of the community's economic base. [Emphasis added.]

See also, *R. v. King*, [1993] O.J. 1794 (Prov. Ct.), at para. 51; and *R. v. Fraser*, [1994] 3 C.N.L.R. 139(B.C. Prov. Ct.), atp. 145; as well as the commentators Binnie, "The *Sparrow* Doctrine: Beginning of the End or End of the Beginning?", supra,at pp. 234–35; and Bowker, "*Sparrow*'s Promise: Aboriginal Rights in the B.C. Court of Appeal", supra, at p. 8.

191 In sum, as *Sparrow*, *supra*, suggests, when assessing whether aboriginal practices, traditions and customs have been sufficiently significant and fundamental to the culture and social organization of a particular group of aboriginal people for a substantial continuing period of time, the purposes for which such activities are undertaken should be considered highly relevant. An aboriginal activity can form an integral part of the distinctive culture of a group of aboriginal people if it is done for certain purposes — e.g., for livelihood, support and sustenance purposes. However, the same activity could be considered not to be part of their distinctive aboriginal culture if it is done for other purposes — e.g., for purely commercial purposes. The Chief Justice fails to draw this distinction, which I believe to be highly relevant, although he agrees that the Court of Appeal mischaracterized the aboriginal right here claimed.

192 This contemplation of aboriginal or treaty rights based on the purpose of the activity is aimed at facilitating the delineation of the rights claimed as well as the identification and evaluation of the evidence presented in their support. However, as in Horseman, , to respect aboriginal perspective on the matter, the purposes for which aboriginal activities are undertaken cannot and should not be strictly compartmentalized. Rather, in my view, such purposes should be viewed on a spectrum, with aboriginal

activities undertaken solely for food, at one extreme, those directed to obtaining purely commercial profit, at the other extreme, and activities relating to livelihood, support and sustenance, at the centre.

193 This being said, in this case, as I have already noted elsewhere, the British Columbia Court of Appeal framed the issue as being one of whether the Sto:lo possess an aboriginal right to fish which includes the right to make commercial use of the fish. To state the question in that fashion not only disregards the above distinction between the purposes for which fish can be sold, traded and bartered but also mischaracterizes the facts of this case, misconceives the contentions of the appellant and overlooks the legislative provision here under constitutional challenge.

194 First, the facts giving rise to this case do not support the Court of Appeal's framing of the issue in terms of commercial fishing. The appellant, Dorothy Van der Peet, was charged with the offence of selling salmon which were legally caught by her common law spouse and his brother. The appellant sold 10 salmon. There is no evidence as to the purposes of the sale or as to what the money was going to be used for. It is clear, however, that the offending transaction proven by the Crown is not part of a commercial venture, nor does it constitute an act directed at profit. It would be different if the Crown had shown, for instance, that the appellant sold 10 salmon every day for a year or that she was selling fish to provide for commercial profit. This is not, however, the scenario presented to us and, as the facts stand on the record, it is reasonable to infer from them that the appellant sold the 10 salmon, not for profit, but for the support and sustenance of herself and her family.

195 Furthermore, the appellant did not argue in the courts below or before this Court that the Sto:lo possess an aboriginal right to fish for commercial purposes. The submissions were only to the effect that the Sto:lo's aboriginal right to fish includes the right to sell, trade and barter fish for their livelihood, support and sustenance. In fact, before this Court, the appellant relied on the dissenting opinion of Lambert J.A., at the Court of Appeal, who stated (at para. 150) that the Sto:lo had the right to "catch and, if they wish, sell, themselves and through other members of the Sto:lo people, sufficient salmon to provide all the people who wish to be personally engaged in the fishery, and their dependent families, when coupled with their other financial resources, with a *moderate livelihood*" (italics omitted, underlining added). It is well settled that in framing the issue in a case courts cannot overlook the contentions of the parties; in the case at bar, the appellant did not seek the recognition and affirmation of an aboriginal right to fish for commercial purposes.

196 Finally, the legislative provision under constitutional challenge is not only aimed at commercial fishing, but also forbids both commercial and non-commercial sale, trade and barter of fish. For convenience, here is again s. 27(5) of the British Columbia Fishery(General) Regulations:

> 127. ...
>
> (5) No person shall *sell, barter or offer to sell or barter* any fish caught under the authority of an Indian food fish licence. [Emphasis added.]

The scope of s. 27(5) encompasses any sale, trade or barter of fish caught under an Indian food fish licence. If the prohibition were directed at the sale, trade and barter of fish for commercial purposes, the question of the validity of the Regulations would raise a different issue, one which does not arise on the facts of this case since an aboriginal right to fish commercially is not claimed here. Section 27(5) prohibits the sale, trade and barter of fish for livelihood, support and sustenance, and we must determine whether, as it stands, this provision complies with the constitutional protection afforded to aboriginal rights under s. 35(1) of theConstitution Act, 1982.

197 An aboriginal activity does not need to be undertaken for livelihood, support and sustenance purposes to benefit from s. 35(1) protection. In other words, the above distinction based on the purposes of aboriginal activities does *not* impose an additional burden on the claimant of an aboriginal right. It may be that, for a particular group of aboriginal people, the practices, traditions and customs relating to some commercial activities meet the test for the recognition of an aboriginal right, i.e. to be sufficiently significant and fundamental to the culture and social organization for a substantial continuing period of time. This will have to be determined on the specific facts giving rise to each case, as proven by the Crown, in view of the particular aboriginal culture and the evidence supporting the recognition of such right. In fact, the consideration of aboriginal activities

based on their purposes is simply aimed at facilitating the delineation of the aboriginal rights claimed as well as the identification and evaluation of the evidence presented in support of the rights.

198 In the instant case, this Court is only required to decide whether the Sto:lo's right to fish includes the right to sell, trade and barter fish for livelihood, support and sustenance purposes, and *not* whether it includes the right to make commercial use of the fish. In that respect, it is necessary to review the evidence to determine whether such activities have formed an integral part of the Sto:lo's distinctive aboriginal culture for a substantial continuous period of time so as to give rise to an aboriginal right. That is what I now propose to do.

V. The Case

199 The question here is whether the particular group of aboriginal people, the Sto:lo Band, of which the appellant is a member, has engaged in the sale, trade and barter of fish for livelihood, support and sustenance purposes, in a manner sufficiently significant and fundamental to their culture and social organization, for a substantial continuous period of time, entitling them to benefit from a constitutionally protected aboriginal right to that extent.

200 At trial, after having examined the historical evidence presented by the parties, Scarlett Prov. Ct. J. arrived at the following conclusions (at p. 160):

> This court was not satisfied upon the evidence that aboriginal trade in salmon took place in any regularized or market sense. Oral evidence demonstrated that trade was incidental to fishing for food purposes. Anthropological and archaeological evidence was in conflict. This court accepts the evidence of Dr. Stryd and John Dewhurst [*sic*] in preference to Dr. Daly and therefore, accepts that the Sto:lo were a band culture as opposed to tribal. *While bands were guided by siem or prominent families, no regularized trade in salmon existed in aboriginal times. Such trade as took place was either for ceremonial purposes or opportunistic exchanges taking place on a casual basis. Such trade as did take place was incidental only*. Evidence led by the Crown that the Sto:lo had no access to salt for food preservation is accepted.
>
> Exchange of fish was subject to local conditions of availability, transportation and preservation. It was the establishment by the Hudson's Bay Company at the fort at Langley that created the market and trade in fresh salmon. *Trade in dried salmon in aboriginal times was, as stated, minimal and opportunistic*. This court concludes on the evidence, therefore, that the Sto:lo aboriginal right to fish for food and ceremonial purposes does not include the right to sell such fish. [Emphasis added.]

201 I agree with the Chief Justice that it is well established, both in criminal and civil contexts, that an appellate court will not disturb the findings of fact made by a trial judge in the absence of "some *palpable and overriding error* which affected his [or her] assessment of the facts" (emphasis added): see Stein v. “KathyK.” (The) (“StormPoint” (The))1975[1976] 2 S.C.R. 802, at p. 808; see also *Beaudoin-Daigneault v. Richard*, [1984] 1 S.C.R. 2; Lensen v. Lensen[1987] 2 S.C.R. 672 [[1988] 1 W.W.R. 481]; *Laurentide Motels Ltd. c. Beauport (Ville)*, [1989] 1 S.C.R. 705; *Ontario (Attorney General) v. Bear Island Foundation*, [1991] 2 S.C.R. 570; *Lapointe v. Hôpital Le Gardeur*, [1992] 1 S.C.R. 351; *R. v. B. (R.H.)*, [1994] 1 S.C.R. 656; Hodgkinson v. Simms[1994] 3 S.C.R. 377 [[1994] 9 W.W.R. 60997 B.C.L.R. (2d) 1]; and *Schwartz v. R.*, *(*sub nom. *Schwartz v. Canada)* [1996] 1 S.C.R. 254.

202 At the British Columbia Supreme Court, Selbie J. was of the view that the trial judge committed such an error and, as a consequence, substituted his own findings of fact (at paras. 15 and 16):

> With respect, in my view *the learned judge erred in using contemporary tests for "marketing" to determine whether the aboriginal acted in ways which were consistent with trade albeit in a rudimentary way as dictated by the times*.
>
> In my view, the evidence in this case, oral, historical and opinion, looked at in the light of the principles of interpreting aboriginal rights referred to earlier, is more consistent with the aboriginal right to fish including the right to sell, barter or exchange than otherwise and must be found so. We are, after all, basically considering the existence in antiquity of an aboriginal's right to dispose of his fish other than by eating it himself or using it for ceremonial purposes — the words "sell", "barter", "exchange", "share", are but variations on the theme of "disposing". It defies common sense to think that

> if the aboriginal did not want the fish for himself, there would be some stricture against him disposing of it by some other means to his advantage. We are speaking of an aboriginal "right" existing in antiquity which should not be restrictively interpreted by today's standards. I am satisfied that when the first Indian caught the first salmon he had the "right" to do anything he wanted with it — eat it, trade it for deer meat, throw it back or keep it against a hungrier time. As time went on and for an infinite variety of reasons, that "right" to catch the fish and do anything he wanted with it became hedged in by rules arising from religion, custom, necessity and social change. One such restriction requiring an adjustment to his rights was the need dictated by custom or religion to share the first catch — to do otherwise would court punishment by his god and by the people. One of the social changes that occurred was the coming of the white-man, a circumstance, as any other, to which he must adjust. With the white-man came new customs, new ways and new incentives to colour and change his old life, including his trading and bartering ways. The old customs, rightly or wrongly, for good or for bad, changed and he must needs change with them — and he did. A money economy eventually developed and he adjusted to that also — he traded his fish for money. This was a long way from his ancient sharing, bartering and trading practices but it was the logical progression of such. It has been held that the aboriginal right to hunt is not frozen in time so that only the bow and arrow can be used in exercising it — the rights evolves with the times: (see *Simon v. R.*, [1985] 2 S.C.R. 387 ...). So, in my view, with the right to fish and dispose of them, which I find on the evidence includes the right to trade and barter them. *The Indian right to trade his fish is not frozen in time to doing so only by the medium of the potlatch and the like*; *he is entitled, subject to extinguishment or justifiable restrictions, to evolve with the times and dispose of them by modern means, if he so chooses, such as the sale of them for money. It is thus my view that the aboriginal right of the Sto:lo peoples to fish includes the right to sell, trade or barter them after they have been caught. It is my view that the learned judge imposed a verdict inconsistent with the evidence and the weight to be given it*. [Emphasis added.]

203 At the British Columbia Court of Appeal, Macfarlane J.A. (Taggart J.A. concurring) and Wallace J.A., for the majority, took the position that an aboriginal right would be recognized only if the manifestations of the distinctive aboriginal culture — i.e., the particular aboriginal practices, traditions or customs — were particular to native culture and not common to non-aboriginal societies. Further, the evidence would need to show that the activities in question have been engaged in for time immemorial at the time sovereignty was asserted by Britain. Macfarlane J.A. wrote (at para. 21):

> To be so regarded those practices must have been integral to the distinctive culture of the aboriginal society from which they were said to have arisen. A modernized form of such a practice would be no less an aboriginal right. *A practice which had not been integral to the organized society and its distinctive culture, but which became prevalent merely as a result of European influences would not qualify for protection as an aboriginal right*. [Emphasis added.]

The majority of the Court of Appeal agreed with the trial judge's findings and held that the Sto:lo's practices, traditions and customs did not justify the recognition of an aboriginal right to fish for commercial purposes.

204 Lambert J.A., in dissent, applied what he called a "social" form of description of aboriginal rights, one which does not "freeze" native practices, traditions and customs in time. In light of the evidence, he concluded that the distinctive aboriginal culture of the Sto:lo warranted the recognition of an aboriginal right to sell, trade and barter fish in order to provide them with a "moderate livelihood". He stated (at para. 150):

> *For those reasons I conclude that the best description of the aboriginal customs, traditions and practices of the Sto:lo people in relation to the sockeye salmon run on the Fraser River is that their aboriginal customs, traditions and practices have given rise to an aboriginal right, to be exercised in accordance with their rights of self-regulation including recognition of the need for conservation to catch and, if they wish, sell, themselves and through other members of the Sto:lo people, sufficient salmon to provide all the people who wish to be personally engaged in the fishery, and their dependent families, when coupled with their other financial resources, with a _moderate livelihood_, and, in any event, not less than the quantity of salmon needed to provide every one of the collective holders of the aboriginal right with the same amount of salmon per person per year as would have been consumed or otherwise utilized by each of the collective holders of the right, on average, from a comparable year's salmon run, in, say, 1800*. [Italics in original, underlining added.]

205 It appears from the foregoing review of the judgments that the conclusions on the findings of fact relating to whether the Sto:lo possess an aboriginal right to sell, trade and barter fish varied depending on the delineation of the aboriginal right claimed and on the approach used to interpreting such right. The trial judge, as well as the majority of the Court of Appeal, framed the issue as being whether the Sto:lo possess an aboriginal right to fish for commercial purposes and used an approach based on the manifestations of distinctive aboriginal culture which differentiates between aboriginal and non-aboriginal practices and which "freezes" aboriginal rights in a pre-contact or pre-sovereignty aboriginal time. The summary appeal judge, as well as Lambert J.A. at the Court of Appeal, described the issue in terms of whether the Sto:lo possess an aboriginal right to sell, trade and barter fish for livelihood. Further, they examined the aboriginal right claimed at a certain level of abstraction, which focused on the distinctive aboriginal culture of the Sto:lo and which was evolutive in nature.

206 As I have already noted elsewhere, the issue in the present appeal is whether the Sto:lo's aboriginal right to fish includes the right to sell, trade and barter fish for livelihood, support and sustenance purposes. Accordingly, the trial judge and the majority of the Court of Appeal erred in framing the issue. Furthermore, it is my view that the nature and extent of aboriginal rights protected under s. 35(1) of the Constitution Act,1982 must be defined by referring to the notion of "integral part of a distinctive aboriginal culture", i.e., whether an aboriginal practice, tradition or custom has been sufficiently significant and fundamental to the culture and social organization of the particular group of aboriginal people for a substantial continuous period of time. Therefore, by using a "frozen right" approach focusing on aboriginal practice to defining the nature and extent of the aboriginal right, Scarlett Prov. Ct. J. and the majority of the Court of Appeal were also in error.

207 Consequently, when the trial judge assessed the historical evidence presented at trial, he asked himself the wrong questions and erred as to the proper evidentiary basis necessary to establish an aboriginal right under s. 35(1) of the Constitution Act, 1982. He thus made no finding of fact, or insufficient findings of fact, as regards the Sto:lo's distinctive aboriginal culture relating to the sale, trade and barter of fish for livelihood, support and sustenance purposes. It is also noteworthy that the first appellate judge, who asked himself the right questions, made diametrically opposed findings of fact on the evidence presented at trial.

208 The result of these palpable and overriding errors, which affected the trial judge's assessment of the facts, is that an appellate court is justified in intervening — as did the summary appeal judge — in the trial judge's findings of fact and substituting its own assessment of the evidence presented at trial: see *Stein v. "Kathy K." (The), supra*. I note also that this Court, as a subsequent appellate court in such circumstances, does not have to show any deference to the assessment of the evidence made by lower appellate courts. Since this Court is in no less advantageous or privileged position than the lower appellate courts in assessing the evidence on the record, we are free to reconsider the evidence and substitute our own findings of fact (see *Schwartz v. Canada, supra*, at paras. 36-37). I find myself, however, in general agreement with the findings of fact of Selbie J., the summary appeal judge, and of Lambert J.A. Nonetheless, I will revisit the evidence to determine whether it reveals that the sale, trade and barter of fish for livelihood, support and sustenance purposes have formed an integral part of the Sto:lo's distinctive aboriginal culture for a substantial continuous period of time.

209 The Sto:lo, who are part of the Coast Salish Nation, have lived in their villages along the Fraser River from Langley to above Yale. They were an organized society, whose main socio-political unit was the extended family. The Fraser River was their main source of food the year around and, as such, the Sto:lo considered it to be sacred. It is interesting to note that their name, the "Sto:lo", means "people of the river": see William Duff, *The Upper Stalo Indians of the Fraser Valley of British Columbia (Anthropology in British Columbia — Memoir No. 1)*, at p. 11.

210 Archaeological evidence demonstrates that the Sto:lo have relied on the fishery for centuries. Located near the mouth of the Fraser River, the Sto:lo fishery consists of five species of salmon — sockeye, chinook, coho, chum and pink — as well as sturgeon, eulachons and trout. The Sto:lo used many methods and devices to fish salmon, such as dip-nets, harpoons, weirs, traps and hooks. Both the wind and the heat retention capacity of the geography of the Fraser Canyon result in an excellent area for wind drying fish. Therefore, although fresh fish were procurable year around, they dried or smoked large amounts at the end of the summer to use for the hard times of winter.

211 The Sto:lo community is geographically located between two biogeoclimatic zones: the interior plateau region and the coastal maritime area. As such, they have long enjoyed the exchange of regional goods with the people living in these zones. See, in that respect, the report of Dr. Richard Daly, an expert in social and cultural anthropology called by the appellant and who gave expert opinion evidence on the social structure and culture of the Sto:lo; and also Duff, *The Upper Stalo Indians of the Fraser Valley of* British Columbia, .

212 The oral histories, corroborated by expert evidence, show a long tradition of trading relationships among the Sto:lo and with their neighbours, both before the arrival of Europeans and to the present day. Dr. Arnoud Henry Stryd, an expert in archaeology with a strong background in anthropology called by the respondent to give expert opinion evidence and to speak to the archaeological record, testified that exchanging goods has been a feature of the human condition from the earliest times:

> Q Yes. You say there's evidence for trade in non-perishable items throughout much of the archaeological record for British Columbia.
>
> A Well, that's right. In my point of view, the tendency to trade is one that's very human and if you have things that you have that you don't need and your neighbours have something that you would like that they are willing to, that they don't need, that *it seems very obvious that some kind of exchange of goods would take place and the earliest part of the human condition to exchange items*. [Emphasis added.]

213 Likewise, John Trevor Dewhirst, an anthropologist and ethno-historian called by the respondent, gave expert opinion evidence on the aboriginal trade of salmon of the Sto:lo. Although he insisted that there was no "organized regularized large scale exchange of salmon" in pre-contact or pre-sovereignty aboriginal time, he testified to the effect that the Sto:lo did exchange, trade and barter salmon among themselves and with other native people, and that such activities were rooted in their culture:

> Q We had reached the stage, sir, as I understand it where — we're now at the point with your evidence, sir, that the exchange of salmon amongst the Indians — you've mentioned that, sir, there was some exchange of salmon amongst the Indians?
>
> A *Oh, yes, very definitely*.
>
> Q Yes. Could you expand on that, please?
>
> A Yes. I think it's very clear from the — both from the historical record and — and from the anthropological evidence, the ethnographic evidence collected by various workers, Wilson Duff, Marion Smith, Dr. Daly and others whom we've mentioned — and Suttles — *exchange of salmon for other foodstuffs and perhaps non-food items definitely took place amongst the Sto:Lo and was a definite feature of their society and culture*.
>
> What I'd like to do is go over some of that material evidence regarding the exchange of salmon and examine that in terms — of of trade and the — try — try to determine — try to develop a context for in fact what was happening at least in some of these instances.
>
> . . . . .
>
> A That — I believe that the record does not indicate the presence of an organized regularized large scale exchange of salmon amongst the Sto:Lo or between the Sto:Lo and other Native peoples and by this large scale exchange I — I think — rather, by the exchange of salmon I think it's important to look at this context and see if in fact there is a kind of a market situation. I mean, most cultures, most societies do exchange items between relatives and friends and so on. I think that this is debatable whether you can call this trade in — in the sense of a — of a kind of a marketplace and I'd like to turn now to some of the — some of the evidence that's been presented. [Emphasis added.]

214 It seems well founded to conclude, as the expert witnesses for the respondent did, that no formalized market system of trade of salmon existed in the original Sto:lo society because, as a matter of fact, organized large scale trade in salmon appears to

run contrary to the Sto:lo's aboriginal culture. They viewed salmon as more than just food; they treated salmon with a degree of respect since the Sto:lo community was highly reliant and dependant on the fish resources. On the one hand, the Sto:lo pursued salmon very aggressively in order to get them for livelihood, support and sustenance purposes. On the other, however, they were sufficiently mindful not to exploit the abundance of the river and they taught their children a thoughtful attitude towards salmon and also how to conserve them.

215 As the social and cultural anthropologist Dr. Richard Daly explained at trial, the exchange of salmon among the Sto:lo and with their neighbours was informed by the ethic of feeding people, catching and trading only what was necessary for their needs and the needs of face-to-face relationships:

> Q Is the sale of fish or other foodstuff, in you opinion, also part of the Sto:lo culture?
>
> A *The way it is explained to me by people in the Sto:lo community, that it's all part of feeding yourself and feeding others. You're looking after your basic necessities*. And today it's all done through the medium of cash. And you may not have anything to reciprocate when — when other native people from a different area come to you with say tanned hides from the Interior for making — for handicraft work. You may not have anything to give them in return at that time and you pay for it, like anyone else would. But then when you — you've put up your salmon or you're able to take them a load of fresh salmon you reciprocate and they pay you. But it's — it's considered to be a similar procedure as the bartering because it's satisfying the basic needs.
>
> And also people tell me that they go fishing in order to get the money for the gas to drive to the fishing sites, to look after the repair of their nets and to — to make some of the necessary amounts of cash needed for their day-to-day existence. And I have observed people going out to fish with an intention of selling. *They don't go to get a maximum number of fish and sell them on the market for the — the going price. They sell it at the going price but they — they won't take any more fish than they have orders for because that's — that's the wrong attitude towards the fish and fishing*. So I think in a sense it — it's very consistent with the type of bartering that has preceded it and it's sort of still couched in that same idiom, as well. [Emphasis added.]

216 The foregoing review of the historical evidence on the record reveals that there was trade of salmon for livelihood, support and sustenance purposes among the Sto:lo and with other native people and, more importantly, that such activities formed part of, and were undoubtedly rooted in, the distinctive aboriginal culture of the Sto:lo. In short, the fishery has always provided a focus for life and livelihood for the Sto:lo and they have always traded salmon for the sustenance and support of themselves and their families. Accordingly, to use the terminology of the test propounded above, the sale, trade and barter of fish for livelihood, support and sustenance purposes was sufficiently significant and fundamental to the culture and social organization of the Sto:lo.

217 The period of intensive trade of fish in a market-type economy involving the Sto:lo began after the coming of the Europeans, in approximately 1820, when the Hudson's Bay Company established a post at Fort Langley on the Fraser River. Following that, the Sto:lo participated in a thriving commercial fishery centred around the trade of salmon. According to Jamie Morton, an historian called by the appellant to give expert opinion evidence on the history of the European trade with native people, approximately 1,500 to 3,000 barrels of salmon (with 60-90 fish per barrel) were cured per year, which the Hudson's Bay Company bought and shipped to Hawaii and other international ports. (See also Lambert J.A., at para. 121).

218 This trade of salmon in a market economy, however, is not relevant to determine whether the Sto:lo possess an aboriginal right to sell, trade and barter fish for livelihood, support and sustenance purposes. I note, in passing, that such commercial use of the fish would seem to be intrinsically incompatible with the pre-contact or pre-sovereignty culture of the Sto:lo which commanded that the utilization of the salmon, including its sale, trade and barter, be restricted to providing livelihood, support and sustenance, and did not entail obtaining purely commercial profit.

219 As far as the issue here is concerned, the sale, trade and barter of fish for livelihood, support and sustenance purposes have always been sufficiently significant and fundamental to the culture and social organization of the Sto:lo. This conclusion is

no doubt in line with the perspective of the Sto:lo regarding the importance of the trade of salmon in their society. Consequently, the criterion regarding the characterization of aboriginal rights protected under s. 35(1) of the Constitution Act,1982 is met.

220 Furthermore, there is no doubt that these activities did form part of the Sto:lo's distinctive aboriginal culture for a substantial continuous period of time. In that respect, we must consider the type of aboriginal practices, traditions and customs, the particular aboriginal culture and society, and the reference period of 20 to 50 years. Here, the historical evidence shows that the Sto:lo's practices, traditions and customs relating to the trade of salmon for livelihood, support and sustenance purposes have existed for centuries before the arrival of Europeans. As well, it appears that such activities have continued, though in modernized forms, until the present day. Accordingly, the time requirement for the recognition of an aboriginal right is also met in this case.

221 As a consequence, I conclude that the Sto:lo Band, of which the appellant is a member, possess an aboriginal right to sell, trade and barter fish for livelihood, support and sustenance purposes. Under s. 35(1) of theConstitution Act, 1982 this right is protected.

VI. Disposition

222 In the result, I would allow the appeal on the question of whether the Sto:lo possess an aboriginal right to fish which includes the right to sell, trade and barter fish for livelihood, support and sustenance purposes. The question of the extinguishment of such right, as well as the issues of *prima facie* infringement and justification, must be remitted to trial since there is insufficient evidence to enable this Court to decide upon them. Consequently, the constitutional question can only be answered partially:

> Question: "Is s. 27(5) of the British ColumbiaFishery (General) Regulations, SOR/84-248, as it read on September 11, 1987, of no force or effect with respect to the appellant in the circumstances of these proceedings, in virtue of s. 52 of the ConstitutionAct, 1982, by reasons of the aboriginal rights within the meaning of s.35 of the Constitution Act, 1982 invoked by the appellant?"
>
> Answer: The aboriginal rights within the meaning of s. 35 ofthe Constitution Act, 1982 invoked by the appellant, are recognized and the question of whether s. 27(5) of the British Columbia Fishery(General) Regulations is of no force or effect with respect to the appellant in the circumstances of these proceedings, in virtue of s. 52 ofthe Constitution Act, 1982, will depend on the issues of extinguishment, *prima facie* infringement and justification as determined in a new trial.

223 There will be no costs to either party.

***McLachlin J. (dissenting)*:**

224 This appeal concerns the right of the Sto:lo of British Columbia to sell fish caught in the Fraser River. The appellant, Mrs. Van der Peet, sold salmon caught under an Indian food fishing licence by her common law husband and his brother. The sale of salmon caught under an Indian food licence was prohibited. Mrs. Van der Peet was charged with selling fish contrary to the Fisheries Act Regulations. At trial, she raised the defence that the regulations under which she was charged was invalid because it infringed her aboriginal right, confirmed by s. 35 of the ConstitutionAct,1982 to catch and sell fish. If so, s. 52 of the Constitution Act,1982 acts to invalidate the regulation to the extent of the conflict.

225 The inquiry thus focuses on s. 35(1) of the ConstitutionAct, 1982, which provides that "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed". Section 35(1) gives constitutional protection not only to aboriginal rights codified through treaties at the time of its adoption in 1982, but also to aboriginal rights which had not been formally recognized at that date: R. v. Sparrow[1990] 1 S.C.R. 1075 [[1990] 4 W.W.R. 41046 B.C.L.R. (2d) 1], per Dickson C.J. and La Forest J. at pp. 1105–06. The Crown has never entered into a treaty with the Sto:lo. They rely not on a codified aboriginal right, but on one which they ask the courts to recognize under s. 35(1).

226 Against this background, I turn to the questions posed in this appeal:

1. Do the Sto:lo possess an aboriginal right under s. 35(1)of the Constitution Act, 1982 which entitles them to sell fish?

(a) Has a *prima facie* right been established?

(b) If so, has it been extinguished?

2. If a right is established, do the government regulations prohibiting sale infringe the right?

3. If the regulations infringe the right, are they justified?

227 My conclusions on this appeal may be summarized as follows. The issue of what constitutes an aboriginal right must, in my view, be answered by looking at what the law has historically accepted as fundamental aboriginal rights. These encompass the right to be sustained from the land or waters upon which an aboriginal people have traditionally relied for sustenance. Trade in the resource to the extent necessary to maintain traditional levels of sustenance is a permitted exercise of this right. The right endures until extinguished by treaty or otherwise. The right is limited to the extent of the aboriginal people's historic reliance on the resource, as well as the power of the Crown to limit or prohibit exploitation of the resource incompatible with its responsible use. Applying these principles, I conclude that the Sto:lo possess an aboriginal right to fish commercially for purposes of basic sustenance, that this right has not been extinguished, that the regulation prohibiting the sale of any fish constitutes a *prima facie* infringement of it, and that this infringement is not justified. Accordingly, I conclude that the appellant's conviction must be set aside.

1. Do the Sto:lo Possess an Aboriginal Right to Sell Fish Protected under Section 35(1) of the Constitution Act, 1982?

A. Is a Prima Facie Right Established?

228 I turn first to the principles which govern the inquiry into the existence of an aboriginal right.

(i) General Principles of Interpretation

229 This Court in *Sparrow* discussed the dual significance of s. 35(1) of the Constitution Act, 1982 in the context of fishing. Section 35(1) is significant, first, because it entrenches aboriginal rights as of the date of its adoption in 1982. Prior to that date, aboriginal rights to fish were subject to regulation and extinguishment by unilateral government act. After the adoption of s. 35, these rights can be limited only by treaty. But s. 35(1) is significant in a second, broader sense. It may be seen as recognition of the right of aboriginal peoples to fair recognition of aboriginal rights and settlement of aboriginal claims. Thus Dickson C.J. and La Forest J. wrote in Sparrowat p. 1105:

> ... s. 35(1) of the *Constitution Act, 1982* represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights. The strong representations of native associations and other groups concerned with the welfare of Canada's aboriginal peoples made the adoption of s. 35(1) possible. ... Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place. It also affords aboriginal peoples constitutional protection against provincial legislative power.

Quoting from Professor Lyon in "An Essay on Constitutional Interpretation" (1988), 26 Osgoode Hall L.J. 95, at p. 100, Dickson C.J. and La Forest J. continued at p. 1105:

> ... the context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.

230 It may not be wrong to assert, as the Chief Justice does, that the dual purposes of s. 35(1) are first to recognize the fact that the land was occupied prior to European settlement and second, to reconcile the assertion of sovereignty with this prior

occupation. But it is, with respect, incomplete. As the foregoing passages from *Sparrow* attest, s. 35(1) recognises not only prior aboriginal occupation, but also a prior legal regime giving rise to aboriginal rights which persist, absent extinguishment. And it seeks not only to reconcile these claims with European settlement and sovereignty but also to reconcile them in a way that provides the basis for a just and lasting settlement of aboriginal claims consistent with the high standard which the law imposes on the Crown in its dealings with aboriginal peoples.

231 Following these precepts, this Court in *Sparrow* decreed, at pp. 1106-07, that s. 35(1) be construed in a generous, purposive and liberal way. It represents "a solemn commitment that must be given meaningful content" (at p. 1108). It embraces and confirms the fiduciary obligation owed by the government to aboriginal peoples (at p. 1109). It does not oust the federal power to legislate with respect to aboriginals, nor does it confer absolute rights. Federal power is to be reconciled with aboriginal rights by means of the doctrine of justification. The federal government can legislate to limit the exercise of aboriginal rights, but only to the extent that the limitation is justified and only in accordance with the high standard of honourable dealing which the Constitution and the law imposed on the government in its relations with aboriginals (at p. 1109).

232 To summarize, a court approaching the question of whether a particular practice is the exercise of a constitutional aboriginal right under s. 35(1) must adopt an approach which: (1) recognizes the dual purposes of s. 35(1) (to preclude extinguishment and to provide a firm foundation for settlement of aboriginal claims); (2) is liberal and generous toward aboriginal interests; (3) considers the aboriginal claim in the context of the historic way of life of the people asserting it; and (4) above all, is true to the position of the Crown throughout Canadian history as trustee or fiduciary for the first peoples of this country. Finally, I would join with the Chief Justice in asserting, as Mark Walters counsels in "British Imperial Law and Aboriginal Rights" (1992), 17 Queen's L.J. 350,at pp. 413 and 412, respectively, that "... a morally and politically defensible conception of aboriginal rights will incorporate both [the] legal perspectives" of the "two vastly dissimilar legal cultures" of European and aboriginal societies. We apply the common law, but the common law we apply must give full recognition to the pre-existing aboriginal tradition.

(ii) The Right Asserted — the Right to Fish for Commercial Purposes

233 The first step is to ascertain the aboriginal right which is asserted by Mrs. Van der Peet. Are we concerned with the right to fish, the right to sell fish on a small sustenance-related level, or commercial fishing?

234 The Chief Justice and Justice L'Heureux-Dubé state that this appeal does not raise the issue of the right of the Sto:lo to engage in commercial fishery. They argue that the sale of one or two fish to a neighbour cannot be considered commerce, and that the British Columbia courts erred in treating it as such.

235 I agree that this case was defended on the ground that the fish sold by Mrs. Van der Peet were sold for purposes of sustenance. This was not a large corporate money-making activity. In the end, as will be seen, I agree with L'Heureux-Dubé J. that a large operation geared to producing profits in excess of what the people have historically taken from the river might not be constitutionally protected.

236 This said, I see little point in labelling Mrs. Van der Peet's sale of fish something other than commerce. When one person sells something to another, that is commerce. Commerce may be large or small, but commerce it remains. On the view I take of the case, the critical question is not whether the sale of the fish is commerce or non-commerce, but whether the sale can be defended as the exercise of a more basic aboriginal right to continue the aboriginal people's historic use of the resource.

237 Making an artificial distinction between the exchange of fish for money or other goods on the one hand and for commercial purposes on the other, may have serious consequences, if not in this case, in others. If the aboriginal right at issue is defined as the right to trade on a massive, modern scale, few peoples may be expected to establish a commercial right to fish. As the Chief Justice observes in R. v. N.T.C.Smokehouse Ltd, S.C.C., No. 23800 [[1996] 9 W.W.R. 114], at para. 20, "[t]he claim to an aboriginal right to exchange fish commercially places a more onerous burden" on the aboriginal claimant "than a claim to an aboriginal right to exchange fish for money or other goods". In the former case, the trade must be shown to have existed pre-contact "on a scale best characterized as commercial". (at para. 20) With rare exceptions (see the evidence in R. v. Gladstone,

S.C.C., No. 23801 [[1996] 9 W.W.R. 149], released concurrently) aboriginal societies historically were not interested in massive sales. Even if they had been, their societies did not afford them mass markets.

(iii) Aboriginal Rights versus the Exercise of Aboriginal Rights

238 It is necessary to distinguish at the outset between an aboriginal right and the exercise of an aboriginal right. Rights are generally cast in broad, general terms. They remain constant over the centuries. The exercise of rights, on the other hand, may take many forms and vary from place to place and from time to time.

239 If a specific modern practice is treated as the right at issue, the analysis may be foreclosed before it begins. This is because the modern practice by which the more fundamental right is exercised may not find a counterpart in the aboriginal culture of two or three centuries ago. So if we ask whether there is an aboriginal *right* to a particular kind of trade in fish, i.e., large-scale commercial trade, the answer in most cases will be negative. On the other hand, if we ask whether there is an aboriginal right to use the fishery resource for the purpose of providing food, clothing or other needs, the answer may be quite different. Having defined the basic underlying right in general terms, the question then becomes whether the modern *practice* at issue may be characterized as an *exercise* of the right.

240 This is how we reconcile the principle that aboriginal rights must be ancestral rights with the uncompromising insistence of this Court that aboriginal rights not be frozen. The rights are ancestral; they are the old rights that have been passed down from previous generations. The *exercise* of those rights, however, takes modern forms. To fail to recognize the distinction between rights and the contemporary form in which the rights are exercised is to freeze aboriginal societies in their ancient modes and deny to them the right to adapt, as all peoples must, to the changes in the society in which they live.

241 I share the concern of L'Heureux-Dubé J. that the Chief Justice defines the rights at issue with too much particularity, enabling him to find no aboriginal right where a different analysis might find one. By insisting that Mrs. Van der Peet's modern practice of selling fish be replicated in pre-contact Sto:lo practices, he effectively condemns the Sto:lo to exercise their right precisely as they exercised it hundreds of years ago and precludes a finding that the sale constitutes the exercise of an aboriginal right.

242 To constitute a right under s. 35(1) of the ConstitutionAct, 1982, the right must be of constitutional significance. A right of constitutional significance may loosely be defined as a right which has priority over ordinary legal principles. It is a maxim which sets the boundaries within which the law must operate. While there were no formal constitutional guarantees of aboriginal rights prior to 1982, we may nevertheless discern certain principles relating to aboriginal peoples which were so fundamental as to have been generally observed by those charged with dealing with aboriginal peoples and with making and executing the laws that affected them.

243 The activity for which constitutional protection is asserted in this case is selling fish caught in the area of the Fraser River where the Sto:lo traditionally fished for the purpose of sustaining the people. The question is whether this activity may be seen as the exercise of a right which has either been recognized or which so resembles a recognized right that it should, by extension of the law, be so recognized.

(iv) The Time Frame

244 The Chief Justice and L'Heureux-Dubé J. differ on the time periods one looks to in identifying aboriginal rights. The Chief Justice stipulates that for a practice to qualify as an aboriginal right it must be traceable to pre-contact times and be identifiable as an "integral" aspect of the group's culture at that early date. Since the barter of fish was not shown to be more than an incidental aspect of Sto:lo society prior to the arrival of the Europeans, the Chief Justice concludes that it does not qualify as an aboriginal right.

245 L'Heureux-Dubé J., by contrast, minimizes the historic origin of the alleged right. For her, all that is required is that the practice asserted as a right have constituted an integral part of the group's culture and social organization for a period of at least 20 to 50 years, and that it continue to be an integral part of the culture at the time of the assertion of the right.

246 My own view falls between these extremes. I agree with the Chief Justice that history is important. A recently adopted practice would generally not qualify as being aboriginal. Those things which have in the past been recognized as aboriginal rights have been related to the traditional practices of aboriginal peoples. For this reason, this Court has always been at pains to explore the historical origins of alleged aboriginal rights. For example, in *Sparrow*, this Court began its inquiry into the aboriginal right to fish for food with a review of the fishing practices of the Musqueum band prior to European contact.

247 I cannot agree with the Chief Justice, however, that it is essential that a practice be traceable to pre-contact times for it to qualify as a constitutional right. Aboriginal rights find their source not in a magic moment of European contact, but in the traditional laws and customs of the aboriginal people in question. As Brennan J. (as he then was) put it in Mabo v. Queensland1992175 C.L.R. 1(Aust. H.C.), at p. 58, "Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory". The French version of s. 35(1) aptly captures the governing concept. "Les droits existants — ancestraux ou issus de traités" — tells us that the rights recognized and affirmed by s. 35(1) must be rooted in the historical or ancestral practices of the aboriginal people in question. This Court in Guerin v. R.[1984] 2 S.C.R. 335 [[1984] 6 W.W.R. 481, 59 B.C.L.R. 301], adopted a similar approach: Dickson J. (as he then was) refers at p. 376, to "aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands". One finds no mention in the text of s. 35(1) or in the jurisprudence of the moment of European contact as the definitive all-or-nothing time for establishing an aboriginal right. The governing concept is simply the traditional customs and laws of people prior to imposition of European law and customs. What must be established is continuity between the modern practice at issue and a traditional law or custom of the native people. Most often, that law or tradition will be traceable to time immemorial; otherwise it would not be an ancestral aboriginal law or custom. But date of contact is not the only moment to consider. What went before and after can be relevant too.

248 My concern is that we not substitute an inquiry into the precise moment of first European contact — an inquiry which may prove difficult — for what is really at issue, namely the ancestral customs and laws observed by the indigenous peoples of the territory. For example, there are those who assert that Europeans settled the eastern maritime regions of Canada in the 7th and 8th century A.D. To argue that aboriginal rights crystallized then would make little sense; the better question is what laws and customs held sway before superimposition of European laws and customs. To take another example, in parts of the west of Canada, over a century elapsed between the first contact with Europeans and imposition of "Canadian" or "European" law. During this period, many tribes lived largely unaffected by European laws and customs. I see no reason why evidence as to the laws and customs and territories of the aboriginals in this interval should not be considered in determining the nature and scope of their aboriginal rights. This approach accommodates the specific inclusion in s.35(1) of the Constitution Act, 1982 of the aboriginal rights of the Métis people, the descendants of European explorers and traders and aboriginal women.

249 Not only must the proposed aboriginal right be rooted in the historical laws or customs of the people, there must also be continuity between the historic practice and the right asserted. As Brennan J. put it in *Mabo*, at p. 60:

> The common law can, by reference to the traditional laws and customs of an indigenous people, identify and protect the native rights and interests to which they give rise. However, when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared.

The continuity requirement does not require the aboriginal people to provide a year-by-year chronicle of how the event has been exercised since time immemorial. Indeed, it is not unusual for the exercise of a right to lapse for a period of time. Failure to exercise it does not demonstrate abandonment of the underlying right. All that is required is that the people establish a link between the modern practice and the historic aboriginal right.

250 While aboriginal rights will generally be grounded in the history of the people asserting them, courts must, as I have already said, take cognizance of the fact that the way those rights are practised will evolve and change with time. The modern exercise of a right may be quite different from its traditional exercise. To deny it the status of a right because of such differences would be to deny the reality that aboriginal cultures, like all cultures, change and adapt with time. As Dickson C.J. and La

Forest J. put it in Sparrow, at p. 1093 "... the phrase 'existing aboriginal rights' [in s. 35(1) of the ConstitutionAct, 1982] must be interpreted flexibly so as to permit their evolution over time".

(v) The Procedure for Determining the Existence of an Aboriginal Right

251 Aboriginal peoples, like other peoples, define themselves through a myriad of activities, practices and claims. A few of these, the *Canadian Charter of Rights and Freedoms* tells us, are so fundamental that they constitute constitutional "rights" of such importance that governments cannot trench on them without justification. The problem before this Court is how to determine what activities, practices and claims fall within this class of constitutionally protected rights.

252 The first and obvious category of constitutionally protected aboriginal rights and practices are those which had obtained legal recognition prior to the adoption of s. 35(1) of the Constitution Act,1982. Section 35(1) confirms "existing" aboriginal rights. Rights granted by treaties or recognized by the courts prior to 1982 must, it follows, remain rights under s. 35(1).

253 But aboriginal rights under s. 35(1) are not confined to rights formally recognized by treaty or the courts before 1982. As noted above, this Court has held that s. 35(1) "is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples": Sparrow, at p. 1106, quoting Noel Lyon, "An Essay on Constitutional Interpretation" (1988), *Osgoode Hall L.J.* 95, at p. 100. This poses the question of what new, previously unrecognized aboriginal rights may be asserted under s.35(1).

254 The Chief Justice defines aboriginal rights as specific pre-contact practices which formed an "integral part" of the aboriginal group's "specific distinct culture". L'Heureux-Dubé J, adopting a "dynamic" rights approach, extends aboriginal rights to any activity, broadly defined, which forms an integral part of a distinctive aboriginal group's culture and social organization, regardless of whether the activity pre-dates colonial contact or not. In my respectful view, while both these approaches capture important facets of aboriginal rights, neither provides a satisfactory test for determining whether an aboriginal right exists.

(vi) The "Integral-Incidental" Test

255 I agree with the Chief Justice, at para. 46, that to qualify as an aboriginal right "an activity must be an element of practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right". I also agree with L'Heureux-Dubé J. that an aboriginal right must be "integral" to a "distinctive aboriginal group's culture and social organization". To say this is simply to affirm the foundation of aboriginal rights in the laws and customs of the people. It *describes* an essential quality of an aboriginal right. But, with respect, a workable legal test for determining the extent to which, if any, commercial fishing may constitute an aboriginal right, requires more. The governing concept of integrality comes from a description in the *Sparrow* case where the extent of the aboriginal right (to fish for food) was not seriously in issue. It was never intended to serve as a test for determining the extent of disputed exercises of aboriginal rights.

256 My first concern is that the proposed test is too broad to serve as a legal distinguisher between constitutional and non-constitutional rights. While the Chief Justice in the latter part of his reasons seems to equate "integral" with "not incidental", the fact remains that "integral" is a wide concept, capable of embracing virtually everything that an aboriginal people customarily did. The *Shorter Oxford English Dictionary*, Vol. 1, (1978), offers two definitions of "integral": l. "Of or pertaining to a whole ... constituent or component"; and 2. "Made up of component parts which together constitute a unity". To establish a practice as "integral" to a group's culture, it follows, one must show that the practice is part of the unity of practices which together make up that culture. This suggests a very broad definition: anything which can be said to be part of the aboriginal culture would qualify as an aboriginal right protected by the *Constitution Act, 1982*. This would confer constitutional protection on a multitude of activities, ranging from the trivial to the vital. The Chief Justice attempts to narrow the concept of "integral" by emphasizing that the proposed right must be part of what makes the group "distinctive", the "specific" people which they are, stopping short, however, of asserting that the practice must be unique to the group and adhere to none other. But the addition of concepts of distinctness and specificity do not, with respect, remedy the overbreadth of the test. Minor practices, falling far short of the importance which we normally attach to constitutional rights, may qualify as distinct or specific to a group. Even the addition of the notion that the characteristic must be central or important rather than merely "incidental", fails to remedy

the problem; it merely poses another problem, that of determining what is central and what is incidental to a people's culture and social organization.

257 The problem of overbreadth thus brings me to my second concern, the problem of indeterminacy. To the extent that one attempts to narrow the test proposed by the Chief Justice by the addition of concepts of distinctiveness, specificity and centrality, one encounters the problem that different people may entertain different ideas of what is distinctive, specific or central. To use such concepts as the markers of legal rights is to permit the determination of rights to be coloured by the subjective views of the decision-maker rather than objective norms, and to invite uncertainty and dispute as to whether a particular practice constitutes a legal right.

258 Finally, the proposed test is, in my respectful opinion, too categorical. Whether something is integral or not is an all or nothing test. Once it is concluded that a practice is integral to the people's culture, the right to pursue it obtains unlimited protection, subject only to the Crown's right to impose limits on the ground of justification. In this appeal, the Chief Justice's exclusion of "commercial fishing" from the right asserted masks the lack of internal limits in the integral test. But the logic of the test remains ineluctable, for all that: assuming that another people in another case establishes that commercial fishing was integral to its ancestral culture, that people will, on the integral test, logically have an absolute priority over non-aboriginal and other less fortunate aboriginal fishers, subject only to justification. All others, including other native fishers unable to establish commercial fishing as integral to their particular cultures, may have no right to fish at all.

259 The Chief Justice recognizes the all or nothing logic of the "integral" test in relation to commercial fishing rights in his reasons in *R. v. Gladstone*, S.C.C. No. 23801, released concurrently. Having determined in that case that an aboriginal right to commercial fishing is established, he notes at para. 63 that unlike the Indian food fishery, which is defined in terms of the peoples' need for food, the right to fish commercially "has no internal limitation". Reasoning that where the test for the right imposes no internal limit on the right, the court may do so, he adopts a broad justification test which would go beyond limiting the use of the right in ways essential to its exercise as envisioned in *Sparrow*, to permit partial reallocation of the aboriginal right to non-natives. The historically based test for aboriginal rights which I propose, by contrast, possesses its own internal limits and adheres more closely to the principles that animated *Sparrow*, as I perceive them.

(vii) The Empirical Historic Approach

260 The tests proposed by my colleagues *describe* qualities which one would expect to find in aboriginal rights. To this extent they may be informative and helpful. But because they are overinclusive, indeterminate, and ultimately categorical, they fall short, in my respectful opinion, of providing a practically workable principle for identifying what is embraced in the term "existing aboriginal rights" in s. 35(1)of the Constitution Act.

261 In my view, the better approach to defining aboriginal rights is an empirical approach. Rather than attempting to describe *a priori* what an aboriginal right is, we should look to history to see what sort of practices have been identified as aboriginal rights in the past. From this we may draw inferences as to the sort of things which may qualify as aboriginal rights under s. 35(1). Confronted by a particular claim, we should ask, "Is this *like* the sort of thing which the law has recognized in the past?" This is the time-honoured methodology of the common law. Faced with a new legal problem, the court looks to the past to see how the law has dealt with similar situations in the past. The court evaluates the new situation by reference to what has been held in the past and decides how it should be characterized. In this way, legal principles evolve on an incremental, pragmatic basis.

262 Just as there are two fundamental types of scientific reasoning — reasoning from first principles and empirical reasoning from experience — so there are two types of legal reasoning. The approach adopted by the Chief Justice and L'Heureux-Dubé J. in this appeal may be seen as an example of reasoning from first principles. The search is for a governing principle which will control all future cases. Given the complexity and sensitivity of the issue of defining hitherto undefined aboriginal rights, the pragmatic approach typically adopted by the common law — reasoning from the experience of decided cases and recognized rights — has much to recommend it. In this spirit, and bearing in mind the important truths captured by the "integral" test proposed by the Chief Justice and L'Heureux-Dubé J., I turn to the question of what the common law and Canadian history tell us about aboriginal rights.

(viii) The Common Law Principle: Recognition of Pre-Existing Rights and Customs

263 The history of the interface of Europeans and the common law with aboriginal peoples is a long one. As might be expected of such a long history, the principles by which the interface has been governed have not always been consistently applied. Yet running through this history, from its earliest beginnings to the present time is a golden thread — the recognition by the common law of the ancestral laws and customs the aboriginal peoples who occupied the land prior to European settlement.

264 For centuries, it has been established that upon asserting sovereignty the British Crown accepted the existing property and customary rights of the territory's inhabitants. Illustrations abound. For example, after the conquest of Ireland, it was held in Tanistry Case (1608), Dav. Ir. 28, 80 E.R. 516, that the Crown did not take actual possession of the land by reason of conquest and that pre-existing property rights continued. Similarly, Lord Sumner wrote in *Re Southern Rhodesia*, [1919] A.C. 211(P.C.), at p. 233 that "it is to be presumed, in the absence of express confiscation or of subsequent expropriatory legislation, that the conqueror has respected [pre-existing aboriginal rights] and forborne to diminish or modify them". Again, Lord Denning affirmed the same rule in *Oyekan v. Adele*, [1957] 2 All E.R. 785(P.C.), at p. 788:

> In inquiring ... what rights are recognised, there is one guiding principle. It is this: The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected. Whilst, therefore, the British Crown, as Sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it: and *the courts will declare the inhabitants entitled to compensation according to their interests, even though those interests are of a kind unknown to English law*. ... [Emphasis added.]

265 Most recently in *Mabo*, the Australian High Court, after a masterful review of Commonwealth and American jurisprudence on the subject, concluded that the Crown must be deemed to have taken the territories of Australia subject to existing aboriginal rights in the land, even in the absence of acknowledgment of those rights. As Brennan J. put it at p. 58: "an inhabited territory which became a settled colony was no more a legal desert than it was 'desert uninhabited' ...." Once the "fictions" of *terra nullius* are stripped away, "[t]he nature and incidents of native title must be ascertained as a matter of fact by reference to [the] laws and customs" of the indigenous people.

266 In Canada, the Courts have recognized the same principle. Thus in *Calder* [Calder v. British Columbia (AttorneyGeneral) [1973] S.C.R. 313[1973] 4 W.W.R. 1], at p. 328, Judson J. referred to the asserted right "to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished." In the same case, Hall J. (dissenting on another point) rejected at p. 416 as "wholly wrong" "the proposition that upon conquest or discovery the native peoples have no rights at all except those subsequently granted or recognized by the conqueror or discoverer." Subsequent decisions in this Court are consistent with the view that the Crown took the land subject to pre-existing aboriginal rights and that such rights remain in the aboriginal people, absent extinguishment or surrender by treaty.

267 In *Guerin*, *supra*, this Court re-affirmed this principle, stating at pp. 377-78:

> In recognizing that the Proclamation is not the sole source of Indian title the *Calder* decision went beyond the judgment of the Privy Council in *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46. In that case Lord Watson acknowledged the existence of aboriginal title but said it had its origin in the Royal Proclamation. In this respect *Calder* is consistent with the position of Chief Justice Marshall in the leading American cases of *Johnson v. M'Intosh*, 8 Wheaton 543 (1823), and *Worcester v. State of Georgia*, 6 Peters 515 (1832), cited by Judson and Hall JJ. in their respective judgments.
>
> In *Johnson v. M'Intosh* Marshall C.J., although he acknowledged the Proclamation of 1763 as one basis for recognition of Indian title, was nonetheless of opinion that *the rights of Indians in the lands they traditionally occupied prior to European colonization both predated andsurvived the claims to sovereignty made by various European nations in the territories of the North American continent*. The principle of discovery which justified these claims gave the ultimate title in the land in a particular area to the nation which had discovered and claimed it. In that respect at least the Indians' rights in the land were obviously diminished; but their rights of occupancy and possession remained unaffected". [Emphasis added.]

This Court's judgment in Sparrow, , re-affirmed that approach.

(ix) The Nature of the Interests and Customs Recognized by the Common Law

268 This much is clear: the Crown, upon discovering and occupying a "new" territory, recognized the law and custom of the aboriginal societies it found and the rights in the lands they traditionally occupied that these supported. At one time it was suggested that only legal interests consistent with those recognised at common law would be recognized. However, as Brennan J. points out in *Mabo*, at p. 59, that rigidity has been relaxed since the decision of the Privy Council in *Tijani v. Secretary, Southern Nigeria*, [1921] 2 A.C. 399, "[t]he general principle that the common law will recognise a customary title only if it be consistent with the common law is subject to an exception in favour of traditional native title."

269 It may now be affirmed with confidence that the common law accepts all types of aboriginal interests, "even though those interests are of a kind unknown to English law": *per* Lord Denning in Oyekan, supra, at p. 788. What the laws, customs and resultant rights are "must be ascertained as a matter of fact" in each case, *per* Brennan J. in *Mabo*, at p. 58. It follows that the Crown in Canada must be taken as having accepted existing native laws and customs and the interests in the land and waters they gave rise to, even though they found no counterpart in the law of England. In so far as an aboriginal people under internal law or custom had used the land and its waters in the past, so it must be regarded as having the continuing right to use them, absent extinguishment or treaty.

270 This much appears from the *Royal Proclamation, 1763*, R.S.C. 1985, App. II, No. 1, which set out the rules by which the British proposed to govern the territories of much of what is now Canada. The Proclamation, while not the sole source of aboriginal rights, recognized the presence of aboriginals as existing occupying peoples. It further recognized that they had the right to use and alienate the rights they enjoyed the use of those territories. The assertion of British sovereignty was thus expressly recognized as not depriving the aboriginal people of Canada of their pre-existing rights; the maxim of *terra nullius* was not to govern here. Moreover, the Proclamation evidences an underlying concern for the continued sustenance of aboriginal peoples and their descendants. It stipulated that aboriginal people not be permitted to sell their land directly but only through the intermediary of the Crown. The purpose of this stipulation was to ensure that the aboriginal peoples obtained a fair exchange for the rights they enjoyed in the territories on which they had traditionally lived — an exchange which would ensure the sustenance not only of the current generation but also of generations to come. *(Guerin*, *supra*, at p. 376; see also Brian Slattery, "Understanding Aboriginal Rights", (1987) 66 Can. Bar Rev.727)

271 The stipulation against direct sale to Europeans was coupled with a policy of entering into treaties with various aboriginal peoples. The treaties typically sought to provide the people in question with a land base, termed a reserve, as well as other benefits enuring to the signatories and generations to come — cash payments, blankets, foodstuffs and so on. Usually the treaties conferred a continuing right to hunt and fish on Crown lands. Thus the treaties recognized that by their own laws and customs, the aboriginal people had lived off the land and its waters. They sought to preserve this right in so far as possible as well as to supplement it to make up for the territories ceded to settlement.

272 These arrangements bear testimony to the acceptance by the colonizers of the principle that the aboriginal peoples who occupied what is now Canada were regarded as possessing the aboriginal right to live off their lands and the resources found in their forests and streams to the extent they had traditionally done so. The fundamental understanding — the *Grundnorm* of settlement in Canada — was that the aboriginal people could only be deprived of the sustenance they traditionally drew from the land and adjacent waters by solemn treaty with the Crown, on terms that would ensure to them and to their successors a replacement for the livelihood that their lands, forests and streams had since ancestral times provided them. (In making this comment, I do not foreclose the possibility that other arguments might be made with respect to areas in Canada settled by France.)

273 The same notions held sway in the colony of British Columbia prior to union with Canada in 1871. An early governor, Governor Douglas, pronounced a policy of negotiating solemn treaties with the aboriginal peoples similar to that pursued elsewhere in Canada. Tragically, that policy was overtaken by the less generous views that accompanied the rapid settlement

of British Columbia. The policy of negotiating treaties with the aboriginals was never formally abandoned. It was simply overridden, as the settlers, aided by administrations more concerned for short-term solutions than the duty of the Crown toward the first peoples of the colony settled where they wished and allocated to the aboriginals what they deemed appropriate. This did not prevent the aboriginal peoples of British Columbia from persistently asserting their right to an honourable settlement of their ancestral rights — a settlement which most of them still await. Nor does it negate the fundamental proposition acknowledged generally throughout Canada's history of settlement that the aboriginal occupants of particular territories have the right to use and be sustained by those territories.

274 Generally speaking, aboriginal rights in Canada were group rights. A particular aboriginal group lived on or controlled a particular territory for the benefit of the group as a whole. The aboriginal rights of such a group inure to the descendants of the group, so long as they maintain their connection with the territory or resource in question. In Canada, as in Australia, "many clans or groups of indigenous people have been physically separated from their traditional land and have lost their connection with it". But "[w]here a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connection with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence" (*Mabo*, at pp. 59-60.)

275 It thus emerges that the common law and those who regulated the British settlement of this country predicated dealings with aboriginals on two fundamental principles. The first was the general principle that the Crown took subject to existing aboriginal interests in the lands they traditionally occupied and their adjacent waters, even though those interests might not be of a type recognized by British law. The second, which may be viewed as an application of the first, is that the interests which aboriginal peoples had in using the land and adjacent waters for their sustenance were to be removed only by solemn treaty with due compensation to the people and its descendants. This right to use the land and adjacent waters as the people had traditionally done for its sustenance may be seen as a fundamental aboriginal right. It is supported by the common law and by the history of this country. It may safely be said to be enshrined in s. 35(1) of theConstitution Act, 1982.

(x) The Right to Fish for Sale

276 Against this background, I come to the issue at the heart of this case. Do aboriginal people enjoy a constitutional right to fish for commercial purposes under s. 35(1) of the Constitution Act, 1982*?* The answer is yes, to the extent that the people in question can show that it traditionally used the fishery to provide needs which are being met through the trade.

277 If an aboriginal people can establish that it traditionally fished in a certain area, it continues to have a similar right to do so, barring extinguishment or treaty. The same justice that compelled those who drafted treaties with the aboriginals in the nineteenth century to make provision for the continuing sustenance of the people from the land, compels those dealing with aboriginals with whom treaties were never made, like the Sto:lo, to make similar provision.

278 The aboriginal right to fish may be defined as the right to continue to obtain from the river or the sea in question that which the particular aboriginal people have traditionally obtained from the portion of the river or sea. If the aboriginal people show that they traditionally sustained themselves from the river or sea, then they have a *prima facie* right to continue to do so, absent a treaty exchanging that right for other consideration. At its base, the right is not the right to trade, but the right to continue to use the resource in the traditional way to provide for the traditional needs, albeit in their modern form. However, if the people demonstrates that trade is the only way of using the resource to provide the modern equivalent of what they traditionally took, it follows that the people should be permitted to trade in the resource to the extent necessary to provide the replacement goods and amenities. In this context, trade is but the mode or practice by which the more fundamental right of drawing sustenance from the resource is exercised.

279 The right to trade the products of the land and adjacent waters for other goods is not unlimited. The right stands as a continuation of the aboriginal people's historical reliance on the resource. There is therefore no justification for extending it beyond what is required to provide the people with reasonable substitutes for what it traditionally obtained from the resource. In most cases, one would expect the aboriginal right to trade to be confined to what is necessary to provide basic housing, transportation, clothing and amenities — the modern equivalent of what the aboriginal people in question formerly took from

the land or the fishery, over and above what was required for food and ceremonial purposes. Beyond this, aboriginal fishers have no priority over non-aboriginal commercial or sport fishers. On this principle, where the aboriginal people can demonstrate that they historically have drawn a moderate livelihood from the fishery, the aboriginal right to a "moderate livelihood" from the fishery may be established (as Lambert J.A. concluded in the British Columbia Court of Appeal). However, there is no automatic entitlement to a moderate or any other livelihood from a particular resource. The inquiry into what aboriginal rights a particular people possess is an inquiry of fact, as we have seen. The right is established only to the extent that the aboriginal group in question can establish historical reliance on the resource. For example, evidence that a people used a water resource only for occasional food and sport fishing would not support a right to fish for purposes of sale, much less to fish to the extent needed to provide a moderate livelihood. There is, on this view, no generic right of commercial fishing, large-scale or small. There is only the right of a particular aboriginal people to take from the resource the modern equivalent of what by aboriginal law and custom it historically took. This conclusion echos the suggestion in *Jack*, approved by Dickson C.J. and La Forest J. in *Sparrow*, of a "limited" aboriginal priority to commercial fishing.

280 A further limitation is that all aboriginal rights to the land or adjacent waters are subject to limitation on the ground of conservation. These aboriginal rights are founded on the right of the people to use the land and adjacent waters. There can be no use, on the long term, unless the product of the lands and adjacent waters is maintained. So maintenance of the land and the waters comes first. To this may be added a related limitation. Any right, aboriginal or other, by its very nature carries with it the obligation to use it responsibly. It cannot be used, for example, in a way which harms people, aboriginal or non-aboriginal. It is up to the Crown to establish a regulatory regime which respects these objectives. In the analytic framework usually used in cases such as this, the right of the government to limit the aboriginal fishery on grounds such as these is treated as a matter of justifying a limit on a *"prima facie"* aboriginal right. Following this framework, I will deal with it in greater detail under the heading of justification.

(xi) Is an Aboriginal Right to Sell Fish for Commerce Established in this Case?

281 I have concluded that subject to conservation needs, aboriginal peoples may possess a constitutional right under s. 35(1) of theConstitution Act, 1982, to use a resource such as a river site beside which they have traditionally lived to provide the modern equivalent of the amenities which they traditionally have obtained from the resource, whether directly or indirectly, through trade. The question is whether, on the evidence, Mrs. Van der Peet has established that the Sto:lo possessed such a right.

282 The evidence establishes that by custom of the aboriginal people of British Columbia, the Sto:lo have lived since time immemorial at the place of their present settlement on the banks of the Fraser River. It also establishes that as a fishing people, they have for centuries used the fish from that river to sustain themselves. One may assume that the forest and vegetation on the land provided some of their shelter and clothing. However, their history indicates that even in days prior to European contact, the Sto:lo relied on fish, not only for food and ceremonial purposes, but also for the purposes of obtaining other goods through trade. Prior to contact with Europeans, this trade took place with other tribes; after contact, sales on a larger scale were made to the Hudson's Bay Company, a practice which continued for almost a century. In summary, the evidence conclusively establishes that over many centuries, the Sto:lo have used the fishery not only for food and ceremonial purposes, but also to satisfy a variety of other needs. Unless that right has been extinguished, and subject always to conservation requirements, they are entitled to continue to use the river for these purposes. To the extent that trade is required to achieve this end, it falls within that right.

283 I agree with L'Heureux-Dubé J. that the scale of fishing evidenced by the case at bar falls well within the limit of the traditional fishery and the moderate livelihood it provided to the Sto:lo.

284 For these reasons I conclude that Mrs. Van der Peet's sale of the fish can be defended as an exercise of her aboriginal right, unless that right has been extinguished.

B. Is the Aboriginal Right Extinguished?

285 The Crown has never concluded a treaty with the Sto:lo extinguishing its aboriginal right to fish. However, it argues that any right the Sto:lo people possess to fish commercially was extinguished prior to 1982 through regulations limiting commercial

fishing by licence. The appellant, for her part, argues that general regulations controlling the fishery do not evidence the intent necessary to establish extinguishment of an aboriginal right.

286 For legislation or regulation to extinguish an aboriginal right, the intention to extinguish must be "clear and plain": Sparrow, . The Canadian test for extinguishment of aboriginal rights borrows from the American test, enunciated in UnitedStates v. Dion476 U.S. 734 (1986), at pp. 739–40: "what is essential [to satisfy the "clear and plain" test] is clear evidence that [the government] actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty" or right.

287 Following this approach, this Court in Sparrow rejected the Crown's argument that pre-1982 regulations imposing conditions on the exercise of an aboriginal right extinguished it to the extent of the regulation. To accept that argument, it reasoned at p. 1091, would be to elevate such regulations as applied in 1982 to constitutional status and to "incorporate into the Constitution a crazy patchwork of regulations". Rejecting this "snapshot" approach to constitutional rights, the Court distinguished between regulation of the exercise of a right, and extinguishment of the right itself.

288 In this case, the Crown argues that while the regulatory scheme may not have extinguished the aboriginal right to fish for food (*Sparrow*) it nevertheless extinguished any aboriginal right to fish for sale. It relies in particular on Order-in-Council, P.C. 2539, of September 11, 1917, which provided:

> Whereas it is represented that since time immemorial, it has been the practice of the Indians of British Columbia to catch salmon by means of spears and otherwise after they have reached the upper non-tidal portions of the rivers;
>
> And whereas while after commercial fishing began it became eminently desirable that all salmon that succeeded in reaching the upper waters should be allowed to go on to their spawning beds unmolested, in view of the great importance the Indians attached to their practice of catching salmon they have been permitted to do so for their own food purposes only ....
>
> And whereas the Department of the Naval Service is informed that the Indians have concluded that this regulation is ineffective, and this season arrangements are being made by them to carry on fishing for commercial purposes in an extensive way;
>
> And whereas it is considered to be in the public interest that this should be prevented and the Minister of the Naval Service, after consultation with the Department of Justice on the subject, recommends that action as follows be taken;
>
> Therefore His Excellency the Governor General in Council, under the authority of section 45 of the Fisheries Act, 4-5 George V, Chapter 8, is pleased to order and it is hereby ordered as follows:
>
> > 2. An Indian may, at any time, with the permission of the Chief Inspector of Fisheries, catch fish to be used as food for himself and his family, but for no other purpose ...

289 The argument that Regulation 2539 extinguished any aboriginal right to fish commercial faces two difficulties. The first is the absence of any indication that the government of the day considered the aboriginal right on the one hand, and the effect of its proposed action on that right on the other, as required by the "clear and plain" test. There is no recognition in the words of the regulation of any aboriginal right to fish. They acknowledge no more than an aboriginal "practice" of fishing for food. The regulation takes note of the aboriginal position that the regulations confining them to food fishing are "ineffective". However, it does not accept that position. It rather rejects it and affirms that free fishing by natives for sale will not be permitted. This does not meet the test for regulatory extinction of aboriginal rights which requires: acknowledgement of right, conflict of the right proposed with policy, and resolution of the two.

290 The second difficulty the Crown's argument encounters is that the passage quoted does not present a full picture of the regulatory scheme imposed. To determine the intent of Parliament, one must consider the statute as a whole: *Driedger on the Construction of Statutes* (3rd ed. 1994). Similarly, to determine the intent of the Governor-in-Council making a regulation, one must look to the effect of a regulatory scheme as a whole.

291 The effect of Regulation 2539 was that Indians were no longer permitted to sell fish caught pursuant to their right to fish for food. However, Regulation 2539 was only a small part of a much larger regulatory scheme, dating back to 1908, in which aboriginal peoples played a significant part. While the 1917 regulation prohibits aboriginal peoples from selling fish obtained under their food rights, it did not prevent them from obtaining licences to fish commercially under the general regulatory scheme laid down in 1908 and modified through the years. In this way, the regulations recognized the aboriginal right to participate in the commercial fishery. Instead of barring aboriginal fishers from the commercial fishery, government regulations and policy before and after 1917 have consistently given them preferences in obtaining the necessary commercial licences. Far from extinguishing the aboriginal right to fish, this policy may be seen as tacit acceptance of a "limited priority" in aboriginal fishers to the commercial fishery of which Dickson J. spoke in *Jack* and which was approved in *Sparrow*.

292 Evidence of the participation in commercial fishing by aboriginal people prior to the regulations in 1917 in commercial fishing was discussed by Dickson J. in Jack, That case was concerned with the policy of the Colonialists prior to Confederation. Without repeating the entirety of that discussion here, it is sufficient to note the conclusion reached at p. 311:

> ... the Colony gave priority to the Indian fishery as an appropriate pursuit for the coastal Indians, primarily for food purposes and, to a lesser extent, for barter purposes with the white residents.

293 This limited priority for aboriginal commercial fishing is reflected in the government policy of extending preferences to aboriginals engaged in the fishery. The 1954 Regulations, as amended in 1974, provided for reduced licensing fees for aboriginal fishers. For example, either a gill-net fishing licence that would cost a non-aboriginal fisher $2,000, or a seine fishing licence that would cost a non-native fisher $200, would cost a native fisher $10. Moreover, the evidence available indicates that there has been significant aboriginal participation in the commercial fishery. Specifically, a review of aboriginal participation in the commercial fishery for 1985 found that 20.5% of the commercial fleet was Indian-owned or Indian-operated and that that segment of the commercial fleet catches 27.7% of the commercial catch. Since the regulatory scheme is cast in terms of individual rights, it has never expressly recognised the right of a particular aboriginal group to a specific portion of the fishery. However, it has done so implicitly by granting aboriginal fishers preferences based on their membership in an aboriginal group.

294 It thus emerges that the regulatory scheme in place since 1908, far from extinguishing the aboriginal right to fish for sale, confirms that right and even suggests recognition of a limited priority in its exercise. I conclude that the aboriginal right of the Sto:lo to fish for sustenance has not been extinguished.

295 The remaining questions are whether the regulation infringes the Sto:lo's aboriginal right to fish for trade to supplement the fish they took for food and ceremonial purposes and, if so, whether that infringement constitutes a justifiable limitation on the right.

2. Is the Aboriginal Right Infringed?

296 The right established, the next inquiry, following *Sparrow*, is whether the regulation constitutes a *prima facie* infringement of the aboriginal right. If it does, the inquiry moves on to the question of whether the *prima facie* infringement is justified.

297 The test for *prima facie* infringement prescribed by Sparrowat p. 1111, is "whether the legislation in question has the effect of interfering with an existing aboriginal right". If it has this effect, the *prima facie* infringement is made out. Having set out this test, Dickson C.J. and La Forest J. supplement it by stating that the court should consider whether the limit is unreasonable, whether it imposes undue hardship, and whether it denies to the holders of the right their "preferred means of exercising the right" (p. 1112). These questions appear more relevant to the stage two justification analysis than to determining the *prima facie* right; as the Chief Justice notes in *Gladstone* (at para. 43), they seem to contradict the primary assertion that a measure which has the effect of interfering with the aboriginal right constitutes a *prima facie* violation. In any event, I agree with the Chief Justice that a negative answer to the supplementary questions does not negate a *prima facie* infringement.

298 The question is whether the regulatory scheme under which Mrs. Van der Peet stands charged has the "effect" of "interfering with an existing aboriginal right", in this case the right of the Sto:lo to sell fish to the extent required to provide for

needs they traditionally by native law and custom took from the section of the river whose banks they occupied. The inquiry into infringement in a case like this may be viewed in two stages. At the first stage, the person charged must show that he or she had a *prima facie* right to do what he or she did. That established, it falls to the Crown to show that the regulatory scheme meets the particular entitlement of the Sto:lo to fish for sustenance.

299 The first requirement is satisfied in this case by demonstration of the aboriginal right to sell fish prohibited by regulation. The second requirement, however, has not been satisfied. Notwithstanding the evidence that aboriginal fishers as a class enjoy a significant portion of the legal commercial market and that considerable fish caught as "food fish" is illegally sold, the Crown has not established that the existing regulations satisfy the particular right of the Sto:lo to fish commercially for sustenance. The issue is not the quantity of fish currently caught, which may or may not satisfy the band's sustenance requirements. The point is rather that the Crown, by denying the Sto:lo the right to sell *any* quantity of fish, denies their limited aboriginal right to sell fish for sustenance. The conclusion of *prima facie* infringement of the collective aboriginal right necessarily follows.

300 The Crown argued that regulation of a fishery to meet the sustenance needs of a particular aboriginal people is administratively unworkable. The appellant responded with evidence of effective regulation in the State of Washington of aboriginal treaty rights to sustenance fishing. I conclude that the sustenance standard is not so inherently indeterminate that it cannot be regulated. It is for the Crown, charged with administering the resource, to determine effective means to regulate its lawful use. The fact that current regulations fail to do so confirms the infringement, rather than providing a defence to it.

3. Is the Government's Limitation of Mrs. Van der Peet's Right to Fish for Sustenance Justified?

301 Having concluded that the Sto:lo possess a limited right to engage in fishing for commerce and that the regulation constitutes a *prima facie* infringement of this right, it remains to consider whether the infringement is justified. The inquiry into justification is in effect an inquiry into the extent the state can limit the exercise of the right on the ground of policy.

302 Just as I parted company with the Chief Justice on the issue of what constitutes an aboriginal right, so I must respectfully dissent from his view of what constitutes justification. Having defined the right at issue in such a way that it possesses no internal limits, the Chief Justice compensates by adopting a large view of justification which cuts back the right on the ground that this is required for reconciliation and social harmony: *Gladstone*, at paras. 73 to 75. I would respectfully decline to adopt this concept of justification for three reasons. First, it runs counter to the authorities, as I understand them. Second, it is indeterminate and ultimately more political than legal. Finally, if the right is more circumspectly defined, as I propose, this expansive definition of justification is not required. I will elaborate on each of these difficulties in turn, arguing that they suggest a more limited view of justification: that the Crown may prohibit exploitation of the resource that is incompatible with its continued and responsible use.

303 I turn first to the authorities. The doctrine of justification was elaborated in *Sparrow*. Dickson C.J. and La Forest J. endorsed a two-part test. First, the Crown must establish that the law or regulation at issue was enacted for a "compelling and substantial" purpose. Conserving the resource was cited as such a purpose. Also valid, "would be an objective purporting to prevent the exercise of s. 35(1) rights that would cause harm to the general populace or to aboriginal people themselves." Second, the government must show that the law or regulation is consistent with the fiduciary duty of the Crown toward aboriginal peoples. This means, Dickson C.J. and La Forest J. held, that the Crown must demonstrate that it has given the aboriginal fishery priority in a manner consistent with the views of Dickson J. (as he then was) in Jack: absolute priority to the Crown to act in accordance with conservation; clear priority to Indian food fishing; and "limited priority" for aboriginal commercial fishing "over the competing demands of commercial and sports fishing".

304 The Chief Justice interprets the first requirement of the *Sparrow* test for justification, a compelling and substantial purpose, as extending to any goal which can be justified for the good of the community as whole, aboriginal and non-aboriginal. This suggests that once conservation needs are met, the inquiry is whether the government objective is justifiable, having regard to regional interests and the interests of non-aboriginal fishers. The Chief Justice writes in *Gladstone* (at para. 75):

> ... I would suggest that with regards to the distribution of the fisheries resource after conservation goals have been met, objectives such as the *pursuit of economic and regional fairness*, and the *recognition of the historical reliance upon*,

and *participation in, the fishery by non-aboriginal groups, are the types of objectives which can (at least in the right circumstances) satisfy this standard*. [Emphasis added.]

305 Leaving aside the undefined limit of "proper circumstances", the historical reliance of the participation of non-aboriginal fishers in the fishery seems quite different from the compelling and substantial objectives this Court described in Sparrow — conservation of the resource, prevention of harm to the population, or prevention of harm to the aboriginal people themselves. These are indeed compelling objectives, relating to the fundamental conditions of the responsible exercise of the right. As such, it may safely be said that right-thinking persons would agree that these limits may properly be applied to the exercise of even constitutionally entrenched rights. Conservation, for example, is the condition upon which the right to use the resource is itself based; without conservation, there can be no right. The prevention of harm to others is equally compelling. No one can permitted to exercise rights in a way that will harm others. For example, in the domain of property, the common law has long provided remedies against those who pollute streams or use their land in ways that detrimentally affect others.

306 Viewed thus, the compelling objectives foreseen in *Sparrow* may be seen as united by a common characteristic; they constitute the essential pre-conditions of any civilized exercise of the right. It may be that future cases may endorse limitation of aboriginal rights on other bases. For the purposes of this case, however, it may be ventured that the range of permitted limitation of an established aboriginal right is confined to the *exercise* of the right rather than the diminution, extinguishment or transfer of the right to others. What are permitted are limitations of the sort that any property owner or right holder would reasonably expect — the sort of limitations which must be imposed in a civilized society if the resource is to be used now and in the future. They do not *negate* the right, but rather limit its exercise. The extension of the concept of compelling objective to matters like economic and regional fairness and the interests of non-aboriginal fishers, by contrast, would negate the very aboriginal right to fish itself, on the ground that this is required for the reconciliation of aboriginal rights and other interests and the consequent good of the community as a whole. This is not limitation required for the responsible exercise of the right, but rather limitation on the basis of the economic demands of non-aboriginals. It is limitation of a different order than the conservation, harm prevention type of limitation sanctioned in *Sparrow*.

307 The Chief Justice, while purporting to apply the *Sparrow* test for justification, deviates from its second requirement as well as the first, in my respectful view. Here the stipulations are that the limitation be consistent with the Crown's fiduciary duty to the aboriginal people and that it reflect the priority set out by Dickson J. in *Jack*. The duty of a fiduciary, or trustee, is to protect and conserve the interest of the person whose property is entrusted to him. In the context of aboriginal rights, this requires that the Crown not only preserve the aboriginal people's interest, but also manage it well: *Guerin*. The Chief Justice's test, however, would appear to permit the constitutional aboriginal fishing right to be conveyed by regulation, law or executive act to non-native fishers who have historically fished in the area in the interests of community harmony and reconciliation of aboriginal and non-aboriginal interests. Moreover, the Chief Justice's scheme has the potential to violate the priority scheme for fishing set out in *Jack*. On his test, once conservation is satisfied, a variety of other interests, including the historical participation of non-native fishers, may justify a variety of regulations governing distribution of the resource. The only requirement is that the distribution scheme "take into account" the aboriginal right. Such an approach, I fear, has the potential to violate not only the Crown's fiduciary duty toward native peoples, but to render meaningless the "limited priority" to the non-commercial fishery endorsed in *Jack* and *Sparrow*.

308 Put another way, the Chief Justice's approach might be seen as treating the guarantee of aboriginal rights under s. 35(1) as if it were a guarantee of individual rights under the Charter. The right and its infringement are acknowledged. However, the infringement may be justified if this is in the interest of Canadian society as a whole. In the case of individual rights under the Charter, this is appropriate because the Charter expressly states that these rights are subject to such "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." However, in the case of aboriginal rights guaranteed by s. 35(1) of the Constitutional Act, 1982, the framers of s. 35(1) deliberately chose not to subordinate the exercise of aboriginal rights to the good of society as a whole. In the absence of an express limitation on the rights guaranteed by s. 35(1), limitations on them under the doctrine of justification must logically and as a matter of constitutional construction be confined, as *Sparrow* suggests, to truly compelling circumstances, like conservation, which is the *sine qua non* of the right, and restrictions like preventing the abuse of the right to the detriment of the native community or the harm of others — in short, to limitations which

are essential to its continued use and exploitation. To follow the path suggested by the Chief Justice is, with respect, to read judicially the equivalent of s. 1 into s. 35(1), contrary to the intention of the framers of the constitution.

309 A second objection to the approach suggested by the Chief Justice is that it is indeterminate and ultimately may speak more to the politically expedient than to legal entitlement. The imprecision of the proposed test is apparent. "In the right circumstances", themselves undefined, governments may abridge aboriginal rights on the basis of an undetermined variety of considerations. While "account" must be taken of the native interest and the Crown's fiduciary obligation, one is left uncertain as to what degree. At the broadest reach, whatever the government of the day deems necessary in order to reconcile aboriginal and non-aboriginal interests might pass muster. In narrower incarnations, the result will depend on doctrine yet to be determined. Upon challenge in the courts, the focus will predictably be on the social justifiability of the measure rather than the rights guaranteed. Courts may properly be expected, the Chief Justice suggests, not to be overly strict in their review; as under s. 1 of the Charter, the courts should not negate the government decision, so long as it represents a "reasonable" resolution of conflicting interests. This, with respect, falls short of the "solid constitutional base upon which subsequent negotiations can take place" of which Dickson C.J. and La Forest J. wrote in Sparrowat p. 1105.

310 My third observation is that the proposed departure from the principle of justification elaborated in *Sparrow* is unnecessary to provide the "reconciliation" of aboriginal and non-aboriginal interests which is said to require it. The Chief Justice correctly identifies reconciliation between aboriginal and non-aboriginal communities as a goal of fundamental importance. This desire for reconciliation, in many cases long overdue, lay behind the adoption of s. 35(1) of the Constitution Act,1982. As *Sparrow* recognized, one of the two fundamental purposes of s. 35(1) was the achievement of a just and lasting settlement of aboriginal claims. The Chief Justice also correctly notes that such a settlement must be founded on reconciliation of aboriginal rights with the larger non-aboriginal culture in which they must, of necessity, find their exercise. It is common ground that "... a morally and politically defensible conception of aboriginal rights will incorporate both [the] legal perspectives" of the "two vastly dissimilar legal cultures" of European and aboriginal cultures": Walters, supra, at pp. 413and 412, respectively. The question is how this reconciliation of the different legal cultures of aboriginal and non-aboriginal peoples is to be accomplished. More particularly, does the goal of reconciliation of aboriginal and non-aboriginal interests require that we permit the Crown to require a judicially authorized transfer of the aboriginal right to non-aboriginals without the consent of the aboriginal people, without treaty, and without compensation? I cannot think it does.

311 My reasons are twofold. First, as suggested earlier, if we adopt a conception of aboriginal rights founded in history and the common law rather than what is "integral" to the aboriginal culture, the need to adopt an expansive concept of justification diminishes. As the Chief Justice observes, the need to expand the *Sparrow* test stems from the lack of inherent limits on the aboriginal right to commercial fishing he finds to be established in *Gladstone*. On the historical view I take, the aboriginal right to fish for commerce is limited to supplying what the aboriginal people traditionally took from the fishery. Since these were not generally societies which valued excess or accumulated wealth, the measure will seldom, on the facts, be found to exceed the basics of food, clothing and housing, supplemented by a few amenities. This accords with the "limited priority" for aboriginal commercial fishing that this Court endorsed in *Sparrow*. Beyond this, commercial and sports fishermen may enjoy the resource as they always have, subject to conservation. As suggested in *Sparrow*, the government should establish what is required to meet what the aboriginal people traditionally by law and custom took from the river or sea, through consultation and negotiation with the aboriginal people. In normal years, one would expect this to translate to a relatively small percentage of the total commercial fishing allotment. In the event that conservation concerns virtually eliminated commercial fishing, aboriginal commercial fishing, limited as it is, could itself be further reduced or even eliminated.

312 On this view, the right imposes its own internal limit — equivalence with what by ancestral law and custom the aboriginal people in question took from the resource. The government may impose additional limits under the rubric of justification to ensure that the right is exercised responsibly and in a way that preserves it for future generations. There is no need to impose further limits on it to affect reconciliation between aboriginal and non-aboriginal peoples.

313 The second reason why it is unnecessary to adopt the broad doctrine of justification proposed by the Chief Justice is that other means, yet unexploited, exist for resolving the different legal perspectives of aboriginal and non-aboriginal people. In my view, a just calibration of the two perspectives starts from the premise that full value must be accorded to such aboriginal

rights as may be established on the facts of the particular case. Only by fully recognizing the aboriginal legal entitlement can the aboriginal legal perspective be satisfied. At this stage of the process — the stage of defining aboriginal rights — the courts have an important role to play. But that is not the end of the matter. The process must go on to consider the non-aboriginal perspective — how the aboriginal right can be legally accommodated within the framework of non-aboriginal law. Traditionally, this has been done through the treaty process, based on the concept of the aboriginal people and the Crown negotiating and concluding a just solution to their divergent interests, given the historical fact that they are irretrievably compelled to live together. At this stage, the stage of reconciliation, the courts play a less important role. It is for the aboriginal peoples and the other peoples of Canada to work out a just accommodation of the recognized aboriginal rights. This process — definition of the rights guaranteed by s. 35(1) followed by negotiated settlements — is the means envisioned in *Sparrow*, as I perceive it, for reconciling the aboriginal and non-aboriginal legal perspectives. It has not as yet been tried in the case of the Sto:lo. A century and one-half after European settlement, the Crown has yet to conclude a treaty with them. Until we have exhausted the traditional means by which aboriginal and non-aboriginal legal perspectives may be reconciled, it seems difficult to assert that it is necessary for the courts to suggest more radical methods of reconciliation possessing the potential to erode aboriginal rights seriously.

314 I have argued that the broad approach to justification proposed by the Chief Justice does not conform to the authorities, is indeterminate, and is, in the final analysis unnecessary. Instead, I have proposed that justifiable limitation of aboriginal rights should be confined to regulation to ensure their exercise conserves the resource and ensures responsible use. There remains a final reason why the broader view of justification should be accepted. It is, in my respectful opinion, unconstitutional.

315 The Chief Justice's proposal comes down to this. In certain circumstances, aboriginals may be required to share their fishing rights with non-aboriginals in order to effect a reconciliation of aboriginal and non-aboriginal interests. In other words, the Crown may convey a portion of an aboriginal fishing right to others, not by treaty or with the consent of the aboriginal people, but by its own unilateral act. I earlier suggested that this has the potential to violate the Crown's fiduciary duty to safeguard aboriginal rights and property. But my concern is more fundamental. How, without amending the constitution, can the Crown cut down the aboriginal right? The exercise of the rights guaranteed by s. 35(1) is subject to reasonable limitation to ensure that they are used responsibly. But the rights themselves can be diminished only through treaty and constitutional amendment. To reallocate the benefit of the right from aboriginals to non-aboriginals, would be to diminish the substance of the right that s. 35(1) of the Constitution Act, 1982 guarantees to the aboriginal people. This no court can do.

316 I therefore conclude that a government limitation on an aboriginal right may be justified, provided the limitation is directed to ensuring the conservation and responsible exercise of the right. Limits beyond this cannot be saved on the ground that they are required for societal peace or reconciliation. Specifically, limits that have the effect of transferring the resource from aboriginal people without treaty or consent cannot be justified. Short of repeal of s. 35(1), such transfers can be made only with the consent of the aboriginal people. It is for the governments of this country and the aboriginal people to determine if this should be done, not the courts. In the meantime, it is the responsibility of the Crown to devise a regulatory scheme which ensures the responsible use of the resource and provides for the division of what remains after conservation needs have been met between aboriginal and non-aboriginal peoples.

317 The picture of aboriginal rights that emerges resembles that put forward by Dickson J. (as he then was) in *Jack* and endorsed in *Sparrow*. Reasoning from the premise that the *British Columbia Terms of Union*, R.S.C. 1985, App. II, No. 10, required the federal government to adopt an aboriginal "policy as liberal" as that of the colonial government of British Columbia, Dickson J. opined at p. 311:

> ... one could suggest that "a policy as liberal" would require clear priority to Indian food fishing and some priority to limited commercial fishing over the competing demands of commercial and sport fishing. Finally, there can be no serious question that conservation measures for the preservation of the resource — effectively unknown to the regulatory authorities prior to 1871 — should take precedence over any fishing, whether by Indians, sportsmen, or commercial fishermen.

318 The relationship between the relative interests in a fishery with respect to which an aboriginal right has been established in the full sense, that is of food, ceremony and articles to meet other needs obtained directly from the fishery or through trade and barter of fish products, may be summarized as follows:

1. The state may limit the exercise of the right of the aboriginal people, for purposes associated with the responsible use of the right, including conservation and prevention of harm to others;

2. Subject to these limitations, the aboriginal people have a priority to fish for food, ceremony, as well as supplementary sustenance defined in terms of the basic needs that the fishery provided to the people in ancestral times;

3. Subject to (1) and (2) non-aboriginal peoples may use the resource.

319 In times of plentitude, all interests may be satisfied. In times of limited stocks, aboriginal food fishing will have priority, followed by additional aboriginal commercial fishing to satisfy the sustenance the fishery afforded the particular people in ancestral times. The aboriginal priority to commercial fishing is limited to satisfaction of these needs, which typically will be confined to basic amenities. In this sense, the right to fish for commerce is a "limited" priority. If there is insufficient stock to satisfy the entitlement of all aboriginal peoples after required conservation measures, allocations must be made between them. Allocations between aboriginal peoples may also be required to ensure that upstream bands are allowed their fair share of the fishery, whether for food or supplementary sustenance. All this is subject to the overriding power of the state to limit or indeed, prohibit fishing in the interests of conservation.

320 The consequence of this system of priorities is that the Crown may limit aboriginal fishing by aboriginal people found to possess a right to fish for sustenance on two grounds: (1) on the ground that a limited amount of fish is required to satisfy the basic sustenance requirement of the band, and (2) on the ground of conservation and other limits required to ensure the responsible use of the resource (justification).

321 Against this background, I return to the question of whether the regulation preventing the Sto:lo from selling any fish is justified. In my view it is not. No compelling purpose such as that proposed in *Sparrow* has been demonstrated. The denial to the Sto:lo of their right to sell fish for basic sustenance has not been shown to be required for conservation or for other purposes related to the continued and responsible exploitation of the resource. The regulation, moreover, violates the priorities set out in *Jack* and *Sparrow* and breaches the fiduciary duty of the Crown to preserve the rights of the aboriginal people to fish in accordance with their ancestral customs and laws by summarily denying an important aspect of the exercise of the right.

4. Conclusion

322 I would allow the appeal to the extent of confirming the existence in principle of an aboriginal right to sell fish for sustenance purposes, and set aside the appellant's conviction. I would answer the Constitutional question as follows:

Question: "Is s. 27(5) of the British ColumbiaFishery (General) Regulations, SOR/84-248, as it read on September 11, 1987, of no force or effect with respect to the appellant in the circumstances of these proceedings, in virtue of s. 52 of the ConstitutionAct, 1982, by reason of the aboriginal rights within the meaning of s. 35***o***f the Constitution Act, 1982, invoked by the appellant?"

Answer: Section 27(5) of the British Columbia Fishery(General) Regulations, SOR/84-248, as it read on September 11, 1987, is of no force or effect with respect to the appellant in the circumstances of these proceedings, in virtue of s. 52 of the Constitution Act, 1982, by reasons of the aboriginal rights within the meaning of s. 35 of the Constitution Act, 1982, as invoked by the appellant.

Appeal dismissed.

3.

R v Sparrow 1990 Carswell BC 105

Most Negative Treatment: Distinguished
Most Recent Distinguished: R. v. Janvier | 1995 CarswellSask 472, [1995] 4 C.N.L.R. 29 | (Sask. Prov. Ct., Jul 27, 1995)

1990 CarswellBC 105
Supreme Court of Canada

R. v. Sparrow

1990 CarswellBC 105, 1990 CarswellBC 756, [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160, [1990] 4 W.W.R. 410, [1990] B.C.W.L.D. 1567, [1990] S.C.J. No. 49, 10 W.C.B. (2d) 194, 111 N.R. 241, 46 B.C.L.R. (2d) 1, 56 C.C.C. (3d) 263, 70 D.L.R. (4th) 385, J.E. 90-851, EYB 1990-68598

SPARROW v. R. et al.

Dickson C.J.C., McIntyre, * Lamer, Wilson, La Forest, L'Heureux-Dubé and Sopinka JJ.

Heard: November 3, 1988
Judgment: May 31, 1990
Docket: No. 20311

Counsel: *M.R.V. Storrow, Q.C., L.F. Harvey* and *J. Lysyk*, for appellant.
T.R. Braidwood, Q.C., and *J.E. Dorsey*, for respondent.
H.A. Slade, A. Pape and *L. Mandell*, for the intervener the National Indian Brotherhood/the Assembly of First Nations.
C. Harvey, for the interveners the B.C. Wildlife Federation et al.
J.K. Lowes, for the intervener the Fisheries Council of British Columbia.
I. Donald, Q.C., for the intervener the United Fishermen and Allied Workers' Union.
J.T.S. McCabe, Q.C., and *M. Hélie*, for the intervener the Attorney General for Ontario.
R. Morin and *R. Décary, Q.C.*, for the intervener the Attorney General of Quebec.
E.R.A. Edwards, Q.C., and *H.R. Eddy*, for the intervener the Attorney General of British Columbia.
K.J. Tyler and *R.G. Richards*, for the intervener the Attorney General for Saskatchewan.
R.J. Normey, for the intervener the Attorney General for Alberta.
S.R. Stevenson, for the intervener the Attorney General of Newfoundland.

Subject: Natural Resources; Public
Related Abridgment Classifications
Aboriginal and Indigenous law
V Indigenous rights to natural resources and environmental protections
V.2 Right of access to natural resources
V.2.b Fishing
V.2.b.ii Application of federal statutes
Headnote
Aboriginal and indigenous law --- Indigenous rights to natural resources and environmental protections — Right of access to natural resources — Fishing — Application of federal statutes
Recognition of existing aboriginal rights by constitution — Canadian Charter of Rights and Freedoms, s. 1 — Constitution Act, 1982, s. 35(1) — Fisheries Act, R.S.C. 1970, c. F-14, ss. 34, 61(1) — British Columbia Fishery (General) Regulations, SOR/84-248, ss. 4, 12(1), (2), 27(1), (4) Constitution Act, 1982, s 35(1).
The accused, a member of the Musqueam band, was charged under s. 61(1) of the Fisheries Act with fishing with a drift net that was longer than that permitted by the band's Indian food fishing licence. The accused contended that, because he had an aboriginal right to fish, the net length restriction was inconsistent with s. 35(1) of the Constitution Act, 1982, which recognizes

and affirms existing aboriginal and treaty rights. The accused appealed his conviction first to the County Court and then to the Court of Appeal. The Court of Appeal allowed the appeal and ordered a new trial. The accused appealed the court's holding that s. 35(1) protects the aboriginal right only when exercised for food purposes and in failing to find the net length restriction in the licence was inconsistent with s. 35(1). The Crown cross-appealed the finding that the aboriginal right had not been extinguished before the date of commencement of the Constitution Act, 1982, and argued, alternatively, that the court erred in its conclusions concerning the scope of the aboriginal right to fish for food. It maintained that a new trial should not have been directed because the accused failed to establish a prima facie case that the reduction in length of the net unreasonably interfered with his right.

Held:

Appeal and cross-appeal dismissed; setting aside of conviction affirmed; new trial ordered.

Section 35(1) of the Constitution Act, 1982 applies to those rights in existence when the Act came into effect. Extinguished rights are not revived by the Act. An existing aboriginal right cannot be read as incorporating the specific manner in which it was regulated before 1982. Indeed, the phrase "existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time. The Court of Appeal's finding that at the relevant time the accused was exercising an existing aboriginal right was supported by the evidence and not to be disturbed. To show that an aboriginal right has been extinguished, the Sovereign's intention must be be clear and plain; here, the Crown failed to prove the aboriginal right to fish had been extinguished. Nothing in the Fisheries Act or its regulations demonstrates a clear and plain intention to extinguish the aboriginal right to fish. The issuance of individual permits for an extended period on a discretionary basis was a means of controlling the fisheries, not of defining underlying rights.

As to the scope of the right to fish, government regulations have only recognized the right to fish for food for over a hundred years. The nature of government regulations cannot be determinative of the content and scope of an existing aboriginal right, government policy can regulate the exercise of that right but such regulation must be in keeping with s. 35(1), which is the culmination of a political and legal struggle for the constitutional recognition of aboriginal rights. The approach to be taken to interpreting s.35(1) is derived from general principles of constitutional interpretation, principles relating to aboriginal rights and the purposes behind the provision itself. The nature of s. 35(1) suggests that it be construed in a purposive way. Given that the provision affirms aboriginal rights, a generous, liberal interpretation of the words in the subsection is demanded. The fact that s. 35(1) is not subject to s. 1 of the Charter does not mean that any law or regulation affecting aboriginal rights will automatically be of no force or effect by the operation of s. 52 of the Constitution Act,1982. Legislation that affects the exercise of aboriginal rights will be valid if it meets the test for justifying an interference with a right recognized and affirmed under s. 35(1). The government must bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s. 35(1).

The first question to ask is whether the legislation in issue has the effect of interfering with an existing aboriginal right. If so, it represents a prima facie infringement of s. 35(1). The inquiry begins with a reference to the characteristics of the right at stake. As they develop an understanding of the sui generis nature of aboriginal rights, courts must carefully avoid applying traditional common law concepts of property. Sensitivity to the aboriginal perspective on the meaning of the right is crucial. To determine whether there has been a prima facie infringement certain questions must be asked. First, is the limitation reasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a prima facie infringement lies on the individual or group challenging the legislation. If prima facie interference is found the analysis moves to the issue of justification. The first step is to determine whether there is a valid legislative objective, such as an objective aimed at preserving s. 35(1) rights by conserving and managing a natural resource. If a valid legislative objective is found, the second step is to assess whether the legislation can be justified in light of the Crown's responsibility to and trust relationship with aboriginal peoples. The nature of the constitutional protection afforded by s. 35(1) demands that there be a link between the justification question and the allocation of priorities in the fishery. The constitutional nature of the Musqueam food fishing rights meant that any allocation of priorities after valid conservation measures have been implemented had to give top priority to Indian food fishing.

The justificatory standard to be met may place a heavy burden on the Crown. However, government policy regarding the British Columbia fishery already dictates that, in allocating the right to take fish, Indian food fishing is to be given priority over the interests of other user groups. The constitutional entitlement embodied in s. 35(1) requires the Crown to ensure that its regulations are in keeping with that allocation of priority. The objective of this requirement is to guarantee that federal

conservation and management plans concerning the salmon fishery treat aboriginal peoples in a way ensuring that their rights are taken seriously.

Table of Authorities

Cases considered:

A.G. Can. v. A.G. Ont. (Ref. re Prov. Fisheries), [1898] A.C. 700 (P.C.) — *applied*

A.G. Ont. v. Bear Island Foundation, 49 O.R. (2d) 353, [1985] 1 C.N.L.R. 1, 15 D.L.R. (4th) 321 (H.C.) — *referred to*

Baker Lake v. Min. of Indian Affairs & Nor. Dev., [1980] 1 F.C. 518, [1980] 5 W.W.R. 193, 107 D.L.R. (3d) 513, [1979] 3 C.N.L.R. 17 (T.D.) — *considered*

C.P. Ltd. v. Paul, [1988] 2 S.C.R. 654, [1989] 1 C.N.L.R. 47, 1 R.P.R. (2d) 105, 53 D.L.R. (4th) 487, 91 N.B.R. (2d) 43, 232 A.P.R. 43, 89 N.R. 325 — *referred to*

Calder v. A.G.B.C., 74 W.W.R. 481, 13 D.L.R. (3d) 64, affirmed [1973] S.C.R. 313, [1973] 4 W.W.R. 1, 34 D.L.R. (3d) 145 [B.C.] — *considered*

Guerin v. R., [1984] 2 S.C.R. 335, 59 B.C.L.R. 301, [1984] 6 W.W.R. 481, 36 R.P.R. 1, 20 E.T.R. 6, [1985] 1 C.N.L.R. 20, 13 D.L.R. (4th) 321, 55 N.R. 161 — *applied*

Jack v. R., [1980] 1 S.C.R. 294, [1979] 5 W.W.R. 364, [1979] 2 C.N.L.R. 25, 48 C.C.C. (2d) 246, 100 D.L.R. (3d) 193, 28 N.R. 162 [B.C.] — *applied*

Johnson v. McIntosh (1823), 21 U.S. (8 Wheat.) 543 (S.C.) — *referred to*

Kruger v. R., [1978] 1 S.C.R. 104, [1977] 4 W.W.R. 300, 34 C.C.C. (2d) 377, 75 D.L.R. (3d) 434, 14 N.R. 495 [B.C.] — *referred to*

Nowegijick v. R., [1983] 1 S.C.R. 29, [1983] C.T.C. 20, 83 D.T.C. 5041, [1983] 2 C.N.L.R. 89, 144 D.L.R. (3d) 193, 46 N.R. 41 [Fed.] — *applied*

Pasco v. C.N.R., 69 B.C.L.R. 76, [1986] 1 C.N.L.R. 35 (S.C.) [affirmed [1986] 1 C.N.L.R. 34, leave to appeal to S.C.C. refused [1986] 1 C.N.L.R. 34n, 64 N.R. 232n] — *referred to*

Prince v. R., [1964] S.C.R. 81, 46 W.W.R. 121, 41 C.R. 403, [1964] 3 C.C.C. 1 [Man.] — *referred to*

R. v. Agawa, 65 O.R. (2d) 505, [1988] 3 C.N.L.R. 73, 43 C.C.C. (3d) 266, 53 D.L.R. (4th) 101, 28 O.A.C. 201 (C.A.) — *referred to*

R. v. Denny, N.S.C.A., 5th March 1990 (not yet reported) — *considered*

R. v. Derriksan, [1976] 6 W.W.R. 480, 31 C.C.C. (2d) 575, 71 D.L.R. (3d) 159 (S.C.C.) [B.C.] — *distinguished*

R. v. Eninew, 7 C.C.C. (3d) 443, [1983] 2 C.N.L.R. 123, [1984] 2 C.N.L.R. 122, 8 C.R.R. 1, 1 D.L.R. (4th) 595, 28 Sask. R. 168, affirmed *(*sub nom. *R. v. Eninew; R. v. Bear)* 12 C.C.C. (3d) 365, [1984] 2 C.N.L.R. 126, 11 C.R.R. 189, 10 D.L.R. (4th) 137, 32 Sask. R. 237 (C.A.) — *considered*

R. v. Hare, 20 C.C.C. (3d) 1, [1985] 3 C.N.L.R. 139, 9 O.A.C. 161 (C.A.) — *considered*

R. v. Martin (1985), 17 C.R.R. 375, 65 N.B.R. (2d) 21, 167 A.P.R. 21 (Q.B.) — *referred to*

R. v. Simon, [1985] 2 S.C.R. 387, [1986] 1 C.N.L.R. 153, 23 C.C.C. (3d) 238, 24 D.L.R. (4th) 390, 71 N.S.R. (2d) 15, 171 A.P.R. 15, 62 N.R. 366 — *referred to*

R. v. Sutherland, [1980] 2 S.C.R. 451, [1980] 5 W.W.R. 456, 53 C.C.C. (2d) 289, 113 D.L.R. (3d) 374, [1980] 3 C.N.L.R. 71, 7 Man. R. (2d) 359, 35 N.R. 361 — *referred to*

R. v. Taylor, 34 O.R. (2d) 360, [1981] 3 C.N.L.R. 114, 62 C.C.C. (2d) 227 (C.A.) — *applied*

R. v. Wesley, [1932] 2 W.W.R. 337, 26 Alta. L.R. 433, 58 C.C.C. 269, [1932] 4 D.L.R. 774 (C.A.) — *referred to*

Ref. re Man. Language Rights, [1985] 1 S.C.R. 721, *(*sub nom. *Ref. re Language Rights under s. 23 of Man. Act, 1870)* [1985] 4 W.W.R. 385, 19 D.L.R. (4th) 1, 35 Man. R. (2d) 83, 59 N.R. 321 — *considered*

St. Catherine's Milling & Lumber Co. v. R. (1888), 14 App. Cas. 46, 4 Cart. 107 (P.C.) — *referred to*

Steinhauer v. R., [1985] 3 C.N.L.R. 187, 15 C.R.R. 175, 63 A.R. 381 (Q.B.) — *referred to*

Statutes considered:

British Columbia Terms of Union, 1871

art. 13

Constitution Act, 1867

s. 91(12)

s. 91(24)

s. 109

Constitution Act, 1930

Constitution Act, 1982

s. 1

s. 33

s. 35

s. 52(1)

Fisheries Act, R.S.C. 1985, c. F-14

s. 43

s. 79(1)

Quebec Boundary Extension Act, S.C. 1912, c. 45

Royal Proclamation of 1763 [R.S.C. 1985, App. II (No. 1), pp. 4-6]

Wildlife Act, S.B.C. 1966, c. 55

Regulations considered:

Fisheries Act, R.S.C. 1985, c. F-14

British Columbia Fishery (General) Regulations, SOR/84-284

s. 4

s. 12

s. 27(1), (4)

Words and phrases considered:

EXISTING

The word "existing" makes it clear that the rights to which s. 35(1) [of the Constitution Act, 1982] applies are those that were in existence when the Constitution Act 1982, came into effect. This means that extinguished rights are not revived by the Constitution Act, 1982. A number of courts have taken the position that "existing" means being in actuality in 1982 . . .

Further, an existing aboriginal right cannot be read so as to incorporate the specific manner in which it was regulated before 1982 . . . As noted by Blair J.A. [in R. v. Agawa (1988), 43 C.C.C. (3d) 266 (Ont. C.A.)], academic commentary lends support to the conclusion that "existing" means "unextinguished" rather than exercisable at a certain time in history.

. . . . .

Far from being defined according to the regulatory scheme in place in 1982, the phrase "existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time. To use Professor Slattery's expression, in "Understanding

Aboriginal Rights", [(1987), 66 Can. Bar Rev. 727] . . . at p. 782, the word "existing" suggests that those rights are "affirmed in a contemporary form rather than in their primeval simplicity and vigour".

RECOGNIZE AND AFFIRM

There is no explicit language in [s. 35(1) of the *Canadian Charter of Rights and Freedoms*] that authorizes this Court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights . . . the words "recognition and affirmation" [in relation to the phrase "recognize and affirm" in s. 35(1)] incorporate the fiduciary relationship [between the Government and aboriginals] and so import some restraint on the exercise of sovereign power. Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the *Constitution Act, 1867*. These powers must . . . now be read together with s. 35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies any aboriginal rights.

Appeal and Cross-appeal from decision of British Columbia Court of Appeal, [1987] 2 W.W.R. 577, 9 B.C.L.R. (2d) 300, 32 C.C.C. (3d) 65, [1987] 1 C.N.L.R. 145, 36 D.L.R. (4th) 246, allowing appeal from decision of Lamperson Co. Ct. J., [1986] B.C.W.L.D. 599, dismissing appeal from conviction under Fisheries Act.

The judgment of the court was delivered by *Dickson C.J.C.* and *La Forest J.*:

1 This appeal requires this court to explore for the first time the scope of s. 35(1) of the Constitution Act, 1982, and to indicate its strength as a promise to the aboriginal peoples of Canada. Section 35(1) is found in Pt. IIof that Act, entitled "Rights of the Aboriginal Peoples of Canada", and provides as follows:

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

2 The context of this appeal is the alleged violation of the terms of the Musqueam food fishing licence which are dictated by the Fisheries Act, R.S.C.1970, c. F-14 [now R.S.C. 1985, c. F-14], and the regulations under that Act. The issue is whether Parliament's power to regulate fishing is now limited by s. 35(1) of the Constitutional Act, 1982, and, more specifically, whether the net length restriction in the licence is inconsistent with that provision.

Facts

3 The appellant, a member of the Musqueam Indian Band, was charged under s.61(1) [now s. 79(1)] of the Fisheries Act of the offence of fishing with a drift net longer than that permitted by the terms of the band's Indian food fishing licence. The fishing which gave rise to the charge took place on 25th May 1984 in Canoe Passage, which is part of the area subject to the band's licence. The licence, which had been issued for a one-year period beginning 31st March 1984, set out a number of restrictions including one that drift nets were to be limited to 25 fathoms in length. The appellant was caught with a net which was 45 fathoms in length. He has throughout admitted the facts alleged to constitute the offence, but has defended the charge on the basis that he was exercising an existing aboriginal right to fish and that the net length restriction contained in the band's licence is inconsistent with s. 35(1) of the Constitution Act, 1982, and therefore invalid.

The Courts Below

4 Goulet Prov. J., who heard the case [20th March 1985 (unreported)], first referred to the very similar pre-Charter case of *R. v. Derriksan*, [1976] 6 W.W.R. 480, 31 C.C.C. (2d) 575, 71 D.L.R. (3d) 159 (S.C.C.) [B.C.], where this court held that the aboriginal right to fish was governed by the Fisheries Act and regulations. He then expressed the opinion that he was bound by *Calder v. A.G. B.C.* (1970), 74 W.W.R. 481, 13 D.L.R. (3d) 64 (B.C.C.A.), which held that a person could not claim an aboriginal right unless it was supported by a special treaty, proclamation, contract or other document, a position that was not disturbed because of the divided opinions of the members of this court on the appeal which affirmed that decision ([1973] S.C.R. 313, [1973] 4 W.W.R. 1, 34 D.L.R. (3d) 145 [B.C.]). Section 35(1) of the Constitution Act, 1982 thus had no application. The alleged right here was not based on any treaty or other document, but was said to have been one exercised by the Musqueam from time

immemorial before European settlers came to this continent. He therefore convicted the appellant, finding it unnecessary to consider the evidence in support of an aboriginal right.

5 An appeal to Lamperson J. Co. Ct. of the County Court of Vancouver was dismissed for similar reasons ([1986] B.C.W.L.D. 599).

6 The British Columbia Court of Appeal, [1987] 2 W.W.R 577, 9 B.C.L.R. (2d) 30032 C.C.C. (3d) 65[1987] 1 C.N.L.R. 14536 D.L.R. (4th) 246, found that the courts below had erred in deciding that they were bound by the Court of Appeal decision in *Calder*, supra, to hold that the appellant could not rely on an aboriginal right to fish. Since the pronouncement of the Supreme Court of Canada judgment, the Court of Appeal's decision has been binding on no one. The court also distinguished *Calder* on its facts.

7 The court then dealt with the other issues raised by the parties. On the basis of the trial judge's conclusion that Mr. Sparrow was fishing in ancient tribal territory where his ancestors had fished "from time immemorial", it stated that, with the other circumstances, this should have led to the conclusion that Mr. Sparrow was exercising an existing aboriginal right. It rejected the Crown's contention that the right was no longer existing by reason of its "extinguishment by regulation". An aboriginal right could continue, though regulated. The court also rejected textual arguments made to the effect that s. 35 was merely of a preambular character, and concluded that the right to fish asserted by the appellant was one entitled to constitutional protection.

8 The issue then became whether that protection extended so far as to preclude regulation (as contrasted with extinguishment, which did not arise in this case) of the exercise of that right. In its view, the general power to regulate the time, place and manner of all fishing, including fishing under an aboriginal right, remains. Parliament retained the power to regulate fisheries and to control Indian lands under s. 91(12) and (24)of the Constitution Act, 1867 respectively. Reasonable regulations were necessary to ensure the proper management and conservation of the resource, and the regulations under the Fisheries Act restrict the right of all persons including Indians. The court observed, at p. 330:

> Section 35(1) of the Constitution Act, 1982 does not purport to revoke the power of Parliament to act under Head 12 or 24. The power to regulate fisheries, including Indian access to the fisheries, continues, subject only to the new constitutional guarantee that the aboriginal rights existing on 17th April 1982 may not be taken away.

9 The court rejected arguments that the regulation of fishing was an inherent aspect of the aboriginal right to fish and that such regulation must be confined to necessary conservation measures. The right had always been and continued to be a regulated right. The court put it this way, at p. 331:

> The aboriginal right which the Musqueam had was, subject to conservation measures, the right to take fish for food and for the ceremonial purposes of the band. It was in the beginning a regulated, albeit self-regulated, right. It continued to be a regulated right, and on 17th April 1982, it was a regulated right. It has never been a fixed right, and it has always taken its form from the circumstances in which it has existed. If the interests of the Indians and other Canadians in the fishery are to be protected then reasonable regulations to ensure the proper management and conservation of the resource must be continued.

10 The court then went on to particularize the right still further. It was a right for a purpose, not one related to a particular method. Essentially, it was a right to fish for food and associated traditional band activities:

> The aboriginal right is not to take fish by any particular method or by a net of any particular length. It is to take fish for food purposes. The breadth of the right should be interpreted liberally in favour of the Indians. So "food purposes" should not be confined to subsistence. In particular, this is so because the Musqueam tradition and culture involves a consumption of salmon on ceremonial occasions and a broader use of fish than mere day-to-day domestic consumption.

That right, the court added, has not changed its nature since the enactment of the Constitution Act, 1982. What has changed is that the Indian food fishery right is now entitled to priority over the interests of other user groups, and that that right, by reason of s. 35(1), cannot be extinguished.

11 The Court of Appeal found that the trial judge's findings of facts were insufficient to lead to an acquittal. Observing that the conviction was based on an erroneous view of the law and could not stand, the court further remarked upon the existence of unresolved conflicts in the evidence, including the question whether a change in the fishing conditions was necessary to reduce the catch to a level sufficient to satisfy reasonable food requirements, as well as for conservation purposes.

The Appeal

12 Leave to appeal to this court was then sought and granted. On 24th November 1987, the following constitutional question was stated:

> Is the net length restriction contained in the Musqueam Indian Band Indian Food Fishing Licence dated 30th March 1984, issued pursuant to the British Columbia Fishery (General) Regulations and the Fisheries Act, R.S.C. 1970, c. F-14, inconsistent with s. 35(1) of the Constitution Act, 1982?

13 The appellant appealed on the ground that the Court of Appeal erred (1) in holding that s. 35(1) of the Constitution Act, 1982 protects the aboriginal right only when exercised for food purposes and permits restrictive regulation of such rights whenever "reasonably justified as being necessary for the proper management and conservation of the resource or in the public interest", and (2) in failing to find the net length restriction in the band's food fish licence was inconsistent with s. 35(1) ofthe Constitution Act, 1982.

14 The respondent Crown cross-appealed on the ground that the Court of Appeal erred in holding that the aboriginal right had not been extinguished before 17th April 1982, the date of commencement of the Constitution Act,1982, and in particular in holding that, as a matter of fact and law, the appellant possessed the aboriginal right to fish for food. In the alternative, the respondent alleged, the Court of Appeal erred in its conclusions respecting the scope of the aboriginal right to fish for food and the extent to which it may be regulated, more particularly in holding that the aboriginal right included the right to take fish for the ceremonial purposes and societal needs of the band and that the band enjoyed a constitutionally protected priority over the rights of other people engaged in fishing. Section 35(1), the respondent maintained, did not invalidate legislation passed for the purpose of conservation and resource management, public health and safety and other overriding public interests such as the reasonable needs of other user groups. Finally, it maintained that the conviction ought not to have been set aside or a new trial directed because the appellant failed to establish a prima facie case that the reduction in the length of the net had unreasonably interfered with his right by preventing him from meeting his food fish requirements. According to the respondent, the Court of Appeal had erred in shifting the burden of proof to the Crown on the issue before the appellant had established a prima facie case.

15 The National Indian Brotherhood Assembly of First Nations intervened in support of the appellant. The Attorneys General of British Columbia, Ontario, Quebec, Saskatchewan, Alberta and Newfoundland supported the respondent, as did the British Columbia Wildlife Federation and others, the Fishery Council of British Columbia and the United Fishermen and Allied Workers Union.

The Regulatory Scheme

16 The Fisheries Act, s. 34 [now s. 43], confers on the Governor in Council broad powers to make regulations respecting the fisheries, the most relevant for our purposes being those set forth in the following paragraphs of that section:

> 34. ...
>
> (*a*) for the proper management and control of the seacoast and inland fisheries;
>
> (*b*) respecting the conservation and protection of fish;
>
> (*c*) respecting the catching, loading, landing, handling, transporting, possession and disposal of fish ...
>
> (*e*) respecting the use of fishing gear and equipment;

(*f*) respecting the issue, suspension and cancellation of licences and leases;

(*g*) respecting the terms and conditions under which a lease or licence may be issued;

Contravention of the Act and the regulations is made an offence under s.61(1) under which the appellant was charged.

17 Acting under its regulation-making powers, the Governor in Council enacted the British Columbia Fishery (General) Regulations, SOR/ 84-248. Under these regulations (s. 4), everyone is, inter alia, prohibited from fishing without a licence, and then only in areas and at the times and in the manner authorized by the Act or regulations. That provision also prohibits buying, selling, trading or bartering fish other than those lawfully caught under the authority of a commercial fishing licence. Section 4 reads:

4. (1) Unless otherwise provided in the Act or in any Regulations made thereunder in respect of the fisheries to which these Regulations apply or in the *Wildlife Act* (British Columbia), no person shall fish except under the authority of a licence or permit issued thereunder.

(2) No person shall fish for any species of fish in the Province or in Canadian fisheries waters of the Pacific Ocean except in areas and at times authorized by the Act or any Regulations made thereunder in respect of the fisheries to which these Regulations apply.

(3) No person who is the owner of a vessel shall operate that vessel or permit it to be operated in contravention of these Regulations.

(4) No person shall, without lawful excuse, have in his possession any fish caught or obtained contrary to the Act or any Regulations made thereunder in respect of the fisheries to which these Regulations apply.

(5) No person shall buy, sell, trade or barter or attempt to buy, sell, trade or barter fish or any portions thereof other than fish lawfully caught under the authority of a commercial fishing licence issued by the Minister or the Minister of Environment for British Columbia.

18 The regulations make provision for issuing licences to Indians or a band "for the sole purpose of obtaining food for that Indian and his family and for the band", and no one other than an Indian is permitted to be in possession of fish caught pursuant to such a licence. Subsections 27(1) and (4) of the regulations read:

27. (1) In this section "Indian food fish licence" means a licence issued by the Minister to an Indian or a band for the sole purpose of obtaining food for that Indian and his family or for the band ...

(4) No person other than an Indian shall have in his possession fish caught under the authority of an Indian food fish licence.

19 As in the case of other licences issued under the Act, such licences may, by s. 12 of the regulations, be subjected to restrictions regarding the species and quantity of fish that may be taken, the places and times when they may be taken, the manner in which they are to be marked and, most important here, the type of gear and equipment that may be used. Section 12 reads as follows:

12. (1) Subject to these Regulations and any regulations made under the Act in respect of the fisheries to which these Regulations apply and for the proper management and control of such fisheries, there may be specified in a licence issued under these Regulations

(*a*) the species of fish and quantity thereof that is permitted to be taken;

(*b*) the period during which and the waters in which fishing is permitted to be carried out;

(*c*) the type and quantity of fishing gear and equipment that is permitted to be used and the manner in which it is to be used;

(*d*) the manner in which fish caught and retained for educational or scientific purposes is to be held or displayed;

(*e*) the manner in which fish caught and retained is to be marked and transported; and

(*f*) the manner in which scientific or catch data is to be reported.

(2) No person fishing under the authority of a licence referred to in subsection (1) shall contravene or fail to comply with the terms of the licence.

20 Pursuant to these powers, the Musqueam Indian Band, on 31st March 1984, was issued an Indian food fishing licence as it had since 1978 "to fish for salmon for food for themselves and their family" in areas which included the place where the offence charged occurred, the waters of Ladner Reach and Canoe Passage therein described. The licence contained time restrictions as well as the type of gear to be used, notably "One Drift net twenty-five (25) fathoms in length".

21 The appellant was found fishing in the waters described using a drift net in excess of 25 fathoms. He did not contest this, arguing instead that he had committed no offence because he was acting in the exercise of an existing aboriginal right which was recognized and affirmed by s. 35(1) of theConstitution Act, 1982.

Analysis

22 We will address first the meaning of "existing" aboriginal rights and the content and scope of the Musqueam right to fish. We will then turn to the meaning of "recognized and affirmed", and the impact of s. 35(1) on the regulatory power of Parliament.

"Existing"

23 The word "existing" makes it clear that the rights to which s. 35(1) applies are those that were in existence when the Constitution Act,1982 came into effect. This means that extinguished rights are not revived by the Constitution Act, 1982. A number of courts have taken the position that "existing" means being in actuality in 1982: R. v. Eninew7 C.C.C. (3d) 443 at 446[1983] 2 C.N.L.R. 123[1984] 2 C.N.L.R. 1228 C.R.R. 11 D.L.R. (4th) 59528 Sask. R. 168, affirmed R. v. Eninew; R. v. Bear12 C.C.C. (3d) 365[1984] 2 C.N.L.R. 12611 C.R.R. 18910 D.L.R. (4th) 13732 Sask. R. 237(C.A.). See also *A.G. Ont. v. Bear Island Foundation*, 49 O.R. (2d) 353, [1985] 1 C.N.L.R. 1, 15 D.L.R. (4th) 321(H.C.); *R. v. Hare*, 20 C.C.C. (3d) 1, [1985] 3 C.N.L.R. 139, 9 O.A.C. 161(C.A.); *Steinhauer v. R.*, [1985] 3 C.N.L.R. 187, 15 C.R.R. 175, 63 A.R. 381(Q.B.); *R. v. Martin* (1985), 17 C.R.R. 375, 65 N.B.R. (2d) 21, 167 A.P.R. 21 (Q.B.); *R. v. Agawa*, 65 O.R. (2d) 505, [1988] 3 C.N.L.R. 73, 43 C.C.C. (3d) 266, 53 D.L.R. (4th) 101, 28 O.A.C. 201 (C.A.) .

24 Further, an existing aboriginal right cannot be read so as to incorporate the specific manner in which it was regulated before 1982. The notion of freezing existing rights would incorporate into the Constitution a crazy patchwork of regulations. Blair J.A. in *Agawa*, supra, had this to say about the matter, at p. 214:

> Some academic commentators have raised a further problem which cannot be ignored. The *Ontario Fishery Regulations* contain detailed rules which vary for different regions in the province. Among other things, the *Regulations* specify seasons and methods of fishing, species of fish which can be caught and catch limits. Similar detailed provisions apply under the comparable fisheries *Regulations* in force in other provinces. These detailed provisions might be constitutionalized if it were decided that the existing treaty rights referred to in s. 35(1) were those remaining after regulation at the time of the proclamation of the *Constitution Act, 1982*.

As noted by Blair J.A., academic commentary lends support to the conclusion that "existing" means "unextinguished" rather than exercisable at a certain time in history. Professor Slattery, "Understanding Aboriginal Rights" (1987), 66 Can. Bar Rev. 726,at pp. 781–82, has observed the following about reading regulations into the rights:

> This approach reads into the Constitution the myriad of regulations affecting the exercise of aboriginal rights, regulations that differed considerably from place to place across the country. It does not permit differentiation between regulations

> of long-term significance and those enacted to deal with temporary conditions, or between reasonable and unreasonable restrictions. Moreover, it might require that a constitutional amendment be enacted to implement regulations more stringent than those in existence on 17 April 1982. This solution seems unsatisfactory.

See also Professor McNeil, "The Constitutional Rights of the Aboriginal People of Canada" (1982), 4 Sup. Ct. L. Rev. 25, at p. 258 (q.v.); Pentney, "The Rights of the Aboriginal Peoples of Canada in the Constitution Act, 1982, Part II, Section 35: The SubstantiveGuarantee" (1987), 22 U.B.C. Law Rev. 207.

25 The arbitrariness of such an approach can be seen if one considers the recent history of the federal regulation in the context of the present case and the fishing industry. If the Constitution Act, 1982 had been enacted a few years earlier, any right held by the Musqueam band, on this approach, would have been constitutionally subjected to the restrictive regime of personal licences that had existed since 1917. Under that regime, the Musqueam catch had by 1969 become minor or non-existent. In 1978 a system of band licences was introduced on an experimental basis which permitted the Musqueam to fish with a 75 fathom net for a greater number of days than other people. Under this regime, from 1977 to 1984, the number of band members who fished for food increased from 19 persons using 15 boats, to 64 persons using 38 boats, while 10 other members of the band fished under commercial licences. Before this regime, the band's food fish requirement had basically been provided by band members who were licensed for commercial fishing. Since the regime introduced in 1978 was in force in 1982, then, under this approach, the scope and content of an aboriginal right to fish would be determined by the details of the band's 1978 licence.

26 The unsuitability of the approach can also be seen from another perspective. 91 other tribes of Indians, comprising over 20,000 people (compared with 540 Musqueam on the reserve and 100 others off the reserve), obtain their food fish from the Fraser River. Some or all of these bands may have an aboriginal right to fish there. A constitutional patchwork quilt would be created if the constitutional right of these bands were to be determined by the specific regime available to each of those bands in 1982.

27 Far from being defined according to the regulatory scheme in place in 1982, the phrase "existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time. To use Professor Slattery's expression, in "Understanding Aboriginal Rights", supra, at p. 782, the word "existing" suggests that those rights are "affirmed in a contemporary form rather than in their primeval simplicity and vigour". Clearly, then, an approach to the constitutional guarantee embodied in s. 35(1) which would incorporate "frozen rights" must be rejected.

The Aboriginal Right

28 We turn now to the aboriginal right at stake in this appeal. The Musqueam Indian Reserve is located on the north shore of the Fraser River close to the mouth of that river and within the limits of the city of Vancouver. There has been a Musqueam village there for hundreds of years. This appeal does not directly concern the reserve or the adjacent waters, but arises out of the band's right to fish in another area of the Fraser River estuary known as Canoe Passage in the south arm of the river, some 16 kilometres (about 10 miles) from the reserve. The reserve and those waters are separated by the Vancouver International Airport and the municipality of Richmond.

29 The evidence reveals that the Musqueam have lived in the area as an organized society long before the coming of European settlers, and that the taking of salmon was an integral part of their lives and remains so to this day. Much of the evidence of an aboriginal right to fish was given by Dr. Suttles, an anthropologist, supported by that of Mr. Grant, the band administrator. The Court of Appeal thus summarized Dr. Suttles' evidence, at pp. 307-308:

> Dr. Suttles was qualified as having particular qualifications in respect of the ethnography of the Coast Salish Indian people of which the Musqueams were one of several tribes. He thought that the Musqueam had lived in their historic territory, which includes the Fraser River estuary, for at least 1,500 years. That historic territory extended from the north shore of Burrard Inlet to the south shore of the main channel of the Fraser River, including the waters of the three channels by which that river reaches the ocean. As part of the Salish people, the Musqueam were part of a regional social network covering a much larger area but, as a tribe, were themselves an organized social group with their own name, territory and

> resources. Between the tribes there was a flow of people, wealth and food. No tribe was wholly self-sufficient or occupied its territory to the complete exclusion of others.
>
> Dr. Suttles described the special position occupied by the salmon fishery in that society. The salmon was not only an important source of food but played an important part in the system of beliefs of the Salish people, and in their ceremonies. The salmon were held to be a race of beings that had, in "myth times", established a bond with human beings requiring the salmon to come each year to give their bodies to the humans who, in turn, treated them with respect shown by performance of the proper ritual. Toward the salmon, as toward other creatures, there was an attitude of caution and respect which resulted in effective conservation of the various species.

30 While the trial for a violation of a penal prohibition may not be the most appropriate setting in which to determine the existence of an aboriginal right, and the evidence was not extensive, the correctness of the finding of fact of the trial judge "that Mr. Sparrow was fishing in ancient tribal territory where his ancestors had fished from time immemorial in that part of the mouth of the Fraser River for salmon" is supported by the evidence and was not contested. The existence of the right, the Court of Appeal tells us, "was not the subject of serious dispute". It is not surprising, then, that, taken with other circumstances, that court should find that "the judgment appealed from was wrong in ... failing to hold that Sparrow at the relevant time was exercising an existing aboriginal right".

31 In this court, however, the respondent contested the Court of Appeal's finding, contending that the evidence was insufficient to discharge the appellant's burden of proof upon the issue. It is true that for the period from 1867 to 1961 the evidence is scanty. But the evidence was not disputed or contradicted in the courts below and there is evidence of sufficient continuity of the right to support the Court of Appeal's finding, and we would not disturb it.

32 What the Crown really insisted on, both in this court and the courts below, was that the Musqueam Band's aboriginal right to fish had been extinguished by regulations under the Fisheries Act.

33 The history of the regulation of fisheries in British Columbia is set out in *Jack v. R.*, [1980] 1 S.C.R. 294 at 308 et seq., [1979] 5 W.W.R. 364, [1979] 2 C.N.L.R. 25, 48 C.C.C. (2d) 246, 100 D.L.R. (3d) 193, 28 N.R. 162, and we need only summarize it here. Before the province's entry into Confederation in 1871, the fisheries were not regulated in any significant way, whether in respect of Indians or other people. The Indians were not only permitted but encouraged to continue fishing for their own food requirements. Commercial and sport fishing were not then of any great importance. The federal Fisheries Act was only proclaimed in force in the province in 1876 and the first Salmon Fishery Regulations for British Columbia were adopted in 1878 and were minimal.

34 The 1878 regulations were the first to mention Indians. They simply provided that the Indians were at all times at liberty, by any means other than drift nets or spearing, to fish for food for themselves, but not for sale or barter. The Indian right or liberty to fish was thereby restricted, and more stringent restrictions were added over the years. As noted in *Jack v. R.*, supra, at p. 310:

> The federal Regulations became increasingly strict in regard to the Indian fishery over time, as first the commercial fishery developed and then sport fishing became common. What we can see is an increasing subjection of the Indian fishery to regulatory control. First, the regulation of the use of drift nets, then the restriction of fishing to food purposes, then the requirement of permission from the Inspector and, ultimately, in 1917, the power to regulate even food fishing by means of conditions attached to the permit.

The 1917 regulations were intended to make still stronger the provisions against commercial fishing in the exercise of the Indian right to fish for food: see P.C. 2539 of 22nd September 1917. The Indian food fishing provisions remained essentially the same from 1917 to 1977. The regulations of 1977 retained the general principles of the previous 60 years. An Indian could fish for food under a "special licence" specifying method, locale and times of fishing. Following an experimental program to be discussed later, the 1981 regulations provided for the entirely new concept of a band food fishing licence, while retaining comprehensive specification of conditions for the exercise of licences.

35 It is this progressive restriction and detailed regulation of the fisheries which, respondent's counsel maintained, have had the effect of extinguishing any aboriginal right to fish. The extinguishment need not be express, he argued, but may take place where the sovereign authority is exercised in a manner "necessarily inconsistent" with the continued enjoyment of aboriginal rights. For this proposition, he particularly relied on St. Catherine's Milling & Lumber Co. v. R.188814 App. Cas. 464 Cart. 107(P.C.); *Calder v. A.G.B.C.*, supra [S.C.C.]; Baker Lake v. Min. of Indian Affairs & Nor. Dev.[1980] 1 F.C. 518[1980] 5 W.W.R. 193107 D.L.R. (3d) 513, [179] 3 C.N.L.R. 17(T.D.); and A.G. Ont. v. Bear Island Foundation, supra. The consent to its extinguishment before the Constitution Act, 1982 was not required; the intent of the sovereign could be effected not only by statute but by valid regulations. Here, in his view, the regulations had entirely displaced any aboriginal right. There is, he submitted, a fundamental inconsistency between the communal right to fish embodied in the aboriginal right, and fishing under a special licence or permit issued to individual Indians (as was the case until 1977) in the discretion of the minister and subject to terms and conditions which, if breached, may result in cancellation of the licence. The Fisheries Act and its regulations were, he argued, intended to constitute a complete code inconsistent with the continued existence of an aboriginal right.

36 At bottom, the respondent's argument confuses regulation with extinguishment. That the right is controlled in great detail by the regulations does not mean that the right is thereby extinguished. The distinction to be drawn was carefully explained, in the context of federalism, in the first fisheries case, *A.G. Can. v. A.G. Ont. (Ref. re Prov. Fisheries)*, [1898] A.C. 700. There, the Privy Council had to deal with the interrelationship between, on the one hand, provincial property, which by s. 109 of the Constitution Act, 1867 is vested in the provinces (and so falls to be regulated qua property exclusively by the provinces) and, on the other hand, the federal power to legislate respecting the fisheries thereon under s. 91(12) of that Act. The Privy Council said the following in relation to the federal regulation (at pp. 712-13):

> ... the power to legislate in relation to fisheries does necessarily to a certain extent enable the Legislature so empowered to affect proprietary rights. An enactment, for example, prescribing the times of the year during which fishing is to be allowed, or the instruments which may be employed for the purpose (which it was admitted the Dominion Legislature was empowered to pass) might very seriously touch the exercise of proprietary rights, and the extent, character, and scope of such legislation is left entirely to the Dominion Legislature. The suggestion that the power might be abused so as to amount to a practical confiscation of property does not warrant the imposition by the Courts of any limit upon the absolute power of legislation conferred. The supreme legislative power in relation to any subject-matter is always capable of abuse, but it is not to be assumed that it will be improperly used; if it is, the only remedy is an appeal to those by whom the Legislature is elected.

37 In the context of aboriginal rights, it could be argued that, before 1982, an aboriginal right was automatically extinguished to the extent that it was inconsistent with a statute. As Mahoney J. stated in *Baker Lake*, supra, at p. 568:

> Once a statute has been validly enacted, it must be given effect. If its necessary effect is to abridge or entirely abrogate a common law right, then that is the effect that the courts must give it. That is as true of an aboriginal title as of any other common law right.

See also A.G. Ont. v. Bear Island Foundation, supra, at pp.439–40. That in Judson J.'s view was what had occurred in *Calder*, supra, where, as he saw it, a series of statutes evinced a unity of intention to exercise a sovereignty inconsistent with any conflicting interest, including aboriginal title. But Hall J. in that case stated (at p. 404) that "the onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent and *that intention must be 'clear and plain'* " (emphasis added). The test of extinguishment to be adopted, in our opinion, is that the sovereign's intention must be clear and plain if it is to extinguish an aboriginal right.

38 There is nothing in the Fisheries Act or its detailed regulations that demonstrates a clear and plain intention to extinguish the Indian aboriginal right to fish. The fact that express provision permitting the Indians to fish for food may have applied to all Indians and that for an extended period permits were discretionary and issued on an individual rather than a communal basis in no way shows a clear intention to extinguish. These permits were simply a manner of controlling the fisheries, not defining underlying rights.

39 We would conclude then that the Crown has failed to discharge its burden of proving extinguishment. In our opinion, the Court of Appeal made no mistake in holding that the Indians have an existing aboriginal right to fish in the area where Mr. Sparrow was fishing at the time of the charge. This approach is consistent with ensuring that an aboriginal right should not be defined by incorporating the ways in which it has been regulated in the past.

40 The scope of the existing Musqueam right to fish must now be delineated. The anthropological evidence relied on to establish the existence of the right suggests that, for the Musqueam, the salmon fishery has always constituted an integral part of their distinctive culture. Its significant role involved not only consumption for subsistence purposes, but also consumption of salmon on ceremonial and social occasions. The Musqueam have always fished for reasons connected to their cultural and physical survival. As we stated earlier, the right to do so may be exercised in a contemporary manner.

41 The British Columbia Court of Appeal in this case held that the aboriginal right was to fish for food purposes, but that purpose was not to be confined to mere subsistence. Rather, the right was found to extend to fish consumed for social and ceremonial activities. The Court of Appeal thereby defined the right as protecting the same interest as is reflected in the government's food fish policy. In limiting the right to food purposes, the Court of Appeal referred to the line of cases involving the interpretation of the natural resources agreements and the food purpose limitation placed on the protection of fishing and hunting rights by the Constitution Act, 1930 (see *R. v. Wesley*, [1932] 2 W.W.R. 337, 26 Alta. L.R. 433, 58 C.C.C. 269, [1932] 4 D.L.R. 774(C.A.); *Prince v. R.*, [1964] S.C.R. 81, 46 W.W.R. 121, 41 C.R. 403, [1964] 3 C.C.C. 1 [Man.]; *R. v. Sutherland*, [1980] 2 S.C.R. 451, [1980] 5 W.W.R. 456, 53 C.C.C. (2d) 289, 113 D.L.R. (3d) 374, [1980] 3 C.N.L.R. 71, 7 Man. R. (2d) 359, 35 N.R. 361).

42 The Court of Appeal's position was attacked from both sides. The respondent for its part argued that, if an aboriginal right to fish does exist, it does not include the right to take fish for the ceremonial and social activities of the band. The appellant, on the other hand, attacked the Court of Appeal's restriction of the right to fish for food. He argued that the principle that the holders of aboriginal rights may exercise those rights according to their own discretion has been recognized by this court in the context of the protection of treaty hunting rights (*R. v. Simon*, [1985] 2 S.C.R. 387, [1986] 1 C.N.L.R. 153, 23 C.C.C. (3d) 238, 24 D.L.R. (4th) 390, 71 N.S.R. (2d) 15, 171 A.P.R. 15, 62 N.R. 366) and that it should be applied in this case such that the right is defined as a right to fish for any purpose and by any non-dangerous method.

43 In relation to this submission, it was contended before this court that the aboriginal right extends to commercial fishing. While no commercial fishery existed prior to the arrival of European settlers, it is contended that the Musqueam practice of bartering in early society may be revived as a modern right to fish for commercial purposes. The presence of numerous interveners representing commercial fishing interests, and the suggestion on the facts that the net length restriction is at least in part related to the probable commercial use of fish caught under the Musqueam food fishing licence, indicate the possibility of conflict between aboriginal fishing and the competitive commercial fishery with respect to economically valuable fish such as salmon. We recognize the existence of this conflict and the probability of its intensification as fish availability drops, demand rises and tensions increase.

44 Government regulations governing the exercise of the Musqueam right to fish, as described above, have only recognized the right to fish *for food* for over a hundred years. This may have reflected the existing position. However, historical policy on the part of the Crown is not only incapable of extinguishing the existing aboriginal right without clear intention, but is also incapable of, in itself, delineating that right. The nature of government regulations cannot be determinative of the content and scope of an existing aboriginal right. Government policy *can*, however, regulate the exercise of that right, but such regulation must be in keeping with s. 35(1).

45 In the courts below, the case at bar was not presented on the footing of an aboriginal right to fish for commercial or livelihood purposes. Rather, the focus was and continues to be on the validity of a net length restriction affecting the appellant's *food fishing licence*. We therefore adopt the Court of Appeal's characterization of the right for the purpose of this appeal, and confine our reasons to the meaning of the constitutional recognition and affirmation of the existing aboriginal right to fish for food and social and ceremonial purposes.

"Recognized and Affirmed"

46 We now turn to the impact of s. 35(1) of the Constitution Act, 1982 on the regulatory power of Parliament and on the outcome of this appeal specifically.

47 Counsel for the appellant argued that the effect of s. 35(1) is to deny Parliament's power to restrictively regulate aboriginal fishing rights under s. 91(24) ("Indians and Lands Reserved for the Indians"), and s.91(12) ("Sea Coast and Inland Fisheries"). The essence of this submission, supported by the intervener, the National Indian Brotherhood Assembly of First Nations, is that the right to regulate is part of the right to use the resource in the band's discretion. Section 35(1) is not subject to s.1 of the Charter, nor to legislative override under s. 33. The appellant submitted that, if the regulatory power continued, the limits on its extent are set by the word "inconsistent" in s. 52(1) of theConstitution Act, 1982 and the protective and remedial purposes of s. 35(1). This means that aboriginal title entails a right to fish by any non-dangerous method chosen by the aboriginals engaged in fishing. Any continuing governmental power of regulation would have to be exceptional and strictly limited to regulation that is clearly not inconsistent with the protective and remedial purposes of s. 35(1). Thus, counsel for the appellant speculated, "in certain circumstances, necessary and reasonable conservation measures *might* qualify" (emphasis added) — where for example such measures were necessary to prevent serious impairment of the aboriginal rights of present and future generations, where conservation could only be achieved by restricting the right and not by restricting fishing by other users, and where the aboriginal group concerned was unwilling to implement necessary conservation measures. The onus of proving a justification for restrictive regulations would lie with the government by analogy with s. 1 of the Charter.

48 In response to these submissions and in finding the appropriate interpretive framework for s. 35(1), we start by looking at the background of s. 35(1).

49 It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown: see *Johnson v. McIntosh* (1823), 21 U.S. (8 Wheat.) 543 (S.C.); see also the Royal Proclamation itself (R.S.C. 1985, App. II, No. 1, pp. 4-6); *Calder*, supra, per Judson J. at p. 328, Hall J. at pp. 383, 402. And there can be no doubt that over the years the rights of the Indians were often honoured in the breach (for one instance in a recent case in this court, see *C.P. Ltd. v. Paul*, [1988] 2 S.C.R. 654, [1989] 1 C.N.L.R. 47, 1 R.P.R. (2d) 105, 53 D.L.R. (4th) 487, 91 N.B.R. (2d) 43, 232 A.P.R. 43, 89 N.R. 325. As MacDonald J. stated in Pasco v. C.N.R.69 B.C.L.R. 76[1986] 1 C.N.L.R. 35 at 37(S.C.): "We cannot recount with much pride the treatment accorded to the native people of this country."

50 For many years, the rights of the Indians to their aboriginal lands — certainly as *legal* rights — were virtually ignored. The leading cases de fining Indian rights in the early part of the century were directed at claims supported by the Royal Proclamation or other legal instruments, and even these cases were essentially concerned with settling legislative jurisdiction or the rights of commercial enterprises. For 50 years after the publication of Clement's The Law of the Canadian Constitution, 3rd ed. (1916), there was a virtual absence of discussion of any kind of Indian rights to land even in academic literature. By the late 1960s, aboriginal claims were not even recognized by the federal government as having any legal status. Thus, the Statement of the Government of Canada on Indian Policy, 1969, although well meaning, contained the assertion (at p. 11) that "aboriginal claims to land ... are so general and undefined that it is not realistic to think of them as specific claims capable of remedy except through a policy and program that will end injustice to the Indians as members of the Canadian community". In the same general period, the James Bay development by Quebec Hydro was originally initiated without regard to the rights of the Indians who lived there, even though these were expressly protected by a constitutional instrument: see the QuebecBoundary Extension Act, S.C. 1912, c. 45. It took a number of judicial decisions and notably the *Calder* case in this court (1973) to prompt a reassessment of the position being taken by government.

51 In the light of its reassessment of Indian claims following *Calder*, the federal government on 8th August 1973 issued "a statement of policy" regarding Indian lands. By it, it sought to "signify the Government's *recognition and acceptance* of its continuing responsibility under the British North America Act for Indians and lands reserved for Indians", which it regarded

"as an historic evolution dating back to the Royal Proclamation of 1763, which, whatever differences there may be about its judicial interpretation, stands as a basic declaration of the Indian people's interests in land in this country" (emphasis added). See Statement made by the Honourable Jean Chreacutetien, Minister of Indian Affairs and Northern Development, on Claims of Indian and Inuit People, 8th August 1973. The remarks about these lands were intended "as an expression of acknowledged responsibility". But the statement went on to express, for the first time, the government's willingness to negotiate regarding claims of aboriginal title, specifically in British Columbia, Northern Quebec, and the Territories, and this without regard to formal supporting documents. "The Government", it stated, "is now ready to negotiate with authorized representatives of these native peoples on the basis that where their traditional interest in the lands concerned can be established, an agreed form of compensation or benefit will be provided to native peoples in return for their interest."

52 It is obvious from its terms that the approach taken towards aboriginal claims in the 1973 statement constituted an expression of a policy, rather than a legal position; see also Canada, Department of Indian Affairs and Northern Development, In All Fairness: A Native Claims Policy — Comprehensive Claims (1981), pp. 11-12; Slattery, "Understanding Aboriginal Rights", op. cit., at p. 730. Asrecently as Guerin v. R.[1984] 2 S.C.R. 33559 B.C.L.R. 301[1984] 6 W.W.R. 48136 R.P.R. 120 E.T.R. 6[1985] 1 C.N.L.R. 2013 D.L.R. (4th) 32155 N.R. 161, the federal government argued in this court that any federal obligation was of a political character.

53 It is clear, then, that s. 35(1) of the Constitution Act, 1982, represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights. The strong representations of native associations and other groups concerned with the welfare of Canada's aboriginal peoples made the adoption of s. 35(1) possible and it is important to note that the provision applies to the Indians, the Inuit and the Meacutetis. Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place. It also affords aboriginal peoples constitutional protection against provincial legislative power. We are, of course, aware that this would, in any event, flow from the *Guerin* case, supra, but for a proper understanding of the situation, it is essential to remember that the *Guerin* case was decided after the commencement of the Constitution Act, 1982. In addition to its effect on aboriginal rights, s. 35(1) clarified other issues regarding the enforcement of treaty rights (see Sanders, "Pre-existing Rights: The Aboriginal Peoples of Canada", in Beaudoin and Ratushny, eds., The Canadian Charter of Rightsand Freedoms, 2nd ed., esp. at p. 730).

54 In our opinion, the significance of s. 35(1) extends beyond these fundamental effects. Professor Lyon in "An Essay on Constitutional Interpretation" (1988), 26 Osgoode Hall L.J. 95 at 100, says the following about s. 35(1):

> ... the context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.

55 The approach to be taken with respect to interpreting the meaning of s.35(1) is derived from general principles of constitutional interpretation, principles relating to aboriginal rights, and the purposes behind the constitutional provision itself. Here, we will sketch the framework for an interpretation of "recognized and affirmed" that, in our opinion, gives appropriate weight to the constitutional nature of these words.

56 In Ref. re Man. Language Rights[1985] 1 S.C.R. 721 at 745Ref. re Language Rights under s. 23 of Man. Act, 1870[1985] 4 W.W.R. 38519 D.L.R. (4th) 135 Man. R. (2d) 8359 N.R. 321, this court said the following about the perspective to be adopted when interpreting a constitution:

> The Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government. It is, as s. 52 of the *Constitutional Act, 1982* declares, the "supreme law" of the nation, unalterable by the normal legislative process, and unsuffering of laws inconsistent with it. The duty of the judiciary is to interpret and apply the laws of Canada and each of the provinces, and it is thus our duty to ensure that the constitutional law prevails.

The nature of s. 35(1) itself suggests that it be construed in a purposive way. When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded. When the Court of Appeal below was confronted with the submission that s. 35 has no effect on aboriginal or treaty rights and that it is merely a preamble to the parts of the Constitution Act, 1982 which deal with aboriginal rights, it said the following, at p. 322:

> This submission gives no meaning to s. 35. If accepted, it would result in denying its clear statement that existing rights are hereby recognized and affirmed, and would turn that into a mere promise to recognize and affirm those rights sometime in the future ... To so construe s. 35(1) would be to ignore its language and the principle that the Constitution should be interpreted in a liberal and remedial way. We cannot accept that that principle applies less strongly to aboriginal rights than to the rights guaranteed by the Charter, particularly having regard to the history and to the approach to interpreting treaties and statutes relating to Indians required by such cases as *Nowegijick v. R.*, [1983] 1 S.C.R. 29 ...

57 In *Nowegijick v. R.*, [1983] 1 S.C.R. 29 at 36, [1983] C.T.C. 20, 83 D.T.C. 5041, [1983] 2 C.N.L.R. 89, 144 D.L.R. (3d) 193, 46 N.R. 41 [Fed.], the following principle that should govern the interpretation of Indian treaties and statutes was set out:

> ... treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians.

58 In R. v. Agawa, supra, Blair J.A. stated that the above principle should apply to the interpretation of s. 35(1). He added the following principle to be equally applied, at pp. 215-16:

> The second principle was enunciated by the late Associate Chief Justice MacKinnon in *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360. He emphasized the importance of Indian history and traditions as well as the perceived effect of a treaty at the time of its execution. He also cautioned against determining Indian right "in a vacuum". The honour of the Crown is involved in the interpretation of Indian treaties and, as a consequence, fairness to the Indians is a governing consideration. He said at p. 367:
>
> > The principles to be applied to the interpretation of Indian treaties have been much canvassed over the years. In approaching the terms of a treaty quite apart from the other considerations already noted the honour of the Crown is always involved and no appearance of 'sharp dealing' should be sanctioned.
>
> This view is reflected in recent judicial decisions which have emphasized the responsibility of Government to protect the rights of Indians arising from the special trust relationship created by history, treaties and legislation: see *Guerin v. the Queen*, [1984] 2 S.C.R. 335, 55 N.R. 161, 13 D.L.R. (4th) 321.

59 In *Guerin*, supra, the Musqueam Band surrendered reserve lands to the Crown for lease to a golf club. The terms obtained by the Crown were much less favourable than those approved by the band at the surrender meeting. This court found that the Crown owed a fiduciary obligation to the Indians with respect to the lands. The sui generis nature of Indian title and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation. In our opinion, *Guerin*, together with *R. v. Taylor*, 34 O.R. (2d) 360, [1981] 3 C.N.L.R. 114, 62 C.C.C. (2d) 227(C.A.), ground a general guiding principle for s. 35(1). That is, the government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.

60 We agree with both the British Columbia Court of Appeal below and the Ontario Court of Appeal that the principles outlined above, derived from *Nowegijick, Taylor* and *Guerin*, should guide the interpretation of s. 35(1). As commentators have noted, s. 35(1) is a solemn commitment that must be given meaningful content (Lyon, op. cit.; Pentney, op. cit.; Schwartz, "Unstarted Business: Two Approaches to Defining s.35 — 'What's in the Box?' and 'What Kind of Box?' ", c. XXIV, in First Principles, Second Thoughts (Montreal: Institute for Research on Public Policy, 1986); Slattery, op. cit.; and Slattery, "The Hidden Constitution: Aboriginal Rights in Canada" (1984), 32 Am. J. of Comp. Law 361).

61 In response to the appellant's submission that s. 35(1) rights are more securely protected than the rights guaranteed by the Charter, it is true that s. 35(1) is not subject to s. 1 of the Charter. In our opinion, this does not mean that any law or regulation affecting aboriginal rights will automatically be of no force or effect by the operation of s. 52 of theConstitution Act, 1982. Legislation that affects the exercise of aboriginal rights will nonetheless be valid, if it meets the test for justifying an interference with a right recognized and affirmed under s. 35(1).

62 There is no explicit language in the provision that authorizes this court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights. Yet we find that the words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the Constitution Act, 1867. These powers must, however, now be read together with s. 35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights. Such scrutiny is in keeping with the liberal interpretive principle enunciated in *Nowegijick*, supra, and the concept of holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada as suggested by *Guerin*, supra.

63 We refer to Professor Slattery's "Understanding Aboriginal Rights", op. cit., with respect to the task of envisioning a s. 35(1) justificatory process. Professor Slattery, at p. 782, points out that a justificatory process is required as a compromise between a "patchwork" characterization of aboriginal rights whereby past regulations would be read into a definition of the rights, and a characterization that would guarantee aboriginal rights in their original form unrestricted by subsequent regulation. We agree with him that these two extreme positions must be rejected in favour of a justificatory scheme.

64 Section 35(1) suggests that while regulation affecting aboriginal rights is not precluded, such regulation must be enacted according to a valid objective. Our history has shown, unfortunately all too well, that Canada's aboriginal peoples are justified in worrying about government objectives that may be superficially neutral but which constitute de facto threats to the existence of aboriginal rights and interests. By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected. Implicit in this constitutional scheme is the obligation of the legislature to satisfy the test of justification. The way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples. The extent of legislative or regulatory impact on an existing aboriginal right may be scrutinized so as to ensure recognition and affirmation.

65 The constitutional recognition afforded by the provision therefore gives a measure of control over government conduct and a strong check on legislative power. While it does not promise immunity from government regulation in a society that, in the 20th century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s. 35(1).

66 In these reasons, we will outline the appropriate analysis under s. 35(1) in the context of a regulation made pursuant to the Fisheries Act. We wish to emphasize the importance of context and a case-by-case approach to s. 35(1). Given the generality of the text of the constitutional provision, and especially in light of the complexities of aboriginal history, society and rights, the contours of a justificatory standard must be defined in the specific factual context of each case.

Section 35(1) and the Regulation of the Fisheries

67 Taking the above framework as guidance, we propose to set out the test for prima facie interference with an existing aboriginal right and for the justification of such an interference. With respect to the question of the regulation of the fisheries, the existence of s. 35(1) of the ConstitutionAct, 1982, renders the authority of R. v. Derriksan, supra, inapplicable. In that case, Laskin C.J.C., for this court, found that there was nothing to prevent the Fisheries Act and the regulations from subjecting the alleged aboriginal right to fish in a particular area to the controls thereby imposed. As the Court of Appeal in the case at bar

noted, the *Derriksan* line of cases established that, before 17th April 1982, the aboriginal right to fish was subject to regulation by legislation and subject to extinguish ment. The new *constitutional* status of that right enshrined in s. 35(1) suggests that a different approach must be taken in deciding whether regulation of the fisheries might be out of keeping with constitutional protection.

68 The first question to be asked is whether the legislation in question has the effect of interfering with an existing aboriginal right. If it does have such an effect, it represents a prima facie infringement of s. 35(1). Parliament is not expected to act in a manner contrary to the rights and interests of aboriginals, and, indeed, may be barred from doing so by the second stage of s. 35(1) analysis. The inquiry with respect to interference begins with a reference to the characteristics or incidents of the right at stake. Our earlier observations regarding the scope of the aboriginal right to fish are relevant here. Fishing rights are not traditional property rights. They are rights held by a collective and are in keeping with the culture and existence of that group. Courts must be careful, then, to avoid the application of traditional common law concepts of property as they develop their understanding of what the reasons for judgment in *Guerin*, supra, at p. 382, referred to as the "sui generis" nature of aboriginal rights. (See also Little Bear, "A Concept of Native Title", [1982] 5 Can. Legal Aid Bul. 99.)

69 While it is impossible to give an easy definition of fishing rights, it is possible, and, indeed, crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake. For example, it would be artificial to try to create a hard distinction between the right to fish and the particular manner in which that right is exercised.

70 To determine whether the fishing rights have been interfered with such as to constitute a prima facie infringement of s. 35(1), certain questions must be asked. First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a prima facie infringement lies on the individual or group challenging the legislation. In relation to the facts of this appeal, the regulation would be found to be a prima facie interference if it were found to be an adverse restriction on the Musqueam exercise of their right to fish for food. We wish to note here that the issue does not merely require looking at whether the fish catch has been reduced below that needed for the reasonable food and ceremonial needs of the Musqueam Indians. Rather the test involves asking whether either the purpose or the effect of the restriction on net length unnecessarily infringes the interests protected by the fishing right. If, for example, the Musqueam were forced to spend undue time and money per fish caught or if the net length reduction resulted in a hardship to the Musqueam in catching fish, then the first branch of the s. 35(1) analysis would be met.

71 If a prima facie interference is found, the analysis moves to the issue of justification. This is the test that addresses the question of what constitutes legitimate regulation of a constitutional aboriginal right. The justification analysis would proceed as follows. First, is there a valid legislative objective? Here the court would inquire into whether the objective of Parliament in authorizing the department to enact regulations regarding fisheries is valid. The objective of the department in setting out the particular regulations would also be scrutinized. An objective aimed at preserving s. 35(1) rights by conserving and managing a natural resource, for example, would be valid. Also valid would be objectives purporting to prevent the exercise of s. 35(1) rights that would cause harm to the general populace or to aboriginal peoples themselves, or other objectives found to be compelling and substantial.

72 The Court of Appeal below held, at p. 331, that regulations could be valid if reasonably justified as "necessary for the proper management and conservation of the resource *or in the public interest*" (emphasis added). We find the "public interest" justification to be so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights.

73 The justification of conservation and resource management, on the other hand, is surely uncontroversial. In *Kruger v. R.*, [1978] 1 S.C.R. 104, [1977] 4 W.W.R. 300, 34 C.C.C. (2d) 377, 75 D.L.R. (3d) 434, 14 N.R. 495 [B.C.], the applicability of the B.C. Wildlife Act, S.B.C. 1966, c. 55, to the appellant members of the Penticton Indian band was considered by this court. In discussing that Act, the following was said about the objective of conservation (at p. 112):

> Game conservation laws have as their policy the maintenance of wildlife resources. It might be argued that without some conservation measures the ability of Indians or others to hunt for food would become a moot issue in consequence of the

> destruction of the resource. The presumption is for the validity of a legislative enactment and in this case the presumption has to mean that in the absence of evidence to the contrary the measures taken by the British Columbia Legislature were taken to maintain an effective resource in the Province for its citizens and not to oppose the interests of conservationists and Indians in such a way as to favour the claims of the former ...

74 While the "presumption" of validity is now outdated in view of the constitutional status of the aboriginal rights at stake, it is clear that the value of conservation purposes for government legislation and action has long been recognized. Further, the conservation and management of our resources is consistent with aboriginal beliefs and practices, and, indeed, with the enhancement of aboriginal rights.

75 If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue. Here, we refer back to the guiding interpretive principle derived from *Taylor* and *Guerin*, supra. That is, the honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.

76 The problem that arises in assessing the legislation in light of its objective and the responsibility of the Crown is that the pursuit of conservation in a heavily used modern fishery inevitably blurs with the efficient allocation and management of this scarce and valued resource. The nature of the constitutional protection afforded by s. 35(1) in this context demands that there be a link between the question of justification and the allocation of priorities in the fishery. The constitutional recognition and affirmation of aboriginal rights may give rise to conflict with the interests of others, given the limited nature of the resource. There is a clear need for guidelines that will resolve the allocational problems that arise regarding the fisheries. We refer to the reasons of Dickson J. in *Jack v. R.*, supra, for such guidelines.

77 In *Jack*, the appellants' defence to a charge of fishing for salmon in certain rivers during a prohibited period was based on the alleged constitutional incapacity of Parliament to legislate such as to deny the Indians their right to fish for food. They argued that art. 13 of the British Columbia Terms of Union imposed a constitutional limitation on the federal power to regulate. While we recognize that the finding that such a limitation had been imposed was not adopted by the majority of this court, we point out that this case concerns a different constitutional promise that asks this court to give a meaningful interpretation to recognition and affirmation. That task requires equally meaningful guidelines responsive to the constitutional priority accorded aboriginal rights. We therefore repeat the following passage from *Jack*, at p. 313:

> Conservation is a valid legislative concern. The appellants concede as much. Their concern is in the allocation of the resource after reasonable and necessary conservation measures have been recognized and given effect to. They do not claim the right to pursue the last living salmon until it is caught. Their position, as I understand it, is one which would give effect to an order of priorities of this nature: (i) conservation; (ii) Indian fishing; (ii) non-Indian commercial fishing; or (iv) non-Indian sports fishing; the burden of conservation measures should not fall primarily upon the Indian fishery.
>
> I agree with the general tenor of this argument ... With respect to whatever salmon are to be caught, then priority ought to be given to the Indian fishermen, subject to the practical difficulties occasioned by international waters and the movement of the fish themselves. But any limitation upon Indian fishing that is established for a valid conservation purpose overrides the protection afforded the Indian fishery by art. 13, just as such conservation measures override other taking of fish.

78 The constitutional nature of the Musqueam food fishing rights means that any allocation of priorities after valid conservation measures have been implemented must give top priority to Indian food fishing. If the objective pertained to conservation, the conservation plan would be scrutinized to assess priorities. While the detailed allocation of maritime resources is a task that must be left to those having expertise in the area, the Indians' food requirements must be met first when that allocation is established. The significance of giving the aboriginal right to fish for food top priority can be described as follows. If, in a given year, conservation needs required a reduction in the number of fish to be caught such that the number equalled the number required for food by the Indians, then all the fish available after conservation would go to the Indians according to the constitutional nature of their fishing right. If, more realistically, there were still fish after the Indian food requirements were met, then the brunt of conservation measures would be borne by the practices of sport fishing and commercial fishing.

79 The decision of the Nova Scotia Court of Appeal in *R. v. Denny*, 5th March 1990 (not yet reported), addresses the constitutionality of the Nova Scotia Micmac Indians' right to fish in the waters of Indian Brook and the Afton River, and does so in a way that accords with our understanding of the constitutional nature of aboriginal rights and the link between allocation and justification required for government regulation of the exercise of the rights. Clarke C.J.N.S., for a unanimous court, found that the Nova Scotia Fishery Regulations enacted pursuant to the federal FisheriesAct were in part inconsistent with the constitutional rights of the appellant Micmac Indians. Section 35(1) of the Constitution Act, 1982, provided the appellants with the right to a top priority allocation of any surplus of the fisheries resource which might exist after the needs of conservation had been taken into account. With respect to the issue of the Indians' priority to a food fishery, Clarke C.J.N.S. noted that the official policy of the federal government recognizes that priority. He added the following, at pp. 22-23:

> I have no hesitation in concluding that factual as well as legislative and policy recognition must be given to the existence of an Indian food fishery in the waters of Indian Brook, adjacent to the Eskasoni Reserve, and the waters of the Afton River after the needs of conservation have been taken into account ...
>
> To afford user groups such as sports fishermen (anglers) a priority to fish over the legitimate food needs of the appellants and their families is simply not appropriate action on the part of the Federal government. It is inconsistent with the fact that the appellants have for many years, and continue to possess an aboriginal right to fish for food. The appellants have, to employ the words of their counsel, a "right to share in the available resource". This constitutional entitlement is second only to conservation measures that may be undertaken by federal legislation.

Further, Clarke C.J.N.S. found that s. 35(1) provided the constitutional recognition of the aboriginal priority with respect to the fishery, and that the regulations, in failing to guarantee that priority, were in violation of the constitutional provision. He said the following, at p. 25:

> Though it is crucial to appreciate that the rights afforded to the appellants by s. 35(1) are not absolute, the impugned regulatory scheme fails to recognize that this section provides the appellants with a priority of allocation and access to any surplus of the fisheries resource once the needs of conservation have been taken into account. Section 35(1), as applied to these appeals, provides the appellants with an entitlement to fish in the waters in issue to satisfy their food needs, where a surplus exists. To the extent that the regulatory scheme fails to recognize this, it is inconsistent with the Constitution. Section 52 mandates a finding that such regulations are of no force and effect.

80 In light of this approach, the argument that the cases of R. v.Hare, supra, and R. v. Eninew; R. v. Bear12 C.C.C. (3d) 365[1984] 2 C.N.L.R. 12611 C.R.R. 18910 D.L.R. (4th) 13732 Sask. R. 237(C.A.), stand for the proposition that s. 35(1) provides no basis for restricting the power to regulate must be rejected, as was done by the Court of Appeal below. In *Hare*, which addressed the issue of whether the Ontario Fishery Regulations, C.R.C. 1978, c. 849, applied to members of an Indian band entitled to the benefit of the Manitoulin Island Treaty which granted certain rights with respect to taking fish, Thorson J.A. emphasized the need for priority to be given to measures directed to the management and conservation of fish stocks with the following observation (at p. 17):

> Since 1867 and subject to the limitations thereon imposed by the Constitution, which of course now includes s. 35 of the *Constitution Act, 1982*, the constitutional authority and responsibility to make laws in relation to the fisheries has rested with Parliament. Central to Parliament's responsibility has been, and continues to be, the need to provide for the proper management and conservation of our fish stocks, and the need to ensure that they are not depleted or imperilled by deleterious practices or methods of fishing.
>
> The prohibitions found in ss. 12 and 20 of the Ontario regulations clearly serve this purpose. Accordingly it need not be ignored by our courts that while these prohibitions place limits on the rights of all persons, they are there to serve the larger interest which all persons share in the proper management and conservation of these important resources.

In *Eninew*, Hall J.A. found, at p. 368, that "the treaty rights can be limited by such regulations as are reasonable". As we have pointed out, management and conservation of resources is indeed an important and valid legislative objective. Yet, the fact that

the objective is of a "reasonable" nature cannot suffice as constitutional recognition and affirmation of aboriginal rights. Rather, the regulations enforced pursuant to a conservation or management objective may be scrutinized according to the justificatory standard outlined above.

81 We acknowledge the fact that the justificatory standard to be met may place a heavy burden on the Crown. However, government policy with respect to the British Columbia fishery, regardless of s. 35(1), already dictates that, in allocating the right to take fish, Indian food fishing is to be given priority over the interests of other user groups. The constitutional entitlement embodied in s. 35(1) requires the Crown to ensure that its regulations are in keeping with that allocation of priority. The objective of this requirement is not to undermine Parliament's ability and responsibility with respect to creating and administering overall conservation and management plans regarding the salmon fishery. The objective is rather to guarantee that those plans treat aboriginal peoples in a way ensuring that their rights are taken seriously.

82 Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented. The aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries.

83 We would not wish to set out an exhaustive list of the factors to be considered in the assessment of justification. Suffice it to say that recognition and affirmation requires sensitivity to and respect for the rights of aboriginal peoples on behalf of the government, courts and, indeed, all Canadians.

Application To This Case — Is The Net Length Restriction Valid?

84 The Court of Appeal below found that there was not sufficient evidence in this case to proceed with an analysis of s. 35(1) with respect to the right to fish for food. In reviewing the competing expert evidence, and recognizing that fish stock management is an uncertain science, it decided that the issues at stake in this appeal were not well adapted to being resolved at the appellate court level.

85 Before the trial, defence counsel advised the Crown of the intended aboriginal rights defence and that the defence would take the position that the Crown was required to prove, as part of its case, that the net length restriction was justifiable as a necessary and reasonable conservation measure. The trial judge found s. 35(1) to be inapplicable to the appellant's defence, based on his finding that no aboriginal right had been established. He therefore found it inappropriate to make findings of fact with respect to either an infringement of the aboriginal right to fish or the justification of such an infringement. He did, however, find that the evidence called by the appellant:

> Casts some doubt as to whether the restriction was necessary as a conservation measure. More particularly, it suggests that there were more appropriate measures that could have been taken if necessary; measures that would not impose such a hardship on the Indians fishing for food. That case was not fully met by the Crown.

86 According to the Court of Appeal, the findings of fact were insufficient to lead to an acquittal. There was no more evidence before this court. We also would order a re-trial which would allow findings of fact according to the tests set out in these reasons.

87 The appellant would bear the burden of showing that the net length restriction constituted a prima facie infringement of the collective aboriginal right to fish for food. If an infringement were found, the onus would shift to the Crown which would have to demonstrate that the regulation is justifiable. To that end, the Crown would have to show that there is no underlying unconstitutional objective such as shifting more of the resource to a user group that ranks below the Musqueam. Further, it would have to show that the regulation sought to be imposed is required to accomplish the needed limitation. In trying to show that the restriction is necessary in the circumstances of the Fraser River fishery, the Crown could use facts pertaining to fishing by other Fraser River Indians.

88 In conclusion, we would dismiss the appeal and the cross-appeal and affirm the Court of Appeal's setting aside of the conviction. We would accordingly affirm the order for a new trial on the questions of infringement and whether any infringement is nonetheless consistent with s. 35(1), in accordance with the interpretation set out here.

89 For the reasons given above, the constitutional question must be answered as follows:

90 *Question:* Is the net length restriction contained in the Musqueam Indian Band Indian Food Fishing Licence dated 30th March 1984, issued pursuant to the British Columbia Fishery (General) Regulations and the Fisheries Act, R.S.C. 1970, c. F-14, inconsistent with s. 35(1) of theConstitution Act, 1982?

91 *Answer:* This question will have to be sent back to trial to be answered according to the analysis set out in these reasons.

Appeal and cross-appeal dismissed; new trial ordered.

Footnotes

* McIntyre J. took no part in the judgment.

4.

R v Howell 2020 ABQB 385 2020 Carswell ALTA 1176

2020 ABQB 385
Alberta Court of Queen's Bench

R v. Howell

2020 CarswellAlta 1176, 2020 ABQB 385, [2020] A.W.L.D. 3341, [2020] A.W.L.D. 3342, [2020] A.W.L.D. 3344, [2020] A.W.L.D. 3360, 167 W.C.B. (2d) 99, 18 Alta. L.R. (7th) 307, 463 C.R.R. (2d) 282

Her Majesty the Queen in Right of Canada (Respondent) and Shaun Howell (Applicant)

Robert A. Graesser J.

Heard: October 21-25, 2019; February 3-5, 2020
Judgment: June 26, 2020
Docket: Red Deer 170341762Q1

Counsel: Paul Lewin, Jack Lloyd, for Applicant
Barbara Mercier, Levi Camack, for Respondent

Subject: Constitutional; Criminal; Evidence; Human Rights

Related Abridgment Classifications

Criminal law
IV Charter of Rights and Freedoms
IV.12 Life, liberty and security of person [s. 7]
IV.12.c Principles of fundamental justice
IV.12.c.vii Miscellaneous
Criminal law
IV Charter of Rights and Freedoms
IV.30 Charter remedies [s. 24]
IV.30.b Stay of proceedings
Criminal law
IV Charter of Rights and Freedoms
IV.30 Charter remedies [s. 24]
IV.30.d Declaration of invalidity
Evidence
XIII Opinion
XIII.2 Experts
XIII.2.b Admissibility
XIII.2.b.iii Miscellaneous

Headnote

Criminal law --- Charter of Rights and Freedoms — Life, liberty and security of person [s. 7] — Principles of fundamental justice — Miscellaneous

Accused owned and operated marihuana production facility — Accused acknowledged that he was growing marihuana for use and consumption by people for whom he did not have permits under s. 56 of Controlled Drugs and Substances Act (CDSA) and Access to Cannabis for Medical Purposes Regulations (ACMPR), latter which had been repealed — Accused was charged with unlawful possession of cannabis marihuana in amount exceeding three kilograms for purpose of trafficking, as well as unlawfully producing cannabis marihuana — Accused brought application under s. 52(1) of Canadian Charter of Rights and Freedoms for declaration of invalidity of provisions of CDSA and ACMPR; accused brought application for stay of proceedings under s. 24 of Charter on basis of violations of s. 7 of Charter — Application for declaration of invalidity granted in part; application for stay dismissed — It was found that ACMPRs violated s. 7 of Charter in relating to prohibition on concentrations

of THC in cannabis oil and extracts above 30 mg/mL, and in manner of distribution of medical cannabis by licensed producers (LPs) — What ACMPR restricted was where medical marihuana could be mailed or shipped by LP and how it was to be handled by designated grower — If objective of ACMPR was to provide reasonable but safe access to medical marihuana, there did not appear to be any reasonable justification for limitation on THC concentration in oil and extracts — Accused was entitled to grow and possess marihuana for his personal medical needs, however, it was not found that violations of s. 7 of Charter were engaged in relation to his alleged role in trafficking marihuana — Liberty and security of person were impacted by limitation on THC concentration but fact that some doctors were reluctant to prescribe cannabis had nothing to do with ACMPR, because procedures set up by private LPs were not within control of federal Crown and were essentially outside ACMPR.

Criminal law --- Charter of Rights and Freedoms — Charter remedies [s. 24] — Declaration of invalidity

Accused owned and operated marihuana production facility — Accused acknowledged that he was growing marihuana for use and consumption by people for whom he did not have permits under s. 56 of Controlled Drugs and Substances Act (CDSA) and Access to Cannabis for Medical Purposes Regulations (ACMPR), latter which had been repealed — Accused was charged with unlawful possession of cannabis marihuana in amount exceeding three kilograms for purpose of trafficking, as well as unlawfully producing cannabis marihuana — Accused brought application under s. 52(1) of Canadian Charter of Rights and Freedoms for declaration of invalidity of provisions of CDSA and ACMPR; accused brought application for stay of proceedings under s. 24 of Charter on basis of violations of s. 7 of Charter — Application for declaration of invalidity granted in part; application for stay dismissed — Although ACMPRs were no longer in force, declaratory relief under s. 52(1) of Constitution Act, 1982 was granted — Specific provisions in ACMPRs that were found to be invalid under s. 7 of Charter were no longer of any force or effect, particularly in any ongoing prosecutions — Striking offending provisions of ACMPRs would be effective in addressing breaches of s. 7 of Charter — CDSA and balance of regulations otherwise remained constitutionally valid for those prosecutions that had yet to be concluded.

Evidence --- Opinion — Experts — Admissibility — Miscellaneous

Accused owned and operated marihuana production facility — Accused acknowledged that he was growing marihuana for use and consumption by people for whom he did not have permits under s. 56 of Controlled Drugs and Substances Act (CDSA) and Access to Cannabis for Medical Purposes Regulations (ACMPR), latter which had been repealed — Accused was charged with unlawful possession of cannabis marihuana in amount exceeding three kilograms for purpose of trafficking, as well as unlawfully producing cannabis marihuana — Several experts testified on behalf of defence — Accused brought application under s. 24 of Canadian Charter of Rights and Freedoms for declaration of invalidity of provisions of CDSA and ACMPR, and for stay of proceedings on basis of violations of s. 7 of Charter — Crown brought application to strike all or portions of affidavits of two experts — Application granted in part — It was clear that expert 1's long participation in medical cannabis industry, and as expert in development of medical cannabis regulation in Canada and internationally, meant that he was interested in outcome of this litigation — Many of expert 1's opinions were based on personal observation and experience, which related to his qualified experience, and it was found that his evidence ought not to be entirely excluded based on perceived bias or partiality in relation to his background as advocate for cannabis users and industry — In conclusion, it was found that portions of affidavit Crown sought to excise, on basis that they were based on hearsay and were beyond scope of expertise of expert 1, ought not be struck — Expert 2's evidence should be given limited weight only in relation to seizures, panic attacks, and anxiety in adults and pediatric patients, and her opinions on access to medical marihuana through LPs should be limited to her experiences in Toronto and Ontario — Defence experts were not found to have strayed too far into advocacy to discount their evidence, however, their opinions evidence, as to whether various regulations met constitutional requirements, was not found to be helpful or appropriate.

Criminal law --- Charter of Rights and Freedoms — Charter remedies [s. 24] — Stay of proceedings

Accused owned and operated marihuana production facility — Accused acknowledged that he was growing marihuana for use and consumption by people for whom he did not have permits under s. 56 of Controlled Drugs and Substances Act (CDSA) and Access to Cannabis for Medical Purposes Regulations (ACMPR), latter which had been repealed — Accused was charged with unlawful possession of cannabis marihuana in amount exceeding three kilograms for purpose of trafficking, as well as unlawfully producing cannabis marihuana — Accused brought application for stay of proceedings pursuant to s. 24 of Canadian Charter Rights and Freedoms on basis of violations of s. 7 of Charter — Application dismissed — Remedy of stay of proceedings was declined, because public interest in having this matter adjudicated on its merits outweighed benefits of stay of proceedings in this action — In this case, accused operated entirely outside ACMPRs, as he had no licensing himself, although he could

likely have obtained medical authorization to use marihuana and he could likely have obtained authorization to grow his own marihuana and become designated grower — Accused appeared to have taken medical history of his patients and determined need himself but he was not doctor or health professional.

Table of Authorities

Cases considered by *Robert A. Graesser J.*:

ANC Timber Ltd. v. Alberta (Minister of Agriculture and Forestry) (2019), 2019 ABQB 653, 2019 CarswellAlta 1749, 5 Alta. L.R. (7th) 102 (Alta. Q.B.) — referred to

Allard v. Canada (2016), 2016 FC 236, 2016 CF 236, 2016 CarswellNat 458, 2016 CarswellNat 459, 394 D.L.R. (4th) 694, [2016] 3 F.C.R. 303, 349 C.R.R. (2d) 86 (F.C.) — considered

Ares v. Venner (1970), [1970] S.C.R. 608, 12 C.R.N.S. 349, 73 W.W.R. 347, 14 D.L.R. (3d) 4, 1970 CarswellAlta 80, 1970 CarswellAlta 142 (S.C.C.) — considered

Astrazeneca Canada Inc. v. Canada (Minister of Health) (2006), 2006 SCC 49, 2006 CarswellNat 3436, 2006 CarswellNat 3437, 52 C.P.R. (4th) 145, 272 D.L.R. (4th) 577, 354 N.R. 88, [2006] 2 S.C.R. 560 (S.C.C.) — referred to

B. (R.) v. Children's Aid Society of Metropolitan Toronto (1995), 9 R.F.L. (4th) 157, 21 O.R. (3d) 479 (note), 122 D.L.R. (4th) 1, [1995] 1 S.C.R. 315, 26 C.R.R. (2d) 202, (sub nom. *Sheena B., Re)* 176 N.R. 161, (sub nom. *Sheena B., Re)* 78 O.A.C. 1, 1995 CarswellOnt 105, 1995 CarswellOnt 515 (S.C.C.) — referred to

Bedford v. Canada (Attorney General) (2013), 2013 SCC 72, 2013 CarswellOnt 17681, 2013 CarswellOnt 17682, 303 C.C.C. (3d) 146, 366 D.L.R. (4th) 237, 7 C.R. (7th) 1, 312 O.A.C. 53, 452 N.R. 1, (sub nom. *Canada (Attorney General) v. Bedford)* [2013] 3 S.C.R. 1101, (sub nom. *Canada (Attorney General) v. Bedford)* 297 C.R.R. (2d) 334, 128 O.R. (3d) 385 (note) (S.C.C.) — referred to

Bilodeau v. Manitoba (Attorney General) (1986), [1986] 1 S.C.R. 449, 42 Man. R. (2d) 242, [1986] 3 W.W.R. 673, 67 N.R. 108, 27 D.L.R. (4th) 39, 1986 CarswellMan 312, 1986 CarswellMan 402, (sub nom. *R. v. Bilodeau)* 25 C.C.C. (3d) 289 (S.C.C.) — referred to

Carter v. Canada (Attorney General) (2015), 2015 SCC 5, 2015 CSC 5, 2015 CarswellBC 227, 2015 CarswellBC 228, 66 B.C.L.R. (5th) 215, [2015] 3 W.W.R. 425, 17 C.R. (7th) 1, 320 C.C.C. (3d) 1, 468 N.R. 1, 384 D.L.R. (4th) 14, 366 B.C.A.C. 1, 629 W.A.C. 1, [2015] 1 S.C.R. 331, 327 C.R.R. (2d) 334 (S.C.C.) — referred to

Corbiere v. Canada (Minister of Indian & Northern Affairs) (1999), 239 N.R. 1, 1999 CarswellNat 663, 1999 CarswellNat 664, (sub nom. *Corbière v. Canada (Minister of Indian & Northern Affairs))* 173 D.L.R. (4th) 1, (sub nom. *Canada (Minister of Indian & Northern Affairs) v. Corbiere)* 61 C.R.R. (2d) 189, [1999] 3 C.N.L.R. 19, [1999] 2 S.C.R. 203, 163 F.T.R. 284 (note) (S.C.C.) — referred to

Doucet-Boudreau v. Nova Scotia (Department of Education) (2003), 2003 SCC 62, 2003 CarswellNS 375, 2003 CarswellNS 376, (sub nom. *Doucet-Boudreau v. Nova Scotia (Minister of Education))* 232 D.L.R. (4th) 577, 312 N.R. 1, 218 N.S.R. (2d) 311, 687 A.P.R. 311, (sub nom. *Doucet-Boudreau v. Nova Scotia (Minister of Education))* [2003] 3 S.C.R. 3, 112 C.R.R. (2d) 202, 45 C.P.C. (5th) 1 (S.C.C.) — referred to

Francis v. Baker (1999), 1999 CarswellOnt 2734, 1999 CarswellOnt 2948, 44 O.R. (3d) 736 (headnote only), 177 D.L.R. (4th) 1, 246 N.R. 45, 50 R.F.L. (4th) 228, 125 O.A.C. 201, [1999] 3 S.C.R. 250 (S.C.C.) — referred to

Gosselin c. Québec (Procureur général) (2002), 2002 SCC 84, 2002 CarswellQue 2706, 2002 CarswellQue 2707, (sub nom. *Gosselin v. Québec (Procureur général))* 298 N.R. 1, (sub nom. *Gosselin v. Quebec (Attorney General))* 221 D.L.R. (4th) 257, (sub nom. *Gosselin v. Quebec (Attorney General))* 100 C.R.R. (2d) 1, (sub nom. *Gosselin v. Quebec (Attorney General))* 44 C.H.R.R. D/363, (sub nom. *Gosselin v. Quebec (Attorney General))* [2002] 4 S.C.R. 429, 2002 CSC 84 (S.C.C.) — considered

Hitzig v. R. (2003), 2003 CarswellOnt 3795, (sub nom. *Hitzig v. Canada)* 177 C.C.C. (3d) 449, (sub nom. *Hitzig v. Canada)* 231 D.L.R. (4th) 104, 14 C.R. (6th) 1, (sub nom. *Hitzig v. Canada)* 177 O.A.C. 321, (sub nom. *Hitzig v. Canada)* 111 C.R.R. (2d) 201 (Ont. C.A.) — considered

M. v. H. (1999), 171 D.L.R. (4th) 577, (sub nom. *M. v. H.)* 238 N.R. 179, 1999 CarswellOnt 1348, 1999 CarswellOnt 1349, (sub nom. *M. v. H.)* 62 C.R.R. (2d) 1, (sub nom. *M. v. H.)* 121 O.A.C. 1, 46 R.F.L. (4th) 32, (sub nom. *Attorney General for Ontario v. M. & H.)* 1999 C.E.B. & P.G.R. 8354 (headnote only), (sub nom. *M. v. H.)* [1999] 2 S.C.R. 3, 7 B.H.R.C. 489, 43 O.R. (3d) 254 (note) (S.C.C.) — referred to

Malette v. Shulman (1990), 2 C.C.L.T. (2d) 1, 72 O.R. (2d) 417, 67 D.L.R. (4th) 321, 37 O.A.C. 281, 1990 CarswellOnt 642, [1991] 2 Med. L.R. 162 (Ont. C.A.) — referred to

Manitoba (Director of Child & Family Services) v. C. (A.) (2009), 2009 SCC 30, 2009 CarswellMan 293, 2009 CarswellMan 294, [2009] 7 W.W.R. 379, 65 R.F.L. (6th) 239, 66 C.C.L.T. (3d) 1, (sub nom. *Director of Child & Family Services v. C. (A.))* 390 N.R. 1, 240 Man. R. (2d) 177, 456 W.A.C. 177, 309 D.L.R. (4th) 581, [2009] 2 S.C.R. 181, (sub nom. *C. (A.) v. Manitoba (Director of Child & Family Services))* 191 C.R.R. (2d) 300 (S.C.C.) — referred to

Mazur v. Lucas (2010), 2010 BCCA 473, 2010 CarswellBC 2878, 93 C.P.C. (6th) 1, 10 B.C.L.R. (5th) 253, [2011] 2 W.W.R. 1, 325 D.L.R. (4th) 385, 300 B.C.A.C. 276, 509 W.A.C. 276 (B.C. C.A.) — referred to

PHS Community Services Society v. Canada (Attorney General) (2011), 2011 SCC 44, 2011 CarswellBC 2443, 2011 CarswellBC 2444, 336 D.L.R. (4th) 385, 272 C.C.C. (3d) 428, 86 C.R. (6th) 223, 22 B.C.L.R. (5th) 213, [2011] 12 W.W.R. 43, 421 N.R. 1, (sub nom. *Canada (Attorney General) v. PHS Community Services Society)* [2011] 3 S.C.R. 134, 310 B.C.A.C. 1, 526 W.A.C. 1, (sub nom. *Canada (Attorney General) v. PHS Community Services Society)* 244 C.R.R. (2d) 209 (S.C.C.) — considered

R v. McPhail (2019), 2019 ABCA 427, 2019 CarswellAlta 2366 (Alta. C.A.) — referred to

R. c. Demers (2004), 2004 SCC 46, 2004 CarswellQue 1547, 2004 CarswellQue 1548, 20 C.R. (6th) 241, (sub nom. *R. v. Demers)* 185 C.C.C. (3d) 257, (sub nom. *R. v. Demers)* 240 D.L.R. (4th) 629, (sub nom. *R. v. Demers)* 323 N.R. 201, 120 C.R.R. (2d) 327, [2004] 2 S.C.R. 489 (S.C.C.) — considered

R. v. Abbey (2009), 2009 ONCA 624, 2009 CarswellOnt 5008, 246 C.C.C. (3d) 301, 68 C.R. (6th) 201, 97 O.R. (3d) 330, 254 O.A.C. 9 (Ont. C.A.) — referred to

R. v. Appulonappa (2015), 2015 SCC 59, 2015 CarswellBC 3427, 2015 CarswellBC 3428, 390 D.L.R. (4th) 425, 35 Imm. L.R. (4th) 171, 24 C.R. (7th) 385, 478 N.R. 3, 379 B.C.A.C. 3, 654 W.A.C. 3, [2015] 3 S.C.R. 754, 332 C.C.C. (3d) 1, 345 C.R.R. (2d) 74 (S.C.C.) — referred to

R. v. B. (S.A.) (2003), 2003 SCC 60, 2003 CarswellAlta 1525, 2003 CarswellAlta 1526, 14 C.R. (6th) 205, 178 C.C.C. (3d) 193, 231 D.L.R. (4th) 602, 311 N.R. 1, [2004] 2 W.W.R. 199, 21 Alta. L.R. (4th) 207, 339 A.R. 1, 312 W.A.C. 1, [2003] 2 S.C.R. 678, 112 C.R.R. (2d) 155 (S.C.C.) — referred to

R. v. Beren (2009), 2009 BCSC 429, 2009 CarswellBC 794, 192 C.R.R. (2d) 79 (B.C. S.C.) — considered

R. v. Big M Drug Mart Ltd. (1985), [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321, 58 N.R. 81, [1985] 3 W.W.R. 481, 37 Alta. L.R. (2d) 97, 60 A.R. 161, 18 C.C.C. (3d) 385, 85 C.L.L.C. 14,023, 13 C.R.R. 64, 1985 CarswellAlta 316, 1985 CarswellAlta 609 (S.C.C.) — referred to

R. v. Bingley (2017), 2017 SCC 12, 2017 CSC 12, 2017 CarswellOnt 2406, 2017 CarswellOnt 2407, 4 M.V.R. (7th) 1, 35 C.R. (7th) 1, 345 C.C.C. (3d) 306, 407 D.L.R. (4th) 383, [2017] 1 S.C.R. 170, 146 O.R. (3d) 704 (note) (S.C.C.) — referred to

R. v. Boehme (2016), 2016 BCSC 2014, 2016 CarswellBC 3048, 33 C.R. (7th) 431, 346 C.C.C. (3d) 406 (B.C. S.C.) — referred to

R. v. Caesar (2016), 2016 ONCA 599, 2016 CarswellOnt 12068, 339 C.C.C. (3d) 354, 350 O.A.C. 352 (Ont. C.A.) — referred to

R. v. Clay (2000), 2000 CarswellOnt 2626, 188 D.L.R. (4th) 468, 146 C.C.C. (3d) 276, 49 O.R. (3d) 577, 75 C.R.R. (2d) 310, 37 C.R. (5th) 170, 135 O.A.C. 66 (Ont. C.A.) — considered

R. v. Clay (2003), 2003 SCC 75, 2003 CarswellOnt 5179, 2003 CarswellOnt 5180, 16 C.R. (6th) 117, 179 C.C.C. (3d) 540, 233 D.L.R. (4th) 541, 313 N.R. 252, 181 O.A.C. 350, 114 C.R.R. (2d) 137, 70 O.R. (3d) 95 (note), [2003] 3 S.C.R. 735 (S.C.C.) — referred to

R. v. Dominic (2016), 2016 ABCA 114, 2016 CarswellAlta 690, 335 C.C.C. (3d) 178, 34 Alta. L.R. (6th) 219, 29 C.R. (7th) 219, 616 A.R. 356, 672 W.A.C. 356 (Alta. C.A.) — referred to

R. v. Ferguson (2008), 2008 SCC 6, 2008 CarswellAlta 228, 2008 CarswellAlta 229, 228 C.C.C. (3d) 385, 54 C.R. (6th) 197, 371 N.R. 231, 87 Alta. L.R. (4th) 203, [2008] 5 W.W.R. 387, 290 D.L.R. (4th) 17, 425 A.R. 79, 418 W.A.C. 79, [2008] 1 S.C.R. 96, 168 C.R.R. (2d) 34 (S.C.C.) — considered

R. v. Ferkul (2019), 2019 ONCJ 893, 2019 CarswellOnt 20531 (Ont. C.J.) — referred to

R. v. Hornby (2003), 2003 BCPC 60, 2003 CarswellBC 640 (B.C. Prov. Ct.) — referred to

R. v. Jacobs (2014), 2014 ABCA 172, 2014 CarswellAlta 828, 312 C.C.C. (3d) 45, 577 A.R. 3, 613 W.A.C. 3 (Alta. C.A.) — referred to

R. v. Krieger (2003), 2003 ABCA 85, 2003 CarswellAlta 351, 225 D.L.R. (4th) 183, 327 A.R. 88, 296 W.A.C. 88, 18 Alta. L.R. (4th) 227 (Alta. C.A.) — considered

R. v. Long (2007), 2007 ONCJ 340, 2007 CarswellOnt 4759, 226 C.C.C. (3d) 66, 159 C.R.R. (2d) 301, 88 O.R. (3d) 146 (Ont. C.J.) — considered

R. v. Malmo-Levine (2003), 2003 SCC 74, 2003 CarswellBC 3133, 2003 CarswellBC 3134, 16 C.R. (6th) 1, 179 C.C.C. (3d) 417, 233 D.L.R. (4th) 415, 314 N.R. 1, 23 B.C.L.R. (4th) 1, 191 B.C.A.C. 1, 314 W.A.C. 1, [2004] 4 W.W.R. 407, [2003] 3 S.C.R. 571, 114 C.R.R. (2d) 189 (S.C.C.) — referred to

R. v. Mernagh (2013), 2013 ONCA 67, 2013 CarswellOnt 885, 100 C.R. (6th) 120, 295 C.C.C. (3d) 431, 301 O.A.C. 333, 276 C.R.R. (2d) 59 (Ont. C.A.) — referred to

R. v. Mills (1986), [1986] 1 S.C.R. 863, *(*sub nom. *Mills v. R.)* 29 D.L.R. (4th) 161, *(*sub nom. *Mills v. R.)* 67 N.R. 241, 16 O.A.C. 81, *(*sub nom. *Mills v. R.)* 26 C.C.C. (3d) 481, 52 C.R. (3d) 1, *(*sub nom. *Mills v. R.)* 21 C.R.R. 76, *(*sub nom. *Mills v. R.)* 58 O.R. (2d) 544 (note), 1986 CarswellOnt 1716, 1986 CarswellOnt 116 (S.C.C.) — referred to

R. v. Mohan (1994), 29 C.R. (4th) 243, 71 O.A.C. 241, 166 N.R. 245, 89 C.C.C. (3d) 402, 114 D.L.R. (4th) 419, [1994] 2 S.C.R. 9, 18 O.R. (3d) 160 (note), 1994 CarswellOnt 66, 1994 CarswellOnt 1155 (S.C.C.) — referred to

R. v. Morgentaler (1988), [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385, 26 O.A.C. 1, 37 C.C.C. (3d) 449, 62 C.R. (3d) 1, 31 C.R.R. 1, 82 N.R. 1, 63 O.R. (2d) 281 (note), 1988 CarswellOnt 954, 1988 CarswellOnt 45 (S.C.C.) — referred to

R. v. Nasogaluak (2010), 2010 SCC 6, 2010 CarswellAlta 268, 2010 CarswellAlta 269, 90 M.V.R. (5th) 1, 251 C.C.C. (3d) 293, [2010] 4 W.W.R. 1, 72 C.R. (6th) 1, 469 A.R. 395 (note), 470 W.A.C. 395 (note), 315 D.L.R. (4th) 193, 19 Alta. L.R. (5th) 1, 398 N.R. 107, 474 A.R. 88, 479 W.A.C. 88, [2010] 1 S.C.R. 206, 206 C.R.R. 100 (S.C.C.) — considered

R. v. Nur (2015), 2015 SCC 15, 2015 CSC 15, 2015 CarswellOnt 5038, 2015 CarswellOnt 5039, 469 N.R. 1, 18 C.R. (7th) 227, 322 C.C.C. (3d) 149, 385 D.L.R. (4th) 1, 332 O.A.C. 208, [2015] 1 S.C.R. 773, 332 C.R.R. (2d) 128, 132 O.R. (3d) 719 (note), 134 O.R. (3d) 399 (S.C.C.) — referred to

R. v. Oakes (1986), [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, 65 N.R. 87, 14 O.A.C. 335, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1, 19 C.R.R. 308, 1986 CarswellOnt 95, 1986 CarswellOnt 1001, 53 O.R. (2d) 719 (note) (S.C.C.) — referred to

R. v. Parker (2000), 2000 CarswellOnt 2627, 188 D.L.R. (4th) 385, 146 C.C.C. (3d) 193, 49 O.R. (3d) 481, 75 C.R.R. (2d) 233, 37 C.R. (5th) 97, 135 O.A.C. 1 (Ont. C.A.) — considered

R. v. Sekhon (2014), 2014 SCC 15, 2014 CarswellBC 379, 2014 CarswellBC 380, 367 D.L.R. (4th) 601, 2014 CSC 15, 8 C.R. (7th) 223, 454 N.R. 41, 307 C.C.C. (3d) 464, 351 B.C.A.C. 1, 599 W.A.C. 1, [2014] 1 S.C.R. 272 (S.C.C.) — referred to

R. v. Smith (2012), 2012 BCSC 544, 2012 CarswellBC 1043, 257 C.R.R. (2d) 129, 290 C.C.C. (3d) 91 (B.C. S.C.) — referred to

R. v. Smith (2014), 2014 BCCA 322, 2014 CarswellBC 2383, 14 C.R. (7th) 81, 315 C.C.C. (3d) 36, 360 B.C.A.C. 66, 617 W.A.C. 66, 316 C.R.R. (2d) 205 (B.C. C.A.) — considered

R. v. Smith (2015), 2015 SCC 34, 2015 CSC 34, 2015 CarswellBC 1587, 2015 CarswellBC 1588, 20 C.R. (7th) 246, 472 N.R. 1, 386 D.L.R. (4th) 583, 323 C.C.C. (3d) 461, [2015] 10 W.W.R. 1, 74 B.C.L.R. (5th) 1, 372 B.C.A.C. 1, 640 W.A.C. 1, [2015] 2 S.C.R. 602, 337 C.R.R. (2d) 202 (S.C.C.) — considered

R. v. Spence (2005), 2005 SCC 71, 2005 CarswellOnt 6824, 2005 CarswellOnt 6825, 33 C.R. (6th) 1, 259 D.L.R. (4th) 474, 202 C.C.C. (3d) 1, 206 O.A.C. 150, 135 C.R.R. (2d) 318, [2005] 3 S.C.R. 458, 342 N.R. 126 (S.C.C.) — referred to

R. v. Tedder (2018), 2018 ONSC 6072, 2018 CarswellOnt 20496 (Ont. S.C.J.) — considered

R. v. Voss (2013), 2013 ABCA 38, 2013 CarswellAlta 149, 542 A.R. 202, 566 W.A.C. 202, 276 C.R.R. (2d) 340 (Alta. C.A.) — referred to

R. v. Wood (2006), 2006 NBCA 49, 2006 CarswellNB 346, 2006 CarswellNB 347, 39 C.R. (6th) 358, 210 C.C.C. (3d) 526, 301 N.B.R. (2d) 159, 783 A.P.R. 159 (N.B. C.A.) — referred to

Reference re s. 94(2) of Motor Vehicle Act (British Columbia) (1985), [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536, 63 N.R. 266, 69 B.C.L.R. 145, 23 C.C.C. (3d) 289, 18 C.R.R. 30, 36 M.V.R. 240, [1986] 1 W.W.R. 481, 48 C.R. (3d) 289, 1985 CarswellBC 398, [1986] D.L.Q. 90, 1985 CarswellBC 816 (S.C.C.) — referred to

Rodriguez v. British Columbia (Attorney General) (1993), 82 B.C.L.R. (2d) 273, 85 C.C.C. (3d) 15, 107 D.L.R. (4th) 342, [1993] 3 S.C.R. 519, 17 C.R.R. (2d) 193, 24 C.R. (4th) 281, 158 N.R. 1, 34 B.C.A.C. 1, 56 W.A.C. 1, [1993] 7 W.W.R. 641, 1993 CarswellBC 228, 1993 CarswellBC 1267 (S.C.C.) — considered

Schachter v. Canada (1992), 92 C.L.L.C. 14,036, 10 C.R.R. (2d) 1, 139 N.R. 1, 93 D.L.R. (4th) 1, 1992 CarswellNat 658, 1992 CarswellNat 1006, 53 F.T.R. 240 (note), [1992] 2 S.C.R. 679 (S.C.C.) — referred to

Sfetkopoulos v. Canada (Attorney General) (2008), 2008 FC 33, 2008 CarswellNat 24, 2008 CF 33, 2008 CarswellNat 376, 166 C.R.R. (2d) 86, 323 F.T.R. 146 (Eng.), [2008] 3 F.C.R. 399, 78 Admin. L.R. (4th) 171 (F.C.) — considered

Sfetkopoulos v. Canada (Attorney General) (2008), 2008 FCA 328, 2008 CarswellNat 3822, 382 N.R. 71, 2008 CAF 328, 2008 CarswellNat 5897 (F.C.A.) — referred to

UFCW, Local 401 v. Alberta (Information and Privacy Commissioner) (2013), 2013 SCC 62, 2013 CarswellAlta 2210, 2013 CarswellAlta 2211, D.T.E. 2013T-775, 365 D.L.R. (4th) 257, [2014] 2 W.W.R. 1, 60 Admin. L.R. (5th) 173, 88 Alta. L.R. (5th) 1, (sub nom. *Alberta (IPC) v. UFCW, Local 401)* 2014 C.L.L.C. 210-003, (sub nom. *United Food and Commercial Workers, Local 401 v. Privacy Commissioner (Alta.))* 451 N.R. 253, (sub nom. *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401)* [2013] 3 S.C.R. 733, (sub nom. *United Food and Commercial Workers, Local 401 v. Privacy Commissioner (Alta.))* 561 A.R. 359, (sub nom. *United Food and Commercial Workers, Local 401 v. Privacy Commissioner (Alta.))* 594 W.A.C. 359, 239 L.A.C. (4th) 317, (sub nom. *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, local 401)* 297 C.R.R. (2d) 71 (S.C.C.) — referred to

Vancouver (City) v. Weeds Glass and Gifts Ltd. (2020), 2020 BCCA 46, 2020 CarswellBC 225, 100 M.P.L.R. (5th) 15 (B.C. C.A.) — considered

Wakeford v. Canada (2000), 2000 CarswellOnt 1528, 187 D.L.R. (4th) 175, (sub nom. *R. v. Wakeford)* 74 C.R.R. (2d) 61, 106 O.T.C. 219 (Ont. S.C.J.) — referred to

Wakeford v. Canada (2002), 2002 CarswellOnt 66, 209 D.L.R. (4th) 124, 162 C.C.C. (3d) 51, 155 O.A.C. 78, 58 O.R. (3d) 65, 50 C.R. (5th) 385, (sub nom. *R. v. Wakeford)* 91 C.R.R. (2d) 213, [2002] O.T.C. 387 (Ont. C.A.) — referred to

Wakeford v. Canada (2002), 2002 CarswellOnt 3964, 2002 CarswellOnt 3965, 101 C.R.R. (2d) 372 (note), 305 N.R. 397 (note), 177 O.A.C. 399 (note), [2002] 4 S.C.R. vii (note) (S.C.C.) — referred to

White Burgess Langille Inman v. Abbott and Haliburton Co. (2015), 2015 SCC 23, 2015 CSC 23, 2015 CarswellNS 313, 2015 CarswellNS 314, 383 D.L.R. (4th) 429, 18 C.R. (7th) 308, (sub nom. *Abbott and Haliburton Co. v. WBLI Chartered Accountants)* 470 N.R. 324, 67 C.P.C. (7th) 73, (sub nom. *Abbott and Haliburton Co. v. WBLI Chartered Accountants)* 1135 A.P.R. 1, (sub nom. *Abbott and Haliburton Co. v. WBLI Chartered Accountants)* 360 N.S.R. (2d) 1, [2015] 2 S.C.R. 182 (S.C.C.) — referred to

Statutes considered:

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

Generally — referred to

s. 1 — considered

s. 7 — considered

s. 24(1) — considered

Cannabis Act, S.C. 2018, c. 16

Generally — referred to

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44

s. 52(1) — considered

Controlled Drugs and Substances Act, S.C. 1996, c. 19

Generally — referred to

s. 4 — considered

s. 5(2) — considered

s. 7(1) — considered

s. 56 — considered

Controlled Drugs and Substances Act, S.C. 1996, c. 19

s. 4 — considered

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

s. 95(2)(a) — considered

Food and Drugs Act, R.S.C. 1985, c. F-27

Generally — referred to

Regulations considered:

Controlled Drugs and Substances Act, S.C. 1996, c. 19

Access to Cannabis for Medical Purposes Regulations, SOR/2016-230

Generally — referred to

Pt. 1 — referred to

s. 67(1) — considered

s. 93(1)(d)(i) — considered

s. 130(1)(b) — considered

s. 133(2)(a) — considered

s. 189(1)(e) — considered

Cannabis Regulations, SOR/2018-144

Generally — referred to

Marihuana Medical Access Regulations, SOR/2001-227

Generally — referred to

s. 41(b.1) [en. SOR/2003-387] — considered

Marihuana for Medical Purposes Regulations, SOR/2013-119

Generally — referred to

Narcotic Control Regulations, C.R.C. 1978, c. 1041

Generally — referred to

APPLICATION by accused pursuant to s. 52(1) of *Canadian Charter of Rights and Freedoms* for declaration of invalidity of provisions of *Controlled Drugs and Substances Act* and *Access to Cannabis for Medical Purposes Regulations*; APPLICATION by accused for stay of proceedings pursuant to s. 24(1) of *Charter* on basis of violations of s. 7 of *Charter*; APPLICATION by Crown to strike all or portions of affidavits of two experts.

***Robert A. Graesser J.*:**

I. Introduction

1 Shaun Howell is charged with unlawfully possessing cannabis marihuana in an amount exceeding three kilograms for the purpose of trafficking, as well as unlawfully producing cannabis marihuana. The alleged offence date is March 24, 2017.

2 The charges arise out of a marihuana production facility owned and operated by Mr. Howell near Innisfail, Alberta. Mr. Howell acknowledges that he was growing marihuana for use and consumption by people for whom he did not have permits under the section 56 of the *Controlled Drugs and Substances Act*, SC 1996, c 19 (the "*CDSA*") and the *Access to Cannabis for Medical Purposes Regulations*, SOR 2016-230 (the "*ACMPR*"), since repealed.

3 Mr. Howell argues the *CDSA* and *ACMPR* are inconsistent with section 7 of the *Charter of Rights and Freedoms* (the "*Charter*"). Mr. Howell seeks a declaration that they are of no force and effect pursuant to section 52(1) of the *Charter*.

4 For the reasons that follow, I grant a declaration of invalidity for certain provisions of the *ACMPR*. However, for reasons that I go on to explain, that remedy is inapplicable to the *CDSA* trafficking charges that Mr. Howell faces, and the trial may proceed on those counts.

Procedural history

5 Mr. Howell filed a notice of Constitutional Challenge on April 18, 2019. That application was heard by me over the weeks of October 21, 2019 and February 3, 2020. A number of affidavits were filed in support of the application. The Defence objected to the admissibility of the affidavit (or some of it) of Todd Cain, the Crown expert, on the basis that it contained inadmissible hearsay as well as opinion evidence. The Crown objected to the affidavits of Eric Nash and Dr. Carolina Landolt on similar bases.

6 The application before me commenced with Mr. Howell's application to exclude Mr. Cain's affidavit and the Crown's application to exclude Mr. Nash's and Dr. Landolt's affidavits. I heard those applications and indicated that I would deal with the admissibility of some or all of Mr. Cain's affidavit evidence and Mr. Nash's and Dr. Landolt's affidavit evidence when I dealt with the main application, so that I would be relying only on the evidence I considered to be admissible on the main application. I would allow the affiants to be cross-examined during the application, and would rule on admissibility later.

7 The underlying facts for this application are generally not in dispute. I will deal with contested evidence where it is necessary for the purpose of these applications, but do not intend to deal with the evidence in any great detail. These applications turn mainly on the law.

8 In support of the Constitutional Challenge, Mr. Howell filed a number of affidavits. His own affidavit affirmed April 15, 2019 sets out most of the relevant facts and issues, as well as his own use of cannabis for medical purposes.

9 Lisa Kirkman affirmed an affidavit on April 15, 2019. Her affidavit describes herself and her son as "patients" of Mr. Howell, and outlines their medical issues, the failure of conventional medicine to help them, their use of medical marihuana, the difficulties they have encountered finding a reliable source both as to availability and cost, and the benefits they have received from cannabis extracts supplied to them by Mr. Howell.

10 Dr. David Rosenbloom's affidavit was sworn April 11, 2019. Dr. Rosenbloom is an expert in pharmacy and pharmacology, the effect of delayed access to drugs including medical cannabis, and the purchase of drugs.

11 An affidavit from Dr. Stephen Gaetz sworn June 21, 2019 was filed. Dr. Gaetz is an expert in "homelessness, precarious housing, matters related to homelessness and precarious housing, and services for those of modest means."

12 Sarah Wilkinson's affidavit affirmed June 25, 2019 describes her daughter's struggle with Ohtahara syndrome, the ineffectiveness of "traditional therapies," and the benefits her daughter has received from cannabis use. Ms. Wilkinson is Mr. Howell's partner. She also describes her health issues and the benefits she has received from Mr. Howell's products.

13 Dr. Jokubas Ziburkus swore an affidavit on April 11, 2019. He is an expert in "endocannabinoid system, endocannabinoids, phytocannabinoids, cannabis plants and products, and the pre-clinical research on medical cannabis." He filed a second affidavit sworn June 26, 2019.

14 An affidavit from Dr. Carolina Landolt sworn April 15 was also filed. Dr. Landolt is an expert in cannabis, medical cannabis patient access, and the management of chronic complex problems in both patient and out-patient settings.

15 Mr. Howell also filed an affidavit from Harrison Jordan sworn April 15, 2019. Mr. Jordan is a lawyer and says he has "personal knowledge of information related to Canadian licensed producers of medical cannabis, their pricing of cannabis as well changes to pricing and policies of these licensed producers over time." The thrust of his evidence is to outline problems with the legal medical cannabis system.

16 In response, the Crown filed an affidavit from Todd Cain, affirmed October 1, 2019. Mr. Cain is the Director General of the Licensing and Medical Access Directorate of the Controlled Substances and Cannabis Branch of Health Canada. Mr. Cain's affidavit describes Health Canada's regulatory framework. He reviewed all of Health Canada's records relating to Mr. Howell, and stated that Mr. Howell "was not authorized under Part 1 of the *ACMPR* to operate any type of commercial enterprise regarding cannabis." He also states that Mr. Howell:

> . . . has only ever been authorized to produce cannabis for medical purposes on behalf of one person. This authorization was valid from July 28, 2017 until January 26, 2018. He was not authorized to possess, cultivate, produce, sell, provide, ship, deliver, distribute or transport cannabis for any other individuals.

17 Mr. Cain also states that Mr. Howell's activities "were carried out completely outside the regulatory regime designed to protect patients and the Canadian public."

18 Before the application, it was agreed that questioning of Dr. Ziburkus, Dr. Landolt, Eric Nash and Mr. Cain would be done by way of video link. At the application itself, Mr. Howell testified in chief and was then cross-examined. The Crown did not cross-examine Ms. Kirkman, Ms. Wilkinson, Mr. Jordan, Dr. Rosenbloom, or Dr. Gaetz on their affidavits.

19 I requested written submissions from the parties and we re-convened in February 2020 for argument. I reserved decision.

II. Background and Evidence

20 The evidence on the application comes from a combination of affidavits, direct examination and cross-examination. Most of the affidavit evidence was not controversial. I will only deal with conflicts in the evidence when they are material to my analysis.

Legal Background

21 For the purposes of this decision, it is important to set out some of the legal background to access to medical marihuana in Canada.

22 The use of medical marihuana was essentially decriminalized in *R. v. Parker* (2000), 49 O.R. (3d) 481 (Ont. C.A.).

23 Before *Parker*, possession of marihuana for medical purposes was only permitted by way of a ministerial exemption granted under section 56 of the *CDSA*. The granting of an exemption was entirely within the discretion of the Minister. There was no lawful source of marihuana.

24 In *Parker*, the Ontario Court of Appeal held that the prohibition on possession of marihuana in section 4 of the *Controlled Drugs and Substances Act* was of no force and effect because the blanket prohibition violated section 7 of the *Charter*, and was not justifiable under section 1 of the *Charter*. The possibility of obtaining a ministerial exemption was not sufficient to save the

section. The Court of Appeal suspended the declaration of invalidity for a period of one year to give the Federal Government time to amend the legislations to provide for medically-approved use.

25 Mr. Parker suffered from epilepsy and experienced frequent life-threatening seizures. He was unable to control his seizures using conventional medication and found that his seizures were substantially reduced by smoking marihuana. Mr. Parker could not locate a lawful source of marihuana, so began growing his own.

26 The trial judge had read into section 4 of the *CDSA* a constitutional exemption for "persons possessing or cultivating marihuana for their personal medically approved use."

27 The Federal Government did not appeal the decision, and instead began work on medical marihuana regulations.

28 At the same time, the Ontario Court of Appeal confirmed the right of the Federal Government to regulate the recreational and non-medical use of marihuana in *R. v. Clay* (2000), 49 O.R. (3d) 577 (Ont. C.A.). That decision was affirmed by the Supreme Court of Canada at 2003 SCC 75 (S.C.C.), the companion case to *R. v. Malmo-Levine*, 2003 SCC 74 (S.C.C.). That decision confirmed that possession of marihuana for the purposes of trafficking under the *CDSA* did not infringe section 7 of the *Charter* and that prohibition of possession of marihuana for personal use was within the legislative competence of the Federal Government under its criminal law power.

29 The majority in the Supreme Court of Canada stated at paragraph 208:

> 208 The main objective of the impugned legislation here is protection from the possible adverse health consequences of marihuana use. The objective of the state in prohibiting marihuana has been summarized by Rosenberg J.A. in ***Clay***'s companion case ***R v. Parker***, (2000), 146 C.C.C. (3d) 193 (Ont. C.A.), at para. 143:
>
> > First, the state has an interest in protecting against the harmful effects of use of that drug. Those include bronchial pulmonary harm to humans; psychomotor impairment from marihuana use leading to a risk of automobile accidents and no simple screening device for detection; possible precipitation of relapse in persons with schizophrenia; possible negative effects on immune system; possible long-term negative cognitive effects in children whose mothers used marihuana while pregnant; possible long-term negative cognitive effects in long-term users; and some evidence that some heavy users may develop a dependency. The other objectives are: to satisfy Canada's international treaty obligations and to control the domestic and international trade in illicit drugs.

30 Following *Parker*, the Federal Government enacted the *Medical Marihuana Access Regulations*, SOR/2001/227 (the "*MMAR 2001*") under the *CDSA*. They were effective on July 30, 2001. The Federal Government's response to *Parker* and the beginning of regulation of medical marihuana in Canada is described in *Sfetkopoulos v. Canada (Attorney General)*, 2008 FC 33 (F.C.), aff'd 2008 FCA 328 (F.C.A.) and *Hitzig v. R.* (2003), 231 D.L.R. (4th) 104 (Ont. C.A.). The *MMAR 2001* created a licensing regime where people needing medical marihuana could apply for a licence or permit to grow and possess marihuana for medical use, and to designate a grower to grow approved quantities of marihuana for them. Designated growers were not permitted to charge for their services, and a designated grower could only be designated for one person.

31 In *Hitzig*, the Ontario Court of Appeal concluded that the *MMPR 2001* was not a constitutionally acceptable medical exemption to the criminal prohibition against possession of marihuana. A 6-month suspension of the declaration of invalidity had been granted. The Ontario Court of Appeal denied a stay pending appeal. After the Superior Court decision in early January 2003 and just before the case was to be argued in the Court of Appeal in July 2003, the Minister of Health passed an interim regulation making marihuana and seeds grown by a Government-approved supplier would be made available to individuals who had an Authorization to Possess ("ATP") or a ministerial exemption. This was intended to be a stop-gap measure to ensure that possession and trafficking in marihuana for non-medical purposes remained a criminal offence.

32 For the purposes of the *Hitzig* proceedings, the Federal Government conceded that "the criminal prohibition against the possession of marihuana will be constitutional only if it is accompanied by a medical exemption from that prohibition that is consistent with section 7 of the *Charter*" (at para 12). *Clay* and *Malmo-Levine* had not yet been released by the Supreme Court

of Canada. *Hitzig* was not a criminal prosecution but was rather an application for a declaration as to the validity of the *MMAR 2001* and section 4 of the *CDSA*.

33 The Ontario Court of Appeal struck down portions of the *MMAR 2001* on the bases of the onerous eligibility conditions for obtaining an ATP for those with medical needs; the difficulties in obtaining an ATP; that the regulations did not remove a real risk of criminal conviction for such individuals; and the Regulations did not go far enough to ensure a legal supply of medical marihuana to the holders of ATPs. All of these were found to represent significant barriers for those with medical needs. The Court of Appeal did not strike down section 4 of the *CDSA*.

34 The Court of Appeal commented on how medical marihuana users were finding marihuana at paragraphs 21-23:

> [21] The applicants all meet their medical marihuana needs through a combination of self-cultivation and purchase on the black market. They described the significant problems associated with both sources of supply. Some are too ill and are physically unable to grow their marihuana. Others do not have the facilities to grow their own. Still others are concerned about exposing themselves and family members to the risks inherent in producing a product for which there is a thriving black market. Production by designates is also not a viable alternative to many for a variety of reasons. The applicants described the many problems associated with the actual cultivation. Growing marihuana that is suitable for medicinal use is no easy task. It is time consuming and labour intensive. Crops can fail entirely or yield insufficient marihuana to supply the grower's medical needs.
>
> [22] The problems associated with the purchase of medicinal marihuana on the black market are numerous and, in most cases, obvious. As with any black market product, prices are artificially high. High prices cause real difficulty for seriously ill individuals, many of whom live on fixed incomes. Black market supply is also notoriously unpredictable. The supplier of marihuana today may have moved on by tomorrow or may have been closed down by the police. In addition to unpredictability, there is no quality control on the black market. Purchasers do not know what they are getting and have no protection against adulterated product. This is particularly problematic for some whose illnesses involve allergies, or stomach ailments that can be aggravated by the consumption of tainted products. Resort to the black market may also require individuals to consort with criminals who are unknown to them. In doing so, they risk being cheated and even subjected to physical violence. Finally, the evidence of the applicants makes it abundantly clear that requiring law-abiding citizens who are seriously ill to go to the black market to fill an acknowledged medical need is a dehumanizing and humiliating experience.
>
> [23] The Government accepts that reliance on the black market to fill a medical need would in most cases raise supply problems. It maintains, however, that marihuana is unique in that there is an established part of the black market, which the Government calls "unlicensed suppliers", that has for many years provided a safe source of medical marihuana. The Government argues that those who want to use marihuana for medical purposes have been "self-medicating" for years and know full well where to go to obtain the necessary medical marihuana. It is the Government's contention that this particular part of the black market does not present the problems that are generally associated with purchase of product on the black market. The application record offers some support for this contention. Many of the applicants do have well-established "friendly" sources in the black market from which they can safely acquire reliable medicinal marihuana. It is ironic, given the Government's reliance on this part of the black market to supply those whom the Government has determined should be allowed to use marihuana, that the police, another arm of the state, shut down these operations from time to time, presumably because they contravene the law.

35 It concluded at paragraph 73:

> [73] The evidence adduced on the ***Hitzig*** application belies both of the assumptions described above. Many long-term users of marihuana for medical reasons are unable to produce their own marihuana for a variety of reasons and cannot obtain a designate to produce it for them. Those individuals must go to the black market and have experienced significant difficulties in doing so safely. They go to the black market only because they have no choice. Moreover, the assumptions have no application to potential ATP holders who have not established a pattern of self-medication and have no prior

contact with the marihuana black market. Nothing in the *MMAR* suggests that the scheme is limited to experienced medical marihuana users.

36 The Court of Appeal held at paragraphs 93-95:

> [93] Here, as in ***Parker***, there is no doubt that the decision by those with the medical need to do so to take marihuana to treat the symptoms of their serious medical conditions is one of fundamental personal importance. While this scheme of medical exemption accords them a medical exemption, it does so only if they undertake an onerous application process and can comply with its stringent conditions. Thus, the scheme itself stands between these individuals and their right to make this fundamentally important personal decision unimpeded by state action. Hence the right to liberty in this broader sense is also implicated by the MMAR.
>
> [94] It is equally clear that the right to security of the person of those with the medical need to use marihuana is implicated in the circumstances of this case. In Parker, *supra*, this court reviewed the jurisprudence and concluded that this right encompasses the right to access medication reasonably required for the treatment of serious medical conditions, at least, when that access is interfered with by the state by means of a criminal sanction. In *Gosselin c. Québec (Procureur général)*, [2002 SCC 84 (S.C.C.)] (which postdated ***Parker*** by two and one-half years) the Supreme Court of Canada made clear that this interference by the state need not be by way of the criminal law, provided it results from the state's conduct in the course of enforcing and securing compliance with the law.
>
> [95] In this case, the MMAR, with their strict conditions for eligibility and their restrictive provisions relating to a source of supply, clearly present an impediment to access to marihuana by those who need it for their serious medical conditions. By putting these regulatory constraints on that access, the MMAR can be said to implicate the right to security of the person even without considering the criminal sanctions which support the regulatory structure. Those sanctions apply not only to those who need to take marihuana but do not have an ATP or who cannot comply with its conditions. They also apply to anyone who would supply marihuana to them unless that person has met the limiting terms required to obtain a DPL. As seen in *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 (S.C.C.), a criminal sanction applied to another who would assist an individual in a fundamental choice affecting his or her personal autonomy can constitute an interference with that individual's security of the person. Thus, we conclude that the MMAR implicate the right of security of the person of those with the medical need to take marihuana.

37 The Court considered the remedy of complete invalidation of the *MMAR* to be too broad, and sought a better tailored solution. The Court invalidated the requirement of a second specialist and found that the restrictions failed to effectively remove barriors to sources of supply (at paras 156-160). The Court allowed all holders of Designated-person Production Licences (" DPL") producers to be compensated, to grow for more than one ATP holder, and to combine their growing with more than two other DPL holders. The purpose of removing the barriers was to provide a constitutionally sound medical exemption to the medical prohibition in section 4 of the *CDSA*. The court indicated that further barriers in relation to eligibility and reasonable access, which could require further remedies (at paras 165-166).

38 The *MMAR 2001* provisions relating to non-compensation of Designated Producers ("DP") and the limit of only one person per DP were thus struck down.

39 In response, the Government enacted amendments to the *MMAR 2001* with SOR/2003-387 (the "*MMAR 2003*"). The amendments did not change the DP requirements. It retained the one ATP holder per DP restriction as well as the restriction on more than 3 DPs growing jointly with each other.

40 The next major challenge to the *MMAR* regime was *Sfetkopoulos*. There, the applicants applied for judicial review of the rejection of their application for a designated person licence as well as a declaration that the *MMAR 2003* was invalid, essentially following what the Ontario Court of Appeal said in *Hitzig*, that is, revisiting the appropriate remedy.

41 Strayer J commented at paragraph 12:

[12] First it must be observed that, according to the government's own statistics, some 80% of persons with ATPs who have been duly authorized to have and use marihuana are not obtaining it from the government source, namely PPS. The evidence shows that many users are unable to grow their own marihuana, either because they are too ill or because their home circumstances do not make it possible. While I have no statistics on the percentage of the market supplied by DPLs, the Regulations remain almost as restrictive as those which were struck down by the Ontario Court of Appeal as creating an undue restraint on an ATP's recognized right to access. The Ontario Court of Appeal held that, by inference, a large percentage of ATPs were getting their marihuana from illicit sources. The only things that have changed in this respect since that decision is the amendment to the MMAR permitting designated producers to be compensated, and the availability of marihuana and seeds from the government's producer, PPS. I will discuss the latter factor later.

42 He held at paragraphs 23 and 24:

[23] The applicants argued certain other grounds which I will not go into in any detail. It was argued that the current Regulations were adopted without adequate consultation with the "stakeholders" and therefore they are invalid. The evidence did not entirely support the claim of no consultation, and in any event, I know of no authority for the proposition that there is a constitutional requirement in the legislative process for consultation to occur with parties who may have an interest. However desirable consultation may be, it has not yet become a constitutional imperative in the legislative process. The applicants also cited to me the recent case of *R. v. Long*, 2007 ONCJ 340 (Ont. C.J.) (CanLII), (2007), 88 O.R. (3d) 146 (Ont. C.J.). In this case an Ontario Court of Justice Judge held invalid subsection 4(1) of the Controlled Drugs and Substances Act, which prohibits the possession of marihuana because in his view, the Government of Canada had not yet adequately removed barriers to access. The MMAR still limits access. While the policy adopted in 2003 could make it possible for anyone in need of marihuana to obtain it from PPS, the government contractor, the learned Judge did not consider this to be enough because that policy is not expressed in law. Therefore, while persons who have a constitutional right to access might in fact get it through PPS, they could not be said to have a legal right to that access, only the benefit of an administrative policy permitting it. I do not intend to deal with this case further. It is under appeal. Further, I have found that the unnecessary restrictions on access in paragraph 41(b.1) cannot be overcome by a forced monopoly for PPS product for those who cannot grow for themselves or find an available designated producer. Therefore the question of whether the policy should be embodied in law is not relevant to my finding.

[24] In conclusion, it can be said that the Minister in assuming the validity of paragraph 41(b.1) did not take a correct view of the law.

43 The remedy granted was a declaration that subsection 41(b.1) of the *MMAR 2003* (the DPL provision) was invalid because it violated section 7 of the *Charter*. That effectively ended the limit on a DP to produce for only one person.

44 Strayer J's decision was upheld by the Federal Court of Appeal.

45 *R. v. Beren*, 2009 BCSC 429 (B.C. S.C.) ("*Beren*") involved charges against a man who claimed he was producing large quantities of marihuana only for medical and experimental purposes. He claimed, citing *Hitzig* and *Sfetkopoulos*, that access to a legal supply of medical marihuana remained problematic and the restrictions on holders of licences were arbitrary as no state interest was served by them.

46 Mr. Beren was running what was known as the Vancouver Island Compassion Club and the Vancouver Island Therapeutic Cannabis Research Institute. Koenigsberg J approved the decisions in *Sfetkopoulos* and *Hitzig*, and found section 41(b.1) of the *MMAR* unconstitutional. She suspended the declaration of invalidity for a year for the Government to be able to amend the *MMAR* to make it constitutional.

47 Koenigsberg J stated at paragraphs 133-135:

[133] The discussions set out above, in both ***Hitzig*** and then ***Sfetkopoulos***, suggest the admissibility of finding a means by which compassion clubs can be licensed or regulated. I use compassion clubs as shorthand for persons who, once licensed

> and regulated, may grow marihuana and cannabis for more than one ATP holder. In order for such regulation to withstand *Charter* scrutiny it must be done without unduly restricting the ability of such organizations to take advantage of economies of scale, carry out research on the efficacy of varying strains of cannabis, and/or other desirable activities directed toward improving access to medical treatments to eligible patients.
>
> [134] Such regulation and licensing requires careful thought in drafting. Consistent with the reasoning in *Schachter v. Canada*, [1992] 2 S.C.R. 679, 93 D.L.R. (4th) 1 (S.C.C.), these provisions, unduly restricting DPLs from growing for more than one ATP or growing in concert with two other DPLs, are hereby severed from the MMAR.
>
> [135] The government, in my view, will need time to put in place appropriate monitoring and enforcement mechanisms in relation to such compassion clubs. Thus, it is appropriate to stay the effect of this declaration of invalidity for one year.

48 *Beren* concluded that the restriction on a maximum of three growers per site was arbitrary and violated section 7.

49 Notwithstanding the *Charter* violations with respect to the *MMARs*, Koenigsberg J convicted Mr. Beren, stating at paragraph 136:

> [136] In relation to the charges against Mr. Beren, the Crown, having proved beyond a reasonable doubt that Mr. Beren was producing and trafficking in marihuana for the purpose of supplying a compassion club, which in turn was selling the marihuana to most of its members who did not have ATPs, and thus were not licensed to possess, which parts of the MMAR I have found to be valid, is guilty on both counts.

50 The *MMAR* was amended in 2010 to increase the number of DPs per site to 4.

51 Following *Beren*, the Supreme Court of Canada considered the *MMARs* in the context of the prohibition on anything other than dried marihuana in *R. v. Smith*, 2015 SCC 34 (S.C.C.) ("*Smith*").

52 Under the *MMAR 2001* and the *MMAR 2003*, only dried marihuana was available for legal purchase. Mr. Smith "operated outside the *MMARs*". He produced edible and topical marihuana derivatives for sale. He was not a medical marihuana user himself. Mr. Smith was charged with possession of cannabis for the purpose of trafficking. His defence challenged the constitutionality of the *MMARs*.

53 Since Mr. Smith was not a medical marihuana user himself, the Crown challenged his status to raise a *Charter* issue. The Supreme Court of Canada held at paragraph 12:

> Accused persons have standing to challenge the constitutionality of the law they are charged under, even if the alleged unconstitutional effects are not directed at them: see*R. v. Morgentaler*, [1988] 1 S.C.R. 30 (S.C.C.); *R. v. Big M Drug Mart Ltd.* [1985 CarswellAlta 316 (S.C.C.)]. Nor need accused persons show that all possible remedies for the constitutional deficiency will as a matter of course end the charges against them. In cases where a claimant challenges a law by arguing that the law's impact on other persons is inconsistent with the *Charter*, it is always possible that a remedy issued under s. 52 of the *Constitution Act, 1982* will not touch on the claimant's own situation.

54 On the merits of the case, the Supreme Court of Canada approved the Ontario Court of Appeal decision in *Parker*, and concluded that the blanket prohibition of non-dried forms of medical marihuana "limits liberty and security of the person, engaging section 7 of the *Charter*" (at para 21). It concluded at paragraph 28 that the probation was arbitrary and was thus not in accordance with the principles of fundamental justice. The Court reasoned at paragraphs 31-32:

> [31] The precise form the order should take is complicated by the fact that it is the combination of the offence provisions and the exemption that creates the unconstitutionality. The offence provisions in the *CDSA* should not be struck down in their entirety. Nor is the exemption, insofar as it goes, problematic — the problem is that it is too narrow, or under-inclusive. We conclude that the appropriate remedy is a declaration that ss. 4 and 5 of the *CDSA* are of no force and effect, to the extent that they prohibit a person with a medical authorization from possessing cannabis derivatives for medical purposes.

[32] We would reject the Crown's request that the declaration of invalidity be suspended to keep the prohibition in force pending Parliament's response, if any. (What Parliament may choose to do or not do is complicated by the variety of available options and the fact that the *MMARs* have been replaced by a new regime.) To suspend the declaration would leave patients without lawful medical treatment and the law and law enforcement in limbo. We echo the Ontario Court of Appeal in *Hitzig*, at para. 170: "A suspension of our remedy would simply [continue the] undesirable uncertainty for a further period of time."

55 The Supreme Court concluded at paragraphs 33 and 34:

[33] We would dismiss the appeal, but vary the Court of Appeal's order by deleting the suspension of its declaration and instead issue a declaration that ss. 4 and 5 of the *CDSA* are of no force and effect to the extent that they prohibit a person with a medical authorization from possessing cannabis derivatives for medical purposes.

[34] At no point in the course of these proceedings did the British Columbia courts or this Court issue a declaration rendering the charges against Mr. Smith unconstitutional. In fact, following the *voir dire*, the trial judge refused to grant a judicial stay of proceedings. Despite this, the Crown chose not to adduce any evidence at trial. As a result of the Crown's choice, Mr. Smith was acquitted. We see no reason why the Crown should be allowed to reopen the case following this appeal. Mr. Smith's acquittal is affirmed.

56 In response to *Sfetkopoulos* and *Beren*, the Government replaced the *MMAR* with the *Marihuana for Medical Purposes Regulations*, SOR 2013-119 (the "*MMPR*").

57 The effect of the *MMPR* was described in *Allard v. Canada*, 2016 FC 236 (F.C.):

• There was no limit on the daily dosage a doctor could prescribe, but they limited the amount of marihuana an ATP holder could possess at any one time to 30 times the daily dosage;

• ATP license holders could obtain lawful access to marihuana in one of three ways:

1) through a Personal-Use Production Licence ("PUPL"), which permitted the individual ATP license holder to grow a certain quantity of marihuana for his or her own use;

2) through a Designated Person Production Licence ("DPPL") that permitted a person designated by an ATP license holder to produce marihuana for up to two (2) ATP licence holders; or

3) through purchasing dried marihuana directly from Health Canada which had contracted with a private company to produce and distribute medical marihuana;

• The production of marihuana under a PUPL or DPPL could only be conducted at the site designated on that licence; and

• A site could only be used for a maximum of three registrations.

58 It is interesting that in *Allard*, the Plaintiffs' position was that while section 7 of the *Charter* permits the government to regulate *commercial* behaviour in the growing and processing of marihuana, section 7 does not permit the government to criminalize individual non-commercial patient conduct such as personal production of cannabis-based products.

59 In *Allard*, the Director of the Bureau of Medical Cannabis testified and catalogued her concerns with the *MMAR*. These included the rapid increase in the number of individuals authorized to possess and produce increasing amounts of marihuana; the fact that the majority of medical marihuana was grown in dwelling houses which were not constructed to support large scale production; and the unintended negative impacts on public health, safety and security (which covered such matters as mould, fires, thefts, harms from fertilizers, odours and diversion to the black market). She further contended that some *MMAR* program

participants had expressed dissatisfaction due to regulatory wait times. Finally, she stated that the program was becoming an administrative and financial burden for the federal government (at para 31).

60 After reviewing the evidence, Phelan J commented:

> [36] The Court's role is only to determine if the policy or regulations comply with the *Charter*, not if their development was adequate. Even a bad policy may be *Charter* compliant. The Supreme Court of Canada in *PHS Community Services Society v. Canada (Attorney General)*, 2011 SCC 44 (S.C.C.) at para 105, [2011] 3 S.C.R. 134 (S.C.C.) [***PHS***], stated the following on the role of the court:
>
> > . . . It is for the relevant governments, not the Court, to make criminal and health policy. However, when a policy is translated into law or state action, those laws and actions are subject to scrutiny under the *Charter*: ***Chaoulli***, [2005 SCC 35] at para. 89, *per* Deschamps J., at para. 107, *per* McLachlin C.J. and Major J., and at para. 183, *per* Binnie and LeBel JJ.; ***Rodrigue***z, at pp. 589-90, *per* Sopinka J. The issue before the Court at this point is not whether harm reduction or abstinence-based programmes are the best approach to resolving illegal drug use. It is simply whether Canada has limited the rights of the claimants in a manner that does not comply with the *Charter*.
>
> [37] Similarly, the issue before the Court is not whether the LP regime (MMPR) or the personal cultivation regime (MMAR) is the best approach for access to medical cannabis. It is simply whether Canada has limited the rights of the Plaintiffs in a manner that does not comply with the *Charter*.

61 Ultimately, Phelan J ruled that *MMPR* violated section 7 of the *Charter* because it unreasonably and arbitrarily restricted access to medical marihuana. He concluded that it would not be feasible or effective to strike out certain words and provisions, and thus declared the entire regulation unconstitutional. He suspended the declaration for six months to give the Government time to enact a new regime.

62 He noted at paragraph 295:

> [295] It would be possible for the Court to suspend the operation of the provisions which make it an offence to possess, use, grow and/or distribute marihuana for those persons holding a medical prescription or medical authorization. However, this is a blunt instrument which may not be necessary if a *Charter* compliant regime were put in place or different legislation were passed.

63 Thus, the *MMPR* regime ended on February 24, 2016. The Government response to *Allard* was the *Access to Cannabis for Medical Purposes Regulations*, SOR 2016-230 (the "*ACMPR*") which came into force on August 24, 2016.

64 The *ACMPR* purported to fix the problem created by *Smith* by allowing for the production of cannabis oil. It also permitted authorized individuals to make and possess extracts, edibles or other derivative products as long as they did so without using highly flammable, explosive or toxic organic solvents. Medical practitioners (physicians and nurse practitioners) could provide a medical document prescribing the daily quantity of cannabis for that person and the duration of the prescription, up to one year. The authorized individual was allowed to possess a total quantity of dried cannabis (or its equivalent) of the lesser of 30 times the daily quantity or 150 grams.

65 LPs were carefully regulated with respect to a number of matters, including facilities, production practices, quality control, safety and security measures. The *ACMPR* simplified the process to obtain a medical authorization to possess medical marihuana by transferring the authorization process to medical practitioners, instead of Health Canada.

66 Personal production was permitted so as to allow a single person to grow medical cannabis for their own use. Designated Producers could grow for the use of two registered persons (including the DP). This limit was unchanged from the *MMPR* following *Sfetkopoulos*.

67 The number of DPLs per site was limited to 4 registrations, up from 3 following *Beren*.

68 While cannabis oil was permitted, the concentration of THC was limited to 30 mg/100 mL in oil, and 10 mg in capsules.

69 The *ACMPRs* were short-lived. Possession of marihuana became legal on October 17, 2018 under the *Cannabis Act*, SC 2018, c 16. The *ACMPR*s were repealed on October 17, 2018. They were replaced by the *Cannabis Regulations*, SOR 2018-144.

70 The charges against Mr. Howell arose while the *ACMPRs* were in effect.

Time-line

71 The following is a time-line of legal background to this application:

- July 31, 2000 — prohibition on possession of medical marihuana violates section 7 (*Parker*);
- July 30, 2001 — *MMAR 2001* — permitted possession of medical marihuana if licensed by Health Canada under an Authorization to Possess could grow for self or find an uncompensated Designated Producer; only 2 DP licenses per site; all purchases from Licensed Producer; provided process to become an LP;
- July 2003 — dried marihuana and seeds became available from government supplier (Health Canada Interim Policy);
- October 7, 2003 — *MMAR 2001* prohibitions that DP could not be compensated or grow for more than 1 person and only 2 growers could grow together held invalid (*Hitzig*);
- December 3, 2003 — *MMAR 2003* regulates that DP can be compensated and can grow with 2 other growers allowing three growers per site;
- January 10, 2008 — *MMAR* restrictions that DP could grow for only one ATP holder declared invalid (*Sfetkopoulos*);
- February 2, 2009 — *MMAR* restrictions that a DP can grow for only one ATP holder declared invalid (*Beren*);
- 2010 — *MMAR* amended to permit 3 growers per site;
- June 7, 2013 — *MMPR* come into effect; permit DP to grow for 2 ATP holders, and can grow with 3 other growers;
- June 11, 2015 - *MMAR* ban on medical marihuana other than dried marihuana invalid (*Smith*);
- February 24, 2016 — *MMPR* invalid (*Allard*);
- August 24, 2016 — *ACMPR* in force; permit production of cannabis oil and derivatives; number of DPs to 4 per site; and
- October 17, 2018 — cannabis legalized, medical marihuana now regulated by *Cannabis Regulations*.

Testimony

Shaun Howell

72 Mr. Howell is a businessman in his early forties. He has no criminal record and until his arrest in 2017 was an involved member of the Airdrie community and served as a volunteer firefighter. Because of issues with ADHD and PTST, Mr. Howell began to take prescribed medication for those conditions. He has had arthritis since 2004 and has also been depressed since 2017.

73 He says he has used cannabis "since the 1980's" to manage his depression and the pain from his arthritis. He also says that traditional therapies have not been helpful and he has had severe side effects from them. Some of the medications exacerbate other medical conditions. His experience with cannabis is that it has been effective and does not cause any adverse side effects.

74 Mr Howell has experimented with various marihuana strains and now looks for strains with a high terpene profile for use during the day and a lower terpene profile for use at night.

75 Mr. Howell obtained his first medical marihuana licence in 2014 and says he has since then "been continuously approved by doctors for medical cannabis". No documentation was provided.

76 His affidavit outlines his difficulties in obtaining prescribed medical marihuana from government licensed producers ("LPs"), both bureaucratically through the suppliers' procedures as well as lack of inventory, poor quality and delays in shipments to him. Mr. Howell says that he interacted a lot with medical cannabis patients and came to believe that there were a lot of problems with the prescription-based system and that patients were suffering as a result.

77 Mr. Howell says that he thought he could solve these problems by creating a system based on a co-op style model "whereby medical growers pool their resources and designate a single grower." But he learned that solution was prohibited.

78 Mr. Howell's affidavit speaks to the high cost of medical cannabis from LPs, noting the average price of a gram of LP cannabis is about $10. He believes that a number of patients are of limited financial means, often living on public assistance, and gave the example of one of his "patients", a person with autism who was on public assistance, sometimes homeless and sometimes living with his family. That patient required 20 grams of cannabis per day to treat his autism symptoms and he simply could not afford to pay for it. Mr. Howell says that he provided this person with 20 grams of cannabis per day at no cost, stating that his added cost of doing so was small.

79 Mr. Howell describes his early interest in becoming an LP. He began the registration process through Health Canada in 2013. From his own research, he concluded that he would not be able to become an LP unless he could prove that he had experience in the production of cannabis. He says "I pursued it (production) openly and in consultation with government authorities. I was under the impression that if I set up a safe, responsible cannabis production facility then I would become an LP."

80 Mr. Howell started his own facility in May or June 2016. He initially had difficulties getting suitable property for his planned operation and was turned down by Ponoka County for a development permit because of perceived opposition to a marihuana grow operation from residents. He eventually found property near Innisfail. He describes the upfront cost for a facility with a capacity for 640 plants as being $307,200.

81 Mr. Howell also describes the economics of his facility, estimating that if he did a good job, he could harvest 145,280 grams per year with operating costs of less than $50,000 per year. He said based on these numbers, in his first year, factoring in the up-front costs and operating costs, his per gram cost was $2.44. That would decline significantly for the second year because of relatively low operating costs. He estimates that he might be able to get the cost down to as little as $0.19 per gram.

82 Before starting up this facility, Mr. Howell was involved with Canruderal Inc. He began his efforts to set up his own facility in late 2013 working with Ponoka County and Health Canada. In 2014 he began working with Red Deer County and the local RCMP, telling them that he was applying to be an LP. He was told by the RCMP they "had no issue with that as long as he acted in a responsible manner that did not give rise to any complaints".

83 He says in his affidavit that Health Canada accepted his LP application in 2014. From the affidavit of Todd Cain and from cross-examination, it is clear that Health Canada did not grant the application and in fact refused it. I assume that Mr. Howell meant that Health Canada had received his application, not that it had ever been granted.

84 Following the rejection of the 2013 application, Mr. Howell had found a new site where he believed he would be permitted to grow marihuana by the local authorities. He filed a series of new applications culminating in one in July 2014. He communicated with Health Canada and provided the further information it requested. Health Canada wrote him in October 2014 acknowledging receipt of his application, and then advised him in November 2014 that there was still further information required. In December, he was advised that his application appeared complete and that he was in the "enhanced screening stage".

85 Mr. Howell enquired as to the status of his application, and in April 2016 was told that he was still in the enhanced screening stage.

86 The application is apparently pending information requested under the *Cannabis Regulations* in 2018.

87 Mr. Howell says that he began producing cannabis "openly for the benefit of valid medicinal patients in or around May and June 2016". Mr. Howell believed that various people were covered by the decision in *Allard*, which he understood to allow them to grow and possess cannabis for their personal medical use. He referred to this as an "*Allard* licence". This was not something that a patient obtained from the government or any authority, but rather as a result of the Supreme Court of Canada decision in that case.

88 His evidence in conjunction with the evidence of his partner Sarah Wilkinson, establishes that between 2016 and 2017 Mr. Howell was growing marihuana and supplying dried marihuana and high concentrate THC cannabis oil for himself, Ms. Wilkinson and her daughter, Ms. Kirkman and her son, and an unnamed homeless autistic man.

89 Mr. Howell introduced into evidence a "Memo of Understanding" between himself and Lisa Kirkman dated April 2, 2016. In the Memo, there is reference to Ms. Kirkman being the holder of a "*MMAR* client ID", something under the "MMAD", and an "Authorization Number". The information regarding Ms. Kirkman's licensing and registration appears to be taken from the Designated Person Production Licence given to a third party in British Columbia by Ms. Kirkman in 2014 (Exhibit C11, introduced with the Memo), which has an expiry date of March 31, 2014.

90 In the Memo, Mr. Howell agrees to produce 3,360 grams per month of dried cannabis at his facility. He notes that he is "an MMRR applicant and will remain your designated producer until such time as we both agree in writing."

91 Mr. Howell's affidavit goes to great lengths to demonstrate how his facility fully complies with all of Health Canada's requirements for safety, security, quality and sanitation, and that he produces a consistently high quality, reliable product. He notes that a Red Deer County inspector came to the property after he began production to investigate a noise complaint. The noise issue was resolved and the inspector did not object to any other aspect of the operation.

92 He has also learned to extract oil from cannabis, using a closed loop carbon dioxide extraction system. Mr. Howell explains that extracts are better than regular products because they can deliver a higher concentration of THC in a much smaller volume. He notes that while extracts are available from some LPs, they come at a very high cost and those extracts are limited to containing 30 mg of THC per mL of oil. He is able to make higher concentration extracts.

93 Mr. Howell also says that he is able to address the individual needs of his patients by growing different strains of cannabis as well as his ability to extract the oil from the plants.

94 He noted that some of his patients did not feel comfortable sharing personal information with an LP.

95 Effective July 28, 2017, Mr. Howell became the designated grower for one of his patients, Lisa Kirkman. Her application to have him designated was prepared in early March 2017. The authorization allowed him to have a maximum of 244 marihuana plants at his facility. Mr. Howell was charged with committing these offences on March 24, 2017.

96 Mr. Howell testified that before he was charged, he understood that producing cannabis for Ms. Kirkman was covered under *Allard*. He recognized that he was not the licence holder and did not have a DPL, but he believed that because Ms. Kirkman had the "*Allard*" licence, his agreement to become her producer would satisfy any requirements.

97 Mr. Howell was cross-examined as to the number of plants he could have had on Ms. Kirkman's licence. He confirmed that on March 24, 2017 he had 739 plants in his facility. He believed he could have had 589 plants under Ms. Kirkman's licence. He confirmed that he had "other business" and the additional 150 or so plants were a bunch of clippings that were started to replace a number of plants that were to be harvested. He said that one of his helpers planted the clippings instead of finishing the harvesting, describing that as "jumping the gun".

98 Mr. Howell was also cross-examined about his experiences with Health Canada relating to various applications he made over the years since cultivation of medical marihuana became legal. He had filed an application to become a Licensed Producer on October 30, 2013. At the time, he was applying on behalf of an entity known as Canruderal Inc. The detailed application was attached to Mr. Cain's affidavit.

99 The documents in Mr. Cain's affidavit and which were entered as exhibits through Mr. Howell showed that Mr. Howell was contacted by Health Canada on November 24, 2013 requesting more information. They wrote him again on January 27, 2014 seeking more information about the proposed production site, asking for the information by January 31. Mr. Howell replied on that day regarding his efforts to find a site that could be approved by local authorities.

100 Health Canada wrote him again on February 19, 2014 noting that it had not received the information requested and was accordingly denying his application as being incomplete.

101 Following the refusal, Mr Howell wrote Health Canada on February 19 explaining that Canruderal had been looking for a suitable production site since the one in the application had fallen through. He sought assistance from Health Canada in finding a site. Health Canada wrote Mr. Howell on February 20 advising that "it cannot intervene in any discussion with local government."

102 Mr. Howell submitted a new application in July 2014, which was accepted as complete later that year, and is still pending.

103 Mr. Howell described his experiences with Health Canada as very difficult and that there were usually more questions asked of him than answers to his questions. He said that people he spoke to at Health Canada admitted that they were having trouble processing the number of applications and that they were short staffed.

104 No evidence was provided by Mr. Howell of any licenses for medical marihuana, either as a Licensed Producer, having an Authorization to Possess, having a Personal-Use Production Licence, or producing for someone else under a Designated Person Production Licence.

105 In his affidavit, Mr. Howell describes his operation as a "co-op" but makes no mention of anyone else working in his operation or contributing to it, and there was no information that there was ever a Designated Producer growing there before the charges were laid in March 2017.

Sarah Wilkinson

106 Ms. Wilkinson affirmed an affidavit in support of the application on April 15, 2019. She was not cross-examined.

107 Ms. Wilkinson is Mr. Howell's partner. She describes her daughter's difficulties with a rare form of epilepsy that can only be managed with large quantities of cannabis oil. The seizures her daughter has can be life threatening. Ms. Wilkinson describes her attempt to obtain treatment for her daughter through prescription medications, without success.

108 She says the traditional medications were largely ineffective, and the side effects were so serious that they had to discontinue use of them. Ms. Wilkinson describes cannabis as "the only solution" to her daughter's medical issues. She obtained a medical marihuana prescription in 2013; it was renewed in 2014 and expired in 2015. At that time, the Alberta Children's Hospital in Calgary was no longer prescribing cannabis for children with epilepsy.

109 A doctor in Ontario prescribed cannabis, and through a process of trial and error, they found that "with the rights strains (her daughter) could become completely seizure free".

110 Ms. Wilkinson describes her own medical history, including post-traumatic stress disorder ("PTSD"), from which she has suffered since childhood. Because of how much cannabis had helped her daughter, Ms. Wilkinson got a medical marihuana prescription herself in 2015. Use of cannabis has allowed Ms. Wilkinson to phase out use of the pharmaceuticals she had been prescribed. She says her life improved.

111 Once her daughter began to use medical marihuana, Ms. Wilkinson had difficulty finding the right strains. Switching suppliers was a slow process, the cost was unaffordable (nearly $2,000 per month with the LPs), and she had difficulty finding a consistent supply. Sometimes shipments were delayed and sometimes the necessary strains were not available.

112 Ms. Wilkinson then began growing her own cannabis, but there were difficulties at that and growing her own did not result in a reliable source of cannabis for them.

113 In September 2016, she received some cannabis extracts from Mr. Howell. These proved very effective. Cannabis oil from LPs was not strong enough as it is diluted. Her daughter could not ingest the quantity of cannabis oil necessary to properly treat her. She says that cannabis oils from LPs cost approximately $90 per bottle. Because of her daughter's condition, she would need to use two bottles per day, and the cost was unaffordable.

114 Her daughter is now treated with injections of a high concentration extract. This is very effective. She believes if her daughter had a seizure and had to rely on cannabis oil, that would be dangerous because of the choking risk of ingesting the 60 mg of oil necessary to provide the required rescue dose.

115 She continues to use cannabis oil herself to treat her PTSD and other conditions.

116 Ms. Wilkinson concludes "I could not afford to purchase dried cannabis from LPs, did not have a designated grower, and was not capable of growing a consistent supply."

117 Her affidavit attaches medical authorizations for the period November 1, 2017 to November 1, 2018 for 3 grams per day and then July 18, 2018 to July 18, 2019 for 85 grams per day. There are no registrations covering March 2017.

Lisa Kirkman

118 Ms. Kirkman affirmed an affidavit on April 15, 2017. She was not cross-examined. In her affidavit, she described her and her adult son's health issues and cannabis use. Ms. Kirkman has a number of anxiety related issues and arthritis related pain issues. Conventional medications did not help her. In 2009, she was prescribed cannabis at the Calgary Pain Clinic. She had difficulties inhaling and digesting edible products. She says that she continues to struggle with osteoporosis, degenerative disk disease and severe arthritis, along with depression, OCD and ADHD. She says that "cannabis has been the most effective way for me to manage all of my illnesses at once."

119 Her adult son suffers from ADHD, OCD, PTSD and Tourette's syndrome. He used conventional medications until his early teens. They provided a "50% efficacy" in controlling his symptoms. Cannabis use changed his life such that he was able to complete his high school education and enjoy relationships with his family. He requires a substantial amount of cannabis every day.

120 Ms. Kirkman describes the difficulties she had accessing "legal" cannabis. In 2010 she applied for a personal production licence and began growing marihuana. She did not have the space to grow the quantity needed, as she needed 121 grams per day herself and her son needed 10 grams per day. She had difficulty growing marihuana herself and began to look for a designated grower. Finding a reliable designated grower was difficult. Changing designated growers was problematic and the application and licensing process sometimes took months.

121 She met Mr. Howell in 2016 and received cannabis from him until March 2017. Mr. Howell provided her with the cannabis free of charge as she was in financial distress at the time.

122 An Authorization to Possess up to 3620 grams was appended to her affidavit, although it expired on March 31, 2014. It appears to coincide with a Designated Person Production Licence that also expired on March 31, 2014. This licence authorized up to 589 plants and 26,505 grams of dried marihuana. Ms. Kirkman was registered under the *ACMPRs* effective July 28, 2017. Mr. Howell was registered as a Designated Person under her registration. He was authorized to grow 244 marihuana plants.

123 There was no evidence of any registrations or authorizations for Ms. Kirkman or her son between April 1, 2014 and July 27, 2017.

Eric Nash

124 Mr. Nash provided an affidavit he swore on April 12, 2019. His opinions are based on his experience with Health Canada's regulatory framework for the medicinal use, production, distribution and sale of cannabis and access to medical cannabis.

125 Mr. Nash has extensive experience in the medical marihuana field, having been co-owner and principal of two medical cannabis-based businesses. From 2002 to 2014, he cultivated, distributed and sold cannabis for medical purposes to patients authorized by Health Canada as chief operating officer of a federally-licensed producer. That company had applied to become an LP in August 2013 and was issued a "Ready to Build" approval on February 24, 2014.

126 His report relies to some extent on the testimony of a medical cannabis expert in the *Allard*, as well as his discussions and interviews with a large number of people. His opinions include that:

1. Some 700,000 Canadians use cannabis for medicinal purposes;

2. Some 60,000 Canadians have Personal use Production licences;

3. The price charged by Licensed Producers is based primarily on what the market will bear;

4. The current high cost is based on years of black-market prices;

5. Personal use production is "the best option for patients in securing an affordable, safe and consistent supply to meet their therapeutic needs";

6. People who are unable for reasons of housing restrictions, health issues and other considerations require a designated grower to assist them; and

7. Designated growers can satisfy the individual patient's needs, including consistency of product, strains and requirements such as the absence of pesticides and herbicides, although the primary benefit is financial.

127 Mr. Nash estimated the cost of medical cannabis from licensed producers at $10.00 per gram, contrasted with $1.29 per gram or less for self-production or production by a designated grower.

128 His affidavit speaks of him having spoken to "several hundred licensed patients and authorized growers" which has given him significant knowledge and insight into the marihuana access programs, patients, supply issues and the medical cannabis industry in Canada.

129 He references recommendations made to Health Canada by the Canadian AIDS Society calling for lifting restrictions on designated producers, including the limits on the number of personal and designated growers per site.

130 Mr. Nash says that in his opinion, "the *MMAR*, the *MMPR* and the *ACMPR* limit access for medical purposes by presenting significant barriers to many Canadians who benefit from using cannabis therapeutically by making commercially grown and sold cannabis as a medical product unaffordable". He extends his opinion to the new *Cannabis Regulations*.

131 Mr. Nash says that the barriers to access to medical marihuana through LPs include the requirement of many LPs that payment be by credit card or bank transfer (when many patients do not have such means of payment available); that many LPs operate only through the mail such that patients without a fixed address may have difficulties obtaining deliveries; that shipping costs are very expensive and in some cases prohibitively so; the scarcity of medical professionals prepared to prescribe cannabis; that shipping can damage the product; that the supply of various strains or hybrids may be interrupted and is inconsistent; that switching suppliers is time-consuming and often results in interruptions in supply; products are sometimes recalled or contaminated; and that LPs cannot distribute or sell cannabis edibles or concentrates other than diluted cannabis oil.

132 He opines that Health Canada "has failed to address patient needs by supplying a range of safe and efficacious cannabis-based products to Canadian Medical patients." He says that from his experience, "a very large percentage of Canadian patients are consistently denied legal access to medical cannabis due to prohibitive cost and unaffordability, administrative delays,

inability to find a doctor to sign for legal access, continued stigma and prejudice towards the use of medical cannabis, and a myriad of regulatory burdens placed onto patients, doctors and legal home cultivators."

133 Mr. Nash gave evidence by video conference. His expertise to offer opinion evidence on the use, production and sale of medical marihuana was confirmed. He described growing marihuana as labourious and technically challenging but not particularly difficult. It is "tricky but forgiving".

134 He was cross-examined as to the basis for his beliefs and opinions, and confirmed that he had kept no records of these conversations by way of statistics or graphs. Issues like patients being denied authorizations come from the patients themselves, as do the anecdotal stories of difficulties finding a producer and people enquiring of him whether costs can be covered under "PharmaCare" (British Columbia's subsidized prescription program).

135 Mr. Nash did not differentiate between authorized or unauthorized medical marihuana users, or delve into the financial concerns expressed by people he spoke to. He referenced the time frame of 2002 to 2016 with respect to these various conversations. He expressed the view that since doctors prescribe marihuana, it should be paid for by health programs.

136 The emphasis on his evidence related to the affordability of medical marihuana through LPs and the difficulty many people experience accessing medical marihuana through LPs.

Dr. Carolina Landolt

137 Dr. Landolt was qualified as an expert in cannabis, medical cannabis patient access and the management of complex chronic pain problems in patient and out-patient settings. She is an internal medicine specialist, as well as a rheumatologist. Her affidavit sworn April 15, 2019 describes a number of concerns about the medical marihuana system under the *ACMPRs* and previous regulations. She had been asked a number of questions by Defence Counsel, which were answered in her affidavit.

a) What role does trial and error play for a medical cannabis patient seeking medical cannabis that is effective for their condition

138 Her response described how not all cannabis strains have the same effects for a given patient such that strain selection is a "highly individualized and iterative process". She said that initiating medical cannabis is a "gradual process which can require multiple iterations for many reasons including establishing the optimal method of consumption (and) correct dose . . . ".

b) In early 2017 and generally, how long did it take for the medical cannabis patients to receive cannabis from licensed producers? How long did it take for a medical cannabis patient to obtain a medical document and register with a licensed producer? And if a medical cannabis patient wanted to switch to a different licensed producer what would be required?

139 Dr. Landolt described the various processes involved and problems created from fall 2015 to early 2017 by limited availability of various strains and products, limited supplies, successful strains being discontinued, short supply of oils, and delays with registration processes. She described registration delays of up to weeks. Switching suppliers was so time consuming that many patients were reluctant to change suppliers even if there were supply or quality problems.

c) What is important for various patients?

140 Dr. Landolt dealt with patient classes who seemed to benefit most from medical marihuana, including those suffering from chronic pain, sleep disruption, fatigue, inflammatory bowel disease such as IBD, Crohn's Disease and ulcerative colitis, seizure disorders such as epilepsy, and endometriosis.

141 She also discussed the benefits from extracts such as oils, and problems encountered because of limitations on the amount of THC concentrations. Dr. Landolt also provided information on communications between patients and LPs, and difficulties caused by the general use of online ordering from LPs. She says that the need for computer access causes difficulties for patients with limited financial means, those with less formal education, older patients, disabled patients, and patients for whom English is a second language.

142 Dr. Landolt notes that cannabis is the only medication that is exclusively purchased online without the benefit of a physical store. She also referenced privacy concerns expressed by some of her patients who had to share personal information with LPs.

Dr. David Rosenbloom

143 Dr. Rosenbloom's affidavit of April 11, 2019 deals with pharmacy and pharmacology, the effect of delayed access to drugs and the purchase of drugs. His expertise was acknowledged. He was not cross-examined at the hearing.

144 As with Dr. Landolt, he was asked a number of questions by Defence Counsel and his affidavit serves as his expert report.

145 Dr. Rosenbloom provided information on the importance of accessing medical cannabis on an uninterrupted and on-demand basis for pain patients, gastro-intestinal patients, autistic patients, ADD patients, Tourette's patients, OCD patients, PTSD patients, patients with severe menstrual cramping, and children with severe seizure. He commented on studies which have found that cannabis users vs opiate users are less likely to experience respiratory depression and that cannabis use is associated with decreased opiate use. If access to cannabis is interrupted, that might push patients into using opioids.

146 Inflammatory bowel disease patients may be unable to control their symptoms without cannabis and require hospitalization. Failure to take cannabis for seizure disorders could lead to a recurrence of seizures and could lead to a potentially fatal condition.

147 With other conditions, Dr. Rosenbloom said that without cannabis, the patient's symptoms would recur. He contrasted patient confidence in pharmacists (which is very high) to patient confidence in drug manufacturers (which is very low), noting that medical cannabis is purchased directly from the manufacturer.

Dr. Jokubas Ziburkus

148 Dr. Ziburkus was qualified as an expert in the endocannabinoid system, endocannabinoids, phytocannabinoids, cannabis plants and products, and the pre-clinical and clinical research on medical cannabis. His expert report is contained in his affidavits sworn April 15, 2019 and June 26, 2019.

149 His evidence focused on the history of cannabis use for medicinal purposes, and technical aspects of extracting medicinal ingredients from the cannabis plant. Dr. Ziburkus notes that cannabis dosing "can be easier to achieve using cannabis oils, topical preparations, and even vaporizer 'pens'."

150 Dr. Ziburkus says that high concentrations and inhalation may be necessary in diseases that have acute onset of conditions, such as migraines or seizures. These high concentrations can be potentially lifesaving. He described a number of studies involving cancer pain patients, tremors in Parkinson's disease, and muscle spasms that affect the diaphragm. All of these demonstrated the benefits of high concentrations of THC.

151 Dr. Ziburkus opines that "cannabis is safer than coffee" and that cannabis has the highest safety ratio of any common illicit substance such as heroin, alcohol or methamphetamine. It is also the least addictive of any scheduled drugs. He says there are zero reported overdose deaths from cannabis use.

152 He also notes the difficulties some patients have taking cannabis oil because of the limit on THC potency. Some patients have difficulty swallowing, for others the carrier oils may be too caloric, and with others, absorption may be a difficulty.

153 Dr. Ziburkus describes "full spectrum CO2 extraction" and the potential use of neutral cannabinoid forms such as THCA.

154 He describes the benefits of medical marihuana with patients suffering from autism, pain, gastro-intestinal issues, seizure disorders, ADHD, Tourette's, OCD and PTSD.

155 Dr. Ziburkus was cross-examined on his work with cannabis, including his involvement with a cannabis production company. He acknowledged that he was no longer researching, but was working to promote medical marihuana. He noted that social reform appears to be happening faster that scientific research.

156 He emphasized that the medically beneficial substances in the cannabis plant are the components that do not cause the high or psychotropic effect. Much of the scientific work is to remove those elements, which cause concerns for medical practitioners, especially with children.

157 Crown counsel asked a number of questions about safety issues, vaping, children ingesting edibles, addiction, and brain development. Dr. Ziburkus opined that benefits from the use of medical cannabis clearly outweighed any risks.

Harrison Jordan

158 Mr. Jordan is an Ontario lawyer. His affidavit of April 15, 2019 is based on his personal knowledge of information related to Canadian licensed producers of medical cannabis, their pricing of cannabis, as well as changes to pricing and policies.

159 He conducted research of LPs relating to shipping times, same day deliveries, strain availability, oil availability, and minimum purchase orders in effect around March 24, 2017. His findings from this research described how the mail order medical cannabis system operated at the time in a step by step way:

1. The patient must obtain a medical document from a licensed medical practitioner following a visit with that practitioner;

2. The patient must then send the medical document to an LP;

3. To obtain medical cannabis from a second or third LP, a new medical document from a licensed medical practitioner must to be obtained for each new LP and sent to that LP;

4. Patients could purchase dried cannabis, cannabis oil or capsules if available, at a quantity of no more than 30 times their daily limit; and

5. Medical cannabis could only be delivered to the patient's residence or to the prescribing medical practitioner's office.

160 Mr. Jordan then described a number of problems with the system, including:

1. Delays caused by the time taken by the patient to find a medical practitioner willing to prescribe cannabis, getting in to see that medical practitioner, and getting the necessary medical document;

2. Delays caused between the patient sending the medical document to a LP, the LP verifying the medical document with the patient and the doctor, and then registering the document with Health Canada;

3. Delays in switching LPs, which required going back to the medical practitioner;

4. Limited availability because there were only 39 LPs in Canada, 26 of whom were licensed for production and sale, and only 16 of whom were selling cannabis oil products;

5. Limited availability as some of the LPs were showing "out of stock" for some products on their websites;

6. Limited availability of cannabis oil and small container sizes;

7. Limited information on extraction methods;

8. Unavailability of oil other than in edible form;

9. High prices caused by minimum order requirements, taxation and shipping costs;

10. Limited "compassionate" pricing programs;

11. Shipping problems and shipping times; and

12. Shortages in recreational cannabis supplies as an alternate source.

Stephen Gaetz

161 Dr. Gaetz was qualified as an expert in homelessness, precarious housing, matters related to homelessness and precarious housing, and services for those of modest means.

162 His affidavit sworn June 21, 2019 provides his report. He described the income available to Albertans in March 2014 under the Alberta Income and Employment Supports program, as well as under the Assured Income for the Severely Handicapped program. Dr. Gaetz also provided statistics on homelessness and "precarious" housing (not affordable, over-crowded or substandard).

163 Dr. Gaetz's affidavit includes statistics on the prevalence of disabilities among the homeless and those living in precarious housing. He also provided information on the increased likelihood that such persons would not have credit cards, or a bank account, or access to computers. For people living in shelters, there may be limitations on their ability to smoke. Dr. Gaetz described the difficulties such persons have in getting mail

164 His affidavit also provided information on the incidence of domestic violence in Canada, and that domestic violence often forces victims and family members into shelters and homelessness.

165 Dr. Gaetz was not cross-examined.

Todd Cain

166 Mr. Cain's affidavit affirmed October 1, 2019 was submitted on behalf of the Crown. His evidence was presented as fact evidence. Mr. Cain is the Director General of the Licensing and Medical Access Directorate of the Controlled Substances and Cannabis Branch of Health Canada. His duties in that capacity include managing the licensing, registration and client service functions under the *Cannabis Act* and its regulations. Before the regulations under the *CDSA* were repealed, he had similar responsibilities under the *ACMPRs*. Prior to his present position, Mr. Cain was the Director General of Organization and Launch Directorate of the Cannabis Legalization and Regulation Branch at Health Canada.

167 His affidavit describes the history of the legalization of medical marihuana in Canada and the progression of regulations from the *MMAR 2001*, *MMAR 2003*, *MMPR*, the *ACMPR*, and the *Cannabis Regulations*.

168 He discusses the Government purpose behind the various regulations and the changes made as a result of the various court decisions that struck down portions of them.

169 Mr. Cain discusses the changes from the *MMAR* and *MMPR* regimes to the *ACMPR*, which were in effect at the time Mr. Howell was charged. He describes the process for individuals to access medical marihuana from an LP. He notes that the *ACMPR* allowed for the production and possession of cannabis oil and not just dried marihuana.

170 From the Health Canada records available to him, Mr. Cain says that as of March 2017 there were 374 health care practitioners in Alberta who had prescribed medical marihuana. There were 2,695 health care practitioners who had done so in Canada.

171 He described the process to become an LP and the rationale for the requirements necessary to become licensed. Applicants were required to provide detailed descriptions of the physical security measures for the site, how records will be kept, quality assurance procedures, notices to local authorities, and a floor plan of the site. Applicants were required to pass security clearance. Licensing could be refused if there was false or misleading information in the application, if information was received that the

applicant had been involved in the "diversion of a controlled substance", if there would likely be a risk to public health, safety or security, including diversion, or for security clearance purposes.

172 Good production practices were required to be followed relating to cleanliness of the facility, employment of skilled personnel, testing practices and procedures, and ensuring the quality of the product (being free from unacceptable solvents and residues).

173 Mr. Cain's affidavit discusses the growth of LPs since they began under the *MMPR* in 2013. He describes the "vast list of offerings and strains" available in 2017 from the then 12 LPs. Mr. Cain also discusses the services offered by the LPs to make medical marihuana available. He notes that while shipments were to be delivered to the patient's ordinary place of residence, they could also go to the individual's health care practitioner or even shelters and other organizations providing social services to the individual.

174 Mr. Cain describes measures taken by some LPs to assist financially disadvantaged patients, as well as payment options including pre-paid credit cards and money orders.

175 He says that Health Canada's data shows that the system under the *ACMPR* has met the demand, based on key indicators such as the number of shipments, the number of client registrations and the amount of inventory.

176 Mr. Cain notes that in May 2017, Health Canada streamlined the application process for issuing production licences to increase production of medical cannabis, and that within 12 months, an additional 61 commercial licences had been issued.

177 He states that "past inventory levels show that licensed producers held sufficient inventory to meet the demand for cannabis for medical purposes." LPs were supplying 201,398 patients in the first quarter of 2017-2018, which grew to 354,538 patients by the fourth quarter of 2018-2019.

178 Health Canada's figures show that the average cost of medical marihuana from LPs was $9.17 per gram of dried cannabis, compared to $8.84 on the black market.

179 Mr. Cain says the average daily dose per registered user was 2.3 grams.

180 Based on those averages, he says that the "average monthly cost of cannabis for medical purposes would be approximately $660.24."

181 Mr. Cain also provides information about licensing under the *ACMPRs* for personal production, including production by designated producers. Under the application process, individuals could get registration certificates allowing them to obtain cannabis from an LP while they waited for their first crop to mature, or in the event of a crop failure. From Health Canada's records, in June 2017 there were 6,797 individuals with active and valid registrations allowing them to produce cannabis for themselves or to obtain cannabis from a designated person.

182 Mr. Cain explains the restrictions on registrations per person as well as per production site. These were introduced to provide for "some control on the size of cannabis for medical purposes production operations and to reduce the risk of diversion to the illicit market and other risks to public safety." The change of the number of people a designated grower could grow for following *Hitzig* (1 to 2) and the change to the number of registrations per site following *Beren* (3 to 4) were intended to preserve the intent of the regime, which was "to permit the production of small quantities of cannabis and was not intended to regulate large production operations."

183 The prohibition against derivatives prior to the *ACMPRs* was safety related because of the potential impact of highly concentrated products and accidental consumption by children. Over-intoxication was also a concern. Under the *ACMPR*, derivatives were permitted as long as they were not created using organic compounds that were highly flammable, explosive, or toxic. CO2 extraction was generally permitted.

184 Concentrations of THC were limited to 30 mg per mL and the content of capsules was limited to 10 mg, because higher concentrations have not been shown by Health Canada testing to be consistent with a therapeutic effect without undue risk to the patient's health, and to reduce the risk of overconsumption.

185 His review of Mr. Howell's licensing applications shows:

1. An application on October 30, 2013 on behalf of Canruderal Inc to become an LP;

2. Applications in April and May 2014 that were refused; and

3. A new application received July 14, 2014 which remains on hold because Mr. Howell has not taken steps to migrate his application to Health Canada's online system and to provide information required under the *Cannabis Act*.

186 Mr. Cain says that from his review of Health Canada's records, Mr. Howell has never held a commercial cannabis production licence under the *MMPR* or the *ACMPR*.

187 Mr. Cain provided a second affidavit, sworn October 17, 2019 providing information on the ability of persons requiring cannabis for medical purposes outside of the parameters of the *ACMPR*. He notes that such person could apply to the Minister for an authorized individual discretionary exemption pursuant to section 56 of the *CDSA*. Health Canada records indicate that from June 2016 to March 2017 28 such exemptions were issued, including exemptions relating to the importation of specialized cannabis products.

Applications to exclude evidence

188 The Crown applied to strike all or portions of the affidavits of Eric Nash and of Dr. Landolt. With respect to Mr. Nash, the objections are that Mr. Nash exceeded the scope of his expertise, relies on anecdotal evidence and in some cases becomes an advocate for the Applicant with respect to his opinions that:

1. personal and designated production is the best option for many patients and supports that view with a statement from the Canadian AIDS Society;

2. the *ACMPRs* presented a significant barrier to access as the regulated system is expensive, there are problems with the use of a mail order system, and problems because of the need for a doctor's authorization and the need for a fixed address;

3. the *ACMPR* system is inadequate because it fails to provide edibles, topicals and concentrates; and

4. Health Canada has failed to provide "simple, immediate and affordable" access to medical cannabis.

189 The Crown submits that his opinions relating to the *ACMPR*s are on the issues before the court, namely the reasonableness of the *ACMPRs*.

190 The Crown seeks excision of portions of his affidavit, relating to the process charged for medical cannabis, limitations on marihuana use in multi-family dwellings, the practices of insurance companies and access to diverse strains, forms and strengths of cannabis. It argues that little or no weight should be attached to other portions of his affidavit where he steps into the role of advocate for the Applicant.

191 With respect to Dr. Landolt's affidavit, the Crown submits that she has exceeded the scope of her expertise relating to her opinions on:

1. How long it took for patients to obtain cannabis or change LPs;

2. Whether stockpiling medication is within the financial means of many patients;

3. Predatory practices in some medical cannabis clinics;

4. Strain availability; and

5. Emerging studies and clinical trials.

192 Mr. Howell applied to strike all or part of Todd Cain's affidavit of October 1, 2019 on the basis that it contains inadmissible opinion evidence and hearsay evidence. The referenced paragraphs and portions of Mr. Cain's evidence are objectionable because they:

1. Purport to show legislative intent;

2. Purport to show why government responded to the various Court decisions striking down portions of the regulations; and

3. Express opinions on information in SOR/2009-142 (the *MMAR*).

193 The striking applications were argued at the outset of the application, and I reserved decision on them, noting that I would hear the evidence and rule on admissibility at the time of my decision on the merits of the application itself.

194 Counsel submitted a number of cases on the admissibility issues (By the Crown: *R. v. Mohan*, [1994] 2 S.C.R. 9 (S.C.C.); *R. v. Sekhon*, 2014 SCC 15 (S.C.C.); *R. v. Abbey*, 2009 ONCA 624 (Ont. C.A.); *R. v. Jacobs*, 2014 ABCA 172 (Alta. C.A.); *Mazur v. Lucas*, 2010 BCCA 473 (B.C. C.A.); *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 (S.C.C.); and *R. v. Mernagh*, 2013 ONCA 67 (Ont. C.A.). By the Defence: *White Burgess*; *R. v. Spence*, [2005] 3 S.C.R. 458 (S.C.C.); *R. v. Caesar*, 2016 ONCA 599 (Ont. C.A.); *M. v. H.*, [1999] S.C.J. No. 23 (S.C.C.); *Francis v. Baker*, [1999] 3 S.C.R. 250 (S.C.C.); *R. v. Dominic*, 2016 ABCA 114 (Alta. C.A.); and *R. v. B. (S.A.)*, 2003 SCC 60 (S.C.C.)). The Court also considered the following cases: *ANC Timber Ltd. v. Alberta (Minister of Agriculture and Forestry)*, 2019 ABQB 653 (Alta. Q.B.); *R. v. Bingley*, 2017 SCC 12 (S.C.C.); and *R v. McPhail*, 2019 ABCA 427 (Alta. C.A.)).

Analysis on objections to evidence

195 The law on expert evidence was described by Topolniski J in *ANC* at paragraphs 126 to 129:

> [126] Expert evidence is allowed "on matters requiring specialized knowledge": ***White Burgess*** at para 15. In ***R v Bingley***, 2017 SCC 12 (CanLII) (Bingley) the Supreme Court reaffirmed the purpose of the framework for admissibility noting, at para 13:
>
> > The modern legal framework for the admissibility of expert opinion evidence was set out in Mohan and clarified in ***White Burgess Langille Inman v. Abbott and Haliburton Co.***, 2015 SCC 23 (CanLII), [2015] 2 SCR 182. This framework guards against the dangers of expert evidence. It ensures that the trial does not devolve into "trial by expert" and that the trier of fact maintains the ability to critically assess the evidence: see ***White Burgess***, at paras 17-18. The trial judge acts as gatekeeper to ensure that expert evidence enhances, rather than distorts, the fact-finding process.
>
> [127] The Court in ***Bingley*** also observed that "[t]he boundaries of the proposed expert opinion must be carefully delineated to ensure that any harm to the trial process is minimized": para 17.
>
> [128] Similarly, in ***White Burgess***, the Supreme Court explained the importance of the gatekeeper role at paras 12 and 16:
>
> > . . . we are now all too aware that an expert's lack of independence and impartiality can result in egregious miscarriages of justice . . .
> >
> > The jurisprudence has clarified and tightened the threshold requirements for admissibility, added new requirements in order to assure reliability, particularly of novel scientific evidence, and emphasized the important role that judges

> should play as "gatekeepers" to screen out proposed evidence whose value does not justify the risk of confusion, time and expense that may result from its admission.

> [129] The expert evidence analysis is divided into two stages. First, it must first meet the four ***Mohan*** [[1994] 2 SCR 9] factors: (1) relevance; (2) necessity; (3) absence of an exclusionary rule; and (4) special expertise. If it does, the Court then weighs the potential risks and benefits of admitting the evidence against the benefits: ***White Burgess*** at paras 23-24.

196 The Crown argued that the expert evidence sought to be admitted exceeded the scope of expertise, reached the ultimate issue, and lacked impartiality. In particular, the Crown argued that Mr. Nash lacked impartiality and portions of his evidence ought to be excluded, and that Dr. Landholt exceeded her expertise and her evidence ought to be excluded.

197 The Defence argued anecdotal evidence of both experts is "based on the accumulated wisdom of . . . information learned on the job" (*Dominic* at para 22) and ought to be admitted. The anecdotal evidence is evidence which arises within the scope of his or her expertise and not evidence which requires independent proof (*B. (S.A.)*, Sopinka J at para 62). The Defence argued the evidence must be assessed contextually and in the course of the trial.

Mr. Nash

198 The Crown argues that certain portions of Mr. Nash's affidavit that exceed his expertise are inadmissible and should be struck, while other portions of his affidavit are based on anecdotal evidence and lack impartiality and should be afforded little weight at trial.

199 An opinion is necessary if it provides information that is likely to be outside the experience or knowledge of a judge or jury. Mr. Nash's proposed expert evidence is necessary on "issues of medical cannabis supply, pricing, products, access, policy, regulatory framework and related issues." These are beyond the scope of expertise of the trier of fact and will assist in determining the issue of whether the medical cannabis regime for medically qualified patients provides "reasonable access" to supply. The first threshold requirement is satisfied.

200 The second threshold requirement, relevance, requires the trier of fact to determine whether the existence or non-existence of a fact is more or less likely than it would be without that evidence, which is a low threshold. The expert report describes Mr. Nash's professional opinion that several barriers to access exist to the access of medical cannabis, and goes on to discuss those barriers in extensive detail. The second threshold requirement of relevance is satisfied.

201 Third, there is no exclusionary rule which operates in these circumstances.

202 Fourth, the requirement that an expert be properly qualified for the evidence to be admissible was described in *ANC* at paragraphs 146-147:

> [146] In ***White Burgess***, the Supreme Court held that the threshold for admissibility of expert evidence flows from the expert's duty to be fair, objective, and non-partisan and noted at para 49:
>
> > This threshold requirement is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it. The trial judge must determine, having regard to both the particular circumstances of the proposed expert and the substance of the proposed evidence, whether the expert is able and willing to carry out his or her primary duty to the court. For example, it is the nature and extent of the interest or connection with the litigation or a party thereto which matters, not the mere fact of the interest or connection; the existence of some interest or a relationship does not automatically render the evidence of the proposed expert inadmissible. In most cases, a mere employment relationship with the party calling the evidence will be insufficient to do so. On the other hand, a direct financial interest in the outcome of the litigation will be of more concern. The same can be said in the case of a very close familial relationship with one of the parties or situations in which the proposed expert will probably incur professional liability if his or her opinion is not accepted by the court. Similarly, an expert who, in his or her proposed evidence or otherwise, assumes the role of an advocate for a party is clearly unwilling and/

> or unable to carry out the primary duty to the court. I emphasize that exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence.

[147] In ***Abbey***, the Ontario Court of Appeal also noted the two-step process for admitting expert evidence at paras 78-79:

> It is helpful to distinguish between what I describe as the preconditions to admissibility of expert opinion evidence and the performance of the "gatekeeper" function because the two are very different. The inquiry into compliance with the preconditions to admissibility is a rules-based analysis that will yield "yes" or "no" answers. Evidence that does not meet all of the preconditions to admissibility must be excluded and the trial judge need not address the more difficult and subtle considerations that arise in the "gatekeeper" phase of the admissibility inquiry.
>
> The "gatekeeper" inquiry does not involve the application of bright line rules, but instead requires an exercise of judicial discretion. The trial judge must identify and weigh competing considerations to decide whether on balance those considerations favour the admissibility of the evidence. This cost-benefit analysis is case-specific and, unlike the first phase of the admissibility inquiry, often does not admit of a straightforward "yes" or "no" answer. Different trial judges, properly applying the relevant principles in the exercise of their discretion, could in some situations come to different conclusions on admissibility.

203 Mr. Nash's statement of qualifications emphasize his work as a co-owner and principal of two Canadian medical cannabis-based businesses, which were federally licensed producers operating under the regulatory framework. His experience working with authorized patients and growers provided him with significant knowledge and insight into the medical marihuana access program. He participated as an advisor to Health Canada's Multi-Stakeholder Consultation session on the *MMAR*. He has an impressive resume describing his activities in relation to producing using medical cannabis, including providing expert input at the Marihuana Legalization and Roundtable Session, chaired by the Honourable Anne McLellan in the lead up to the legalization of cannabis in 2018.

204 Reviewing Mr. Nash's background, I find he is knowledgeable and experienced in relation to the operation, distribution and regulation of medical cannabis in Canada. He understands the technical requirements of cannabis growth and distribution, and has contributed to policy developments relating to health, safety, security and regulatory development. He was qualified as an expert in medical cannabis and access to medical cannabis, cannabis growing, cannabis products, and the medical cannabis regimes in Canada (now and in the past), as he has the requisite skill, knowledge and experience necessary to assist the Court.

205 The Crown further challenges his impartiality and objectivity. In *White Burgess*, the Supreme Court of Canada found at paragraph 50:

> . . . When looking at an expert's interest or relationship with a party, the question is not whether a reasonable observer would think that the expert is not independent. The question is whether the relationship or interest results in the expert being unable or unwilling to carry out his or her primary duty to the court to provide fair, non-partisan and objective assistance.

206 It is clear that Mr. Nash's long participation in the medical cannabis industry and as an expert in the development of medical cannabis regulation in Canada and internationally means that he is interested in the outcome of this litigation. However, as expressed in *White Burgess*, a financial and employment interest alone is not disqualifying. Rather, the question is whether the expert is unable or unwilling to provide the court with fair, objective, and non-partisan evidence (at paragraph 49, *above*). While Mr. Nash has an obvious stake in the outcome, his evidence, on its face, does not constitute "a very clear case" in which the evidence ought to be excluded at the threshold stage, and not be weighed in the context of all of the evidence at the "gatekeeper stage" (*ibid*). None of the statements are so biased or overly partisan that the Court cannot weigh and consider the factual inferences or conclusions which are drawn based on the totality of his evidence. Many of his opinions are based on personal observation and experience, which, although favouring certain outcomes, nonetheless relate to Mr. Nash's qualified experience.

It is my opinion that the evidence of Mr. Nash ought not be entirely excluded based on the perceived bias or partiality in relation to his background as an advocate for cannabis users and industry.

207 The Crown further sought to exclude certain portions of the evidence as inadmissible.

208 Mr. Nash opines on the price charged for medical cannabis (at paragraph 34) based on observations of what the market will bear following years of black-market prices. The Crown argues that Mr. Nash is not an economist and is not qualified as an expert on the pricing of cannabis. The Defence argues that there is a very clear linkage between the price that a licensed producer sells cannabis and access to cannabis, which was acknowledged in *Allard*. The Defence further argues that evidence of pricing and affordability is well supported by the evidentiary record, both of Mr. Nash and other witnesses.

209 The Crown further argues that the evidence of by-laws and housing regulations that apply to multi-family dwellings is unsupported on the factual record and exceeded his expertise with these statements. The Defence argues that the basis for this statement is his own experience that patients who live in multi-family dwellings, apartments and condominiums are often unable to grow cannabis due to these restrictions, which goes to the issue of access in this litigation.

210 The Crown argues that Mr. Nash's estimates of the current price of cannabis are irrelevant and unsupported. The Defence argues that the issue of cannabis pricing is relevant as it is important to the related issue of affordability. The Defence argues that the Crown acknowledges the relevance of this evidence based on the evidence filed by Mr. Cain.

211 The Crown challenges the statement related to the availability of insurance coverage packages for occupiers based on a lack of qualification. The Defence argues these statements are based on his own experience as a producer and distributor of cannabis and are relevant to context.

212 The Crown argues that the statements that people need access to diverse strains of cannabis for different medical conditions is unsupported and beyond the scope of his qualifications. The Defence contends that in his industry and policy experience, Mr. Nash would be knowledgeable about patient needs and demands for different cannabis strains.

213 The Crown's arguments for excising these parts of the affidavit generally relate to the issue of anecdotal evidence and the scope of the expert's qualifications. Because the litigation relates to issues of accessibility of medical marihuana, and because Mr. Nash has personal knowledge based on his extensive industry and policy background, I do not consider these matters to be beyond the scope of his qualifications as an expert. Particularly in relation to issues of pricing, his evidence is amply supported by other witnesses, to the extent that he does not personally possess that knowledge.

214 The Alberta Court of Appeal supports this view.

215 In *McPhail*, the Court found, at paragraph 4:

> Expert witnesses must be qualified, and testimony outside their area of expertise should be prevented: ***R. v. Sekhon***, 2014 SCC 15 (S.C.C.) at para. 46, [2014] 1 S.C.R. 272 (S.C.C.). Experts, however, must have some latitude in the evidence they give. An expert who is permitted to give his opinion is also permitted to give the circumstances upon which that opinion is based, and experts necessarily bring past experiences to bear on their opinions . . .

216 In *Dominic*, the Court held at paragraph 22:

> . . . "Anecdotal evidence" is not a legal concept or a term of art but simply a way to describe second-hand evidence. It does not define, much less preclude, admissibility of that evidence. Being a qualified expert means having "acquired special or peculiar knowledge through study or experience": ***Mohan***, *supra* at 25. The mere fact that police experience about drug use is gained through information received from others does not, by itself, diminish the validity of the special knowledge acquired in this manner. The reality is that experience is often based on the accumulated wisdom of what some might describe as "anecdotal" information learned on the job.

217 I am satisfied, therefore, that the portions of the affidavit sought to be excised on the basis that they are based on hearsay and are beyond the scope of expertise of Mr. Nash ought not be struck.

Dr. Landolt

218 The Crown argues that certain portions of the affidavit of Dr. Landolt exceeded her qualifications and should be struck out as inadmissible expert evidence.

219 Dr. Landolt's evidence is necessary in relation to "cannabis, medical cannabis patient access, and the management of chronic complex problems in both in patient and out patient settings" (Expert Report of Dr. Landolt, at paragraph 4). These matters are both beyond the expertise of the trier of fact and will assist the Court in understanding the use and access of patients of medical cannabis.

220 The second threshold requirement, relevance, is met. Her professional opinion relates to the impact of current regulations on her ability to prescribe effective medical cannabis treatments for her patients, which is relevant to the issue of reasonable access of patients to cannabis in this litigation.

221 The third threshold requirement, the absence of an exclusionary rule, is met.

222 The fourth threshold requirement, that the expert be properly qualified for the evidence to be admissible, is also met. Dr. Landolt is a qualified medical doctor specializing in rheumatology and internal medicine, with a sub-specialty in the management of chronic complex problems in both the in-patient and out-patient settings. She prescribes medical cannabis to patients as part of her medical practice, and has spoken extensively on the medical use of cannabis to diverse audiences. Dr. Landolt has an impressive academic background, having taught previously at the Faculty of Medicine at the University of Toronto from 2009-2015, conducted clinical trials, and published extensively in medical journals in the fields of rheumatology and internal medicine. Since 2015, she has been director of a medical clinic in Toronto, and in that capacity has directly reviewed over 1500 patients for suitability for medical cannabis. Her current clinic specializes in fibromyalgia, osteoarthritis, and arthritic and neuropathic nerve pain. She also provides consultative support for clinical sub-specialities including gastro-enterology, psychiatry and neurology.

223 Reviewing Dr. Landolt's professional experience, she was qualified by the Court to explain the medical uses of cannabis within her specialization, rheumatology and internal medicine and chronic pain management, and the needs and obstacles of her patients that are prescribed medical cannabis within her area of expertise. I consider that she has the requisite skill, knowledge and experience in this area to offer an expert opinion in those areas.

224 The Crown challenges some of the evidence of Dr. Landolt as beyond her qualified expertise. The Crown argues statements of how long it took for patients to obtain cannabis or to switch licensed producers, whether stockpiling medication is within the financial means of patients, the "predatory practices" in medical cannabis clinics, and cannabis strain availability are inadmissible or should be given limited weight. The Respondent argues these statements are based on her experience.

225 In my opinion, these statements fall with Dr. Landolt's experience prescribing medical cannabis to patients within her field of medical practice. In many ways, this evidence is more fact evidence than opinion evidence. She was entitled to rely on knowledge gained in her professional capacity, in the same manner described in the Alberta Court of Appeal decisions of *McPhail* and *Dominic*, above. While some of her opinions are not strictly "medical" in nature, they nevertheless reflect the opinions and experiences of a doctor who frequently prescribes medical cannabis to her patients on a regular basis, and therefore has a special, expert insight into access for medical cannabis.

226 The Crown further challenges the opinion of Dr. Landolt as falling beyond the scope of her qualified expertise in relation to conditions such as seizures, migraines, panic attacks, and anxiety in adult and pediatric patients. The Defence agrees that the references to these areas of medical practice fall beyond her qualified area of expertise. I agree to some extent with the

Defence's position in that Dr. Landolt was not qualified as a medical expert in areas such as seizure disorders, panic attacks and anxiety, nor in pediatrics. Migraines fall within the umbrella of chronic pain.

227 That said, Dr. Landolt is a medical doctor whose medical practice includes treating the patients she described in her evidence. Some of that evidence is also fact evidence and not expert opinion evidence. She has more expertise through her training and experience with these types of patients and medical conditions than does a trier of fact, so I am satisfied that she is entitled to express expert opinions in such medical matters. I conclude, however, that where she expresses opinions in those areas, they should be given less weight than if they had been given by someone truly qualified as an expert in those specific areas. Since there was really no contradictory evidence, the issue is largely moot.

228 Finally, the Crown challenges Dr. Landolt's evidence with respect to her experience with licensed producers in the Toronto area as beyond her expertise, as this experience cannot be extrapolated to all of Canada. While the Respondent did not address this point, I am of the opinion that her general observations based on her experience in Toronto should be limited to that geographic region or to the jurisdiction of Ontario.

229 In conclusion, I am satisfied only that Dr. Landolt's opinion should given limited weight in relation to seizures, panic attacks, and anxiety in adults and pediatric patients, and that her opinions on access to medical marihuana through LPs should be limited to her experiences in Toronto and Ontario.

Mr. Cain

230 Mr. Cain was not put forward as an expert, nor was he qualified as such. To the extent that he offers opinions in his evidence, I will not rely on them. The objection to him expressing opinions is well founded, not necessarily because of any lack of expertise, but because he was not sought to be qualified.

Conclusions on the evidence

231 Most of the evidence put forward by the Defence was unchallenged by the Crown. Some of it, such as the fact that homeless people may have difficulties getting deliveries to their residence, or some doctors may not be comfortable having marihuana sent to their offices for homeless patients, or that people with limited financial resources may have difficulty purchasing medical marihuana at the cost estimated by either Mr. Nash or Mr. Cain, are matters that the Court can take judicial notice of (see, *R. v. Spence*, 2005 SCC 71 (S.C.C.)).

232 I am mindful that the experts put forward by the Defence in connection with medical marihuana are not entirely objective. Dr. Ziburkus, Mr. Nash and Mr. Jordan are actively involved in the promotion of medical marihuana. Dr. Ziburkus and Dr. Landolt are strong supporters of medical marihuana for its apparent medical benefits for their patients. Dr. Rosenbloom and Dr. Gaetz were not cross-examined, and their evidence was in the nature of social science evidence based on science and research with no direct involvement in promoting medical marihuana.

233 There were really no points of significant contention in the evidence, other than the opinions expressed on the successes of the *MMAR*, *MMPR* and *ACMPR* to provide reasonable access to medical marihuana. Any differences between the direct evidence of the Defence experts and their cross-examination, and the Crown evidence put through Mr. Cain were more matters of degree than direct contradictions.

234 While not qualified as an expert witness in these proceedings, Mr. Cain's evidence was based mainly on Health Canada's records. While we did not go through an extensive *Ares v. Venner*, [1970] S.C.R. 608 (S.C.C.) process to establish that the records are ordinary business records kept by Health Canada, Mr. Cain was knowledgeable about them. With respect to the Defence complaint that he was putting in legislative policy in an improper way, I treat his evidence as reflecting what his marching orders had been following the various court decisions affecting the constitutional validity of the medical marihuana regulations between 2001 and 2018. My view of his evidence is that he testified in a fair and objective manner and I accept the factual matters he put forward without reservation.

235 I do agree with Defence counsel that I should not consider any parts of Mr. Cain's evidence that may be considered to be opinion evidence.

236 I did not view any of the Defence experts as straying too far into advocacy to discount their evidence. However, I do not find any of their opinions as to whether the various regulations meet constitutional requirements to be helpful, or appropriate. That is my task, not theirs.

237 Mr. Howell was a good witness and there is really nothing in his evidence that I reject other than the sincerity or reasonableness of his beliefs concerning licensing requirements. In that area, he was either wilfully blind to the licensing requirements under the *ACMPR* and Ms. Kirkman's so-called "*Allard* " licence under the *ACMPR*, or his evidence was self-serving. The documentation he put forward for Ms. Kirkman clearly expired in July 2014 and Mr. Howell took no steps to check if there was anything current. His view of Ms. Kirkman's status is that she had an *Allard* license, which is a legal conclusion and not a regulatory conclusion. Other than that aspect of his testimony, it appears that he acted openly throughout the relevant time period (from October 2013 when he applied for an LP licence to March 2017 when he was charged).

238 The totality of the evidence leads me to a number of fact findings. I will focus mainly on the *ACMPR* and the period from April 2016 when Mr. Howell began to supply marihuana to Lisa Kirkman to March 2017 when he was charged. I make the following fact findings:

1) the medical marihuana system under the *ACMPR*s did not result in a perfect system of economic, efficient and consistent supply of medical marihuana to patients;

2) Health Canada had been responsive to concerns about the effectiveness of the earlier medical marihuana regulations and made sincere efforts to make them constitutionally valid;

3) Marihuana provides health benefits to many people, sometimes life-changing benefits;

4) For some persons, the health benefits depend on the strain of marihuana, the manner of dosage (smoking, vaping, ingesting, topical application) and the concentration of THC in the product they use;

5) For persons with complicated medical issues, persons who require a consistent source of the type of marihuana they require, and for people who require specialized products such as high concentration oil or extracts, personal production is the most economical way of sourcing the marihuana they need;

6) LPs do not adequately serve the homeless (because of issues including the residential delivery requirements, on-line registration and purchasing, the need for computer access, the lack of computer skills, the lack of fluency in English or French, and payment requirements (such as bank accounts and credit cards));

7) Medical marihuana accessed through LPs is expensive and beyond the financial means of many people requiring medical marihuana;

8) Where personal production is an option, many people are unable to grow marihuana themselves because of disabilities, skills, finances, and a site the can use;

9) While the designated grower provisions are intended to address this issue, there are people who are unable (for a variety of reasons, including lack of family and friends, remote locations, and finances) to find a designated grower;

10) Some people had difficulty finding a medical practitioner willing to prescribe medical marihuana in general;

11) Some people experienced delays in getting an access permit because of waiting times to see a medical practitioner;

12) Some people experienced delays in the registration process with Health Canada;

13) Some people experienced delays in the registration process with LPs;

14) Some people experienced problems with LPs because of a lack of choice of products, unavailability of the products they needed, delays in changing LPs;

15) Some people have no legal access to the products that benefit them the most, such as high concentration THC oil and extracts;

16) Mr. Howell began growing large quantities of marihuana without any proper licensing;

17) Mr. Howell's production practices were consistent with the Health Canada requirements respecting quality control and quality assurance and he was producing good quality marihuana and extracts;

18) Mr. Howell began to supply marihuana to Sarah Wilkinson and her daughter and to Lisa Kirkman and her son, not being their registered designated grower;

19) None of Ms. Wilkinson, her daughter, Ms. Kirkman or her son, had an authorization to possess medical marihuana under the *ACMPR* during the period April 2016 to March 2017; and

20) Production of high concentrate cannabis oil and extracts by Mr. Howell was not authorized under the *ACMPR*.

III. Charter Section 7

Arguments

Applicant Mr. Howell

239 Mr. Howell argues that the *ACMPR* deprives his liberty and security of the person interests and those interests of other individual medical cannabis patients. He argues these deprivations are not in accordance with the principles of fundamental justice because of arbitrariness, overbreadth and gross disproportionality.

240 Mr. Howell seeks a declaration that the prohibitions on distribution and production of cannabis in sections 5(2) and 7(1) of the *CDSA* and the *ACMPR* are of no force and effect based on section 52(1) of the *Constitution Act*, 1982.

241 He first focuses on the effects of the growing prohibitions that prevent "medical cooperative growing" as well as the restriction on producing cannabis oil of a greater THC concentration than 30 mg per mL.

242 The evidence of Ms. Wilkinson and Ms. Kirkman establishes that they and their children needed medical marihuana for treatment of complex medical situations, including depression, PTSD, chronic pain, autism, and seizure disorders. They were unable to find designated growers (other than Mr. Howell) who could provide them with the high concentration products they required from the right strain of marihuana in a timely, uninterrupted and cost-effective manner. In the case of Ms. Kirkman and her son and the homeless autistic man, Mr. Howell provided the marihuana for free.

243 Because of the high cost of medical marihuana from LPs, and the large doses required by each of Mr. Howell's "patients," Ms. Kirkman would have had to pay an LP over $5000 per month just for the marihuana she needed. Ms. Wilkinson would have had to pay over $6,000 per month just for her daughter.

244 Cannabis can be grown at a modest cost. Mr. Howell's evidence was that he believes he could bring the cost down to $0.19 per gram if he upgraded his facility to run on propane.

245 The system under the *ACMPR* to obtain medical marihuana from an LP fails to provide a timely, reliable source of affordable medical cannabis of the nature required by some people. Interruptions to access to the needed medical cannabis can result in serious impacts on some persons, including returning to the use of opiates, as well as exacerbation of existing conditions.

246 Second, according to Mr. Howell, cooperative growing should not be prohibited, as the prohibition provides a significant barrier to access to medical cannabis for many people. In his view, *Hitzig*, *Sfetkopoulos*, *Beren* and *Allard* all support the constitutionality of medical cooperative growing.

247 Mr. Howell invokes the right not to have one's physical liberty endangered by the risk of physical imprisonment, and the right to make personal choices about medical care free from state interference; and the right to make choices concerning one's own body and have control over one's own physical and psychological integrity.

248 He argues that the prohibition against cooperative growing has no rational connection between the state objective of providing health and safety and a regulatory scheme that only allowed access to drugs that were shown by scientific study to be safe and therapeutically effective. There is no rational connection between those objectives and curbing the illegal cannabis market, or managing fire, home invasion and diversion risks. The mail order requirement is not rationally connected with the objectives and arbitrarily restricts access. Nor is the limitation on concentrations in oil or other extractions.

249 The Defence argues that the *ACMPR*s are overbroad, and grossly disproportionate, noting that the penalties for trafficking where medical marihuana is grown cooperatively or grown in a responsible manner when the medical regime is not permitting reasonable access to cannabis are grossly disproportionate to the law's purposes.

250 Mr. Howell submits that the prohibitions are not saved by section 1 of the *Charter*. He argues that cooperative growing could proceed with the *ACMPR* rules for designated growers or with further reasonable rules. He further submits that the limiting measures under the *ACMPR* is not minimally intrusive under section 7 based on several examples.

251 Mr. Howell referred to a large number of cases: *Allard*; *Smith* *Parker*; *Hitzig*; *Sfetkopoulos* (FC and FCA); *R. v. Beren*, 2009 BCSC 429 (B.C. S.C.); *R. v. Nur*, 2015 SCC 15 (S.C.C.); *R. v. Appulonappa*, 2015 SCC 59 (S.C.C.); *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 (S.C.C.); *Reference re s. 94(2) of Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486 (S.C.C.); *Manitoba (Director of Child & Family Services) v. C. (A.)*, 2009 SCC 30 (S.C.C.); *Malette v. Shulman* (1990), 67 D.L.R. (4th) 321 (Ont. C.A.); *Bedford v. Canada (Attorney General)*, [2013] 3 S.C.R. 1101 (S.C.C.); *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.); *Schachter v. Canada*, [1992] 2 S.C.R. 679 (S.C.C.); *Doucet-Boudreau v. Nova Scotia (Department of Education)*, 2003 SCC 62 (S.C.C.); *Carter v. Canada (Attorney General)*, 2015 SCC 5 (S.C.C.); *Morgentaler*; *UFCW, Local 401 v. Alberta (Information and Privacy Commissioner)*, 2013 SCC 62 (S.C.C.); Kent Roach, *Constitutional Remedies in Canada*, 2nd ed, loose-leaf, Aurora, ON: Canada Law Book, 2013-, *Bilodeau v. Manitoba (Attorney General)*, [1986] 1 S.C.R. 449 (S.C.C.), *Corbiere v. Canada (Minister of Indian & Northern Affairs)*, [1999] 2 S.C.R. 203 (S.C.C.), and *R. v. Mills*, [1986] 1 S.C.R. 863 (S.C.C.).

Respondent Crown

252 The Crown argues that Mr. Howell has not made out any *Charter* violations. The *ACMPR* together with the exemption available under section 56 of the *CDSA* provided multiple ways to access medical marihuana. While the *ACMPR* may not allow perfect unfettered access for all users of medical marihuana, that does not make the law arbitrary or unreasonable.

253 The Crown notes that during the period the *ACMPR*s were in force, marihuana was a drug under the *Food and Drugs Act*, RSC 1985, c F-27 ("*FDA*"), a controlled substance under the *CDSA* and a narcotic subject to the *Narcotic Control Regulations*, CRC, c 1041.

254 *The CDSA*'s purposes are to maintain and promote public health and public safety. It does so by regulating possession, trafficking and imports and exports. The *FDA* is meant to protect Canadians' health and safety by regulating drugs and food, by means of controlling processes to ensure that drugs made available for therapeutic use meet safety, efficacy and quality standards.

255 The Crown acknowledges that the process to become an LP under the *ACMPR* was onerous. Once licensed, LPs were subject to rigorous inspections and enforcement measures. It notes that between April 2014 and November 1, 2017, 1101 inspections took place. There was a 92% compliance rate.

256 While personal production was limited, and designated producers were limited to 4 registrations, the site restrictions permitted up to 8 registrations per site. The Crown notes that if each of the registrations authorized the same amount of marihuana needed by Ms. Kirkman, that would permit over four thousand plants on one site.

257 The Crown argues that most of the "growing pains" under the *ACMPR* had been resolved by March 2017.

258 The Crown acknowledges that while there were delays in getting medical marihuana from an LP, an average 5-day process was not unreasonable, especially since a person was able to order a 30-day supply. While the system was not perfect for an indigent, homeless person, some LPs waive shipping charges, did not have minimum purchase requirements, and provided numerous payment options, referring to some of the evidence of Mr. Cain. The Crown says the evidence of Dr. Gaetz is insufficient to demonstrate that there were barriers to access as he relies on American studies and an old Toronto study for these conclusions.

259 The Crown notes that the *ACMPRs* do not prohibit a cooperative marihuana growing operation as the *ACMPR* does not mandate any particular business structure. The Crown says that Mr. Howell did not need to apply for an LP to personally supply marihuana to as many as 8 people if he joined with three other designated growers.

260 The Crown says that the system under the *ACMPR* has progressed from the *Allard* regime (the *MMPR*), where prohibiting personal production meant those who needed marihuana had no choice but to buy it from an illicit source. Now, the *ACMPR* allows for multiple access options.

261 It says that other concerns, such as the need for higher strength concentrations can be addressed by applications under section 56 of the *CDSA*.

262 The Crown says that the Defence did not seriously contend that the *ACMPR* regime was over-broad or grossly disproportionate. As for arbitrariness, the Crown responds that the regulations provide multiple avenues to access medical cannabis that is quality-controlled and regulated, to protect public health and safety. All of the limits imposed by the regulations are connected to that objective. Flexibility has been added as a result of *Smith*, so that patients can now access cannabis oil. And following *Allard*, patients can grow cannabis themselves or designate a grower.

263 According to the Crown, patients are no longer forced into the black market. Even though some medical marihuana users have had less than perfect experiences with the regime, Mr. Howell has not shown that access to medical cannabis has not been restricted in a manner that unjustifiably infringes liberty or rights to security.

264 Even if section 7 rights have been violated, according to the Crown, the Defence has not shown that the violations are contrary to the principles of fundamental justice. The Crown says that principles of fundamental justice do not require a perfect system. Health Canada has taken an incremental approach to enabling the production and sale of cannabis and derivatives, and the regulations are justified.

265 In support of its arguments, the Crown relies on the following authorities: *PHS*; *Astrazeneca Canada Inc. v. Canada (Minister of Health)*, 2006 SCC 49 (S.C.C.); *Parker*; *Hitzig*; *Long*; *R. v. Voss*, 2013 ABCA 38 (Alta. C.A.); *Sfetkopoulos* (FC and FCA); *Beren*; *R. v. Mernagh*, 2013 ONCA 67 (Ont. C.A.); *R. v. Hornby*, 2003 BCPC 60 (B.C. Prov. Ct.); *R. v. Wood*, 2006 NBCA 49 (N.B. C.A.); *R. v. Smith*, 2012 BCSC 544 (B.C. S.C.); *R. v. Smith*; *Allard*; *R. v. Ferkul*, 2019 ONCJ 893 (Ont. C.J.); *Bedford v. Canada (Attorney General)*; *R. v. Boehme*, 2016 BCSC 2014 (B.C. S.C.); and *Wakeford v. Canada* (2000), 187 D.L.R. (4th) 175 (Ont. S.C.J.), aff'd (2002), 209 D.L.R. (4th) 124 (Ont. C.A.), leave to appeal to SCC refused [2002] S.C.C.A. No. 147 (S.C.C.).

Defence reply

266 The Defence replied arguing that section 56 of the *CDSA* does not cure any arbitrary, overbroad, or grossly disproportionate application of the *CDSA*. Even if it could, the provision is an "illusory option."

267 It also argues that section 56 is not an answer to the under inclusiveness of the regimes at issue in *Hitzig*, *Allard*, *Smith* and here. It is inappropriate to place the onus on individuals to seek government approval on a case-by-case basis. The Defence notes that the Crown witness Mr. Cain did not know how an ordinary cannabis patient would come to know about applying for a section 56 exemption, or how to go about it. According to the Defence, this is an example of unfettered ministerial discretion, and is therefore arbitrary.

268 As a result, a section 56 exemption is not a practical option for most cannabis patients facing arbitrary access barriers.

269 The Defence cites *R. v. Smith*, 2014 BCCA 322 (B.C. C.A.) in support of its arguments.

Analysis

270 This was a well-argued case that raised difficult issues. It is obvious that the federal Crown appears to have responded to medical marihuana issues only when it has been forced to do so by the courts. Nevertheless, the federal Crown appears to have put significant efforts into creating and then amending the regulations in an attempt to meet constitutional requirements.

271 I accept that Mr. Howell attempted to become an LP during the in 2013 and 2014, and that his application was in the "enhanced screening" stage from December 2014 until long after he was charged with the subject offences. As a businessman, he saw a need and an opportunity. He appears to have applied in good faith and attempted to satisfy the onerous Health Canada requirements. While his initial application of October 2013 was refused for lack of information, when Mr. Howell found a new site with the support of Red Deer County he reapplied. His new application in July 2014 was eventually accepted as complete in November 2014 and has been pending ever since. There is no information suggesting that before March 2017 his application was ever rejected, or that Health Canada ever required further information from him at least until the *Cannabis Act* came into force.

272 No explanation was offered by the Crown for the delay in processing Mr. Howell's application, other than as stated in the correspondence back to him: a high number of applicants and inadequate staff to deal with them.

273 While Mr. Howell's difficulties and frustrations with the licensing process were real, and help put this matter in context, by themselves they do not affect the constitutional validity of the *ACMPR*. It certainly appears that Mr. Howell started out trying to do the right thing, but eventually gave up on the licensing process. Applying for a licence and obtaining one are two separate things.

274 Under the *ACMPR*s, it appears that Mr. Howell could have become Lisa Kirkman's designated grower before he started growing for her and supplying her. He was approved as her designated grower after he was charged with the underlying offences here. That appears to have been a simple and quick process. Mr. Howell could likely have produced for her and her son in 2016 if the appropriate applications had been made. Ms. Wilkinson could have applied for a personal production license, and produced for herself and her daughter in Mr. Howell's facility. Two other designated growers could have used Mr. Howell's facility for two more people with medical authorizations. As noted by Mr. Cain, if all of the patients with medical authorizations had the same requirements as Ms. Kirkman, that could result in at least four thousand plants being grown on Mr. Howell's site.

275 When Mr. Howell was charged, he was growing some 700 marihuana plants. His evidence was that the capacity of his facility was several times that amount, so it appears that his facility could be fully utilized if he and three other designated users began to grow and produce cannabis for 8 persons such as Ms. Kirkman. His cost estimate of $0.19 per gram would bring down Ms. Kirkman's costs for her required 3280 grams per month to approximately $640.

Section 7 analysis

276 Mr. Howell challenges the *ACMPR*s in two areas. Firstly, he argues that the prohibition against cannabis oil and extracts containing more than 30 mg/100 mL of THC deprives those persons of the right to make reasonable medical choices as to how best to treat their medical issues.

277 Secondly, he argues that the regime created by the *ACMPR* fails to provide reasonable access to medical marihuana users with the effect that they may be forced into the black market, become subject to criminal prosecution, and have adverse health impacts because of delays, availability and cost.

278 Essentially, I must determine whether the *ACMPR* regime adequately provides for a safe, secure and reliable supply of cannabis for those individuals that are constitutionally entitled to possession and use of cannabis for the treatment of medical conditions (*Beren* at para 98). This requires a balance between constitutionally protected section 7 interests and the role of the state to protect the health and safety of individuals (*Beren*, at para 105).

279 The Crown cited *Ferkul*, which is a case involving the *ACMPR*. The applicants challenged the constitutionality of the regulations on the basis of affordability and access. The judge there noted that the Applicants appeared to be arguing for a system that provided perfect access to medical cannabis. Rondinelli J dismissed the application, concluding at paragraph 23:

> [23] In my view, the access to medical cannabis provided by the ACMPR achieves the object of the ACMPR and therefore, individuals' rights are not limited arbitrarily and the negative effects of the ACMPR regime (delay, cost, and frustrations) are not completely out of sync with the object of the law . . .

280 *Ferkul* is not binding on me, and there were some differences in the evidence there from this case. It is persuasive, but I must conduct my own analysis on the evidence before me.

281 A section 7 analysis has three parts:

1) Is there a deprivation of life, liberty or security of the person?

2) Is the deprivation in accordance with the principles of fundamental justice?

3) If there is a breach of section 7, is it saved by section 1?

282 I will deal with each in turn.

1) Is there a deprivation of life, liberty or security of the person?

283 This ground has been well plowed in previous decisions. I am satisfied that this ground is satisfied. The Crown essentially conceded this issue. If the *ACMPR*s are unconstitutional, Mr. Howell is subject to imprisonment if he is convicted of an offence under them (*Smith* at para 11). If the prohibition against medical marihuana users producing or possessing oil or extracts containing more than 30 mg/mL of THC is unconstitutional, Mr. Howell's "patients" also face imprisonment if they produce or possess such substances.

284 As noted by the majority in *Smith* (at para 18), "forcing a person between a legal but inadequate treatment and an illegal but more effective choice" infringes security of the person.

285 From a legal point of view, it is clear that since *Parker* in 2001, Courts have accepted that marihuana can provide beneficial health effects for many patients suffering from a variety of health conditions. Courts have consistently held that there should be no prohibition against reasonable access to medical marihuana by people who need it.

286 Courts have also consistently held that "Parliament has the constitutional authority in the interests of public health and safety to prohibit the circulation of marihuana outside a licensed commerce created by regulatory exemption for authorized medical use" (*Mernagh* at para 74). In that case, Doherty JA continued saying that "unregulated unlimited patient choice in the matter of medical marijuana is not constitutional mandated."

287 I accept as an accurate statement of the law (before 2018) what Baird J stated in *Boehme* at paragraph 74:

> [74] . . . There is no doubt that Parliament has the constitutional authority, in the interests of public health and safety, to prohibit the circulation of marihuana outside a licenced commerce created by regulatory exemption for authorised medical use. While it seems that this long-standing government policy may soon be changed — Parliament has the power to legalize as well as criminalize — for present purposes I will simply say that unregulated, unlimited patient choice in the matter of medical marihuana is not constitutionally mandated. No unlicensed individual has a constitutional right to produce, distribute or use marihuana.

288 Until the *Cannabis Act* came into force in 2018, possession of any form and any quantity of marihuana was strictly prohibited unless the person in possession was a medical marihuana user or the person was growing marihuana for a medical marihuana user either as an LP or a Designated Producer. Marihuana remained a narcotic and was a controlled substance under the *CDSA*. Regardless of its medical benefits, it remained, from the law's point of view, an illegal and dangerous substance that needed careful regulation and controls to ensure that it did not fall into the hands of recreational users.

289 It remains a substance that poses health and safety risks, especially to children and young adults, and users with a history (or family history) of psychosis. On the evidence of Dr. Ziburkus, which was not significantly challenged by the Crown, and which I accept, marihuana:

- Has the highest safety ration of any common illicit substance;
- Is less addictive than any of the "scheduled" drugs, including caffeine; and
- Is not known to have ever resulted in death from overdose.

290 I am also satisfied from the evidence of Mr. Howell, Ms. Wilkinson, Ms. Kirkman, and Dr. Ziburkus that concentrations of higher than 30 mg/mL THC in cannabis oil or extracts can provide superior results than less potent concentrations in some patients.

291 There was no evidence put forward on behalf of the Crown as to why high concentrations such as those described by Mr. Howell for use by Ms. Wilkinson and her daughter, and by Ms. Kirkman and her son, or by Dr. Ziburkus, are impermissible. Dr. Ziburkus says in his affidavit:

> . . . Quick access to high concentrations of THC, such as in shatter which can reach 80-90% THC, can be potentially lifesaving in the cases of sever epilepsies and life-threatening seizures.

292 There was no evidence to the contrary.

293 My conclusion is that both liberty and security of the person are impacted by the limitation on THC concentration.

294 The fact that some doctors were reluctant or unwilling to prescribe cannabis has nothing to do with the *ACMPR*. Nor does wait times to get into a doctor. Nor does that fact that any registration process will involve some paperwork and time to complete.

295 Procedures set up by private LPs are not within the control of the federal Crown and are essentially outside the *ACMPR*.

296 Price is now set by LPs, or by way of private arrangements between an authorized user and their Designated Grower. The fact that many people (including Ms. Wilkinson, her daughter, Ms. Kirkman, her son, and the homeless autistic man) cannot afford to pay for the quantities of cannabis they require are not bound up in the constitutionality of the *ACMPR*s.

297 What the *ACMPR* restricts is where medical marihuana can be mailed or shipped by an LP and how it is to be handled by a Designated Grower. It does not prohibit LPs from allowing pickups from a facility. The evidence is that there are no "shops" or dispensaries where a person legally entitled to medical marihuana can be picked up, but that has to do with the choices of LPs and the marketplace, and are similarly not bound up in the constitutionality of the *ACMPR*s.

298 Dr. Goetz's evidence is uncontradicted in this case that the home delivery requirement denies access to the homeless. There was evidence that many medical practitioners will not allow their offices to be the mailing address for medical marihuana prescribed for their patients. That also denies access to homeless patients of those patients. While shelters may be used, there is evidence (and I can also take judicial notice) that there are many people living "rough," many people who do not like shelters or social service agencies because of restrictions on drug and alcohol use. There is no evidence before me as to why medically-prescribed marihuana should not be as available to patients as with other prescription drugs.

2) Is the deprivation in accordance with the principles of fundamental justice?

299 *Allard* describes the analysis at the second stage as follows at paragraphs 215-216:

> [215] All three principles of fundamental justice compare the rights infringement caused by the law with the objective of the law, not with the law's effectiveness . . . ([***Bedford***] at para 123). The Supreme Court has cautioned against defining the objective too broadly as it becomes difficult to say that means used to further it are overbroad or disproportionate. In Bedford, the Court held that the object of the prohibition should be confined to measures directly targeted by the law.
>
> [216] The objective of the *CDSA* was defined in ***PHS***, at para 129, adopting ***R v Malmo-Levine*** . . . as the protection of health and public safety. This objective was also adopted by the Supreme Court in ***Smith***. In ***Smith***, the object of the restriction to dried marihuana was defined as simply "the protection of health and safety" (para 24).

300 The medical benefits of cannabis oil were recognized in *Smith* and were incorporated into the *ACMPR*. However, there should be some rationale for limiting concentrations to 30 mg/mL to justify that restriction on access. While it is possible that there be some medical explanation or some health and safety issue, I do not think that the information provided by Mr. Cain overcomes the need for such higher concentration products being available to certain people.

301 Mr. Cain was the sole Crown witness. In his affidavit, he states:

> Health Canada's position is that the consumption of cannabis is known to pose health risks. When use among youth begins early and is frequent, there is an elevated risk of addiction and an increased risk of disrupting normal brain development, in addition to an increased risk of mental illness . . . For pregnant or breastfeeding women, cannabis use can pose risks to the health and normal development of the fetus and child.

302 He attaches a copy of Health Canada's webpage "*Cannabis and your Health*," which sets out the health risks related to the consumption of cannabis. Mr. Cain continues:

> Furthermore, cannabis and cannabis products that are produced illegally and under unregulated conditions can pose additional risks to health and safety, due to lack of quality control and oversight. These products may, unbeknownst to the consumer, have a high concentration of cannabinoids and may contain mould or chemical contaminants that present health hazards when consumed.

303 There may be a great difference between a "position" and reality, and stating a position is not providing evidence. While *Charter* cases permit a variety of materials to be introduced into evidence on social science issues, social science issues need to be contrasted with medicine and medical evidence. Health Canada website information provides information, but not evidence on the medically-proven risks or dangers associated with marihuana use.

304 Mr. Cain has no qualifications to present medical evidence or pharmacological evidence.

305 He explains the prohibition on high concentration cannabis oil "because of the distinct threats to public health and safety posed by such derivatives."

306 Mr. Cain continues:

> Edible forms of cannabis, in particular, raise distinct public health concerns. One such concern is the accidental consumption of edibles by children and the resulting health effects . . .
>
> A further public health concern associated with edible cannabis products is accidental over-intoxication as a result of unclear dosages in edibles produced by third parties.

307 Mr. Cain says that "concentrated cannabis oils are often produced using highly flammable, explosive or toxic solvents, such as butane." He says the resulting extracts may also contain chemical contaminants that present health hazards when consumed.

308 He says that the THC concentration limits under the *ACMPR* were set:

> . . . because a) they were consistent with the quantity/concentration of existing marketed cannabis or derived therapeutic products that have undergone the drug approval process in the Food and Drugs Act to show a therapeutic effect at this concentration without undue risk to the patient's health; b) they reduced the risk of accidental over-consumption and gave the patient flexibility to dose effectively by taking multiple doses as necessary. Over-consumption of cannabis, in particular, can cause adverse effects such as chest pain, rapid heartbeat, nausea/vomiting, psychotic episodes, respiratory depression, and severe anxiety and panic attacks.

309 Mr. Cain again references a Health Canada website publication "*Cannabis in Canada.*"

310 Dr. Ziburkus acknowledged that there were potential cannabis risks for young people and people with a history or family history of mental illness, but his opinion was that the risks were outweighed by the benefits.

311 Mr. Howell was clear in his evidence that he was capable of and did take care with fire safety, ventilation, security, sanitation, and that he grew "clean cannabis," free from pesticides and that he found the "safest and most effective way to produce clean, safe, affordable, and functional medical cannabis extracts without any additives was through the use of a closed loop carbon dioxide extraction system."

312 He said that he did not use any chemical solvents. His facility has been inspected by municipal authorities and appears to have complied with the Health Canada requirements for LPs but for being licensed and inspected.

313 Despite Mr. Cain's assertions, there was no convincing evidence that there was any scientific or health rationale that concentrations of greater than 30 mg/mL were harmful, or that production of concentrations greater than 30 mg/mL using carbon dioxide and without using solvents was riskier than producing concentrations of less than 30 mg/mL using carbon dioxide and without using solvents.

314 Edible products were not available under the *ACMPR*, so the articulated concern that children would potentially be harmed if their parents were careless about storage of tempting edible products does not really hold water. There was in any event no evidence put forward as to the incidence of children accidentally consuming products containing marihuana, or children being harmed by overdosing on marihuana.

315 If the objective of the *ACMPR* was to provide reasonable but safe access to medical marihuana, there does not appear to be any reasonable justification for the limitation on the THC concentration in oil and extracts.

316 In my view, that prohibition fails because it is arbitrary. While there might be some rational connection between the concentration and the objectives of the legislation, no connection beyond theoretical has been established in the evidence. It is difficult to conclude that the prohibition is overbroad because of the absence of any evidence justifying the need for the limitation at all, let alone the maximum concentration. Having found the prohibition to be arbitrary, I do not have to make any determination on rational connection and overbreadth.

317 As a result, I find that the limit on THC concentration infringes a person's rights to life, liberty and security by limiting choices of beneficial medicinal products. That is so because people risk criminal prosecution possessing infringing substances, and the criminalization of these infringing substances limits their right to make medical choices that benefit their health.

318 I have found there were a number of problems for people with legitimate needs for medical cannabis in accessing the strain they required in the form and concentration they required in a timely and affordable manner. I do not need to repeat the difficulties and delays outlined above.

319 Much of the argument on behalf of Mr. Howell revolves around cooperative growing. It is not clear to me that cooperative growing was banned under the *ACMPR*. It was if the cooperative grower was not an LP, and it was if there was no licensing. But the Crown makes the point that the *ACMPR* permitted up to 4 Designated Producers to produce authorized quantities of medical marihuana for up to 8 authorized users. As noted by the Crown, if all 8 users required the same quantity of medical marihuana as did Ms. Kirkman, the 4 Designated Producers could have in excess of 4000 marihuana plants growing at any one time. That is a substantial undertaking.

320 As stated by the Supreme Court in *PHS*, the issue is not whether the current laws are the best approach to access for medical marihuana, but whether the law in question "has limited the rights of the claimants in a manner that does not comply with the Charter" (at para 105, cited in *Allard*, at para 36).

321 The Alberta Court of Appeal considered the *MMAR 2001* in *R. v. Voss*. That case considered *Parker*, *Smith*, *Beren* and *Sfetkopoulos* and its earlier decision in *R. v. Krieger*, 2003 ABCA 85 (Alta. C.A.). The accused challenged the constitutionality of the regulations, arguing that they failed to provide an effective medical exemption because of supply defects and access defects. The Court rejected those arguments, stating at paragraph 7:

> Mere administrative inconvenience, or wish to be free from government regulation, does not entitle [individuals] to pick and choose which statutes will be binding on them.

322 I do not read any of the case law to date as suggesting that the Crown cannot regulate marihuana the same as it can regulate patent medicines and alcohol. That was certainly the case until marihuana was legalized in October 2018. As such, the Crown could restrict possession and use under the *FDA* just like it regulates prescription medicines, and until October 2018 under the *CDSA*.

323 What Mr. Howell appears to be arguing for is free medical marihuana for everyone with a self-assessed need, in any quantity, and available instantly at convenient locations with no red tape. Because it appears from the evidence that Mr. Howell and those he was supplying marihuana to were entirely unlicensed during the time he was supplying them.

324 That is something that is not available for anyone requiring prescription drugs. You need a doctor, nurse practitioner or pharmacist to get the prescription in the first place. There is no right to a prescription — therapeutic need must be demonstrated to the practitioner's satisfaction. And there is no right to a particular medicine — that too is a result of the practitioner's professional judgment.

325 Delays in obtaining medical treatment of any kind are likely similar to the delays related in the evidence on this application.

326 The *Charter* does not require the Government to provide useful medications or prescription medications for free. In the case of the homeless autistic man Mr. Howell supplied for free, or Ms. Kirkman and her son, the cost estimated by Mr. Howell to meet their needs likely far exceeded affordability. *Allard* discusses this issue, and in the summary at paragraph 14 says:

> [14] To the extent that affordability was advanced as a ground of s 7 violation, it has not been made out. More importantly, it is not necessary to make such a finding. Affordability can be a barrier to access, particularly where it is a choice made to expend funds on medical treatment to the detriment of other basic needs. However, this case does not turn on a right to "cheap drugs", nor a right "to grow one's own", nor do the Plaintiffs seek to establish such a positive right from government.

327 There was really no evidence as to how the *ACMPR* impact affordability. Mr. Howell points to himself as an example as to how unregulated production can assist affordability, as he has apparently chosen to provide Ms. Kirkman and her son and the autistic homeless man for free. That is to his credit, but does not demonstrate that there are other growers like him who are prepared to do so. The Defence raises cooperative growing, suggesting that cooperatives may be able to produce a less expensive product than the for-profit LPs. That may be so, but there was no evidence that cooperative growing would provide medical cannabis for indigent people at no cost. I do not accept that the Defence has demonstrated that the prohibitions in the *ACMPR* are more restrictive of access to marihuana because of affordability issues. Price is a barrier to access to medical marihuana, just like price is a barrier to access to food, housing and clothing. That does not mean it is an unconstitutional barrier, and it is not proven as such in this case.

328 The central issue in *Allard* was the "single source" requirement that medical marihuana users either grow themselves under a personal production licence, purchase from an LP, or use or authorized DP. Specifically, they were restricted in purchasing medical marihuana from anyone other than an LP. That restriction was found by Phelan J to be not rationally connected to the evidence of health and safety requirements before him, was overbroad and did not meet the minimum impairment test under section 1.

329 He held at paragraph 253:

> [253] Overall, viewed from the different perspectives, the law is arbitrary as the limits it imposes on section 7 interests bear no rational connection to its objective. Considering the Plaintiffs' situations, the MMPR does not reduce risk to their health and safety, nor does it improve their access to cannabis. In response to the Defendant's primary defense that health and safety risks of cultivation are reduced by the MMPR, the evidence does not qualify this risk. Many of the risks purported to be significant were not proved to exist, including fire, home invasion/violence/diversion and community impacts.

330 Phelan J noted at paragraphs 282 and 283 that the Plaintiffs had "on a balance of probabilities, demonstrated that cannabis can be produced safely and securely with limited risk to public safety and consistently with the promotion of public health" and he suggested that "there are very simple measures that can be taken to minimally impact the section 7 interests" in relation to the Crown concerns over fire, mould, diversion, theft and violence.

331 Having found section 7 violations, he stated at paragraph 295 that

> [295] It would be possible for the Court to suspend the operation of the provisions which make it an offence to possess, use, grow and/or distribute marihuana for those persons holding a medical prescription or medical authorization. However, this is a blunt instrument which may not be necessary if a Charter compliant regime were put in place or different legislation were passed.

332 The *ACMPR*, which followed *Allard*, addressed a number of issues. They did not change the number of registrations per designated grower and they did not change the number of DPs per site from 4.

333 The access regime under the *ACMPR* still required on-line ordering from LPs. That creates difficulties for people without computers or access to computers. But there are free computers in many public locations like libraries. There are numerous social service agencies set up to help the homeless and people without the skills or language capabilities to complete applications for disadvantaged people. People with the disadvantages and disabilities described in the Defence evidence have the same difficulties access basic human needs.

334 Undoubtedly many people do not have the financial ability, physical ability, or a place to grow their own medical cannabis. But that does not mean the Government is required to provide a Designated Grower and a place to grow the marihuana. The Defence points to "compassion clubs" such as the organization described in *Beren*. These clubs have been able to provide marihuana to people who otherwise would not be able to grow it themselves. There was no information before me that compassion clubs address or would provide marihuana for free or at reduced rates. Cost in any event is not addressed in the *ACMPR*. Designated Growers can charge as much or as little as they choose, just like LPs. I am not aware of "compassion

clubs" that provide prescription medications to needy people for free or at lower cost, and again I do not see that the right to have reasonable access means that it should be affordable in all cases. There are undoubtedly some people who may benefit from medical marihuana who cannot afford to pay anything for it, but that does not mean the *ACMPR*s are unconstitutional because they have not succeeded in providing free cannabis for those who can't afford to pay for it.

335 Delays in accessing helpful strains of marihuana, product recalls, sold out products and problems like that occur with regularly-prescribed medications. I think it is fair to take judicial notice of well-publicized products such as the shortage of asthma inhalers, for example.

336 I do see a difficulty with the requirement that medical marihuana from an LP must be shipped to a residential address (or doctor's office or shelter). I am not aware that prescription drugs, including narcotics, are similarly restricted in how a pharmacist can get them into the hands of the patient. That was a problem flagged and identified in the evidence relating to homeless people and people with precarious housing.

337 With the exception of restricting delivery of medical marihuana by LPs to the patient's residence, or health care practitioner, or to a shelter, I do not see the other problems with access identified in the evidence as constituting such an unreasonable barrier to access as to constitute a section 7 violation.

338 The evidence before me does not satisfy me that the restrictions on designated growers or the number of registrations that can result in marihuana being grown on the same site are unreasonable. They are arbitrary, but must be read in conjunction with the number of plants and the size of operation that can be carried on by a single DP. For example, if Mr. Howell produced for 2 people with Ms. Kirkman's requirements, he alone would be producing some 1000 marihuana plants.

339 I do recognize that the limit of 2 registrations per DP is arbitrary, and in Mr. Howell's case would restrict him from producing for himself, Ms. Wilkinson and her daughter. But a "family" exemption could result in a massive operation. Increasing the number of persons per DP without limiting total production per site or DP could result in very large enterprises. Yet limiting the amount of production per site would also be arbitrary because of the individual needs of each medical marihuana user.

340 I have no doubt that at least until marihuana was legalized in 2018, there were legitimate concerns over non-medical cannabis users gaining access to marihuana in any form. I recognize that Strayer J had extensive evidence before him over concerns such as security, theft, quality of product, and safety risks. The evidence before me was limited in that regard, other than through Mr. Howell as to what steps he was taking to address Health Canada's published concerns.

341 It does not take an expert witness to conclude that marihuana grow operations need to be very secure to prevent theft, especially by children and those looking to sell on the black market. Fire and safety concerns are real especially dealing with materials used in extracting the oil from marihuana plants. Fears that solvents may be used relate to serious health risks. Strayer J recognized the need for regulations in *Allard* and the Defence recognizes them in their submissions in relation to how cooperative growing could be safely set up and regulated.

342 On the evidence before me, I cannot conclude that the limitations on the number of registrations per DP and the number of registrations per plot are so unreasonable that the constitute a *Charter*-barred infringement on reasonable access to medical marihuana.

343 Becoming a Designated Producer should not be a backdoor way of becoming an LP, without the onerous registration requirements and qualifications and without inspections and regulation. Mr. Howell's evidence as to the steps he takes to safely produce high quality pesticide free marihuana and to safely extract oil from the plants using a CO2 process suggests that regulations are reasonable and within the ambit of protecting health and safety.

344 The *ACMPR* was certainly an improvement in access to medical marihuana, but reflected the federal Crown's policy approach to move slowly and incrementally. The increments were mainly as a result of Court challenges and decisions under section 7.

345 Here, there was no reason or justification articulated by the Crown in these proceedings as to why the home delivery restriction was considered necessary. If pharmacists can mail out prescribed narcotics to post office boxes or business addresses, what is the rationale for prohibiting regulated medical marihuana from being distributed in a similar fashion.

346 My conclusion is that the delivery restrictions in the *ACMPR*s are arbitrary. That said, this finding may not influence LPs as to how they choose to get their products into the hands of their customers. Like having retail outlets, it is likely beyond governmental power to dictate to a private enterprise how many outlets it must have. The marketplace generally makes those determinations, but for local zoning restrictions.

347 I do not read the *ACMPR* as prohibiting a cooperative from becoming an LP. As well, there would appear to be no prohibition on 4 people getting together and becoming DPs so they could grow for a total of 8 people on a single site. In the case of Mr. Howell, there appears to be no barrier against him and Ms. Wilkinson applying to become DPs to produce the quantities of medical marihuana they have been authorized for, as well as for Ms. Kirkman. While that model might leave Ms. Kirkman's son and the homeless autistic man out, in the context of a cooperative or compassionate endeavor, two medical marihuana users could become DPs for themselves, Ms. Kirkman's son and the homeless autistic man. How the finances are dealt with would appear to be no one's business but theirs.

348 That may not be the kind of cooperative that the Defence contemplates, but there would appear to be no reason under the *ACMPR* prohibiting charitably-minded people from applying to become LPs. They would have the ability to sell their products at the prices they choose, and presumably could find legitimate ways of employing many of their customers who are medical cannabis users to work for the LP in some capacity.

349 It seems to me that the way to challenge the *ACMPR* on cooperative growing would be for a cooperative to apply to become an LP. If the application is refused, an application similar to the application in *Sfetkopoulos* for judicial review of the refusal.

350 In this case, there was no evidence that Mr. Howell was operating as a cooperative venture. Any suggestions of cooperative growing are hypothetical and not founded in any evidence before me.

3) If there is a breach, is it saved by section 1?

351 As stated in *Allard*, at para 279, a disconnect between the object of a prohibition and its object that renders the restrictions arbitrary or overbroad under section 7 will generally frustrate the section 1 requirement that there be a rational connection to the objective with minimal impairment, based on the test in *Oakes*.

352 The Supreme Court of Canada stated in *Smith*, at paragraph 29:

> [29] The remaining question is whether the Crown has shown this violation of s. 7 to be reasonable and demonstrably justified under s. 1 of the *Charter*. As explained in ***Bedford***, the s. 1 analysis focuses on the furtherance of the public interest and thus differs from the s. 7 analysis, which is focused on the infringement of the individual rights: para. 125. However, in this case, the objective of the prohibition is the same in both analyses: the protection of health and safety. It follows that the same disconnect between the prohibition and its object that renders it arbitrary under s. 7 frustrates the requirement under s. 1 that the limit on the right be rationally connected to a pressing objective (***R. v. Oakes*** [1986] 1 S.C.R. 103). Like the courts below, we conclude that the infringement of s. 7 is not justified under s. 1 of the *Charter*.

353 I thus do not think it necessary to embark on a separate analysis under section 1. The ban on higher concentrations of THC and on home delivery is not saved by section 1 of the *Charter*, and is unconstitutional.

Section 56 of the CDSA

354 The Crown argues that in the event I find any section 7 violations under the *ACMPR* because of arbitrariness, they are essentially saved by section 56 of the *CDSA*. That argument was rejected in *Parker*. There, the Ontario Court of Appeal held at paragraphs 187 to 189:

> [187] In my view, this is a complete answer to the Crown's submission. The court cannot delegate to anyone, including the Minister, the avoidance of a violation of Parker's rights. Section 56 fails to answer Parker's case because it puts an unfettered discretion in the hands of the Minister to determine what is in the best interests of Parker and other persons like him and leaves it to the Minister to avoid a violation of the patient's security of the person.
>
> [188] If I am wrong and, as a result, the deprivation of Parker's right to security of the person is in accord with the principles of fundamental justice because of the availability of the s. 56 process, in my view, s. 56 is no answer to the deprivation of Parker's right to liberty. The right to make decisions that are of fundamental personal importance includes the choice of medication to alleviate the effects of an illness with life-threatening consequences. It does not comport with the principles of fundamental justice to subject that decision to unfettered ministerial discretion. It might well be consistent with the principles of fundamental justice to require the patient to obtain the approval of a physician, the traditional way in which such decisions are made. It might also be consistent with the principles of fundamental justice to legislate certain safeguards to ensure that the marihuana does not enter the illicit market. However, I need not finally determine those issues, which, as I will explain in considering the appropriate remedy, are a matter for Parliament.
>
> [189] I have one final concern with the availability of the s. 56 process. An administrative structure made up of unnecessary rules that results in an additional risk to the health of the person is manifestly unfair and does not conform to the principles of fundamental justice. We were provided with little evidence as to the operation of the s. 56 procedure as established by the government . . .

355 The Crown says that section 56 of the *CDSA* acts as a sort of "safety valve" for any arbitrariness in the *ACMPR*. Support for that argument is found in *PHS*. In that case, the applicants' arguments that section 4(1) of the *CDSA* were rejected because of the availability of a section 56 application for a section 56 exemption. In that case, the Minister failed to extend an exemption previously granted to the applicant. The Court found that this failure was arbitrary had rejected a section 56 application.

356 The case is clear authority for the Crown's argument that section 7 challenges to section 4(1) of the *CDSA* are without foundation because section 4(1) is constitutionally sound. The case does not, however, apply to the *ACMPR*. That seems clear from *Smith*, decided after *PHS*.

357 Mr. Cain's evidence provided the number of exemptions granted, but did not give any information on the nature of the exemptions sought. No information was provided on the application process and how, for example, any of Ms. Wilkinson, Ms. Kirkman, or the homeless autistic man might learn of the availability of such an application and how and where to make it.

358 It may be that section 56 does provide a viable option, but that is not made out in the evidence. In *Nur*, the majority in the Supreme Court of Canada rejected the argument that prosecutorial discretion was like safety valve provided by section 56 as described in *PHS* when it struck down mandatory minimum sentences for certain firearms offences under section 95(2)(a) of the *Criminal Code*. To be an effective safety valve, the exemption must be demonstrated to be of assistance to those whose *Charter* rights would otherwise be violated. That has not been done here, as the Crown has not demonstrated that it is practically available.

359 As a result, I do not find the Crown's reliance on section 56 to be of any assistance to it here.

Conclusion on section 7

360 I am satisfied that the *ACMPR*s violate section 7 in relating to the prohibition on concentrations of THC in cannabis oil and extracts above 30 mg/mL, and in the manner of distribution of medical cannabis by LPs. The evidence satisfies me that in that regard, the rights of Ms. Wilkinson and her daughter, Ms. Kirkman and her son, and of the un-named homeless autistic

man were violated. Mr. Howell's rights were violated in relation to his possession of cannabis and cannabis extracts of any concentration for his personal medical use.

IV. Remedies

361 Mr. Howell argues that the appropriate remedy should be effective and responsive. He notes that *ACMPRs* are inadequate to protect him and his patients. Mr. Howell argues that the appropriate remedy is a declaration that the *ACMPR*s and the prohibition on cannabis distribution and production in section 5(2) and 7(1) of the *CDSA* are of no force and effect.

362 He argues that simply striking the "offending" portions of the *ACMPR* would not be appropriate as it is akin to "reading in" as rejected in *Parker*. *Parker* struck the offending provision in the *CDSA*. *Allard* did the same thing as in *Parker*, finding the regulations constitutionally invalid but suspending the declaration for a period of time to allow the Government to remedy the deficiencies. *Smith* is distinguished on the basis that it was relatively easy to fix the offending prohibition by simply striking out "dried" in the *MMPR*.

363 Mr. Howell also seeks a personal remedy in the form of a stay of proceedings under section 24(1) of the *Charter*.

364 Mr. Howell argues that severing the unconstitutional portions of the *ACMPR*s or reading in or out are unworkable because they would lead to the Court overstepping its constitutional competence and trenching on Parliament's role.

365 He cites both *Parker* and *Allard*, and notes that in *Allard*, the Court struck the whole of the cannabis regulatory regime because of the integrated nature of the regime. While it may have been appropriate to sever the offending portion of the regulations in *Smith*, the constitutional remedy there was relatively easy as it only extended to adding cannabis oil to the medical exemption.

366 The Crown says that if the Court finds the *ACMPR* to have violated the *Charter* in a way that does not survive section 1 scrutiny, it should grant the Applicant personal relief pursuant to section 24(1) of the *Charter* and stay the charges against him. It cites *Parker*, *R. c. Demers*, 2004 SCC 46 (S.C.C.) and *Schachter v. Canada*, [1992] 2 S.C.R. 679 (S.C.C.) in support of its position.

367 The Crown notes that in *Vancouver (City) v. Weeds Glass and Gifts Ltd.*, 2020 BCCA 46 (B.C. C.A.), the Court of Appeal declined to grant any declaratory relief because the constitutional validity of the *ACMPR* is for most purposes moot.

368 I do not accept the Defence position that striking offending provisions of the *ACMPR* would either be usurping the role of Parliament, or that it would be ineffective to fix the invalidity issues. I can see those arguments being effective where reading in is concerned, because a court-imposed fix may not be the only potential legislated remedy. It may also be inappropriate where the offending provision goes to the heart of the legislation or regulation and striking would leave the legislation or regulation meaningless.

369 Striking the offending provisions of the *ACMPR*s will be effective in addressing the aforementioned breaches of section 7 of the *Charter*. The *CDSA* and the balance of the regulations otherwise remain constitutionally valid for those prosecutions that have yet to be concluded.

370 While I have accepted the Defence argument that portions of the *ACMPR*s are unconstitutional, I have difficulty directing a stay against Mr. Howell.

371 Having found a section 7 *Charter* violation of Mr. Howell's rights, he is entitled to a remedy (*Doucet-Boudreau v. Nova Scotia (Department of Education)*, 2003 SCC 62 (S.C.C.) at paras 24-25). The Defence argues for a personal remedy of a stay. However, in *Clay*, the Ontario Court of Appeal noted that "it is not unheard of for the successful *Charter* claimant to receive no immediate benefit from the result" (at para 58).

372 When *Parker* was decided, there was no medical exemption for the purposes of marihuana. That directly impacted the *CDSA* as there was no other legislation to decriminalize possession of marihuana for legitimate medical purposes. Mr. Parker,

who was charged with cultivating marihuana for his own medical use, was given a constitutional exemption from section 4 of the CDSA (the possession section). The stay of proceedings granted by the trial judge was upheld.

373 In the companion case of *Clay*, a remedy under section 52(1) of the *Constitution Act* was ineffective, since the impugned provision had since been repealed, as in this case. Rosenberg JA noted at paragraphs 53 and 54:

> [53] However, the *Narcotic Control Act* has been repealed and therefore no declaration of invalidity is required. Further, the appellant, in my view, would not be entitled to a constitutional exemption since, unlike Mr. Parker, he is not within the class of persons for whom the exemption is required. The only issue, then, is whether the appellant is entitled to a personal remedy under s. 24(1) of the *Charter* in the form of a stay of proceedings.
>
> [54] In my view, this is not an appropriate case for a stay of proceedings. The appellant appears to have conceded at trial that he had no standing to challenge the law on the basis of a medical need for marihuana. That concession was wrong. However, it was consistent with the appellant's position throughout the case that the real problem with the legislation was the criminalization of personal possession for recreational use. The appellant did not succeed on that part of the case.

374 *Hitzig*, the first successful attack on the *MMAR*s, struck down various portions of the *MMAR*s, but the Ontario Court of Appeal declined to declare any part of the *CDSA* or the whole of the *MMAR*s to be unconstitutional. *Hitzig* was not a criminal case so a stay did not arise.

375 In *Baren*, Koenigsberg J considered compassion club issues, and concluded that two specific paragraphs offended section 7. She declared them to be invalid. She declined to strike down the whole of the *MMAR 2003* and continued on to convict Mr. Baren. She stated at paragraph 136:

> [136] In relation to the charges against Mr. Beren, the Crown, having proved beyond a reasonable doubt that Mr. Beren was producing and trafficking in marihuana for the purpose of supplying a compassion club, which in turn was selling the marihuana to most of its members who did not have ATPs, and thus were not licensed to possess, which parts of the *MMAR* I have found to be valid, is guilty on both counts.

376 The trial result in *Smith* (at 2012 BCSC 544 (B.C. S.C.)) was to sever the word "dried" before marihuana throughout the *MMAR 2003*, having found that the dried marihuana restriction infringed section 7. Johnston J noted at paragraph 129:

> [129] This leaves in place the requirement that one obtain and retain the authorizations provided under the *MMAR* in order to lawfully access marihuana for medical purposes, but removes the artificial restriction of that lawful use to marihuana in its dried form.

377 Johnston J declined to grant a stay in favour of Mr. Smith. Mr. Smith had been employed by a supplier of cannabis products to the Cannabis Buyers Club of Canada. The Club sold cannabis and cannabis products people who had satisfied the club's owner that they suffered from a permanent physical disability or disease. That was contrasted with Compassion Clubs, which required form or certificate signed by a doctor before it would admit anyone into their club. Mr. Smith was employed as a cook, making various edible cannabis products. Johnston J held at paragraph 131:

> [31] In this case, I have found there has been a violation of liberty and security rights of the medical marihuana users protected by s. 7, as well as Mr. Smith's liberty right. However, I find that society's interests in having the charges against Mr. Smith tried on their merits outweigh the violation of Mr. Smith's liberty right, at least sufficiently to deny him the judicial stay he seeks.

378 Following the *voir dire* decision in *Smith*, the Crown elected to call no evidence at the trial proper. Mr. Smith was found not guilty on the basis of the absence of evidence.

379 More recently, the issue of remedy was discussed in *R. v. Tedder*, 2018 ONSC 6072 (Ont. S.C.J.). Similar to *Beren*, Mr. Tedder was running a commercial enterprise that operated outside of the legal medical marihuana regime, and for a profit. He claimed, amongst other defences, that *Allard* had struck down the entire *MMPR*.

380 In that case, the Ontario Superior Court rejected the *Charter* challenge. Garton J considered the alternative scenario if he had found a *Charter* violation. At paragraph 75, he noted that there was no evidence that Mr. Tedder sold only to those who had an authorization to possess marihuana, or that he was running a medical marihuana dispensary or compassion club. He relied on *Smith* and noted that even if Mr. Tedder had obtained a declaration of unconstitutionality, that would not likely result in a personal remedy.

381 Garton J cites *Smith* at paragraph 41 the Supreme Court of Canada:

> . . . [T]he Court held that Smith had standing to challenge the constitutionality of the law under which he was charged, even if the alleged unconstitutional effects were not directed at him, and even if no possible remedy for the constitutional deficiency would end the charges against him. At para. 12, the Court stated:
>
> > Accused persons have standing to challenge the constitutionality of the law they are charged under, even if the alleged unconstitutional effects are not directed at them: see ***R. v. Morgentaler***, [1988] 1 S.C.R. 30 (S.C.C.); *Big M Drug Mart*. Nor need accused persons show that all possible remedies for the constitutional deficiency will as a matter of course end the charges against them. In cases where a claimant challenges a law by arguing that the law's impact on other persons is inconsistent with the Charter, it is always possible that a remedy issued under s. 52 of the *Constitution Act*, 1982 will not touch on the claimant's own situation.

382 Garton J stated at paragraph 79:

> [79] The courts have recognized that there is a distinction to be made analytically between those who use marihuana for medical purposes, and those who wish to sell marihuana. Those claimants, in the constitutional context, are not similarly situated, and cannot be treated in the same way, as the following passages from the decision in ***R. v. Krieger***, 2008 ABCA 394, 1 Alta. L.R. (5th) 70, at paras. 8-9, make clear:
>
> > There is a second difficulty with the Appellant's argument. Subsection 24(1) of the *Charter* does not authorize a court to grant an applicant a personal remedy for alleged violations of the personal *Charter* rights of other persons. Yet that is precisely what is engaged on the facts of this case. The status of suppliers of marihuana to individuals requiring medical marihuana is very different from those in the latter category. A statutorily mandated exemption for users of marihuana for medical purposes, if practically unavailable, violates the fundamental principle of justice that a statutory defence must not be illusory. Indeed, in broader terms, the Supreme Court of Canada has made clear that if the Government introduces a scheme it must be reasonably adequate and effective. If it is not, those adversely affected who might otherwise enjoy, as in the case of users of marihuana for medicinal purposes, the benefit of such use and the ancillary statutory exemption from criminal sanction, might well invoke their s.7 remedies. The desire of the Appellant to supply others with marihuana is not on the same footing.
> >
> > The complaint here is that the Appellant, an identifiable supplier, upon whom the Government has not conferred a supplier's licence, alleges that those he supplies are disadvantaged and that, accordingly, he, the supplier, is entitled to that which may be described as "adjunct constitutional protection." That argument must be rejected. We see no basis on this record upon which to impose a constitutional obligation upon Parliament to make accommodations for the Appellant to achieve that purpose.

383 I find Garton J's reasoning in *Tedder* to be highly persuasive, particularly as I am bound by the Alberta Court of Appeal's decision in *Krieger*.

384 In this case, Mr. Howell operated entirely outside the *ACMPR*s. He had no licensing himself, although he could likely have obtained a medical authorization to use marihuana, he could likely have obtained authorization to grow his own marihuana, and he could likely have become a designated grower. His evidence is that he was at some time before he began to grow marihuana for himself and others, he had been prescribed marihuana. He was authorized as a designated grower for Lisa Kirkman in July 2017.

385 There was no evidence that anyone he supplied had an authorization to possess marihuana between the time he began growing for Ms. Kirkman in April 2016 to March 24, 2017.

386 Unlike compassion clubs, Mr. Howell did not require anything signed by a doctor or medical practitioner authorizing the possession of marihuana or the appropriate dose from any of his patients. He appears to have taken a medical history and determined need himself. He was not a doctor or health professional.

387 I cannot speculate on why Mr. Howell chose to proceed in the manner he did. He testified that he was under the impression that before he could become an LP he had to be able to demonstrate to Health Canada that he had experience growing marihuana. If that was his concern, he could have become a designated grower for Ms. Kirkman and another person with her needs and gained experience as a designated grower with some 2000 plants.

388 But instead, he proceeded to grow marihuana for a number of people — at a minimum 6 (himself, Ms. Wilkinson, her daughter, the homeless autistic man, Ms. Kirkman and her son). He may well have been growing in compliance with all of the Health Canada regulations for LPs. Mr. Howell appears to have become very knowledgeable in extracting oil from the marihuana plants in a regulation-compliant manner. He could have done that producing for himself or for Ms. Kirkman as a designated grower if he had applied for and obtained authorizations to do so.

389 In these circumstances, I follow the reasoning of Johnston J in *Smith*. Even if a stay were available to me as a potential remedy for Mr. Howell, I would not order one. Society's interests in having the charges against Mr. Howell tried on their merits outweigh the violation of his *Charter* section 7 rights. It remains within the purview of the Crown to decide whether to call any evidence or proceed further on these charges.

390 Other similar cases have come to similar conclusions. In *R. v. Hornby*, 2003 BCPC 60 (B.C. Prov. Ct.), McKinnon PCJ held at paragraph 86:

> [86] However, allowing someone to operate completely outside the parameters established by Health Canada and the law is no answer. Rather, it places the well-being of persons like Mr. Scott into the hands of people who are in no way accountable. An unregulated, covert and uninspected grow operation depends utterly upon the goodwill of the operator to adhere to appropriate health and safety protocols. Dr. Hornby may be a person in whom Ms. Black has personal confidence in regard to his *bona fides* and good intentions, but this kind of *ad hoc*, personality dependent relationship has no place in the production and distribution of drugs to the sick and the dying. The concerns expressed by both Ms. Black and Dr. Hornby about the need for safe and reliable sources of medical use marihuana are logically inconsistent with their position that the production and distribution of such medical use marihuana should take place without any governmental controls, or only with such controls that they are prepared to personally condone.

391 I therefore decline to grant Mr. Howell a stay of proceedings. The public interest in having this matter adjudicated on its merits outweighs the benefits of a stay of proceedings in this action. It is not an appropriate remedy.

392 That leaves me with the issue of declaratory remedies. While prospective remedies are favoured (see, *R. v. Ferguson*, 2008 SCC 6 (S.C.C.), McLachlin CJ at paras 64-65), the *ACMPR*s have since been repealed and replaced under the *Cannabis Act*. Nevertheless, since there are undoubtedly active prosecutions under the *CDSA* and the *ACMPR*s for matters arising before October 2018, I consider it appropriate to grant declaratory relief.

393 I thus declare that sections 67(1) (limiting concentrations) and sections 93(1)(d)(i), 133(2)(a), 130(1)(b) and 189(1)(e) (to the extent that they prohibit distribution and delivery or pick-up of medical marihuana to places other than the patient's ordinary residence, the office if their medical practitioner, or a shelter) are contrary to section 7 of the *Charter* and are of no force and effect.

394 Since the *ACMPR*s have been repealed, I find it unnecessary to suspend this declaration.

395 Mr. Howell may be entitled to a personal remedy if he is convicted at trial based on the principles in *R. v. Nasogaluak*, 2010 SCC 6 (S.C.C.), which may result in a reduction of a possible sentence. That is an issue to be addressed in the event Mr. Howell is tried and convicted, and not now.

V. Conclusion

396 Based on the foregoing, I have found breaches of the section 7 rights that cannot be saved under section 1 of the *Charter*. I am satisfied that he (like Ms. Kirkman) is entitled to grow and possess marihuana for his personal medical needs. However, I do not see that the violations of section 7 are engaged in relation to his alleged role in trafficking marihuana.

397 Although the *ACMPR*s are no longer in force, I grant declaratory relief under section 52(1) of the *Constitution Act*. The specific provisions in the *ACMPR*s I have found to be invalid under section 7 of the *Charter* described above are no longer of any force or effect, particularly in any ongoing prosecutions.

398 I do not consider this an appropriate case in which to order a stay of proceedings under section 24(1) of the *Charter*. However, if Mr. Howell is convicted and sentenced in this case, he may be entitled to a remedy based on *R. v. Nasogaluak*.

399 Counsel should arrange for the continuation of the trial through the Trial Coordinator's office in Red Deer, or at the next arraignment date.

400 I am grateful to counsel for their thorough briefs and well-argued written submissions.

Accused's application for invalidity granted in part; accused's application for stay of proceedings dismissed; Crown's application granted in part.

5.

R v Smith 2015 SCC SCE 34 Carswell BC 1587

Most Negative Treatment: Distinguished
Most Recent Distinguished: Yashcheshen v. Saskatchewan (Ministry of Health) | 2022 SKCA 68, 2022 CarswellSask 260 | (Sask. C.A., Jun 2, 2022)

2015 SCC 34, **2015** CSC **34**
Supreme Court of Canada

R. v. **Smith**

2015 CarswellBC 1587, 2015 CarswellBC 1588, 2015 SCC 34, 2015 CSC 34, [2015] 10 W.W.R. 1, [2015] 2 S.C.R. 602, [2015] B.C.W.L.D. 3767, [2015] B.C.W.L.D. 3930, [2015] B.C.W.L.D. 3931, [2015] A.C.S. No. 34, [2015] S.C.J. No. 34, 122 W.C.B. (2d) 231, 20 C.R. (7th) 246, 323 C.C.C. (3d) 461, 337 C.R.R. (2d) 202, 372 B.C.A.C. 1, 386 D.L.R. (4th) 583, 472 N.R. 1, 640 W.A.C. 1, 74 B.C.L.R. (5th) 1, J.E. 2015-1001

Her Majesty The Queen, Appellant and Owen Edward Smith, Respondent and Santé Cannabis, Criminal Lawyers' Association (Ontario), Canadian Civil Liberties Association, British Columbia Civil Liberties Association, Canadian AIDS Society, Canadian HIV/AIDS Legal Network and HIV & AIDS Legal Clinic Ontario, Interveners

McLachlin C.J.C., Abella, Cromwell, Karakatsanis, Wagner, Gascon, Côté JJ.

Heard: March 20,
2015
Judgment: June 11,
2015
Docket: 36059

Proceedings: affirming *R. v.* ***Smith*** (2014), 617 W.A.C. 66, 360 B.C.A.C. 66, 14 C.R. (7th) 81, 315 C.C.C. (3d) 36, 316 C.R.R. (2d) 205, [2014] B.C.J. No. 2097, 2014 CarswellBC 2383, 2014 BCCA 322, Chiasson J.A., Garson J.A., Levine J.A. (B.C. C.A.); varying *R. v.* ***Smith*** (2012), 257 C.R.R. (2d) 129, [2012] B.C.J. No. 730, 2012 CarswellBC 1043, 2012 BCSC 544, 290 C.C.C. (3d) 91, R.T.C. Johnston J. (B.C. S.C.)

Counsel: W. Paul Riley, Q.C., Kevin Wilson, for Appellant
Kirk I. Tousaw, John W. Conroy, Q.C., Matthew J. Jackson, Bibhas D. Vaze, for Respondent
Julius H. Grey, Geneviève Grey, for Intervener, Santé Cannabis
Gerald Chan, Nader R. Hasan, for Intervener, Criminal Lawyers' Association (Ontario)
Andrew K. Lokan, Debra McKenna, for Intervener, Canadian Civil Liberties Association
Jason B. Gratl, for Intervener, British Columbia Civil Liberties Association
Paul Burstein (written), Ryan Peck (written), Richard Elliott (written), for Interveners, Canadian AIDS Society, the Canadian HIV/AIDS Legal Network and the HIV & AIDS Legal Clinic Ontario

Subject: Constitutional; Criminal; Human Rights
Related Abridgment Classifications
Criminal law
IV Charter of Rights and Freedoms
IV.3 Demonstrably justified reasonable limit [Oakes test] [s. 1]
Criminal law
IV Charter of Rights and Freedoms
IV.12 Life, liberty and security of person [s. 7]
IV.12.f Miscellaneous

Headnote

Criminal law --- Charter of Rights and Freedoms — Life, liberty and security of person [s. 7] — Miscellaneous

Accused was charged with possession and possession for purpose of trafficking under Controlled Drugs and Substances Act (CDSA) — Trial judge held that prohibition of non-dried forms of medical marijuana in Marijuana Medical Access Regulations (MMARs) unjustifiably infringed s. 7 of Canadian Charter of Rights and Freedoms — Accused was acquitted — Court of Appeal upheld trial judge's conclusions — Crown appealed — Appeal dismissed — Accused's acquittal was affirmed — Accused had standing to challenge constitutionality of MMARs — Prohibition of non-dried forms of medical marijuana limited liberty and security of person in manner that was arbitrary and hence was not in accord with principles of fundamental justice — However, suspension of Court of Appeal's declaration of invalidity was deleted — Declaration that ss. 4 and 5 of CDSA were of no force and effect, to extent that they prohibited person with medical authorization from possessing cannabis derivatives for medical purposes, was issued Constitution Act, 1982, s 7; Controlled Drugs and Substances Act, S.C. 1996, c. 19, s 4; Controlled Drugs and Substances Act, S.C. 1996, c. 19, s 5.

Criminal law --- Charter of Rights and Freedoms — Demonstrably justified reasonable limit [Oakes test] [s. 1]

Accused was charged with possession and possession for purpose of trafficking under Controlled Drugs and Substances Act — Trial judge held that prohibition of non-dried forms of medical marijuana in Marijuana Medical Access Regulations unjustifiably infringed s. 7 of Canadian Charter of Rights and Freedoms — Accused was acquitted — Court of Appeal upheld trial judge's conclusions — Crown appealed — Appeal dismissed — Accused's acquittal was affirmed — Infringement of s. 7 of Charter was not justified under s. 1 of Charter.

Droit criminel --- Charte des droits et libertés — Vie, liberté et sécurité de la personne [art. 7] — Divers

Accusé a été inculpé de possession de stupéfiants et de possession de stupéfiants en vue d'en faire le trafic en vertu de la Loi réglementant certaines drogues et autres substances (LRCDAS) — Juge du procès a estimé que l'interdiction prévue dans le Règlement sur l'accès à la marijuana à des fins médicales (RAMFM) touchant les formes non séchées de marijuana utilisées à des fins médicales portait atteinte de façon injustifiable au droit protégé par l'art. 7 de la Charte canadienne des droits et libertés — Accusé a été acquitté — Cour d'appel a confirmé les conclusions du juge du procès — Ministère public a formé un pourvoi — Pourvoi rejeté — Acquittement de l'accusé confirmé — Accusé avait qualité pour contester la constitutionnalité du RAMFM — Interdiction touchant les formes non séchées de marijuana utilisées à des fins médicales limitait la liberté et la sécurité de la personne de façon arbitraire de telle sorte qu'elle allait à l'encontre des principes de justice fondamentale — Toutefois, la suspension de la déclaration d'invalidité prononcée par la Cour d'appel devait être annulée — Déclaration affirmant que les art. 4 et 5 de la LRCDAS étaient inopérants dans la mesure où ils interdisaient à une personne disposant d'une autorisation médicale de posséder des dérivés du cannabis à des fins médicales a été émise.

Droit criminel --- Charte des droits et libertés — Limite raisonnable dont la justification peut être démontrée

Accusé a été inculpé de possession de stupéfiants et de possession de stupéfiants en vue d'en faire le trafic en vertu de la Loi réglementant certaines drogues et autres substances — Juge du procès a estimé que l'interdiction prévue dans le Règlement sur l'accès à la marijuana à des fins médicales touchant les formes non séchées de marijuana utilisées à des fins médicales portait atteinte de façon injustifiable au droit protégé par l'art. 7 de la Charte canadienne des droits et libertés — Accusé a été acquitté — Cour d'appel a confirmé les conclusions du juge du procès — Ministère public a formé un pourvoi — Pourvoi rejeté — Acquittement de l'accusé confirmé — Atteinte à l'art. 7 de la Charte n'était pas justifiée en vertu de l'article premier de la Charte.

The accused was charged with possession and possession for the purpose of trafficking under the Controlled Drugs and Substances Act (CDSA). The trial judge held that the prohibition of non-dried forms of medical marijuana in the Marijuana Medical Access Regulations (MMARs) unjustifiably infringed s. 7 of the Canadian Charter of Rights and Freedoms. The accused was acquitted. The Court of Appeal upheld the trial judge's conclusions. The Crown appealed.

Held: The appeal was dismissed; the accused's acquittal was affirmed.

The accused had standing to challenge the constitutionality of the MMARs. A prohibition of non-dried forms of medical marijuana limited the liberty and security of the person in a manner that was arbitrary and hence was not in accord with the principles of fundamental justice. The infringement of s. 7 of the Charter was not justified under s. 1 of the Charter.

The suspension of the Court of Appeal's declaration of invalidity had to be deleted. It was appropriate to issue a declaration that ss. 4 and 5 of the CDSA were of no force and effect, to the extent that they prohibited a person with medical authorization from possessing cannabis derivatives for medical purposes.

L'accusé a été inculpé de possession de stupéfiants et de possession de stupéfiants en vue d'en faire le trafic en vertu de la Loi réglementant certaines drogues et autres substances (LRCDAS). Le juge du procès a estimé que l'interdiction prévue dans le Règlement sur l'accès à la marijuana à des fins médicales (RAMFM) touchant les formes non séchées de marijuana utilisées à des fins médicales portait atteinte de façon injustifiable au droit protégé par l'art. 7 de la Charte canadienne des droits et libertés. L'accusé a été acquitté. La Cour d'appel a confirmé les conclusions du juge du procès. Le ministère public a formé un pourvoi.

Arrêt: Le pourvoi a été rejeté et l'acquittement de l'accusé a été confirmé.

L'accusé avait qualité pour contester la constitutionnalité du RAMFM. L'interdiction touchant les formes non séchées de marijuana utilisées à des fins médicales limitait la liberté et la sécurité de la personne de façon arbitraire de telle sorte qu'elle allait à l'encontre des principes de justice fondamentale. L'atteinte à l'art. 7 de la Charte n'était pas justifiée en vertu de l'article premier de la Charte.

La suspension de la déclaration d'invalidité prononcée par la Cour d'appel devait être annulée. Il était approprié d'émettre une déclaration affirmant que les art. 4 et 5 de la LRCDAS étaient inopérants dans la mesure où ils interdisaient à une personne disposant d'une autorisation médicale de posséder des dérivés du cannabis à des fins médicales.

Table of Authorities

Cases considered:

Bedford v. Canada (Attorney General) (2013), 2013 **SCC** 72, 2013 CarswellOnt 17681, 2013 CarswellOnt 17682, 303 C.C.C. (3d) 146, 366 D.L.R. (4th) 237, 7 C.R. (7th) 1, 312 O.A.C. 53, 452 N.R. 1, *(*sub nom. *Canada (Attorney General) v. Bedford)* [2013] 3 S.C.R. 1101, *(*sub nom. *Canada (Attorney General) v. Bedford)* 297 C.R.R. (2d) 334, 128 O.R. (3d) 385 (note) (**S.C.C**.) — considered

Carter v. Canada (Attorney General) (**2015**), **2015** **SCC** 5, **2015** CSC 5, **2015** CarswellBC 227, **2015** CarswellBC 228, 66 B.C.L.R. (5th) 215, [**2015**] 3 W.W.R. 425, 17 C.R. (7th) 1, 320 C.C.C. (3d) 1, 468 N.R. 1, 384 D.L.R. (4th) 14, 366 B.C.A.C. 1, 629 W.A.C. 1, [**2015**] 1 S.C.R. 331, 327 C.R.R. (2d) 334 (**S.C.C**.) — referred to

Hitzig v. R. (2003), 2003 CarswellOnt 3795, *(*sub nom. *Hitzig v. Canada)* 177 C.C.C. (3d) 449, *(*sub nom. *Hitzig v. Canada)* 231 D.L.R. (4th) 104, 14 C.R. (6th) 1, *(*sub nom. *Hitzig v. Canada)* 177 O.A.C. 321, *(*sub nom. *Hitzig v. Canada)* 111 C.R.R. (2d) 201 (Ont. C.A.) — referred to

Housen v. Nikolaisen (2002), 2002 **SCC** 33, 2002 CarswellSask 178, 2002 CarswellSask 179, 286 N.R. 1, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1, [2002] 2 S.C.R. 235, 2002 CSC 33 (**S.C.C**.) — referred to

PHS Community Services Society v. Canada (Attorney General) (2011), 2011 **SCC** 44, 2011 CarswellBC 2443, 2011 CarswellBC 2444, 336 D.L.R. (4th) 385, 272 C.C.C. (3d) 428, 86 C.R. (6th) 223, 22 B.C.L.R. (5th) 213, [2011] 12 W.W.R. 43, 421 N.R. 1, *(*sub nom. *Canada (Attorney General) v. PHS Community Services Society)* [2011] 3 S.C.R. 134, 310 B.C.A.C. 1, 526 W.A.C. 1, *(*sub nom. *Canada (Attorney General) v. PHS Community Services Society)* 244 C.R.R. (2d) 209 (**S.C.C**.) — referred to

R. v. Big M Drug Mart Ltd. (1985), [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321, 58 N.R. 81, [1985] 3 W.W.R. 481, 37 Alta. L.R. (2d) 97, 60 A.R. 161, 18 C.C.C. (3d) 385, 85 C.L.L.C. 14,023, 13 C.R.R. 64, 1985 CarswellAlta 316, 1985 CarswellAlta 609 (**S.C.C**.) — considered

R. v. Clay (2000), 2000 CarswellOnt 2626, 188 D.L.R. (4th) 468, 146 C.C.C. (3d) 276, 49 O.R. (3d) 577, 75 C.R.R. (2d) 310, 37 C.R. (5th) 170, 135 O.A.C. 66 (Ont. C.A.) — referred to

R. v. Latchmana (2008), 2008 ONCJ 187, 2008 CarswellOnt 2251, 170 C.R.R. (2d) 128 (Ont. C.J.) — referred to

R. v. Morgentaler (1988), [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385, 26 O.A.C. 1, 37 C.C.C. (3d) 449, 62 C.R. (3d) 1, 31 C.R.R. 1, 82 N.R. 1, 63 O.R. (2d) 281 (note), 1988 CarswellOnt 954, 1988 CarswellOnt 45 (**S.C.C**.) — referred to

R. v. Oakes (1986), [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, 65 N.R. 87, 14 O.A.C. 335, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1, 19 C.R.R. 308, 1986 CarswellOnt 95, 1986 CarswellOnt 1001, 53 O.R. (2d) 719 (note) (**S.C.C**.) — referred to

R. v. Parker (2000), 2000 CarswellOnt 2627, 188 D.L.R. (4th) 385, 146 C.C.C. (3d) 193, 49 O.R. (3d) 481, 75 C.R.R. (2d) 233, 37 C.R. (5th) 97, 135 O.A.C. 1 (Ont. C.A.) — considered

Reference re s. 94(2) of Motor Vehicle Act (British Columbia) (1985), [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536, 63 N.R. 266, 69 B.C.L.R. 145, 23 C.C.C. (3d) 289, 18 C.R.R. 30, 36 M.V.R. 240, [1986] 1 W.W.R. 481, 48 C.R. (3d) 289, 1985 CarswellBC 398, [1986] D.L.Q. 90, 1985 CarswellBC 816 (**S.C.C**.) — referred to

Statutes considered:

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

s. 1 — considered

s. 7 — considered
Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44
s. 52 — considered
Controlled Drugs and Substances Act, S.C. 1996, c. 19
Generally — referred to

s. 4(1) — unconstitutional

s. 4 — unconstitutional

s. 5 — unconstitutional

s. 5(2) — unconstitutional

s. 55 — referred to
Food and Drugs Act, R.S.C. 1985, c. F-27
Generally — referred to
Regulations considered:
Controlled Drugs and Substances Act, S.C. 1996, c. 19
Marihuana for Medical Purposes Regulations, SOR/2013-119

Generally — referred to

Marihuana Medical Access Regulations, SOR/2001-227

Generally — referred to

s. 1(1) "dried marihuana" — considered

s. 24 — referred to

s. **34** — referred to

APPEAL by Crown from judgment reported at *R. v.* ***Smith*** (2014), 2014 BCCA 322, 2014 CarswellBC 2383, [2014] B.C.J. No. 2097, 14 C.R. (7th) 81, 315 C.C.C. (3d) 36, 360 B.C.A.C. 66, 617 W.A.C. 66, 316 C.R.R. (2d) 205 (B.C. C.A.), upholding accused's acquittal of possession and possession for purpose of trafficking.

POURVOI formé par le ministère public à l'encontre d'un jugement publié à *R. v.* ***Smith*** (2014), 2014 BCCA 322, 2014 CarswellBC 2383, [2014] B.C.J. No. 2097, 14 C.R. (7th) 81, 315 C.C.C. (3d) 36, 360 B.C.A.C. 66, 617 W.A.C. 66, 316 C.R.R. (2d) 205 (B.C. C.A.), ayant confirmé l'acquittement de l'accusé relativement à une infraction de possession de stupéfiants et de possession de stupéfiants en vue d'en faire le trafic.

***The Court*:**

1 Regulations under the Controlled Drugs and Substances Act, S.C. 1996, c. 19 (“CDSA”), permit the use of marihuana for treating medical conditions. However, they confine medical access to "dried marihuana", so that those who are legally authorized to possess marihuana for medical purposes are still prohibited from possessing cannabis products extracted from the active medicinal compounds in the cannabis plant. The result is that patients who obtain dried marihuana pursuant to that

authorization cannot choose to administer it via an oral or topical treatment, but must inhale it, typically by smoking. Inhaling marihuana can present health risks and is less effective for some conditions than administration of cannabis derivatives.

2 The parties accept the conclusion of the Ontario Court of Appeal in *R. v. Parker* (2000), 146 C.C.C. (3d) 193 (Ont. C.A.), that a blanket prohibition on medical access to marihuana infringes the *Canadian Charter of Rights and Freedoms*. This appeal requires us to decide whether a medical access regime that only permits access to dried marihuana unjustifiably violates the guarantee of life, liberty and security of the person contrary to s. 7 of the Charter. The British Columbia courts ruled it did, and we agree.

I. Background

3 The *CDSA* prohibits the possession, production, and distribution of cannabis, its active compounds, and its derivatives. In recognition of the fact that controlled substances may have beneficial uses, the *CDSA* empowers the government to create exemptions by regulation for medical, scientific or industrial purposes (s. 55). The Marihuana Medical Access Regulations, SOR/2001-227 ("*MMARs*"), created such an exemption for people who could demonstrate a medical need for cannabis. Applicants had to provide a declaration from a medical practitioner certifying that conventional treatments were ineffective or medically inappropriate for treatment of their medical condition. Once they had met all the regulatory requirements, patients were legally authorized to possess "dried marihuana", defined as "harvested marihuana that has been subjected to any drying process" (s. 1). Some patients were authorized to grow their own marihuana, under a personal-use production licence (s. 24), while others obtained the drug from a designated licensed producer (s. **34**).

4 The *MMARs* were replaced in 2013 with the Marihuana for Medical Purposes Regulations, SOR/2013-119 ("*MMPRs*"). The new regime replaces the marihuana production scheme in the *MMARs* with a system of government-licensed producers. For the purposes of this appeal, however, the situation remains unchanged: for medical marihuana patients, the exemption from the *CDSA* offence is still confined to dried marihuana.

5 The accused, Owen Edward **Smith**, worked for the Cannabis Buyers Club of Canada, located on Vancouver Island, in British Columbia. The Club sold marihuana and cannabis derivative products to members — people the Club was satisfied had a *bona fide* medical condition for which marihuana might provide relief, based on a doctor's diagnosis or laboratory test. It sold not only dried marihuana for smoking, but edible and topical cannabis products — cookies, gel capsules, rubbing oil, topical patches, butters and lip balms. It also provided members with recipe books for how to make such products by extracting the active compounds from dried marihuana. Mr. **Smith's** job was to produce edible and topical cannabis products for sale by extracting the active compounds from the cannabis plant. Mr. **Smith** does not himself use medical marihuana, and the Club did not have a production licence under the *MMARs*.

6 On December 3, 2009, the police, responding to a complaint about an offensive smell, paid Mr. **Smith** a visit at his apartment in Victoria, and saw marihuana on a table. They obtained a search warrant and seized the apartment's inventory, which included 211 cannabis cookies, a bag of dried marihuana, and 26 jars of liquids whose labels included "massage oil" and "lip balm". Laboratory testing established that the cookies and the liquid in the jars contained tetrahydrocannabinol ("THC"), the main active compound in cannabis. THC, like the other active compounds in cannabis, does not fall under the *MMARs* exemption for dried marihuana. The police charged Mr. **Smith** with possession of THC for the purpose of trafficking contrary to s. 5(2) of the CDSA, and possession of cannabis contrary to s. 4(1) of the CDSA.

7 At his trial before Johnston J., Mr. **Smith** argued that the *CDSA* prohibition on possession, in combination with the exemption in the *MMARs*, was inconsistent with s. 7 of the Charter and unconstitutional because it limits lawful possession of marihuana for medical purposes to "dried marihuana". Many witnesses, expert and lay, were called. At the end of the *voir dire*, the judge made the following findings (2012 BCSC 544, 290 C.C.C. (3d) 91 (B.C. S.C.)):

> (1) The active compounds of the cannabis plant, such as THC and cannabidiol, have established medical benefits and their therapeutic effect is generally accepted, although the precise basis for the benefits has not yet been established.

(2) Different methods of administering marihuana offer different medical benefits. For example, oral ingestion of the active compounds, whether by way of products baked with THC-infused oil or butter, or gel capsules filled with the active compounds, may aid gastro-intestinal conditions by direct delivery to the site of the pathology. Further, oral administration results in a slower build-up and longer retention of active compounds in the system than inhaling, allowing the medical benefits to continue over a longer period of time, including while the patient is asleep. It is therefore more appropriate for chronic conditions.

(3) Inhaling marihuana, typically through smoking, provides quick access to the medical benefits of cannabis, but also has harmful side effects. Although less harmful than tobacco smoke, smoking marihuana presents acknowledged risks, as it exposes patients to carcinogenic chemicals and is associated with bronchial disorders.

8 The trial judge found that the restriction to dried marihuana deprives Mr. **Smith** and medical marihuana users of their liberty by imposing a threat of prosecution and incarceration for possession of the active compounds in cannabis. He also found that it deprives medical users of the liberty to choose how to take medication they are authorized to possess, a decision which he characterized as "of fundamental personal importance", contrary to s. 7 of the Charter (para. 88). These limits offend the principles of fundamental justice because they are arbitrary; limiting the medical exemption to dried marihuana does "little or nothing" to enhance the state's interest in preventing diversion of illegal drugs or in controlling false and misleading claims of medical benefit (para. 114). For the same reason, the trial judge held that the restriction is not rationally connected to its objectives, and hence not justified under s. 1 of the Charter.

9 The majority of the Court of Appeal upheld the trial judge's conclusions on the evidence and the constitutional issues, although it characterized the object of the prohibition more broadly, as the protection of health and safety (2014 BCCA 322, 360 B.C.A.C. 66 (B.C. C.A.)). Chiasson J.A., dissenting, held that Mr. **Smith** did not have standing to raise the constitutional issue, and that in any event the restriction did not violate s. 7 because medical users could legally convert dried marihuana into other forms.

II. Discussion

10 Three issues arise: Mr. **Smith's** standing to challenge the constitutionality of the prohibition; the constitutionality of the prohibition; and the appropriate remedy.

A. Standing

11 The first question is whether Mr. **Smith** has standing to challenge the constitutionality of the prohibition. We conclude that he does. The Crown took no issue with Mr. **Smith's** standing at trial. On appeal, although the issue was canvassed in oral argument, the Crown acknowledged that the principle "that no one can be convicted of an offence under an unconstitutional law" applied to Mr. **Smith** (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (**S.C.C**.), at p. 313; C.A. reasons, at para. 147). Before this Court, the Crown adopted Chiasson J.A.'s dissenting position, arguing that Mr. **Smith** does not have standing because he does not himself use medical marihuana and operated outside the regulatory scheme. The restriction to dried marihuana therefore has "nothing to do with him" (C.A. reasons, at para. 151).

12 This overlooks the role the *MMARs* play in the statutory scheme. They operate as an exception to the offence provisions under which Mr. **Smith** was charged, ss. 4 and 5 of the CDSA. As the majority of the Court of Appeal said, the issue is whether those sections of the *CDSA*, "as modified by the *MMARs*, deprive people authorized to possess marijuana of a constitutionally protected right by restricting the exemption from criminal prosecution to possession of dried marijuana" (para. 85). Nor does the fact that Mr. **Smith** is not a medical marihuana user and does not have a production licence under the regime mean he has no standing. Accused persons have standing to challenge the constitutionality of the law they are charged under, even if the alleged unconstitutional effects are not directed at them: R. v. Morgentaler[1988] 1 S.C.R. 30(**S.C.C**.); *Big M Drug Mart*. Nor need accused persons show that all possible remedies for the constitutional deficiency will as a matter of course end the charges against them. In cases where a claimant challenges a law by arguing that the law's impact on other persons is inconsistent with the Charter, it is always possible that a remedy issued under s. 52 of the Constitution Act, 1982 will not touch on the claimant's

own situation: see *R. v. Latchmana*, 2008 ONCJ 187, 170 C.R.R. (2d) 128(Ont. C.J.), at para. 16; *R. v. Clay* (2000), 49 O.R. (3d) 577 (Ont. C.A.).

13 In this case, the constitutionality of the statutory provision under which Mr. **Smith** is charged is directly dependent on the constitutionality of the medical exemption provided by the *MMARs*: see *Parker*. He is therefore entitled to challenge it.

B. The Constitutionality of the Prohibition

14 This appeal asks the Court to determine whether restricting medical access to marihuana to dried marihuana violates s. 7 of the Charter:

> **7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

15 Section 7 permits the law to limit life, liberty and security of the person, provided it does so in a way that is not contrary to the principles of fundamental justice.

16 The first question in the s. 7 analysis is whether the law limits life, liberty or security of the person. We conclude that it does. The legislative scheme's restriction of medical marihuana to dried marihuana limits s. 7 rights in two ways.

17 First, the prohibition on possession of cannabis derivatives infringes Mr. **Smith's** liberty interest, by exposing him to the threat of imprisonment on conviction under s. 4(1) or 5(2) of the CDSA. Any offence that includes incarceration in the range of possible sanctions engages liberty: *Reference re s. 94(2) of Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486 (**S.C.C**.), at p. 515. The prohibition also engages the liberty interest of medical marihuana users, as they could face criminal sanctions if they produce or possess cannabis products other than dried marihuana. We cannot accede to the dissenting judge's position on this point: the *MMARs* do not authorize medical marihuana users to convert dried marihuana into its active compounds. An authorization to possess medical marihuana is no defence for a patient found in possession of an alternate dosage form, such as cannabis cookies, THC-infused massage oil, or gel capsules filled with THC.

18 Second, the prohibition on possession of active cannabis compounds for medical purposes limits liberty by foreclosing reasonable medical choices through the threat of criminal prosecution: *Parker*, at para. 92. In this case, the state prevents people who have already established a legitimate need for marihuana — a need the legislative scheme purports to accommodate — from choosing the method of administration of the drug. On the evidence accepted by the trial judge, this denial is not trivial; it subjects the person to the risk of cancer and bronchial infections associated with smoking dry marihuana, and precludes the possibility of choosing a more effective treatment. Similarly, by forcing a person to choose between a legal but inadequate treatment and an illegal but more effective choice, the law also infringes security of the person: *Morgentaler*; Hitzig v. R.2003231 D.L.R. (4th) 104(Ont. C.A.).

19 The Crown says that the evidence adduced on the *voir dire* did not establish that the prohibition on alternative forms of cannabis intruded on any s. 7 interest, beyond the deprivation of physical liberty imposed by the criminal sanction. It says that the evidence did not prove that alternative forms of medical marihuana had any therapeutic benefit; at most it established that the patient witnesses preferred cannabis products to other treatment options. This submission runs counter to the findings of fact made by the trial judge. After a careful review of extensive expert and personal evidence, the trial judge concluded that in some circumstances the use of cannabis derivatives is more effective and less dangerous than smoking or otherwise inhaling dried marihuana. A trial judge's conclusions on issues of fact cannot be set aside unless they are unsupported by the evidence or otherwise manifestly in error: *Housen v. Nikolaisen*, 2002 **SCC** 33, [2002] 2 S.C.R. 235(**S.C.C**.). The evidence amply supports the trial judge's conclusions on the benefits of alternative forms of marihuana treatment; indeed, even the Health Canada materials filed by the Crown's expert witness indicated that oral ingestion of cannabis may be appropriate or beneficial for certain conditions.

20 The expert evidence, along with the anecdotal evidence from the medical marihuana patients who testified, did more than establish a subjective preference for oral or topical treatment forms. The fact that the lay witnesses did not provide medical

reports asserting a medical need for an alternative form of cannabis is not, as the Crown suggests, determinative of the analysis under s. 7. While it is not necessary to conclusively determine the threshold for the engagement of s. 7 in the medical context, we agree with the majority at the Court of Appeal that it is met by the facts of this case. The evidence demonstrated that the decision to use non-dried forms of marihuana for treatment of some serious health conditions is medically reasonable. To put it another way, there are cases where alternative forms of cannabis will be "reasonably required" for the treatment of serious illnesses (C.A. reasons, at para. 103). In our view, in those circumstances, the criminalization of access to the treatment in question infringes liberty and security of the person.

21 We conclude that the prohibition on possession of non-dried forms of medical marihuana limits liberty and security of the person, engaging s. 7 of the Charter. This leaves the second question — whether this limitation is contrary to the principles of fundamental justice.

22 The trial judge found that the limits on liberty and security of the person imposed by the law were not in accordance with the principles of fundamental justice, because the restriction was arbitrary, doing "little or nothing" to further its objectives, which he took to be the control of illegal drugs or false and misleading claims of medical benefit. The majority of the Court of Appeal, which found that the objective of the prohibition was the protection of public health and safety (relying on *Hitzig* and *PHS Community Services Society v. Canada (Attorney General)*, 2011 **SCC** 44, [2011] 3 S.C.R. 134 (**S.C.C.**)), likewise concluded it did not further that objective and was thus arbitrary and contrary to the principles of fundamental justice.

23 It is necessary to determine the object of the prohibition, since a law is only arbitrary if it imposes limits on liberty or security of the person that have no connection to its purpose: *Bedford v. Canada (Attorney General)*, 2013 **SCC** 72, [2013] 3 S.C.R. 1101 (**S.C.C.**), at para. 98.

24 The Crown does not challenge the Court of Appeal's conclusion that the object of the prohibition on non-dried forms of medical marihuana is the protection of health and safety. However, it goes further, arguing that the restriction protects health and safety by ensuring that drugs offered for therapeutic purposes comply with the safety, quality and efficacy requirements set out in the Food and Drugs Act, R.S.C. 1985, c. F-27, and its regulations. This qualification does not alter the object of the prohibition; it simply describes one of the means by which the government seeks to protect public health and safety. Moreover, the *MMARs* do not purport to subject dried marihuana to these safety, quality and efficacy requirements, belying the Crown's assertion that this is the object of the prohibition. We therefore conclude that the object of the restriction to dried marihuana is simply the protection of health and safety.

25 The question is whether there is a connection between the prohibition on non-dried forms of medical marihuana and the health and safety of the patients who qualify for legal access to medical marihuana. The trial judge concluded that for some patients, alternate forms of administration using cannabis derivatives are more effective than inhaling marihuana. He also concluded that the prohibition forces people with a legitimate, legally recognized need to use marihuana to accept the risk of harm to health that may arise from chronic smoking of marihuana. It follows from these findings that the prohibition on non-dried medical marihuana undermines the health and safety of medical marihuana users by diminishing the quality of their medical care. The effects of the prohibition contradict its objective, rendering it arbitrary: see *Bedford*, at paras. 98-100.

26 The Crown says there are health risks associated with extracting the active compounds in marihuana for administration via oral or topical products. It argues that there is a rational connection between the state objective of protecting health and safety and a regulatory scheme that only allows access to drugs that are shown by scientific study to be safe and therapeutically effective. We disagree. The evidence accepted at trial did not establish a connection between the restriction and the promotion of health and safety. As we have already said, dried marihuana is not subject to the oversight of the *Food and Drugs Act* regime. It is therefore difficult to understand why allowing patients to transform dried marihuana into baking oil would put them at greater risk than permitting them to smoke or vaporize dried marihuana. Moreover, the Crown provided no evidence to suggest that it would. In fact, as noted above, some of the materials filed by the Crown mention oral ingestion of cannabis as a viable alternative to smoking marihuana.

27 Finally, the evidence established no connection between the impugned restriction and attempts to curb the diversion of marihuana into the illegal market. We are left with a total disconnect between the limit on liberty and security of the person imposed by the prohibition and its object. This renders it arbitrary: see *Carter v. Canada (Attorney General)*, **2015** **SCC** 5, [**2015**] 1 S.C.R. 331 (**S.C.C.**), at para. 83.

28 We conclude that the prohibition of non-dried forms of medical marihuana limits liberty and security of the person in a manner that is arbitrary and hence is not in accord with the principles of fundamental justice. It therefore violates s. 7 of the Charter.

29 The remaining question is whether the Crown has shown this violation of s. 7 to be reasonable and demonstrably justified under s. 1 of the Charter. As explained in *Bedford*, the s. 1 analysis focuses on the furtherance of the public interest and thus differs from the s. 7 analysis, which is focused on the infringement of the individual rights: para. 125. However, in this case, the objective of the prohibition is the same in both analyses: the protection of health and safety. It follows that the same disconnect between the prohibition and its object that renders it arbitrary under s. 7 frustrates the requirement under s. 1 that the limit on the right be rationally connected to a pressing objective (*R. v. Oakes*, [1986] 1 S.C.R. 103 (**S.C.C.**)). Like the courts below, we conclude that the infringement of s. 7 is not justified under s. 1 of theCharter.

C. Remedy

30 A law is "of no force or effect" to the extent it is inconsistent with the guarantees in the Charter*:* s. 52 of the Constitution Act, 1982. We have concluded that restricting medical access to marihuana to its dried form is inconsistent with the Charter. It follows that to this extent the restriction is null and void.

31 The precise form the order should take is complicated by the fact that it is the combination of the offence provisions and the exemption that creates the unconstitutionality. The offence provisions in the *CDSA* should not be struck down in their entirety. Nor is the exemption, insofar as it goes, problematic — the problem is that it is too narrow, or under-inclusive. We conclude that the appropriate remedy is a declaration that ss. 4 and 5 of theCDSA are of no force and effect, to the extent that they prohibit a person with a medical authorization from possessing cannabis derivatives for medical purposes.

32 We would reject the Crown's request that the declaration of invalidity be suspended to keep the prohibition in force pending Parliament's response, if any. (What Parliament may choose to do or not do is complicated by the variety of available options and the fact that the *MMARs* have been replaced by a new regime.) To suspend the declaration would leave patients without lawful medical treatment and the law and law enforcement in limbo. We echo the Ontario Court of Appeal in *Hitzig*, at para. 170: "A suspension of our remedy would simply [continue the] undesirable uncertainty for a further period of time."

III. Disposition

33 We would dismiss the appeal, but vary the Court of Appeal's order by deleting the suspension of its declaration and instead issue a declaration that ss. 4 and 5 of the CDSA are of no force and effect to the extent that they prohibit a person with a medical authorization from possessing cannabis derivatives for medical purposes.

34 At no point in the course of these proceedings did the British Columbia courts or this Court issue a declaration rendering the charges against Mr. **Smith** unconstitutional. In fact, following the *voir dire*, the trial judge refused to grant a judicial stay of proceedings. Despite this, the Crown chose not to adduce any evidence at trial. As a result of the Crown's choice, Mr. **Smith** was acquitted. We see no reason why the Crown should be allowed to reopen the case following this appeal. Mr. **Smith's** acquittal is affirmed.

Appeal dismissed.

Pourvoi rejeté.

End of Document

6.

Quebec v. 9147-0732 Quebec Inc 2020 SCC 32

2020 SCC 32, 2020 CSC 32
Supreme Court of Canada

Québec (Procureure générale) c. 9147-0732 Québec inc.

2020 CarswellQue 10837, 2020 CarswellQue 10838, 2020 SCC 32, 2020 CSC 32, 167 W.C.B. (2d) 60, 395 C.C.C. (3d) 1, 451 D.L.R. (4th) 367, 470 C.R.R. (2d) 102, 67 C.R. (7th) 225

Attorney General of Quebec and Director of Criminal and Penal Prosecutions (Appellants) and 9147-0732 Québec inc. (Respondent) and Director of Public Prosecutions, Attorney General of Ontario, Association des avocats de la défense de Montréal, British Columbia Civil Liberties Association, Canadian Civil Liberties Association and Canadian Constitution Foundation (Interveners)

Wagner C.J.C., Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer JJ.

Heard: January 22, 2020
Judgment: November 5, 2020
Docket: 38613

Proceedings: reversing *9147-0732 Québec inc. c. Directeur des poursuites criminelles et pénales* (2019), 2019 CarswellQue 1425, EYB 2019-307903, 2019 QCCA 373, Bélanger J.C.A., Chamberland J.C.A., Rancourt J.C.A. (C.A. Que.) [Quebec]

Counsel: Stéphanie Quirion-Cantin, Sylvain Leboeuf, Julie Dassylva, Anne-Sophie Blanchet-Gravel, for the appellant the Attorney General of Quebec
Laura Élisabeth Trempe, Marie-Pier Champagne, for the appellant the Director of Criminal and Penal Prosecutions
Martin Villa, Niki Galanopoulos, for the respondent
François Lacasse, Mathieu Stanton, for the intervener the Director of Public Prosecutions
Courtney Harris, Ellen Weis, Ravi Amarnath, for the intervener the Attorney General of Ontario
Léon H. Moubayed, Sarah Gorguos, Guillaume Charlebois, for the intervener Association des avocats de la défense de Montréal
Gib van Ert, Jessica Magonet, for the intervener the British Columbia Civil Liberties Association
Alyssa Tomkins, Albert Brunet, Penelope Simons, for the intervener the Canadian Civil Liberties Association
Brandon Kain, Adam Goldenberg, Sébastien Cusson, for the intervener the Canadian Constitution Foundation

Subject: Constitutional; Contracts; Criminal; Public; Employment; Human Rights

Related Abridgment Classifications

Constitutional law
XI Charter of Rights and Freedoms
XI.2 Scope of application
XI.2.b Who having rights under Charter
XI.2.b.ii Corporations
Criminal law
IV Charter of Rights and Freedoms
IV.25 Cruel and unusual punishment [s. 12]

Headnote

Constitutional law --- Charter of Rights and Freedoms — Scope of application — Who having rights under Charter — Corporations

Corporation was found guilty, pursuant to Building Act, of carrying out construction work without holding licence and was fined $30,843 — Corporation challenged constitutionality of fine, alleging that it offended its right to be protected against cruel and unusual treatment or punishment under s. 12 of Canadian Charter of Rights and Freedoms — Trial judge dismissed corporation's

application, holding that expanding protection of rights intrinsically linked to individuals to include corporate rights would trivialize protection granted by s. 12 of Charter, and corporation appealed — Superior Court judge dismissed appeal, holding that s. 12's purpose was protection of human dignity — Corporation further appealed to Court of Appeal — Adopting tangible benefit approach, majority of Court of Appeal found that, since corporations could face cruel treatment or punishment through harsh or severe fines, s. 12 could apply to them — Dissenting judge held that s. 12 is concerned with human dignity, which is inapplicable to corporations — Attorney General of Quebec and Director of Criminal and Penal Prosecutions appealed to Supreme Court of Canada — Appeal allowed — Ordinary meaning of word "cruel" does not permit its application to inanimate objects or legal entities such as corporations — Therefore, corporations lie beyond s. 12's protective scope.

Criminal law --- Charter of Rights and Freedoms — Cruel and unusual punishment [s. 12]

Corporation was found guilty, pursuant to Building Act, of carrying out construction work without holding licence and was fined $30,843 — Corporation challenged constitutionality of fine, alleging that it offended its right to be protected against cruel and unusual treatment or punishment under s. 12 of Canadian Charter of Rights and Freedoms — Trial judge dismissed corporation's application, holding that expanding protection of rights intrinsically linked to individuals to include corporate rights would trivialize protection granted by s. 12 of Charter, and corporation appealed — Superior Court judge dismissed appeal, holding that s. 12's purpose was protection of human dignity — Corporation further appealed to Court of Appeal — Adopting tangible benefit approach, majority of Court of Appeal found that, since corporations could face cruel treatment or punishment through harsh or severe fines, s. 12 could apply to them — Dissenting judge held that s. 12 is concerned with human dignity, which is inapplicable to corporations — Attorney General of Quebec and Director of Criminal and Penal Prosecutions appealed to Supreme Court of Canada — Appeal allowed — Ordinary meaning of word "cruel" does not permit its application to inanimate objects or legal entities such as corporations — Therefore, corporations lie beyond s. 12's protective scope.

Droit constitutionnel --- Charte des droits et libertés — Application — Qui jouit de droits en vertu de la Charte — Personnes morales

Personne morale a été déclarée coupable, en vertu de la Loi sur le bâtiment, d'avoir exécuté des travaux de construction sans être titulaire d'une licence et a été condamnée à payer une amende de 30 843 $ — Personne morale a contesté la constitutionnalité de l'amende au motif qu'elle portait atteinte au droit que lui garantit l'art. 12 de la Charte canadienne des droits et libertés à la protection contre tous traitements ou peines cruels et inusités — Juge de première instance a rejeté la demande de la personne morale, estimant que le fait d'étendre la protection de droits intrinsèquement liés aux personnes physiques à des droits appartenant aux personnes morales banaliserait la protection prévue à l'art. 12 de la Charte, et la personne morale a interjeté appel — Juge de la Cour supérieure a rejeté l'appel, estimant que l'art. 12 a pour objet la protection de la dignité humaine — Personne morale a interjeté appel en Cour d'appel — Juges majoritaires ont adopté une approche axée sur le bénéfice tangible et ont conclu que, comme les personnes morales pouvaient être exposées à des traitements ou peines cruels sous forme d'amendes lourdes ou sévères, l'art. 12 pouvait s'appliquer à elles — Juge dissident a estimé que l'art. 12 traite de la dignité humaine, un concept inapplicable aux personnes morales — Procureure générale du Québec et le directeur des poursuites criminelles et pénales ont formé un pourvoi devant la Cour suprême du Canada — Pourvoi accueilli — Sens courant du mot « cruel » ne permet pas de l'appliquer à des objets inanimés ou à des entités juridiques telles les personnes morales — Par conséquent, les personnes morales sont exclues du champ d'application de la protection de l'art. 12.

Droit criminel --- Charte des droits et libertés — Peines cruelles et inusitées [art. 12]

Personne morale a été déclarée coupable, en vertu de la Loi sur le bâtiment, d'avoir exécuté des travaux de construction sans être titulaire d'une licence et a été condamnée à payer une amende de 30 843 $ — Personne morale a contesté la constitutionnalité de l'amende au motif qu'elle portait atteinte au droit que lui garantit l'art. 12 de la Charte canadienne des droits et libertés à la protection contre tous traitements ou peines cruels et inusités — Juge de première instance a rejeté la demande de la personne morale, estimant que le fait d'étendre la protection de droits intrinsèquement liés aux personnes physiques à des droits appartenant aux personnes morales banaliserait la protection prévue à l'art. 12 de la Charte, et la personne morale a interjeté appel — Juge de la Cour supérieure a rejeté l'appel, estimant que l'art. 12 a pour objet la protection de la dignité humaine — Personne morale a interjeté appel en Cour d'appel — Juges majoritaires ont adopté une approche axée sur le bénéfice tangible et ont conclu que, comme les personnes morales pouvaient être exposées à des traitements ou peines cruels sous forme d'amendes lourdes ou sévères, l'art. 12 pouvait s'appliquer à elles — Juge dissident a estimé que l'art. 12 traite de la dignité humaine, un concept inapplicable aux personnes morales — Procureure générale du Québec et le directeur des poursuites criminelles et pénales ont formé un pourvoi devant la Cour suprême du Canada — Pourvoi accueilli — Sens courant du mot « cruel » ne

permet pas de l'appliquer à des objets inanimés ou à des entités juridiques telles les personnes morales — Par conséquent, les personnes morales sont exclues du champ d'application de la protection de l'art. 12.

A corporation was found guilty, pursuant to the Building Act, of carrying out construction work as a contractor without holding a current licence for that purpose. The corporation was fined $30,843. The corporation challenged the constitutionality of the mandatory minimum fine in s. 197.1 of the Act on the basis that it offended its right to be protected against cruel and unusual treatment or punishment under s. 12 of the Canadian Charter of Rights and Freedoms.

The trial judge dismissed the corporation's application, holding that expanding the protection of rights intrinsically linked to individuals to include corporate rights would trivialize the protection granted by s. 12 of the Charter, and the corporation appealed.

The Superior Court judge dismissed the appeal, holding that s. 12's purpose was the protection of human dignity, a notion clearly meant exclusively for natural persons. The corporation further appealed to the Court of Appeal.

A majority at the Court of Appeal allowed the appeal and held that s. 12 could apply to corporations. It found that s. 12's association with human dignity did not prevent its application to corporations, since other Charter rights which also protect human dignity have been held to apply to corporations. Adopting a tangible benefit approach, the majority of the Court of Appeal found that, since corporations could face cruel treatment or punishment through harsh or severe fines, s. 12 could apply to them. The dissenting judge held that s. 12 is concerned with human dignity, a concept inapplicable to corporations.

The Attorney General of Quebec and the Director of Criminal and Penal Prosecutions appealed to the Supreme Court of Canada.

Held: The appeal was allowed.

Per Brown, Rowe JJ. (Wagner C.J.C., Moldaver, Côté JJ. concurring): To claim protection under the Charter, a corporation must establish that it has an interest falling within the scope of the guarantee, and one which accords with the purpose of that provision. In order to make that determination, the court must seek to discern the scope and purpose of the right by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter.

The protection against cruel and unusual punishment under s. 12 of the Charter exists as a standalone guarantee. For a fine to be unconstitutional, it must be so excessive as to outrage standards of decency and abhorrent or intolerable to society. This threshold is, in accordance with the purpose of s. 12, inextricably anchored in human dignity. It is a constitutional standard that cannot apply to treatments or punishments imposed on corporations.

The ordinary meaning of the word "cruel" does not permit its application to inanimate objects or legal entities such as corporations. Therefore, corporations lie beyond s. 12's protective scope.

While international norms can be considered when interpreting domestic norms, they have typically played a limited role of providing support or confirmation for the result reached by way of purposive interpretation.

Per Abella J. (concurring) (Karakatsanis, Martin JJ. concurring): Section 12 of the Charter guarantees the right not to be subjected to cruel and unusual treatment or punishment. Section 12's purpose is to prevent the state from inflicting physical or mental pain and suffering through degrading and dehumanizing treatment or punishment. It is meant to protect human dignity and respect the inherent worth of individuals. Its intended beneficiaries are people, not corporations.

Regrettably, however, the majority gave the text "primacy" and assigned a secondary role to other contextual factors, thereby erasing the difference between constitutional and statutory interpretation. And instead of only relying on the traditional distinction between binding and non-binding international sources, the majority seemed to have added a novel requirement: whenever a Canadian court considers non-binding international sources, it must explicitly justify their use, segment them into categories, and attribute a degree of weight to their inclusion, thereby transforming the Court's usual panoramic search for global wisdom into a series of compartmentalized barriers.

Per Kasirer J. (concurring): A corporation cannot avail itself of the protection of s. 12 of the Charter. Indeed, it would distort the ordinary meaning of the words to say that it is possible to be cruel to a corporate entity. Further, a corporation could not enjoy the protection of s. 12 through the natural persons closely related to it, because it would then be asserting rights here that are not its own.

Une personne morale a été déclarée coupable, en vertu de la Loi sur le bâtiment, d'avoir exécuté des travaux de construction en tant qu'entrepreneure sans être titulaire d'une licence en vigueur à cette fin. La personne morale a été condamnée à payer une amende de 30 843 $. La personne morale a contesté la constitutionnalité de l'amende minimale obligatoire établie à l'art.

197.1 de la Loi, au motif qu'elle portait atteinte au droit que lui garantit l'art. 12 de la Charte canadienne des droits et libertés à la protection contre tous traitements ou peines cruels et inusités.

Le juge de première instance a rejeté la demande de la personne morale, estimant que le fait d'étendre la protection de droits intrinsèquement liés aux personnes physiques à des droits appartenant aux personnes morales banaliserait la protection prévue à l'art. 12 de la Charte, et la personne morale a interjeté appel.

Le juge de la Cour supérieure a rejeté l'appel, estimant que l'art. 12 a pour objet la protection de la dignité humaine, une notion qui s'applique de toute évidence exclusivement aux personnes physiques. La personne morale a interjeté appel en Cour d'appel.

Les juges majoritaires de la Cour d'appel ont accueilli l'appel et conclu que l'art. 12 pouvait s'appliquer aux personnes morales. Ils ont conclu que le lien existant entre l'art. 12 et la dignité humaine n'interdisait pas son application aux personnes morales, puisque d'autres droits garantis par la Charte qui protègent aussi la dignité humaine ont été jugés applicables aux personnes morales. Les juges majoritaires ont adopté une approche axée sur le bénéfice tangible et ont conclu que, comme les personnes morales pouvaient être exposées à des traitements ou peines cruels sous forme d'amendes lourdes ou sévères, l'art. 12 pouvait s'appliquer à elles. Le juge dissident a estimé que l'art. 12 traite de la dignité humaine, un concept inapplicable aux personnes morales.

La Procureure générale du Québec et le Directeur des poursuites criminelles et pénales ont formé un pourvoi devant la Cour suprême du Canada.

Arrêt: Le pourvoi a été accueilli.

Brown, Rowe, JJ. (Wagner, J.C.C., Moldaver, Côté, JJ., souscrivant à leur opinion) : Une personne morale qui revendique la protection de la Charte doit établir qu'elle a un intérêt qui est compris dans la portée de la garantie et qui s'accorde avec l'objet de la disposition. Afin de décider si c'est bien le cas, le tribunal doit s'efforcer de dégager l'objet et le champ d'application du droit en question en procédant à une interprétation téléologique, c'est-à-dire en fonction de la nature et des objectifs plus larges de la Charte elle-même, des termes choisis pour énoncer ce droit ou cette liberté, des origines historiques des concepts enchâssés et, s'il y a lieu, en fonction du sens et de l'objet des autres libertés et droits particuliers qui s'y rattachent selon le texte de la Charte.

La protection contre les peines cruelles et inusitées prévue par l'art. 12 de la Charte constitue une garantie autonome. Pour qu'une amende soit inconstitutionnelle, elle doit être excessive au point de ne pas être compatible avec la dignité humaine en plus d'être odieuse ou intolérable pour la société. Ce critère est inextricablement ancré dans la dignité humaine. Il s'agit d'une norme constitutionnelle qui ne saurait s'appliquer aux traitements ou peines infligés aux personnes morales.

Le sens courant du mot « cruel » ne permet pas de l'appliquer à des objets inanimés ou à des entités juridiques telles les personnes morales. Par conséquent, les personnes morales sont exclues du champ d'application de la protection de l'art. 12.

Si les normes internationales peuvent être prises en compte dans l'interprétation de normes nationales, ces normes internationales jouent habituellement un rôle limité consistant à appuyer ou à confirmer le résultat auquel arrive le tribunal au moyen d'une interprétation téléologique.

Abella, J. (souscrivant à l'opinion des juges majoritaires) (Karakatsanis, Martin, JJ., souscrivant à son opinion) : L'article 12 de la Charte garantit le droit à la protection contre tous traitements ou peines cruels et inusités. L'article 12 a pour objet d'interdire à l'État d'infliger des douleurs et des souffrances physiques ou psychologiques par des traitements ou peines dégradants et déshumanisants. Cette disposition vise à protéger la dignité humaine et à assurer le respect de la valeur inhérente de chaque personne. Les personnes censées bénéficier de cette protection sont les personnes physiques, et non pas les personnes morales. Malheureusement, toutefois, les juges majoritaires ont donné « préséance » au texte et assigné un rôle secondaire aux autres facteurs contextuels, gommant ainsi la différence entre l'interprétation de la Constitution et l'interprétation des lois. Et plutôt que de s'appuyer uniquement sur la distinction traditionnelle entre les sources internationales contraignantes et non contraignantes, les juges majoritaires ont semblé ajouter une exigence inédite : chaque fois qu'un tribunal canadien considère des sources internationales non contraignantes, il doit explicitement justifier le recours à ces sources, les segmenter en catégories, et attribuer un poids relatif à celles qu'il retient, transformant ainsi la recherche panoramique de la sagesse mondiale à laquelle la Cour se livre habituellement en une progression au travers d'une série d'obstacles cloisonnés.

Kasirer, J. (souscrivant à l'opinion des juges majoritaires) : Une personne morale ne peut bénéficier de la protection de l'art. 12 de la Charte. De fait, ce serait dénaturer le sens commun des mots que de dire que l'on peut faire preuve de cruauté envers une entité corporative. De plus, une personne morale ne pourrait pas, par l'entremise des personnes physiques qui lui sont intimement liées, bénéficier de la protection de l'art. 12, puisque la personne morale ferait alors valoir des droits qui ne sont pas les siens.

Table of Authorities

Cases considered by *Brown, Rowe JJ.*:

Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc. (1984), [1984] 2 S.C.R. 145, (sub nom. *Hunter v. Southam Inc.*) 11 D.L.R. (4th) 641, (sub nom. *Hunter v. Southam Inc.*) 55 N.R. 241, 33 Alta. L.R. (2d) 193, (sub nom. *Hunter v. Southam Inc.*) 55 A.R. 291, 27 B.L.R. 297, (sub nom. *Hunter v. Southam Inc.*) 2 C.P.R. (3d) 1, 41 C.R. (3d) 97, (sub nom. *Hunter v. Southam Inc.*) 9 C.R.R. 355, 84 D.T.C. 6467, (sub nom. *Hunter v. Southam Inc.*) 14 C.C.C. (3d) 97, (sub nom. *Director of Investigations & Research Combines Investigation Branch v. Southam Inc.*) [1984] 6 W.W.R. 577, 1984 CarswellAlta 121, 1984 CarswellAlta 415 (S.C.C.) — followed

Canadian Egg Marketing Agency v. Richardson (1998), 1998 CarswellNWT 118, 1998 CarswellNWT 119, 166 D.L.R. (4th) 1, (sub nom. *Canadian Egg Marketing Agency v. Pineview Poultry Products Ltd.*) 57 C.R.R. (2d) 1, (sub nom. *Canadian Egg Marketing Agency v. Pineview Poultry Products Ltd.*) 223 A.R. 201, (sub nom. *Canadian Egg Marketing Agency v. Pineview Poultry Products Ltd.*) 183 W.A.C. 201, [1998] 3 S.C.R. 157, 231 N.R. 201 (S.C.C.) — considered

Divito v. Canada (Minister of Public Safety and Emergency Preparedness) (2013), 2013 SCC 47, 2013 CarswellNat 3276, 2013 CarswellNat 3277, 301 C.C.C. (3d) 305, 5 C.R. (7th) 1, 448 N.R. 71, 19 Imm. L.R. (4th) 177, 364 D.L.R. (4th) 391, 59 Admin. L.R. (5th) 1, 290 C.R.R. (2d) 134, [2013] 3 S.C.R. 157 (S.C.C.) — followed

Frank v. Canada (Attorney General) (2019), 2019 SCC 1, 2019 CSC 1, 2019 CarswellOnt 154, 2019 CarswellOnt 155, 428 D.L.R. (4th) 451, 426 C.R.R. (2d) 209, [2019] 1 S.C.R. 3 (S.C.C.) — followed

Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia (2007), 2007 SCC 27, 2007 CarswellBC 1289, 2007 CarswellBC 1290, 2007 C.L.L.C. 220-035, 65 B.C.L.R. (4th) 201, [2007] 7 W.W.R. 191, D.T.E. 2007T-507, 363 N.R. 226, 137 C.L.R.B.R. (2d) 166, 283 D.L.R. (4th) 40, 164 L.A.C. (4th) 1, 242 B.C.A.C. 1, 400 W.A.C. 1, [2007] 2 S.C.R. 391, 157 C.R.R. (2d) 21 (S.C.C.) — followed

India v. Badesha (2017), 2017 SCC 44, 2017 CSC 44, 2017 CarswellBC 2440, 2017 CarswellBC 2441, 22 Admin. L.R. (6th) 1, 412 D.L.R. (4th) 411, 40 C.R. (7th) 1, (sub nom. *India v. Dadesha*) 388 C.R.R. (2d) 230, [2017] 2 S.C.R. 127 (S.C.C.) — followed

Irwin Toy Ltd. c. Québec (Procureur général) (1989), 94 N.R. 167, (sub nom. *Irwin Toy Ltd. v. Quebec (Attorney General)*) [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577, 24 Q.A.C. 2, 25 C.P.R. (3d) 417, 39 C.R.R. 193, 1989 CarswellQue 115F, 1989 CarswellQue 115 (S.C.C.) — followed

Kazemi (Estate) v. Islamic Republic of Iran (2014), 2014 SCC 62, 2014 CSC 62, 2014 CarswellQue 9440, 2014 CarswellQue 9441, 375 D.L.R. (4th) 519, 463 N.R. 1, [2014] 3 S.C.R. 176, 83 Admin. L.R. (5th) 1, 320 C.R.R. (2d) 269 (S.C.C.) — followed

Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations) (2017), 2017 CarswellBC 3020, 2017 CarswellBC 3021, 1 B.C.L.R. (6th) 223, 25 Admin. L.R. (6th) 1, 12 C.E.L.R. (4th) 1, [2017] 12 W.W.R. 1, 2017 SCC 54, 2017 CSC 54, 415 D.L.R. (4th) 52, [2017] 2 S.C.R. 386, 394 C.R.R. (2d) 293, [2018] 1 C.N.L.R. 19 (S.C.C.) — followed

R. v. Big M Drug Mart Ltd. (1985), [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321, 58 N.R. 81, [1985] 3 W.W.R. 481, 37 Alta. L.R. (2d) 97, 60 A.R. 161, 18 C.C.C. (3d) 385, 85 C.L.L.C. 14,023, 13 C.R.R. 64, 1985 CarswellAlta 316, 1985 CarswellAlta 609 (S.C.C.) — followed

R. v. Blais (2003), 2003 SCC 44, 2003 CarswellMan 386, 2003 CarswellMan 387, 230 D.L.R. (4th) 22, 177 C.C.C. (3d) 214, [2003] 4 C.N.L.R. 219, 308 N.R. 371, 180 Man. R. (2d) 3, 310 W.A.C. 3, [2003] 2 S.C.R. 236, [2004] 11 W.W.R. 199, 2003 CSC 44 (S.C.C.) — followed

R. v. Boudreault (2018), 2018 SCC 58, 2018 CSC 58, 2018 CarswellOnt 20975, 2018 CarswellOnt 20976, 50 C.R. (7th) 207, 369 C.C.C. (3d) 358, 429 D.L.R. (4th) 583, 423 C.R.R. (2d) 191, [2018] 3 S.C.R. 599 (S.C.C.) — considered

R. v. C.I.P. Inc. (1992), 12 C.R. (4th) 237, 52 O.A.C. 366, 71 C.C.C. (3d) 129, 135 N.R. 90, [1992] 1 S.C.R. 843, 9 C.R.R. (2d) 62, 7 C.O.H.S.C. 1, 1992 CarswellOnt 82, 1992 CarswellOnt 988 (S.C.C.) — followed

R. v. Caron (2015), 2015 SCC 56, 2015 CSC 56, 2015 CarswellAlta 2116, 2015 CarswellAlta 2117, [2015] 12 W.W.R. 205, 23 Alta. L.R. (6th) 1, 477 N.R. 200, (sub nom. *Caron v. Alberta*) [2015] 3 S.C.R. 511, 393 D.L.R. (4th) 577, 331 C.C.C. (3d) 157, 606 A.R. 1, 652 W.A.C. 1 (S.C.C.) — followed

R. v. Grant (2009), 2009 SCC 32, 2009 CarswellOnt 4104, 2009 CarswellOnt 4105, 66 C.R. (6th) 1, 245 C.C.C. (3d) 1, 82 M.V.R. (5th) 1, 309 D.L.R. (4th) 1, 391 N.R. 1, 253 O.A.C. 124, [2009] 2 S.C.R. 353, 193 C.R.R. (2d) 1, 97 O.R. (3d) 318 (note) (S.C.C.) — followed

R. v. Oakes (1986), [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, 65 N.R. 87, 14 O.A.C. 335, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1, 19 C.R.R. 308, 1986 CarswellOnt 95, 1986 CarswellOnt 1001, 53 O.R. (2d) 719 (note) (S.C.C.) — considered

R. v. Poulin (2019), 2019 SCC 47, 2019 CSC 47, 2019 CarswellQue 8570, 2019 CarswellQue 8571, 438 D.L.R. (4th) 1, 379 C.C.C. (3d) 513, 58 C.R. (7th) 249, 443 C.R.R. (2d) 225 (S.C.C.) — followed

R. v. Smith (1987), [1987] 5 W.W.R. 1, [1987] 1 S.C.R. 1045, *(*sub nom. *Smith v. R.)* 40 D.L.R. (4th) 435, 75 N.R. 321, 15 B.C.L.R. (2d) 273, *(*sub nom. *Smith v. R.)* 34 C.C.C. (3d) 97, 58 C.R. (3d) 193, *(*sub nom. *Smith v. R.)* 31 C.R.R. 193, 1987 CarswellBC 198, 1987 CarswellBC 704 (S.C.C.) — considered

R. v. Stillman (2019), 2019 SCC 40, 2019 CSC 40, 2019 CarswellNat 3542, 2019 CarswellNat 3543, 436 D.L.R. (4th) 193, 56 C.R. (7th) 215, 439 C.R.R. (2d) 288 (S.C.C.) — followed

Reference re Public Service Employee Relations Act (Alberta) (1987), 87 C.L.L.C. 14,021, [1987] 1 S.C.R. 313, 38 D.L.R. (4th) 161, *(*sub nom. *Reference re Compulsory Arbitration)* 74 N.R. 99, [1987] 3 W.W.R. 577, 51 Alta. L.R. (2d) 97, 78 A.R. 1, *(*sub nom. *A.U.P.E. v. Alberta (Attorney General))* 28 C.R.R. 305, [1987] D.L.Q. 225, 1987 CarswellAlta 580, 1987 CarswellAlta 705 (S.C.C.) — followed

Reference re s. 94(2) of Motor Vehicle Act (British Columbia) (1985), [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536, 63 N.R. 266, 69 B.C.L.R. 145, 23 C.C.C. (3d) 289, 18 C.R.R. 30, 36 M.V.R. 240, [1986] 1 W.W.R. 481, 48 C.R. (3d) 289, 1985 CarswellBC 398, [1986] D.L.Q. 90, 1985 CarswellBC 816 (S.C.C.) — considered

SFL v. Saskatchewan (2015), 2015 SCC 4, 2015 CSC 4, 2015 CarswellSask 32, 2015 CarswellSask 33, [2015] 3 W.W.R. 1, D.T.E. 2015T-88, 248 L.A.C. (4th) 271, 380 D.L.R. (4th) 577, 2015 C.L.L.C. 220-014, 467 N.R. 3, *(*sub nom. *Saskatchewan Federation of Labour v. Saskatchewan)* 451 Sask. R. 1, *(*sub nom. *Saskatchewan Federation of Labour v. Saskatchewan)* 628 W.A.C. 1, *(*sub nom. *Saskatchewan Federation of Labour v. Saskatchewan)* [2015] 1 S.C.R. 245, *(*sub nom. *Saskatchewan Federation of Labour v. Saskatchewan)* 328 C.R.R. (2d) 1, 281 C.L.R.B.R. (2d) 1 (S.C.C.) — followed

Slaight Communications Inc. v. Davidson (1989), 26 C.C.E.L. 85, [1989] 1 S.C.R. 1038, 59 D.L.R. (4th) 416, *(*sub nom. *Davidson v. Slaight Communications Inc.)* 93 N.R. 183, 89 C.L.L.C. 14,031, 40 C.R.R. 100, 1989 CarswellNat 695, 1989 CarswellNat 193 (S.C.C.) — considered

Suresh v. Canada (Minister of Citizenship & Immigration) (2002), 2002 SCC 1, 2002 CarswellNat 7, 2002 CarswellNat 8, 18 Imm. L.R. (3d) 1, 208 D.L.R. (4th) 1, 281 N.R. 1, 90 C.R.R. (2d) 1, 37 Admin. L.R. (3d) 159, [2002] 1 S.C.R. 3, 2002 CSC 1 (S.C.C.) — considered

United States v. Burns (2001), 2001 SCC 7, 2001 CarswellBC 272, 2001 CarswellBC 273, 85 B.C.L.R. (3d) 1, 151 C.C.C. (3d) 97, 195 D.L.R. (4th) 1, 39 C.R. (5th) 205, [2001] 3 W.W.R. 193, 265 N.R. 212, 148 B.C.A.C. 1, 243 W.A.C. 1, 81 C.R.R. (2d) 1, [2001] 1 S.C.R. 283 (S.C.C.) — considered

Vancouver Island Railway, An Act Respecting, Re (1994), [1994] 6 W.W.R. 1, *(*sub nom. *British Columbia (Attorney General) v. Canada (Attorney General))* 91 B.C.L.R. (2d) 1, 166 N.R. 81, 21 Admin. L.R. (2d) 1, 114 D.L.R. (4th) 193, 44 B.C.A.C. 1, 71 W.A.C. 1, [1994] 2 S.C.R. 41, 1994 CarswellBC 188, 1994 CarswellBC 1239 (S.C.C.) — followed

Cases considered by *Abella J.*:

Baker v. Canada (Minister of Citizenship & Immigration) (1999), 174 D.L.R. (4th) 193, 1999 CarswellNat 1124, 1999 CarswellNat 1125, 243 N.R. 22, 1 Imm. L.R. (3d) 1, 14 Admin. L.R. (3d) 173, [1999] 2 S.C.R. 817, 1999 SCC 699 (S.C.C.) — followed

Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc. (1984), [1984] 2 S.C.R. 145, *(*sub nom. *Hunter v. Southam Inc.)* 11 D.L.R. (4th) 641, *(*sub nom. *Hunter v. Southam Inc.)* 55 N.R. 241, 33 Alta. L.R. (2d) 193, *(*sub nom. *Hunter v. Southam Inc.)* 55 A.R. 291, 27 B.L.R. 297, *(*sub nom. *Hunter v. Southam Inc.)* 2 C.P.R. (3d) 1, 41 C.R. (3d) 97, *(*sub nom. *Hunter v. Southam Inc.)* 9 C.R.R. 355, 84 D.T.C. 6467, *(*sub nom. *Hunter v. Southam Inc.)* 14 C.C.C. (3d) 97, *(*sub nom. *Director of Investigations & Research Combines Investigation Branch v. Southam Inc.)* [1984] 6 W.W.R. 577, 1984 CarswellAlta 121, 1984 CarswellAlta 415 (S.C.C.) — considered

Canadian Egg Marketing Agency v. Richardson (1998), 1998 CarswellNWT 118, 1998 CarswellNWT 119, 166 D.L.R. (4th) 1, *(*sub nom. *Canadian Egg Marketing Agency v. Pineview Poultry Products Ltd.)* 57 C.R.R. (2d) 1, *(*sub nom.

Canadian Egg Marketing Agency v. Pineview Poultry Products Ltd.) 223 A.R. 201, *(*sub nom. *Canadian Egg Marketing Agency v. Pineview Poultry Products Ltd.)* 183 W.A.C. 201, [1998] 3 S.C.R. 157, 231 N.R. 201 (S.C.C.) — considered

Conseil scolaire francophone de la Colombie-Britannique v. British Columbia (2020), 2020 SCC 13, 2020 CSC 13, 2020 CarswellBC 1451, 2020 CarswellBC 1452, [2020] 7 W.W.R. 375, 36 B.C.L.R. (6th) 1, 447 D.L.R. (4th) 1 (S.C.C.) — followed

District of Columbia v. Heller (2008), 554 U.S. 570 (U.S. Sup. Ct.) — referred to

Divito v. Canada (Minister of Public Safety and Emergency Preparedness) (2013), 2013 SCC 47, 2013 CarswellNat 3276, 2013 CarswellNat 3277, 301 C.C.C. (3d) 305, 5 C.R. (7th) 1, 448 N.R. 71, 19 Imm. L.R. (4th) 177, 364 D.L.R. (4th) 391, 59 Admin. L.R. (5th) 1, 290 C.R.R. (2d) 134, [2013] 3 S.C.R. 157 (S.C.C.) — followed

Eldridge v. British Columbia (Attorney General) (1997), 1997 CarswellBC 1939, 1997 CarswellBC 1940, 151 D.L.R. (4th) 577, 218 N.R. 161, 96 B.C.A.C. 81, 155 W.A.C. 81, [1998] 1 W.W.R. 50, 46 C.R.R. (2d) 189, 38 B.C.L.R. (3d) 1, [1997] 3 S.C.R. 624, 3 B.H.R.C. 137 (S.C.C.) — considered

Ford c. Québec (Procureur général) (1988), 90 N.R. 84, 54 D.L.R. (4th) 577, 19 Q.A.C. 69, 36 C.R.R. 1, 10 C.H.R.R. D/5559, 1988 CarswellQue 155, 1988 CarswellQue 155F, *(*sub nom. *Ford v. Quebec (Attorney General))* [1988] 2 S.C.R. 712 (S.C.C.) — considered

Furman v. Georgia (1972), 408 U.S. 238, 92 S.Ct. 2726 (U.S. Ga. S.C.) — considered

Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia (2007), 2007 SCC 27, 2007 CarswellBC 1289, 2007 CarswellBC 1290, 2007 C.L.L.C. 220-035, 65 B.C.L.R. (4th) 201, [2007] 7 W.W.R. 191, D.T.E. 2007T-507, 363 N.R. 226, 137 C.L.R.B.R. (2d) 166, 283 D.L.R. (4th) 40, 164 L.A.C. (4th) 1, 242 B.C.A.C. 1, 400 W.A.C. 1, [2007] 2 S.C.R. 391, 157 C.R.R. (2d) 21 (S.C.C.) — considered

Irwin Toy Ltd. c. Québec (Procureur général) (1989), 94 N.R. 167, *(*sub nom. *Irwin Toy Ltd. v. Quebec (Attorney General))* [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577, 24 Q.A.C. 2, 25 C.P.R. (3d) 417, 39 C.R.R. 193, 1989 CarswellQue 115F, 1989 CarswellQue 115 (S.C.C.) — considered

Kazemi (Estate) v. Islamic Republic of Iran (2014), 2014 SCC 62, 2014 CSC 62, 2014 CarswellQue 9440, 2014 CarswellQue 9441, 375 D.L.R. (4th) 519, 463 N.R. 1, [2014] 3 S.C.R. 176, 83 Admin. L.R. (5th) 1, 320 C.R.R. (2d) 269 (S.C.C.) — considered

Kindler v. Canada (Minister of Justice) (1991), 8 C.R. (4th) 1, [1991] 2 S.C.R. 779, 67 C.C.C. (3d) 1, 84 D.L.R. (4th) 438, 129 N.R. 81, 6 C.R.R. (2d) 193, 1991 CarswellNat 3, 45 F.T.R. 160 (note), 1991 CarswellNat 831 (S.C.C.) — considered

Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations) (2017), 2017 CarswellBC 3020, 2017 CarswellBC 3021, 1 B.C.L.R. (6th) 223, 25 Admin. L.R. (6th) 1, 12 C.E.L.R. (4th) 1, [2017] 12 W.W.R. 1, 2017 SCC 54, 2017 CSC 54, 415 D.L.R. (4th) 52, [2017] 2 S.C.R. 386, 394 C.R.R. (2d) 293, [2018] 1 C.N.L.R. 19 (S.C.C.) — considered

R. v. Amway of Canada Ltd./Amway du Canada Ltée (1989), 91 N.R. 18, *(*sub nom. *R. v. Amway Corp.)* [1989] 1 S.C.R. 21, *(*sub nom. *Amway Corp. v. R.)* [1989] 1 C.T.C. 255, 56 D.L.R. (4th) 309, *(*sub nom. *R. v. Amway of Canada Ltd./ Amway du Canada Ltée)* 33 C.P.C. (2d) 163, *(*sub nom. *Canada v. Amway of Canada Ltd.)* 68 C.R. (3d) 97, 37 C.R.R. 235, 2 T.C.T. 4074, 23 F.T.R. 160n, [1989] 1 T.S.T. 2058, 18 C.E.R. 305, 1989 CarswellNat 690, 1989 CarswellNat 204 (S.C.C.) — followed

R. v. Big M Drug Mart Ltd. (1985), [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321, 58 N.R. 81, [1985] 3 W.W.R. 481, 37 Alta. L.R. (2d) 97, 60 A.R. 161, 18 C.C.C. (3d) 385, 85 C.L.L.C. 14,023, 13 C.R.R. 64, 1985 CarswellAlta 316, 1985 CarswellAlta 609 (S.C.C.) — considered

R. v. Boudreault (2018), 2018 SCC 58, 2018 CSC 58, 2018 CarswellOnt 20975, 2018 CarswellOnt 20976, 50 C.R. (7th) 207, 369 C.C.C. (3d) 358, 429 D.L.R. (4th) 583, 423 C.R.R. (2d) 191, [2018] 3 S.C.R. 599 (S.C.C.) — considered

R. v. Boudreault (2018), 2018 SCC 58, 2018 CSC 58, 2018 CarswellOnt 20975, 2018 CarswellOnt 20976, 50 C.R. (7th) 207, 369 C.C.C. (3d) 358, 429 D.L.R. (4th) 583, 423 C.R.R. (2d) 191, [2018] 3 S.C.R. 599 (S.C.C.) — followed

R. v. C.I.P. Inc. (1992), 12 C.R. (4th) 237, 52 O.A.C. 366, 71 C.C.C. (3d) 129, 135 N.R. 90, [1992] 1 S.C.R. 843, 9 C.R.R. (2d) 62, 7 C.O.H.S.C. 1, 1992 CarswellOnt 82, 1992 CarswellOnt 988 (S.C.C.) — followed

R. v. Ferguson (2008), 2008 SCC 6, 2008 CarswellAlta 228, 2008 CarswellAlta 229, 228 C.C.C. (3d) 385, 54 C.R. (6th) 197, 371 N.R. 231, 87 Alta. L.R. (4th) 203, [2008] 5 W.W.R. 387, 290 D.L.R. (4th) 17, 425 A.R. 79, 418 W.A.C. 79, [2008] 1 S.C.R. 96, 168 C.R.R. (2d) 34 (S.C.C.) — followed

R. v. Goltz (1991), 8 C.R. (4th) 82, 5 B.C.A.C. 161, 11 W.A.C. 161, [1991] 3 S.C.R. 485, 7 C.R.R. (2d) 1, 67 C.C.C. (3d) 481, 61 B.C.L.R. (2d) 145, 131 N.R. 1, 31 M.V.R. (2d) 137, 1991 CarswellBC 280, 1991 CarswellBC 924 (S.C.C.) — followed

R. v. Grant (2009), 2009 SCC 32, 2009 CarswellOnt 4104, 2009 CarswellOnt 4105, 66 C.R. (6th) 1, 245 C.C.C. (3d) 1, 82 M.V.R. (5th) 1, 309 D.L.R. (4th) 1, 391 N.R. 1, 253 O.A.C. 124, [2009] 2 S.C.R. 353, 193 C.R.R. (2d) 1, 97 O.R. (3d) 318 (note) (S.C.C.) — followed

R. v. Hebert (1990), 47 B.C.L.R. (2d) 1, [1990] 2 S.C.R. 151, 77 C.R. (3d) 145, [1990] 5 W.W.R. 1, 57 C.C.C. (3d) 1, 110 N.R. 1, 49 C.R.R. 114, 1990 CarswellYukon 7, 1990 CarswellYukon 4 (S.C.C.) — followed

R. v. J. (K.R.) (2016), 2016 SCC 31, 2016 CSC 31, 2016 CarswellBC 1999, 2016 CarswellBC 2000, 30 C.R. (7th) 1, 337 C.C.C. (3d) 285, 400 D.L.R. (4th) 398, 486 N.R. 1, 390 B.C.A.C. 1, 673 W.A.C. 1, 358 C.R.R. (2d) 204, [2016] 1 S.C.R. 906 (S.C.C.) — considered

R. v. Kapp (2008), 2008 SCC 41, 2008 CarswellBC 1312, 2008 CarswellBC 1313, 79 B.C.L.R. (4th) 201, [2008] 8 W.W.R. 1, 37 C.E.L.R. (3d) 1, 232 C.C.C. (3d) 349, 294 D.L.R. (4th) 1, 376 N.R. 1, [2008] 3 C.N.L.R. 346, 58 C.R. (6th) 1, 256 B.C.A.C. 75, 431 W.A.C. 75, [2008] 2 S.C.R. 483, 175 C.R.R. (2d) 185 (S.C.C.) — followed

R. v. Keegstra (1990), 1 C.R. (4th) 129, [1990] 3 S.C.R. 697, 77 Alta. L.R. (2d) 193, 117 N.R. 1, [1991] 2 W.W.R. 1, 114 A.R. 81, 61 C.C.C. (3d) 1, 3 C.R.R. (2d) 193, 1990 CarswellAlta 192, 1990 CarswellAlta 661 (S.C.C.) — considered

R. v. Latimer (2001), 2001 SCC 1, 2001 CarswellSask 4, 2001 CarswellSask 5, 193 D.L.R. (4th) 577, 150 C.C.C. (3d) 129, 39 C.R. (5th) 1, 264 N.R. 99, 203 Sask. R. 1, 240 W.A.C. 1, [2001] 1 S.C.R. 3, [2001] 6 W.W.R. 409, 80 C.R.R. (2d) 189 (S.C.C.) — followed

R. v. Lloyd (2016), 2016 SCC 13, 2016 CSC 13, 2016 CarswellBC 959, 2016 CarswellBC 960, 27 C.R. (7th) 205, 334 C.C.C. (3d) 20, 396 D.L.R. (4th) 595, 482 N.R. 35, 385 B.C.A.C. 1, 665 W.A.C. 1, [2016] 1 S.C.R. 130 (S.C.C.) — followed

R. v. Luxton (1990), [1990] 6 W.W.R. 137, 76 Alta. L.R. (2d) 43, 79 C.R. (3d) 193, [1990] 2 S.C.R. 711, 58 C.C.C. (3d) 449, 112 N.R. 193, 50 C.R.R. 175, 111 A.R. 161, 1990 CarswellAlta 144, 1990 CarswellAlta 658 (S.C.C.) — followed

R. v. Lyons (1987), 80 N.R. 161, [1987] 2 S.C.R. 309, 44 D.L.R. (4th) 193, 82 N.S.R. (2d) 271, 37 C.C.C. (3d) 1, 61 C.R. (3d) 1, 32 C.R.R. 41, 207 A.P.R. 271, 1987 CarswellNS 41, 1987 CarswellNS 342 (S.C.C.) — followed

R. v. Mills (1986), [1986] 1 S.C.R. 863, *(*sub nom. *Mills v. R.)* 29 D.L.R. (4th) 161, *(*sub nom. *Mills v. R.)* 67 N.R. 241, 16 O.A.C. 81, *(*sub nom. *Mills v. R.)* 26 C.C.C. (3d) 481, 52 C.R. (3d) 1, *(*sub nom. *Mills v. R.)* 21 C.R.R. 76, *(*sub nom. *Mills v. R.)* 58 O.R. (2d) 544 (note), 1986 CarswellOnt 1716, 1986 CarswellOnt 116 (S.C.C.) — considered

R. v. Morrisey (2000), 2000 SCC 39, 2000 CarswellNS 255, 2000 CarswellNS 256, 36 C.R. (5th) 85, 148 C.C.C. (3d) 1, 191 D.L.R. (4th) 86, 259 N.R. 95, 77 C.R.R. (2d) 259, [2000] 2 S.C.R. 90, 187 N.S.R. (2d) 1, 585 A.P.R. 1 (S.C.C.) — followed

R. v. Nur (2015), 2015 SCC 15, 2015 CSC 15, 2015 CarswellOnt 5038, 2015 CarswellOnt 5039, 469 N.R. 1, 18 C.R. (7th) 227, 322 C.C.C. (3d) 149, 385 D.L.R. (4th) 1, 332 O.A.C. 208, [2015] 1 S.C.R. 773, 332 C.R.R. (2d) 128, 132 O.R. (3d) 719 (note), 134 O.R. (3d) 399 (S.C.C.) — followed

R. v. Oakes (1986), [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, 65 N.R. 87, 14 O.A.C. 335, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1, 19 C.R.R. 308, 1986 CarswellOnt 95, 1986 CarswellOnt 1001, 53 O.R. (2d) 719 (note) (S.C.C.) — followed

R. v. Poulin (2019), 2019 SCC 47, 2019 CSC 47, 2019 CarswellQue 8570, 2019 CarswellQue 8571, 438 D.L.R. (4th) 1, 379 C.C.C. (3d) 513, 58 C.R. (7th) 249, 443 C.R.R. (2d) 225 (S.C.C.) — followed

R. v. Smith (1987), [1987] 5 W.W.R. 1, [1987] 1 S.C.R. 1045, *(*sub nom. *Smith v. R.)* 40 D.L.R. (4th) 435, 75 N.R. 321, 15 B.C.L.R. (2d) 273, *(*sub nom. *Smith v. R.)* 34 C.C.C. (3d) 97, 58 C.R. (3d) 193, *(*sub nom. *Smith v. R.)* 31 C.R.R. 193, 1987 CarswellBC 198, 1987 CarswellBC 704 (S.C.C.) — followed

R. v. Stillman (2019), 2019 SCC 40, 2019 CSC 40, 2019 CarswellNat 3542, 2019 CarswellNat 3543, 436 D.L.R. (4th) 193, 56 C.R. (7th) 215, 439 C.R.R. (2d) 288 (S.C.C.) — followed

R. v. Therens (1985), [1985] 1 S.C.R. 613, 13 C.R.R. 193, [1985] 4 W.W.R. 286, 18 D.L.R. (4th) 655, 59 N.R. 122, 40 Sask. R. 122, 18 C.C.C. (3d) 481, 45 C.R. (3d) 97, 32 M.V.R. 153, 38 Alta. L.R. (2d) 99, 1985 CarswellSask 368, 1985 CarswellSask 851 (S.C.C.) — followed

R. v. Wholesale Travel Group Inc. (1991), 67 C.C.C. (3d) 193, 130 N.R. 1, 38 C.P.R. (3d) 451, 8 C.R. (4th) 145, 49 O.A.C. 161, 7 C.R.R. (2d) 36, [1991] 3 S.C.R. 154, 84 D.L.R. (4th) 161, 4 O.R. (3d) 799 (note), 1991 CarswellOnt 117, 1991 CarswellOnt 1029 (S.C.C.) — considered

Reference re Provincial Electoral Boundaries (1991), [1991] 5 W.W.R. 1, [1991] 2 S.C.R. 158, 127 N.R. 1, (sub nom. *Reference re Electoral Boundaries Commission Act, ss. 14, 20 (Saskatchewan))* 81 D.L.R. (4th) 16, (sub nom. *Reference re Provincial Electoral Boundaries (Saskatchewan))* 94 Sask. R. 161, (sub nom. *Carter v. Saskatchewan (Attorney General))* 5 C.R.R. (2d) 1, 1991 CarswellSask 188, 1991 CarswellSask 403 (S.C.C.) — followed

Reference re Public Service Employee Relations Act (Alberta) (1987), 87 C.L.L.C. 14,021, [1987] 1 S.C.R. 313, 38 D.L.R. (4th) 161, (sub nom. *Reference re Compulsory Arbitration)* 74 N.R. 99, [1987] 3 W.W.R. 577, 51 Alta. L.R. (2d) 97, 78 A.R. 1, (sub nom. *A.U.P.E. v. Alberta (Attorney General))* 28 C.R.R. 305, [1987] D.L.Q. 225, 1987 CarswellAlta 580, 1987 CarswellAlta 705 (S.C.C.) — followed

Reference re s. 94(2) of Motor Vehicle Act (British Columbia) (1985), [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536, 63 N.R. 266, 69 B.C.L.R. 145, 23 C.C.C. (3d) 289, 18 C.R.R. 30, 36 M.V.R. 240, [1986] 1 W.W.R. 481, 48 C.R. (3d) 289, 1985 CarswellBC 398, [1986] D.L.Q. 90, 1985 CarswellBC 816 (S.C.C.) — considered

Reyes v. R. (2002), [2002] 2 A.C. 235, [2002] 2 Cr. App. R. 16, [2002] 2 W.L.R. 1034, 12 B.H.R.C. 219, [2002] UKPC 11 (Jud. Com. of Privy Coun.) — considered

Roper v. Simmons (2005), 125 S.Ct. 1183, 543 U.S. 551 (U.S. Sup. Ct.) — considered

S. v. Dodo (2001), 2001 (3) SA 382, [2001] ZACC 16 (South Africa Constitutional Ct.) — referred to

S. v. Makwanyane (1995), [1995] ZACC 3, 1995 (3) SA 391 (South Africa Constitutional Ct.) — referred to

S. v. Williams (1995), 1995 (3) SA 632, [1995] ZACC 6 (South Africa Constitutional Ct.) — referred to

SFL v. Saskatchewan (2015), 2015 SCC 4, 2015 CSC 4, 2015 CarswellSask 32, 2015 CarswellSask 33, [2015] 3 W.W.R. 1, D.T.E. 2015T-88, 248 L.A.C. (4th) 271, 380 D.L.R. (4th) 577, 2015 C.L.L.C. 220-014, 467 N.R. 3, (sub nom. *Saskatchewan Federation of Labour v. Saskatchewan)* 451 Sask. R. 1, (sub nom. *Saskatchewan Federation of Labour v. Saskatchewan)* 628 W.A.C. 1, (sub nom. *Saskatchewan Federation of Labour v. Saskatchewan)* [2015] 1 S.C.R. 245, (sub nom. *Saskatchewan Federation of Labour v. Saskatchewan)* 328 C.R.R. (2d) 1, 281 C.L.R.B.R. (2d) 1 (S.C.C.) — considered

Skapinker v. Law Society of Upper Canada (1984), [1984] 1 S.C.R. 357, 9 D.L.R. (4th) 161, 53 N.R. 169, 3 O.A.C. 321, 20 Admin. L.R. 1, 11 C.C.C. (3d) 481, 8 C.R.R. 193, 1984 CarswellOnt 796, 1984 CarswellOnt 800 (S.C.C.) — followed

Slaight Communications Inc. v. Davidson (1989), 26 C.C.E.L. 85, [1989] 1 S.C.R. 1038, 59 D.L.R. (4th) 416, (sub nom. *Davidson v. Slaight Communications Inc.)* 93 N.R. 183, 89 C.L.L.C. 14,031, 40 C.R.R. 100, 1989 CarswellNat 695, 1989 CarswellNat 193 (S.C.C.) — followed

Steele v. Mountain Institution (1990), [1990] 6 W.W.R. 673, 121 N.R. 198, [1990] 2 S.C.R. 1385, 51 B.C.L.R. (2d) 1, 60 C.C.C. (3d) 1, 80 C.R. (3d) 257, 2 C.R.R. (2d) 304, 1990 CarswellBC 245, 1990 CarswellBC 762 (S.C.C.) — followed

Suresh v. Canada (Minister of Citizenship & Immigration) (2002), 2002 SCC 1, 2002 CarswellNat 7, 2002 CarswellNat 8, 18 Imm. L.R. (3d) 1, 208 D.L.R. (4th) 1, 281 N.R. 1, 90 C.R.R. (2d) 1, 37 Admin. L.R. (3d) 159, [2002] 1 S.C.R. 3, 2002 CSC 1 (S.C.C.) — considered

Syndicat Northcrest c. Amselem (2004), 2004 SCC 47, 2004 CarswellQue 1543, 2004 CarswellQue 1544, 323 N.R. 59, (sub nom. *Syndicat Northcrest v. Amselem)* 241 D.L.R. (4th) 1, [2004] 2 S.C.R. 551, 121 C.R.R. (2d) 189, 28 R.P.R. (4th) 1, 2004 CSC 47 (S.C.C.) — considered

Taunoa v. Attorney-General (2007), [2008] 1 N.Z.L.R. 429, [2007] NZSC 70 (New Zealand S.C.) — considered

Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission) (1990), 76 C.R. (3d) 129, [1990] 1 S.C.R. 425, 67 D.L.R. (4th) 161, 106 N.R. 161, 39 O.A.C. 161, 54 C.C.C. (3d) 417, 29 C.P.R. (3d) 97, 47 C.R.R. 1, 72 O.R. (2d) 415 (note), 1990 CarswellOnt 991, 1990 CarswellOnt 92 (S.C.C.) — considered

United States v. Burns (2001), 2001 SCC 7, 2001 CarswellBC 272, 2001 CarswellBC 273, 85 B.C.L.R. (3d) 1, 151 C.C.C. (3d) 97, 195 D.L.R. (4th) 1, 39 C.R. (5th) 205, [2001] 3 W.W.R. 193, 265 N.R. 212, 148 B.C.A.C. 1, 243 W.A.C. 1, 81 C.R.R. (2d) 1, [2001] 1 S.C.R. 283 (S.C.C.) — followed

Cases considered by *Kasirer J.*:

Conseil scolaire francophone de la Colombie-Britannique v. British Columbia (2020), 2020 SCC 13, 2020 CSC 13, 2020 CarswellBC 1451, 2020 CarswellBC 1452, [2020] 7 W.W.R. 375, 36 B.C.L.R. (6th) 1, 447 D.L.R. (4th) 1 (S.C.C.) — followed

R. v. Smith (1987), [1987] 5 W.W.R. 1, [1987] 1 S.C.R. 1045, *(*sub nom. *Smith v. R.)* 40 D.L.R. (4th) 435, 75 N.R. 321, 15 B.C.L.R. (2d) 273, *(*sub nom. *Smith v. R.)* 34 C.C.C. (3d) 97, 58 C.R. (3d) 193, *(*sub nom. *Smith v. R.)* 31 C.R.R. 193, 1987 CarswellBC 198, 1987 CarswellBC 704 (S.C.C.) — followed

Statutes considered by *Brown, Rowe JJ.*:

Bill of Rights, 1688 (1 Will. & Mary), c. 2 (2nd Sess.)

Article 10 — considered

Canadian Bill of Rights, S.C. 1960, c. 44, Pt. I, reprinted R.S.C. 1985, App. III

Generally — referred to

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(d) — considered

s. 7 — considered

s. 12 — considered

Magna Carta, 1215 (17 John)

Generally — referred to

Statutes considered by *Abella J.*:

United States Constitution, Eighth Amendment, 1791

Generally — referred to

New Zealand Bill of Rights Act 1990, 1990, No. 109

Generally — referred to

s. 9 — considered

Constitution of the Republic of South Africa, 1996, 1996, No. 108

s. 12 ¶ 1 ¶ e — 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 — considered

ss. 7-11 — referred to

ss. 7-14 — referred to

s. 8 — considered

s. 11(b) — considered

s. 11(c) — considered

s. 11(d) — considered

s. 12 — considered

ss. 13-14 — referred to

Canadian Bill of Rights, S.C. 1960, c. 44, Pt. I, reprinted R.S.C. 1985, App. III

Generally — referred to

Preamble — referred to

s. 2(b) — considered

Bâtiment, Loi sur le, RLRQ, c. B-1.1

art. 46 — considered

art. 197.1 [ad. 2011, c. 35, art. 39] — considered

Bill of Rights, 1688 (1 Will. & Mary), c. 2 (2nd Sess.)

Generally — referred to

Article 10 — considered

Statutes considered by *Kasirer J.*:

Bâtiment, Loi sur le, RLRQ, c. B-1.1

art. 197.1 [ad. 2011, c. 35, art. 39] — 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. 12 — considered

Code civil du Québec, L.Q. 1991, c. 64

en général — referred to

Treaties considered by *Brown, Rowe JJ.*:

American Convention on Human Rights, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, 9 I.L.M. 673

Generally — referred to

Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, C.T.S. 1987/36; 23 I.L.M. 1027; 1465 U.N.T.S. 85; U.N. Doc. A/39/51

Generally — referred to

European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222; E.T.S. No. 5

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

International Covenant on Economic, Social and Cultural Rights, 1966, C.T.S. 1976/46; 993 U.N.T.S. 3

Generally — referred to

Universal Declaration of Human Rights, 1948, G.A. Res. 217(III)A

Generally — referred to

Treaties considered by *Abella J.*:

American Convention on Human Rights, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, 9 I.L.M. 673

Generally — referred to

Article 1 ¶ 2 "person" — considered

Article 5 ¶ 2 — considered

Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, C.T.S. 1987/36; 23 I.L.M. 1027; 1465 U.N.T.S. 85; U.N. Doc. A/39/51

Preamble — referred to

Article 1 ¶ 1 "torture" — considered

Article 16 ¶ 1 — considered

European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222; E.T.S. No. 5

Generally — referred to

Article 3 — 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
Preamble — referred to

Article 7 — considered
Universal Declaration of Human Rights, 1948, G.A. Res. 217(III)A
Preamble — referred to

Article 5 — considered
Words and phrases considered:

cruel and unusual punishment

Black's Law Dictionary, [11th ed. by Bryan A. Garner. St. Paul, Minn.: Thomson Reuters, 2019,] defines "cruelty" as "[t]he intentional and malicious infliction of mental or physical suffering on a living creature, esp. a human; abusive treatment; outrage" ((11th ed. 2019), at p. 475). The term "unusual", is not central to the analysis, but is nonetheless part of the "compendious expression of a norm" (*R. v. Smith (Edward Dewey)*[, [1987] 1 S.C.R. 1045], at p. 1072). It is defined as "[e]xtraordinary; abnormal" and "[d]ifferent from what is reasonably expected" (*Black's Law Dictionary*, at p. 1851). Together, the words "cruel and unusual punishment" are defined as "[p]unishment that is torturous, degrading, inhuman, grossly disproportionate to the crime in question, or otherwise shocking to the moral sense of the community" (*Black's Law Dictionary*, at p. 1490).

The *Oxford English Dictionary*, [2nd ed. Oxford: Clarendon Press, 1989] defines "cruel", in relation to persons, as "[d]isposed to inflict suffering; indifferent to or taking pleasure in another's pain or distress, destitute of kindness or compassion; merciless, pitiless, hard-hearted" ((2nd ed. 1989), vol. IV, at p. 78). It is also used to describe actions that are "proceeding from or showing indifference to or pleasure in another's distress" ("cruel", at p. 78). When referring to conditions and circumstances, i.e. treatment or punishment, "cruel" means "[c]ausing or characterized by great suffering; extremely painful or distressing" (p. 78).

Similarly, "cruelty" is defined in the *Oxford English Dictionary* as referring to:

1. The quality of being cruel; disposition to inflict suffering, delight in or indifference to the pain or misery of others; mercilessness, hardheartedness: esp. as exhibited in action. Also, with pl., an instance of this, a cruel deed; [. . .]

2. Severity of pain; excessive suffering; [. . .]

3. Severity, strictness, rigour; [. . .] [p. 79]

[. . .]

The term "*cruel*" is also defined in French by reference to the concept of suffering, which, as Chamberland J.A. noted, cannot be experienced by inanimate entities like corporations:

[TRANSLATION]

1. Taking pleasure in inflicting suffering, in witnessing suffering.

2. Denoting cruelty; showing the cruelty of humans.

3. Inflicting suffering through its harshness, its severity.

4. (Of persons). Without leniency, merciless.

5. (Of personified things). Inflicting suffering by manifesting a sort of hostility.

6. (Of persons). Indifferent, insensitive.

(*Le Grand Robert de la langue française* [2e éd. par Alain Rey, dir. Paris: Le Robert, 2001,] at pp. 864-65)

In short, the ordinary meaning of the words cruel and unusual treatment or punishment centers on *human* pain and suffering. As Chamberland J.A., eloquently stated:

[TRANSLATION] It would completely distort the ordinary meaning of the words, in my view, to say that it is possible to be cruel to a corporate entity.

Cruelty is inflicted on living beings of flesh and blood, be they human beings or animals.

And not on corporations.

Suffering, whether physical or mental, is unique to living beings, not corporate entities and inanimate objects without a soul or emotional life.

[paras. 53-56]

cruel and unusual treatment or punishment

Simply put, the text "cruel and unusual" denotes protection that "only human beings can enjoy" [. . .].

[. . .]

[T]he words "cruel and unusual treatment or punishment" refer to human pain and suffering, both physical and mental.

Termes et locutions cités:

peines cruelles et inusitées

Selon le *Black's Law Dictionary*[, 11th ed., by Bryan A. Garner, St. Paul (Minn.), Thomson Reuters, 2019], le mot « *cruelty* » (cruauté) s'entend de : [TRADUCTION] « [l]'infliction intentionnelle ou malveillante de souffrances mentales ou physiques à une créature vivante, particulièrement un humain; traitement abusif; barbarie ». Le mot « *unusual* » (inusité) n'est pas essentiel dans l'analyse, mais fait néanmoins partie de la « formulation concise d'une norme » (*R. c. Smith (Edward Dewey)*[, [1987] 1 R.C.S. 1045], p. 1072). Suivant la définition qu'on en donne, il signifie « [e]xtraordinaire, anormal » et « [d]iffférent de ce à quoi l'on s'attend raisonnablement » (*Black's Law Dictionary*, p. 1851). Regroupés, les mots « traitements ou peines cruels et inusités » sont définis comme suit : « [p]eine abominable, dégradante, inhumaine, exagérément disproportionnée par rapport au crime en question, ou qui choque d'une autre façon le sens moral de la communauté » (*Black's Law Dictionary*, p. 1490).

Le *Oxford English Dictionary*[, 2nd ed., Oxford, Clarendon Press, 1989] définit ainsi le mot « *cruel* » (cruel), en lien avec des personnes : [TRADUCTION] « disposées à infliger des souffrances; indifférentes aux douleurs ou à la détresse d'autrui ou qui en tire du plaisir, dépourvues de bonté ou de compassion; sans merci, sans pitié, insensibles » ((2e éd. 1989), vol. IV, p. 78). Ce terme s'emploie aussi pour décrire des actes « procédant ou témoignant de l'indifférence manifestée à l'égard de la détresse d'autrui, ou encore du plaisir éprouvé à cet égard » (« *cruel* », p. 78). Lorsqu'on fait référence à des conditions et circonstances, c.-à-d. à un traitement ou à une peine, « cruel » signifie « [c]ausant de grandes souffrances qui se caractérise par de telles souffrances; extrêmement douloureux ou pénible » (p. 78).

De même, « *cruelty* » (cruauté) est défini ainsi dans le *Oxford English Dictionary* :

[TRADUCTION]

1. Le fait d'être cruel; disposition à infliger des souffrances, plaisir ou indifférence à la douleur ou à la misère d'autrui; sans merci, insensible : en particulier lorsqu'elle se manifeste par des actes. Aussi, au pluriel (des cruautés), une occurrence de cruauté, un acte cruel; [. . .]

2. Sévérité de la douleur, souffrance excessive; [. . .]

3. Sévérité, rigidité, rigueur; [. . .]

[p. 79]

Le terme « cruel » est aussi défini en français par référence au concept de souffrance qui, comme l'a souligné le juge d'appel Chamberland, ne peut être éprouvée par des entités inanimées comme les personnes morales :

1. Qui prend plaisir à faire souffrir, à voir souffrir.

2. Qui dénote de la cruauté; qui témoigne de la cruauté des hommes.

3. Littér. Qui fait souffrir par sa dureté, sa sévérité.

4. (Personnes). Sans indulgence, impitoyable.

5. (Choses personnifiées). Qui fait souffrir en manifestant une sorte d'hostilité.

6. (Personnes). Indifférent, insensible.

(*Le Grand Robert de la langue française*[, 2e éd. par Alain Rey, dir., Paris, Le Robert, 2001], p. 864-865.)

En résumé, suivant leur sens ordinaire, les mots traitements ou peines cruels et inusités renvoient à la douleur et à la souffrance humaines. Comme l'a éloquemment exprimé le juge d'appel Chamberland :

Ce serait de dénaturer totalement le sens commun des mots, selon moi, de dire que l'on peut faire preuve de cruauté envers une entité corporative, une société par actions.

La cruauté s'exerce envers des êtres vivants, en chair et en os, fussent-ils des êtres humains ou des animaux.

Et non envers des sociétés par actions.

La souffrance, physique ou mentale, est le propre des êtres vivants, et non des entités corporatives et des objets inanimés, sans âme ni vie émotionnelle.

[par. 53-56]

traitements ou peines cruels et inusités

En termes simples, l'expression « cruels et inusités » dénote une protection que « seul un être humain peut avoir » [. . .].

[. . .]

[L]es mots « traitements ou peines cruels et inusités » s'entendent de la douleur et de la souffrance humaines, tant physiques que mentales.

APPEAL by corporation from decision reported at *9147-0732 Québec inc. c. Directeur des poursuites criminelles et pénales* (2019), 2019 QCCA 373, EYB 2019-307903, 2019 CarswellQue 1425 (C.A. Que.), reversing judgment holding that constitutional guarantee against cruel and unusual punishment did not apply to corporations.

POURVOI formé par une personne morale à l'encontre d'une décision publiée à *9147-0732 Québec inc. c. Directeur des poursuites criminelles et pénales* (2019), 2019 QCCA 373, EYB 2019-307903, 2019 CarswellQue 1425 (C.A. Que.), ayant infirmé un jugement ayant conclu que la garantie constitutionnelle contre les peines cruelles et inusitées ne s'appliquait pas aux personnes morales.

Criminal Reports - Comments

It is difficult not to form the conclusion that *Quebec (Attorney General) v. 9147-0732 Québec Inc.* is a decision reflecting a more vigorous debate in Chambers than is reflected in the substance of the decision. All nine judges agree on the result: that corporations do not benefit from the protection against cruel and unusual punishment in s. 12 of the *Charter*. All nine judges agree that that result is dictated by the text and history of the provision, and they also agree that that conclusion is supported by international and comparative authority. Only two points separate Justices Brown and Rowe's majority opinion from Justice Abella's concurring opinion, but even those two points relate to how other judges might decide different cases about different issues in the future.

The first point of expressed contention to discuss is the role of international and comparative authority. I say "expressed" contention, because the actual substance of the disagreement seems, to outside eyes, quite minor. The majority takes the view that not all international law is of equal value in *Charter* interpretation. First, the majority says that binding instruments are, unlike non-binding instruments, binding. Second, the majority says that instruments which predate the *Charter* can be relevant to understanding the intention of the drafters in a way that instruments which post-date the *Charter* cannot. Finally, the majority concludes that decisions of foreign courts should be approached with caution because they are based on laws other than the *Charter*.

Justice Abella's cohort, in comparison, agrees that not all sources of international and comparative law in fact have equal weight, noting for example at para. 102 that "[n]on-binding international sources are 'relevant and persuasive', not obligatory." Justice Abella does not seem in fact to object to giving different weight to different types of international and comparative law, but only to articulating in advance the method for doing so: "This Court has had no difficulty in the past in deciding which sources it finds to be more relevant and persuasive than others without using a confusing multi-category chart" (para. 104).

On the other hand, both these judgments perceive the other — or perhaps the *implications* of the other — as significantly different from each other. The majority suggests that Justice Abella "considers various sources of international and comparative law, and gives them unstated, but seemingly equal, interpretive weight" (para. 44). Justice Abella, in turn, challenges the wisdom of "[p]resumptively narrowing the significance of international and comparative sources, as the majority suggests" (para. 102).

This disagreement, or perceived disagreement, extends as well to the proper approach to the role of the text in constitutional interpretation. Both decisions agree that the text of the *Charter* provision plays an important role in interpreting that provision. The majority seems to think that Justice Abella ignores that, while Justice Abella suggests the majority drifts toward a kind of "originalism" which focuses on nothing but the text, but in their actual reasoning both decisions start from the words of s. 12, and then consider historical antecedents and international comparisons to reach the same conclusion as one another.

To be sure, it is not that there are no differences between the two approaches. The majority argues at para. 28 that the role of international and comparative law "has properly been to *support* or *confirm* an interpretation arrived at through the *Big M Drug Mart Ltd.* approach; the Court has never relied on such tools to define the scope of *Charter* rights", but Justice Abella considers this approach to put "unnecessary barriers in the way of access to international and comparative sources" (para. 106). Both decisions regard the other as the one which is departing from current practice. It is not difficult to have sympathy for the judgment of the newest member of the Court, Justice Kasirer, who concludes that:

> [142] In this case, all the relevant factors are to the same effect, indicating that the protection offered by s. 12 does not extend to corporations. I therefore find it unnecessary to consider questions relating to the proper approach to constitutional interpretation or the place of international law and comparative law in that approach any further.

Steve Coughlan

Schulich School of Law, Dalhousie University

Recueil de jurisprudence en droit criminel - Commentaires

Il serait tentant de conclure que la décision rendue dans l'arrêt *Québec (Procureure générale) c. 9147-0732 Québec inc.* révèle que les juges ont débattu de la question de manière plus intense que la décision elle-même ne semble l'indiquer. Les neuf juges se sont entendus à l'unanimité quant au résultat, soit que les sociétés ne jouissent pas de la protection contre les peines cruelles et inusitées garantie à l'art. 12 de la *Charte*. Les neuf juges se sont entendus pour dire que le résultat est l'inévitable conjonction du libellé et de l'historique de la disposition et que cette conclusion s'appuie sur des autorités internationales et comparatives. Les motifs des juges majoritaires exprimés par les juges Brown et Rowe, et ceux de la juge Abella, souscrivant quant au résultat, ne divergent que sur deux points, alors même que ces deux points sont évocateurs de la manière dont d'autres juges sont susceptibles de trancher différents dossiers concernant différentes questions à l'avenir.

Le premier point de divergence exprimée sur lequel nous nous pencherons est le rôle des autorités internationales et comparatives. Je dis divergence « exprimée » parce que le véritable point de désaccord, au fond, semble être, vu de l'extérieur, relativement mineur. Selon les juges majoritaires, les droits internationaux n'ont pas tous la même importance dans l'interprétation de la *Charte*. Premièrement, les juges majoritaires affirment que les instruments contraignants sont, contrairement aux instruments non contraignants, contraignants. Deuxièmement, les juges majoritaires affirment que les instruments antérieurs à la *Charte* peuvent être pertinents pour comprendre l'intention des rédacteurs d'une manière que les instruments postérieurs à la *Charte* ne peuvent le faire. Enfin, les juges majoritaires concluent que l'on doit faire preuve de prudence à l'égard des décisions des tribunaux étrangers en ce qu'elles sont fondées sur d'autres textes législatifs que la *Charte*.

En comparaison, la juge Abella, ainsi que les juges ayant souscrit à son opinion, conviennent que les sources internationales et comparatives n'ont, en fait, pas toutes la même importance, faisant remarquer, par exemple, au par. 102 que « [l]es sources internationales non contraignantes sont "pertinentes et convaincantes", mais non impérieuses ». En fait, la juge Abella ne semble pas s'opposer à ce que l'on accorde un poids différent à différents types de droit international et comparatif, mais seulement à l'élaboration à l'avance d'une méthode pour y arriver : « Par le passé, notre Cour n'a pas eu de difficulté à décider quelles sont les sources qu'elle considère plus pertinentes et persuasives que d'autres, et ce, sans recourir à une grille déroutante comportant de multiples catégories » (par. 104).

D'un autre côté, les deux clans perçoivent leurs opinions respectives, ou plutôt *l'incidence* de leurs opinions respectives, comme étant significativement différentes l'une de l'autre. Les juges majoritaires laissent entendre que la juge Abella « examine diverses sources de droit international et de droit comparé et leur accorde une valeur interprétative qu'elle ne précise pas, mais qui semble équivalente » (par. 44). La juge Abella, de son côté, conteste l'à-propos de « [r]éduire par voie de présomption l'importance des sources de droit international et de droit comparé, ainsi que le suggèrent les juges » (par. 102).

Ce désaccord, ou apparent désaccord, s'étend également à la manière appropriée d'aborder le rôle du libellé dans l'interprétation d'un texte constitutionnel. Les deux clans s'entendent pour dire que le libellé de la disposition de la *Charte* joue un rôle important dans l'interprétation de cette disposition. Les juges majoritaires semblent penser que la juge Abella ignore cela, alors que cette dernière laisse entendre que les juges majoritaires sont attirés par une forme d'« originalisme » qui ne tienne compte que du libellé, alors que dans leur raisonnement respectif, les deux clans débutent leurs motifs avec les mots de l'art. 12 avant de prendre en considération l'historique et les comparaisons internationales et de finalement tirer la même conclusion.

Soyons clairs : ce n'est pas que les opinions exprimées par les deux clans ne soient pas différentes l'une de l'autre. Les juges majoritaires font valoir, au par. 28, que le rôle du droit international et du droit comparatif a « consisté à *appuyer* ou à *confirmer* une interprétation dégagée en appliquant la démarche établie dans l'arrêt *Big M Drug Mart Ltd.*; la Cour n'a jamais eu recours à de tels outils pour définir la portée des droits garantis par la *Charte* », mais la juge Abella considère que cette approche érige « des obstacles inutiles au recours à des sources de droit international et de droit comparé » (par. 106). Chacun des clans considère

que l'opinion rendue par l'autre clan est celle qui s'écarte de la pratique actuelle. Il est facile d'éprouver de la sympathie pour l'opinion rendue par le membre le plus récent de la Cour, le juge Kasirer, lequel conclut que :

> [142] En l'espèce, tous les facteurs pertinents abondent dans le même sens, soit que la protection offerte par l'art. 12 ne s'étend pas aux personnes morales. Je trouve donc inopportun de s'attarder davantage sur des questions liées à la démarche appropriée pour l'interprétation constitutionnelle ou sur la place du droit international et du droit comparé dans cette démarche.

Steve Coughlan

Schulich School of Law, Université Dalhousie

Criminal Reports - Comments

This case raises the question of whether a legal person may rely on section 12 of the *Charter* after having been imposed a minimal fine of about $30,000 for having violated the *Building Act* [1] . That Quebec legislation specifically provides a set of sentences for legal persons and another one for natural persons. The Supreme Court judges all agree with the dissenting reasons of Justice Chamberland of the Quebec Court of Appeal that section 12 of the *Charter* extends no protection to legal persons since the phrase "cruel and unusual" suggests that the protection is available only to human beings. The majority rejects the proposition that the effect of a corporation's bankruptcy on its stakeholders should be considered in determining the scope of section 12. According to them, "the existence of human beings behind the corporate veil is insufficient to ground a s. 12 claim of right on behalf of a corporate entity, in light of the corporation's separate legal personality" (para. 2). Justice Abella, in her separate reasons, shares the view that "[section 12's] intended beneficiaries are people, not corporations" (para. 51). In her view, in determining the scope of the protection available under section 12, the question of whether the sentence imposed may have an impact on an individual in a corporation is irrelevant given the corporation's separate legal personality (para. 129). Justice Kasirer shares the view that the corporation is "asserting rights here that are not its own" (para. 141). The relevant Quebec legislation in this case made a distinction between sentences that can be imposed on natural persons and sentences that can be imposed on corporations, and the issue here was precisely whether section 12 of the *Charter* applied to corporations. However, a question may be raised as to the scope of that decision where, pursuant to federal law, sentences are imposed on organizations, within the meaning of section 2 of the *Criminal Code*, that lack legal personality. That section provides that "organization" means a legal person or any other business corporations or an association of persons that is created for a common purpose, has an operational structure, and holds itself out to the public as an association of persons. Neither a distinct legal personality nor a distinct patrimony is required for an organization to come within the definition of the *Code* or any federal legislation that refers to the notion of organization as defined in the *Code*, such as the *Cannabis Act* [2] . An organization without a legal personality or a patrimony may, pursuant to those Acts, engage its criminal or penal liability and be sentenced. Could such an organization challenge a sentence imposed on it on the ground that it is grossly disproportionate and, consequently, contrary to section 12 of the *Charter*? Could it challenge the mandatory victim surcharge? In my opinion, the decision rendered by the Court in the present case does not provide a quick answer to those questions.

Anne-Marie Boisvert

Faculty of Law, Université de Montréal

Recueil de jurisprudence en droit criminel - Commentaires

La décision, dans cette affaire, porte sur la question de savoir si une personne morale peut invoquer l'article 12 de la *Charte* pour s'être vu imposer une amende minimale d'environ 30 000 $ pour avoir contrevenu à la *Loi sur le bâtiment* [3] . Cette loi québécoise prévoit expressément des fourchettes de peines distinctes pour les personnes morales et les personnes physiques. L'ensemble des juges de la Cour suprême se rallie à l'opinion dissidente du juge Chamberland en Cour d'appel du Québec pour dire que l'article 12 de la *Charte* n'offre aucune protection aux personnes morales puisque l'expression « cruels et inusités » connote une protection à laquelle seuls les êtres humains peuvent prétendre. Les juges qui rendent la décision majoritaire rejettent la

proposition voulant que les répercussions de la faillite d'une personne morale sur ses parties prenantes doivent être prises en compte dans la détermination du champ d'application de l'article 12. Selon eux, « le fait qu'il y ait des êtres humains derrière la personnalité morale est insuffisant pour justifier la revendication du droit garanti à l'art. 12 en faveur d'une personne morale, vu la personnalité juridique distincte de celle-ci » (par. 2). La juge Abella, dans ses motifs séparés, partage cette opinion que « les personnes censées bénéficier de cette protection sont les personnes physiques, et non pas les personnes morales » (par. 51). Son refus de reconnaître le fait que la peine infligée puisse avoir des incidences sur des personnes physiques au sein de la personne morale comme facteur à prendre en compte pour déterminer la portée de la protection offerte par l'article 12 s'appuie sur la personnalité juridique distincte de la personne morale (par. 129). Le juge Kasirer partage cette opinion que la personne morale en l'espèce « fait valoir des droits qui ne sont pas les siens » (par. 141). La loi québécoise en cause dans cette affaire distinguait entre les peines applicables aux personnes physiques et celles applicables aux personnes morales, et c'est bel et bien de l'application de l'article 12 de la *Charte* aux personnes morales dont il était question ici. Se pose cependant la question de la portée de cette décision dans le cas de peines imposées, en droit fédéral, aux organisations au sens de l'article 2 du *Code criminel* qui n'ont pas de personnalité juridique. Selon cet article, constituent une organisation, outre les personnes morales et autres sociétés par actions, toutes associations de personnes formées en vue de poursuivre un but commun, dotées d'une structure organisationnelle et qui se présentent au public comme une association de personnes. Ni la personnalité juridique distincte ni même un patrimoine distinct ne sont requis pour se qualifier d'organisation au sens du *Code* et des autres lois fédérales qui recourent à la notion d'organisation au sens du *Code*, pensons simplement à la *Loi sur le cannabis* [4] . Une organisation sans personnalité juridique distincte et sans patrimoine peut, aux termes de ces lois, engager sa responsabilité criminelle ou pénale et se voir imposer une peine. Pareille organisation pourrait-elle contester une peine lui étant imposée au motif qu'elle est grossièrement disproportionnée et, partant, contraire à l'article 12 de la *Charte*? Pourrait-elle contester l'imposition de la suramande obligatoire? À mon avis, il ne faut pas conclure trop vite que la décision de la Cour dans la présente instance règle ces questions.

Anne-Marie Boisvert

Faculté de droit, Université de Montréal

Brown and Rowe JJ. **(Wagner C.J.C. and Moldaver and Côté JJ. concurring):**

I. Overview

1 This appeal requires this Court to decide whether s. 12 of the *Canadian Charter of Rights and Freedoms* protects corporations from cruel and unusual treatment or punishment. Like our colleagues, we conclude that it does not, because corporations lie beyond s. 12's protective scope. Simply put, the text "cruel and unusual" denotes protection that "only human beings can enjoy": *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 1004. The protective scope of s. 12 is thus limited to human beings.

2 This Court's jurisprudence on s. 12, in both its French and English versions, is marked by the concept of human dignity, as our colleagues have noted. And the existence of human beings behind the corporate veil is insufficient to ground a s. 12 claim of right on behalf of a corporate entity, in light of the corporation's separate legal personality. Like our colleagues, and contrary to the majority at the Court of Appeal, we therefore reject the proposition that the effect of a corporation's bankruptcy on its stakeholders should be considered in determining the scope of s. 12.

3 Despite our agreement in the result, we find it necessary to write separately in order to assert the proper place in constitutional interpretation of foreign and international sources such as those upon which our colleague Abella J. relies in her analysis. If these sources are to be accorded a persuasive character, it must be done by way of a coherent and consistent methodology. Coherence and consistency in a court's reasons are important, because they are critical means by which it may account to the public for the manner in which it exercises its powers. This is particularly so on a matter so fundamental as constitutional interpretation. As Professor Stéphane Beaulac notes, a consistently defined methodology of interpretation is a means of promoting the rule of law, notably through legal predictability: "'Texture ouverte', droit international et interprétation de la Charte canadienne" (2013), 61 *S.C.L.R.* (2d) 191, at pp. 192-93.

4 We also make a preliminary and more general point on constitutional interpretation. Our colleague Abella J. applies the primacy of constitutional text and considerations of purpose in accordance with the purposive approach adopted in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344, recently affirmed in *R. v. Poulin*, 2019 SCC 47, at para. 32. In doing so, however, she makes several remarks which risk minimizing the primordial significance assigned by this Court's jurisprudence to constitutional text in undertaking purposive interpretation.

5 Having regard to the decision under appeal, that of the Quebec Court of Appeal, we find Justice Chamberland's dissenting reasons difficult to improve upon. His analysis belies any perceived need to dispose of this matter by referring extensively to international and comparative law. And his textual analysis — notably on the meaning of "cruel" — is compelling. As he put it, [TRANSLATION] "[i]t would completely distort the ordinary meaning of the words ... to say that it is possible to be cruel to a corporate entity": 2019 QCCA 373, at para. 53 (CanLII). His discussion of the other *Big M Drug Mart* factors was also in keeping with this Court's direction on the proper methodology of *Charter* interpretation.

II. Analysis

6 A summary of relevant facts and judicial history is found in the reasons of Abella J., and we are content to rely on it.

7 To claim protection under the *Charter*, a corporation — indeed, any claimant — must establish that "it has an interest falling within the scope of the guarantee, and one which accords with the purpose of that provision": *R. v. CIP Inc.*, [1992] 1 S.C.R. 843, at p. 852. In order to make that determination, the court must seek to discern the scope and purpose of the right by way of a purposive interpretation, that is, "by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*": *Big M Drug Mart*, at p. 344; see also *Poulin*, at para. 32. The approach is "generous, purposive and contextual" and should be done in a "large and liberal manner": *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at para. 15; *Caron v. Alberta*, 2015 SCC 56, [2015] 3 S.C.R. 511, at para. 35.

A. Preliminary Observations on Purposive Interpretation

8 This Court has consistently emphasized that, within the purposive approach, the analysis *must begin* by considering the text of the provision. As this Court made clear in *British Columbia (Attorney General) v. Canada (Attorney General)*, [1994] 2 S.C.R. 41 ("*Vancouver Island Railway*"), "[a]lthough constitutional terms must be capable of growth, constitutional interpretation must nonetheless begin with the language of the constitutional law or provision in question": p. 88. This was reiterated in *Grant*, where the Court stated that "[a]s for any constitutional provision, the starting point *must* be the language of the section": para. 15 (emphasis added). Recently, in *Poulin*, the Court yet again affirmed that the first step to interpreting a *Charter* right is to analyze the text of the provision: para. 64.

9 This is so because constitutional interpretation, being the interpretation *of the text of the Constitution*, must first and foremost have reference to, and be constrained by, that text. Indeed, while constitutional norms are deliberately expressed in general terms, the words used remain "the most primal constraint on judicial review" and form "the outer bounds of a purposive inquiry": B. J. Oliphant, "Taking purposes seriously: The purposive scope and textual bounds of interpretation under the Canadian Charter of Rights and Freedoms" (2015), 65 *U.T.L.J.* 239, at p. 243. The Constitution is not "an empty vessel to be filled with whatever meaning we might wish from time to time": *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 ("*Re PSERA*"), at p. 394; *Caron*, at para. 36. Significantly, in *Caron*, the Court reiterated this latter passage and reasserted "the primacy of the written text of the Constitution": para. 36; see also para. 37.

10 Moreover, while *Charter* rights are to be given a purposive interpretation, such interpretation must not overshoot (or, for that matter, undershoot) the actual purpose of the right: *Poulin*, at paras. 53 and 55; *R. v. Stillman*, 2019 SCC 40, at paras. 21 and 126; *R. v. Blais*, 2003 SCC 44, [2003] 2 S.C.R. 236, at paras. 17-18 and 40; *Big M Drug Mart*, at p. 344. Giving primacy to the text — that is, respecting its established significance as the first factor to consider within the purposive approach — prevents such overshooting.

11 While acknowledging, at para. 71, that language is part of the analysis, and that "the text of the *Charter* matters", our colleague Abella J. stresses the direction in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 that the task of interpreting a constitution is fundamentally different from interpreting a statute, and that courts ought "not to read the provisions of the Constitution like a last will and testament lest it become one": p. 155. This felicitous phrase cannot, however, be taken as minimizing the primordial significance of constitutional text as it has since, and repeatedly, been recognized in this Court's jurisprudence: see, e.g., *Caron*, at para. 36; *Vancouver Island Railway*, at p. 88. It is not the sole consideration, but treating it as the first indicator of purpose is not in the least inconsistent with the principles of *Charter* interpretation; it is in fact constitutive of them.

12 We pause here to emphasize that recognizing the importance of the text in interpreting a *Charter* right purposively does *not* translate into advocating for what our colleague Abella J. calls a "[p]urely textual interpretation" of the Constitution: para. 76, quoting A. Barak, "A Judge on Judging: The Role of a Supreme Court in a Democracy" (2002), 116 *Harv. L. Rev.* 19, at p. 83. The notion of "textualism" to which she looks for support diverges substantially from the idea — embodied in our jurisprudence and in our reasons — that the purposive inquiry must begin by examining the text. For instance, the "new textualism" denounced by Aharon Barak is a "system [which] holds that the Constitution and every statute should be understood according to the reading of a reasonable reader at the time of enactment" and in which "[r]eference to the history of the text's creation ... is not allowed": pp. 82-83. Similarly, the kind of interpretation Lorne Neudorf characterizes as "a purely textual reading" is one where the analysis is strictly restricted to the text of the Constitution: "Reassessing the Constitutional Foundation of Delegated Legislation in Canada" (2018), 41 *Dal. L.J.* 519, at p. 544. These conceptions of constitutional interpretation are not remotely consistent with that which we apply and which our law demands.

13 Moreover, our colleague Abella J. draws a false dichotomy between the purposive approach and beginning that analysis with the text of the provision. Indeed, beginning with the text is precisely what the precedents of this Court direct us to do. Her assertion that "considering the text as prime [is] unhelpful in interpreting constitutional guarantees" (at para. 75) discards these precedents and the role they have assigned to the text in delimiting an analysis which, we repeat, must also be conducted by reference to the historical context, the larger objects of the *Charter*, and, where applicable, the meaning and purpose of associated *Charter* rights.

14 Returning to the case at bar, the text of s. 12, particularly the inclusion of "cruel", strongly suggests that the provision is limited to human beings. Justice Chamberland quite rightly emphasized that the ordinary meaning of the word "cruel" does not permit its application to inanimate objects or legal entities such as corporations. As he explained, [TRANSLATION] "[o]ne would not say, it seems to me, that a group of workers who demolish a building using explosives (rather than going about it more gradually, brick by brick, plank by plank) are being cruel to the building. Nor would one say that a group of consumers who boycott a business's products, creating a real risk that it will be driven into bankruptcy, are being cruel to the company that owns the business": para. 56, fn. 32. We therefore agree with Justice Chamberland (at paras. 51-56), as with our colleague (Abella J.'s reasons, at para. 86), that the words "cruel and unusual treatment or punishment" refer to *human* pain and suffering, both physical and mental.

15 We note that, in refusing to apply s. 7 of the *Charter* to corporations in *Irwin Toy*, Dickson C.J. and Lamer and Wilson JJ. reasoned in a similar manner, observing that the text of the provision did not permit corporations to be included within its protective scope:

> In our opinion, a corporation cannot avail itself of the protection offered by s. 7 of the *Charter*. First, we would have to conceive of a manner in which a corporation could be deprived of its "life, liberty or security of the person". We have already noted that it is nonsensical to speak of a corporation being put in jail. To say that bankruptcy and winding up proceedings engage s. 7 would stretch the meaning of the right to life beyond recognition.
>
> . . . . .
>
> ... A plain, common sense reading of the phrase "Everyone has the right to life, liberty and security of the person" serves to underline the human element involved; only human beings can enjoy these rights. "Everyone" then, must be read in light of the rest of the section and defined to exclude corporations and other artificial entities incapable of enjoying life, liberty or security of the person, and include only human beings.

[Emphasis added; pp. 1002-4.]

16 Relatedly, we also largely agree with our colleague Abella J.'s analysis of s. 12's historical origins, subject to our discussion below on the proper role of international and comparative law in the analysis. We would add that an examination of s. 12's historical origins shows that the *Charter* took a different path from its predecessors. Following an early, related protection in *Magna Carta* (1215), Article 10 of the English *Bill of Rights*, 1688, 1 Will. & Mar. Sess. 2, c. 2 provided that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Using almost identical text, the Eighth Amendment of the Constitution of the United States provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted". In Canada, however, the right not to be denied reasonable bail without just cause was carved off from the right to be free from cruel and unusual punishment, and placed in s. 11(*e*) of the *Charter*. Even more significantly, the protection against "excessive fines" was not retained at all, neither in the *Charter* nor in the *Canadian Bill of Rights*, S.C. 1960, c. 44, as noted by Justice Chamberland: para. 66.

17 The protection against cruel and unusual punishment under s. 12 of the *Charter* therefore exists as a standalone guarantee. Viewed in light of the historical background noted above, this is highly significant, if not determinative: excessive fines (which a corporation *can* sustain), without more, are not unconstitutional. For a fine to be unconstitutional, it must be "so excessive as to outrage standards of decency" and "abhorrent or intolerable" to society: *R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599, at paras. 45 and 94. This threshold is, in accordance with the purpose of s. 12, inextricably anchored in human dignity. It is a constitutional standard that cannot apply to treatments or punishments imposed on corporations.

18 Finally, we agree with our colleague's discussion of related *Charter* rights.

B. The Proper Role of International and Comparative Law in Charter Interpretation

19 We differ fundamentally from our colleague Abella J. on the prominence she gives to international and comparative law in the interpretive process. We see this as a significant and unwarranted departure from this Court's jurisprudence. Specifically, her claim that all international and comparative sources have been "indispensable" to Canadian constitutional interpretation (at para. 100) does not hold true when considering this Court's jurisprudence and the varying role and weight it has assigned to different kinds of instruments.

20 As a constitutional document that was "made in Canada" (Prime Minister Pierre Elliot Trudeau, *Federal-Provincial Conference of First Ministers on the Constitution* (morning session of November 2, 1981), at p. 10), the *Charter* and its provisions are primarily interpreted with regards to Canadian law and history.

21 This remains unchanged by the purposive approach developed in *Big M Drug Mart*. That judgment makes no reference to international and comparative law, except inasmuch as it relates to the historical origins of the concepts enshrined in the *Charter*.

22 While this Court has generally accepted that international norms *can* be considered when interpreting domestic norms, they have typically played a limited role of providing *support* or *confirmation* for the result reached by way of purposive interpretation. This makes sense, as Canadian courts interpreting the *Charter* are not bound by the content of international norms. As Professor Beaulac and Dr. Bérard explain:

> [TRANSLATION] In addition to distorting the relationship between the international and domestic legal orders, the suggestion that domestic courts are bound by international normativity is inconsistent with the constitutional mandate and the function of the judiciary, which is to exercise decision-making power under the applicable Canadian and Quebec law. Seeing international law as having persuasive authority is a more appropriate, consistent and effective approach.
>
> . . . . .
>
> ... even though international normativity is not binding in domestic law, what it can and, indeed, should do in appropriate circumstances is to influence the interpretation and application of domestic law by our courts. Except among a few zealous supporters of the internationalist cause, there is general agreement that, in this regard, the criterion for referring to international law in domestic law is that of "persuasive authority".

> (S. Beaulac and F. Bérard, *Précis d'interprétation législative* (2nd ed. 2014), Chapter 5, at paras. 5 and 36 (emphasis added; footnotes omitted).)

23 Furthermore, even within that limited supporting or confirming role, the weight and persuasiveness of each of these international norms in the analysis depends on the nature of the source and its relationship to our Constitution. The reason for this is the necessity of preserving the integrity of the Canadian constitutional structure, and Canadian sovereignty. As this Court cautioned in *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176, "[t]he interaction between domestic and international law must be managed carefully in light of the principles governing what remains a dualist system of application of international law and a constitutional and parliamentary democracy": para. 150.

24 Although this Court has been careful to attach the appropriate weight to international and comparative law in *Charter* interpretation, it has not always explained how or why different international sources are being discussed or relied on, while others are not. The result has been a want of clarity, even confusion, to which, we say with respect, our colleague Abella J. adds by indiscriminately drawing from binding instruments *and* non-binding instruments, instruments that pre-date the *Charter and* instruments that post-date it, and decisions of international tribunals *and* foreign domestic courts, before concluding that, combined, they represent an "international consensus [that] does not dictate the outcome [but] provides compelling and relevant interpretive support": para. 107.

25 As we will discuss, the various instruments and case law our colleague Abella J. reviews play different roles in the analysis and receive different weight. Treating them all alike — stating that each is "indispensable" and provides "compelling and relevant interpretive support" (at paras. 100 and 107) — actually risks *undermining* the importance of Canada's international obligations:

> The temptation may be great to treat all international law, whether binding on Canada or not, as "optional information" and to disregard the particular interpretative onus that is placed upon courts by the presumption of conformity with Canada's international obligations. There is a significant difference between international law that is binding on Canada and other international norms. The former is not only potentially persuasive but also obligatory. This distinction matters — when we fail to uphold our obligations, we undermine the respect for law internationally. The distinction also provides the rationale for the traditional common law presumption of conformity with Canada's international obligations as well as for treating differently international norms that do not legally bind Canada.
>
> (J. Brunnée and S. J. Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2002), 40 *Can. Y.B. Intl Law* 3, at p. 41 (emphasis added); see also J. H. Currie, *Public International Law* (2nd ed. 2008), at p. 260.)

26 We are not alone in expressing concern about the need for structure when citing international and foreign sources. Commentators have called for clarification in this regard, noting that courts should provide "greater analytical rigour" and "approach international law in a principled and coherent manner, providing clarity as to precisely what effect is accorded to international law in a given case and why": Brunnée and Toope, at p. 8; see also the Honourable Mr. Justice R. G. Juriansz, "International Law and Canadian Courts: A Work in Progress" (2008), 25 *N.J.C.L.* 171, at pp. 176 and 178. Specific areas calling for clarification include:

> ... the standards by which courts will determine whether treaties have been implemented; what role non-binding sources (such as treaties which Canada has signed but not ratified, treaties which Canada has neither signed nor ratified, or "soft law" instruments) should play in interpreting domestic law; and whether these various categories of non-binding sources should be treated differently from one another or Canada's binding international legal obligations.
>
> (Currie, at p. 262)

27 A principled framework is therefore necessary and desirable, both to properly recognize Canada's international obligations and to provide consistent and clear guidance to courts and litigants. Setting out a methodology for considering international and

comparative sources recognizes how this Court has treated such sources in practice and provides guidance and clarity. Given the issue raised in this case, our focus is on the use of international and comparative law in constitutional interpretation.

28 This Court has recognized a role for international and comparative law in interpreting *Charter* rights. However, this role has properly been to *support* or *confirm* an interpretation arrived at through the *Big M Drug Mart* approach; the Court has never relied on such tools to define the scope of *Charter* rights. Respectfully, our colleague Abella J.'s approach represents a marked and worrisome departure from this prudent practice.

29 This Court (generally, albeit not invariably) has been careful to specify the normative value and weight of different kinds of international sources. Our colleague Abella J.'s approach simply abandons this important practice.

30 A useful starting point is Dickson C.J.'s guidance in *Re PSERA*. While it appeared in a dissenting opinion, his approach to international and comparative law has since shaped the way this Court treats these sources. His consideration of the scope of s. 2(*d*) of the *Charter* looked first to Canadian and Privy Council jurisprudence and then to U.S. and international law: p. 335. On international sources specifically, he explained:

> The various sources of international human rights law — declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms — must, in my opinion, be relevant and persuasive sources for interpretation of the *Charter*'s provisions.
>
> In particular, the similarity between the policies and provisions of the *Charter* and those of international human rights documents attaches considerable relevance to interpretations of those documents by adjudicative bodies, in much the same way that decisions of the United States courts under the Bill of Rights, or decisions of the courts of other jurisdictions are relevant and may be persuasive. The relevance of these documents in *Charter* interpretation extends beyond the standards developed by adjudicative bodies under the documents to the documents themselves. [Emphasis added; pp. 348-49.]

31 Continuing, Dickson C.J. then clarified that *not all* of these sources carry identical weight in *Charter* interpretation, stating that "the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions *in international human rights documents which Canada has ratified*": p. 349 (emphasis added). This proposition has since become a firmly established interpretive principle in *Charter* interpretation, the presumption of conformity: *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 S.C.R. 386, at para. 65; *India v. Badesha*, 2017 SCC 44, [2017] 2 S.C.R. 127, at para. 38; *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245, at para. 64; *Kazemi*, at para. 150; *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47, [2013] 3 S.C.R. 157, at para. 23; *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, at para. 70.

32 Importantly, Dickson C.J. referred to instruments that Canada had *ratified*. In other words, his focus in framing this presumption was on *binding* international instruments, as ratification is the way in which international instruments become binding internationally: see Currie, at pp. 153-54. Similarly, Dickson C.J. explained that in becoming a party to international human rights conventions, "Canada has thus *obliged* itself internationally to ensure within its borders the protection of certain fundamental rights and freedoms which are also contained in the *Charter*" and that "[t]he content of Canada's international human rights *obligations* is ... an important indicia of the meaning of 'the full benefit of the *Charter*'s protection'": p. 349 (emphasis added).

33 Subsequent case law has continued to tie the presumption of conformity to the language of Canada's international *obligations* or *commitments*: *Ktunaxa*, at para. 65; *Badesha*, at para. 38; *Saskatchewan Federation of Labour*, at paras. 62 and 64-65; *Divito*, at para. 22; *Health Services*, at para. 69.

34 This Court has explained that the presumption of conformity "operates principally as an interpretive tool in assisting the courts in delineating the breadth and scope of *Charter* rights": *Kazemi*, at para. 150. But, being a presumption, it is also rebuttable and "does not overthrow clear legislative intent": para. 60.

35 Dickson C.J.'s approach to *non-binding* sources — treating them as relevant and persuasive, but not determinative, interpretive tools — also holds true: *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283, at para. 80. Non-binding sources notably include international instruments to which Canada is *not* a party. Such instruments do not give rise to the presumption of conformity. They therefore have only persuasive value in *Charter* interpretation.

36 This is not to say that such instruments are irrelevant. As Professors Brunnée and Toope observe, "[t]here is no reason why Canadian courts should not draw upon these [non-binding] norms *so long as they do so in a manner that recognizes their non-binding legal quality*": p. 53 (emphasis added); see also G. van Ert, *Using International Law in Canadian Courts* (2nd ed. 2008), at p. 350. As our colleague notes, "[t]his Court has frequently relied on [non-binding] international law sources to *assist* in delineating the breadth and content of *Charter* rights": Abella J.'s reasons, at para. 99 (emphasis added). Respectfully, her subsequent attempt to pull into this jurisdiction the deep divisions that inhabit the jurisprudence of our neighbour is no part of what is at issue here. But more importantly, the cases she relies on support the distinctions we draw in these reasons. Dickson C.J.'s articulation of the presumption of conformity in *Re PSERA* was described as the "template for considering the international legal context" in *Divito*, at para. 22. That passage was similarly cited in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1056. Meanwhile, *Burns* and *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, dealt with the meaning of the "principles of fundamental justice," a point we address below in para. 45.

37 In addition to properly characterizing their use, courts must not allow consideration of such instruments to displace the methodology for *Charter* interpretation set out in *Big M Drug Mart*. This Court has been careful to proceed in this manner. For example, in *Ktunaxa*, the Court first reviewed Canadian case law on the scope of freedom of religion before confirming that scope with reference to binding international instruments: paras. 62-65. It then briefly looked to non-binding instruments that "also" supported the Canadian case law, being careful to specify that the instruments were "not binding on Canada and therefore do not attract the presumption of conformity" but were "important illustrations of how freedom of religion is conceived around the world": para. 66. Similarly, in *Saskatchewan Federation of Labour*, the Court began with Canadian case law on s. 2(*d*) of the *Charter* and its history: paras. 28-55. It then explained that Canada's international human rights obligations "also" mandated protecting the right to strike, with particular emphasis on binding instruments and the presumption of conformity: paras. 62-70. Finally, it noted that its conclusion was "[a]dditionally" supported by foreign domestic law: paras. 71-74.

38 It follows from all this — and, specifically, from the presumption of conformity — that binding instruments necessarily carry more weight in the analysis than non-binding instruments. While resort may be had to both, courts drawing from a non-binding instrument should be careful to explain *why* they are drawing on a particular source and *how* it is being used. We respectfully say that the distinctions we draw are the very reason that "[t]his Court has had no difficulty in the past in deciding which sources it finds to be more relevant and persuasive than others" (Abella J.'s reasons, at para. 104) and that stating this framework with clarity will not do "a disservice to our Court's ability to continue to consider them with selective discernment": para. 102. Our methodology is firmly rooted in this Court's jurisprudence.

39 In this case, the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Can. T.S. 1987 No. 36, and the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47 ("*ICCPR*"), are both binding on Canada, thus triggering the presumption of conformity. However, we agree with our colleague that neither extends protection from cruel and unusual punishment to corporations.

40 Our colleague's analysis then flows into a consideration of the *American Convention on Human Rights*, 1144 U.N.T.S. 123, adopted by Mexico and nations in the Caribbean and central and South America, and the European *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221. While we agree that neither instrument has been found to extend protection to corporations against cruel and unusual punishment, we are wary of our colleague Abella J.'s approach, which appears to give these non-binding instruments similar weight to binding ones. We therefore highlight that these instruments are merely persuasive here, and that a court relying upon them should explain *why* it is doing so, and *how* they are being used (that is, what weight is being assigned to them).

41 Another important distinction is between instruments that pre- and post-date the *Charter*. Within the *Big M Drug Mart* approach itself, courts are called on to consider the "historical origins of the concepts enshrined" in the *Charter* when determining the scope of a *Charter* right: p. 344. International instruments that pre-date the *Charter* can clearly form part of the historical context of a *Charter* right and illuminate the way it was framed. Here, whether Canada is or is not a party to such instruments is less important, as the "drafters of the *Charter* drew on international conventions because they were the best models of rights protection, not because Canada had ratified them": L. E. Weinrib, "A Primer on International Law and the Canadian Charter" (2006), 21 *N.J.C.L.* 313, at p. 324. In this case, then, the context of the English *Bill of Rights*, and the Eighth Amendment is highly relevant as each contained similar — but, importantly, not identical — protections as s. 12, as we have explained above. Similarly, it is entirely proper and relevant to consider the *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), which Canada voted to adopt and which inspired the *ICCPR*, the *International Covenant on Economic, Social and Cultural Rights*, Can. T.S. 1976 No. 46, and related protocols Canada has ratified: Weinrib, at p. 317.

42 As for instruments that *post*-date the *Charter*, however, the question becomes once again whether or not they are binding on Canada and, by extension, whether the presumption of conformity is engaged. It can readily be seen that an instrument that post-dates the *Charter* and that does not bind Canada carries much less interpretive weight than one that binds Canada and/or contributed to the development of the *Charter*.

43 Finally, we turn to decisions of foreign and international courts. In *Re PSERA*, these decisions were included among those non-binding sources that "are relevant and may be persuasive": p. 348. Particular caution should, however, be exercised when referring to what other countries have done domestically, as the measures in effect in other countries say little (if anything at all) about the scope of the rights enshrined in the Canadian *Charter* — a point stated emphatically by this Court in *Frank v. Canada (Attorney General)*, 2019 SCC 1, [2019] 1 S.C.R. 3, at para. 62. As Michel Bastarache explains, "[t]he logic employed by other courts provides guidance to Canadian courts rather than precedents to be followed" and "it is important to note that all foreign decisions ultimately influence Canadian law based on persuasive, rather than binding, authority": "How Internationalization of the Law has Materialized in Canada" (2009), 59 *U.N.B.L.J.* 190, at p. 196.

44 While our colleague notes that her review of foreign domestic jurisprudence is "not determinative" and "supports" her analysis (Abella J.'s reasons, at para. 118), jurisprudence of foreign and international courts seems to infuse her analysis at various points without an explanation of their role in the interpretive process. Respectfully, her discussion of these sources fails to explain in what way they are instructive, how they are being used, or why the particular sources are being relied on. Indeed, she considers various sources of international and comparative law, and gives them unstated, but seemingly equal, interpretive weight. This is made most clear at paras. 99-100 of her reasons, where she says that the Court "has frequently relied on international law sources to assist in delineating the breadth and content of *Charter* rights" and that "both those sources which are binding and those which are not have proven to be indispensable in almost all areas of the law". Yet, in line with the distinctions we have drawn, the cases our colleague cites in support of this broad statement largely focus on *binding* instruments: *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157, at para. 58; *R. v. Oakes*, [1986] 1 S.C.R. 103, at pp. 120-21; *Health Services*, at paras. 70-71; *R. v. Smith (Edward Dewey)*, [1987] 1 S.C.R. 1045, at p. 1061; *Ktunaxa*, at paras. 64-65; *Saskatchewan Federation of Labour*, at paras. 65-70. As we have already explained, the discussion of non-binding instruments in *Saskatchewan Federation of Labour* and *Ktunaxa* properly served a *confirmatory* function.

45 Nor can *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, *Re B.C. Motor Vehicle Act*, *Burns*, or *Kazemi* justify relying on non-binding, non-historical instruments for the purposes of *Charter* interpretation in the present case, as those cases required consideration of whether an international consensus existed because of the nature of the questions asked. In *Suresh*, the Court was called on to determine if a peremptory norm of customary international law existed, which necessarily required looking to international sources: paras. 59-75. *Re B.C. Motor Vehicle Act*, *Burns*, and *Kazemi*, meanwhile, were concerned with the principles of fundamental justice under s. 7. Determining these principles may call for an examination into international sources as the analysis requires establishing a "societal consensus": *Kazemi*, at paras. 139 and 150; *Re B.C. Motor Vehicle Act*, at p. 503; *Burns*, at paras. 79-81.

46 As this Court's jurisprudence amply shows, the normative value and weight of international and comparative sources has been tailored to reflect the nature of the source and its relationship to our Constitution. Reaffirming this guidance cannot reasonably be characterized as "novel", howsoever forceful or overstated our colleague Abella J.'s charges to the contrary.

47 In all, courts must be careful not to indiscriminately agglomerate the traditional *Big M Drug Mart* factors with international and comparative law. The analysis must be dominated by the former and draw on the latter only as appropriate, accompanied by an explanation of why a non-binding source is being considered and how it is being used, including the persuasive weight being assigned to it. In our respectful view, our colleague Abella J.'s reasons do not conform to this approach. The result is that foreign and international instruments and jurisprudence dominate her analysis, contrary to this Court's teachings on constitutional interpretation. While this change in approach is not determinative in the case at bar, it could very well be in a different one. We therefore find it crucial to reiterate the proper approach to *Charter* interpretation.

III. Conclusion

48 We would allow the appeal and set aside the judgment of the Court of Appeal.

***Abella J.* (Karakatsanis and Martin JJ. concurring):**

49 The *Canadian Charter of Rights and Freedoms* constitutionalized protection for human rights and civil liberties in Canada, entrusting courts with the responsibility for interpreting the meaning of its provisions. Using a contextual approach, the Court has, over time, decided who and what came within the *Charter*'s protective scope.

50 Section 12 of the *Charter* guarantees the right not to be subjected to cruel and unusual treatment or punishment. This is the first case in which the Court has been asked to determine the scope of s. 12, that is, who or what comes under its protection. This appeal raises the question of whether corporations come within its scope.

51 In my respectful view, s. 12's purpose is to prevent the state from inflicting physical or mental pain and suffering through degrading and dehumanizing treatment or punishment. It is meant to protect human dignity and respect the inherent worth of individuals. Its intended beneficiaries are people, not corporations.

Background

52 The corporation before the Court, 9147-0732 Québec inc., was found guilty of carrying out construction work as a contractor without holding a current license for that purpose, an offence under s. 46 of the *Building Act*, CQLR, c. B-1.1:

> **46.** No person may act as a building contractor, hold himself out to be such or give cause to believe that he is a building contractor, unless he holds a current licence for that purpose.
>
> No contractor may use, for the carrying out of construction work, the services of another contractor who does not hold a licence for that purpose.

53 Pursuant to s. 197.1 of the *Building Act*, the penalty for an offence under s. 46 of this statute is a mandatory minimum fine which varies depending on whether the offender is an individual or a corporation:

> **197.1** Any person who contravenes section 46 or 48 by not holding a licence of the appropriate class or subclass is liable to a fine of $5,141 to $25,703 in the case of an individual and $15,422 to $77,108 in the case of a legal person, and any person who contravenes either of those sections by not holding a licence is liable to a fine of $10,281 to $77,108 in the case of an individual and $30,843 to $154,215 in the case of a legal person. [5]

54 Applying this provision, the Court of Québec imposed the then minimum fine for corporations of $30,843 on 9147-0732 Québec inc.

55 The corporation challenged the constitutionality of the mandatory minimum fine in s. 197.1 of the *Building Act* on the basis that it offended its right to be protected against cruel and unusual treatment or punishment under s. 12 of the *Charter*.

56 It did not succeed at the Court of Québec, where Ratté J.C.Q. concluded that expanding the protection of rights intrinsically linked to individuals to include corporate rights would trivialize the protection granted by s. 12 of the *Charter*. In any event, he concluded that the minimum corporate fine at issue, far from being cruel and unusual, represented the norm in penal regulatory law. At the time, no fine had yet been invalidated as cruel and unusual by a higher court, even in the context of individuals.

57 At the Quebec Superior Court, Dionne J. similarly held that corporations were not covered by s. 12. In his view, s. 12's purpose was the protection of human dignity, a notion clearly meant exclusively for [TRANSLATION] "natural persons".

58 A majority at the Quebec Court of Appeal allowed the appeal and held that s. 12 can apply to corporations. It found that s. 12's association with human dignity did not prevent its application to corporations, since other *Charter* rights which also protect human dignity — ss. 8 and 11(*b*) of the *Charter* — have been held to apply to corporations. Rather than looking at the purpose of the provision, it adopted a [TRANSLATION] "tangible benefit" approach, focusing on whether a corporation could theoretically benefit from the *Charter* protection in question: "a corporation's ability to derive a tangible benefit from it". This resulted in its conclusion that since corporations could face cruel treatment or punishment through harsh or severe fines, s. 12 could apply to them. It remitted to the Court of Québec the question of whether the particular minimum fine against corporations set out in s. 197.1 of the *Building Act* amounted to cruel and unusual treatment or punishment.

59 In dissent, Chamberland J.A. was of the view that s. 12 is concerned with human dignity, a concept inapplicable to corporations.

60 For the following reasons, I agree with Chamberland J.A. that s. 12 does not apply to corporations. I would therefore allow the appeal.

Analysis

61 This case gives us an opportunity to apply this Court's approach to both constitutional interpretation and the role of international and comparative law in its development. Regrettably, however, the majority has put into question this Court's approach to both. Instead of using the text as the beginning of the search for purpose, the majority has given it "primacy" and assigned a secondary role to the other contextual factors, thereby erasing the difference between constitutional and statutory interpretation. And instead of only relying on the traditional distinction between binding and non-binding international sources, the majority seems to have added a novel requirement: whenever a Canadian court considers non-binding international sources, it must explicitly justify their use, segment them into categories, and attribute a degree of weight to their inclusion, thereby transforming the Court's usual panoramic search for global wisdom into a series of compartmentalized barriers. For constitutional, comparative and international law, this apparent change in direction is a worrying setback.

62 Section 12 of the *Charter* states:

> **12.** Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

63 Most of this Court's s. 12 jurisprudence has dealt with minimum and indeterminate sentences and the harmful effects of incarceration. The threshold test developed and applied in these and other cases is whether the treatment or punishment of the individual is so "grossly disproportionate" as to "outrage standards of decency", and be "abhorrent or intolerable". [6]

64 9147-0732 Québec inc. argued that this is the language that we should apply, since it is broader than the language used in the French version of our s. 12 jurisprudence, which refers to treatment or punishment that is [TRANSLATION] "incompatible with human dignity". This argument, with respect, results from looking at the words literally, in both the English and French versions, without examining them in the context of the cases in which they were decided, thereby creating artificial conceptual schisms

instead of linguistic coherence (see Michel Doucet, "Le bilinguisme législatif", in Michel Bastarache and Michel Doucet, eds., *Les droits linguistiques au Canada* (3rd ed. 2013), 179, at p. 281).

65 A review of the language used in our s. 12 jurisprudence shows that both the English and French versions capture the same concept, namely, that s. 12 prohibits treatment or punishment that is incompatible with human dignity (see *R. v. Smith (Edward Dewey)*, [1987] 1 S.C.R. 1045; *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, at pp. 811, 815 and 818; *R. v. Boudreault*, [2018] 3 S.C.R. 599, at paras. 43, 67 and 126). I agree with Chamberland J.A. that [TRANSLATION] "[t]he assertion that no one is to be subjected to cruel [and unusual] treatment or punishment cannot be dissociated from the concept of human dignity" (para. 59). The French and English versions of how this Court has described what is at stake in s. 12 are, therefore, not only reconcilable, they are different ways of expressing the same idea.

66 9147-0732 Québec inc. also argued that the scope of s. 12 should be seen to include corporations based on this Court's recent decision in *Boudreault*. Writing for the majority, Martin J. found that the mandatory victim surcharge under s. 737 of the *Criminal Code*, R.S.C. 1985, c. C-46, violated s. 12 of the *Charter* because it caused four interrelated harms to *individuals*: disproportionate financial consequences suffered by the indigent; threat of detention and/or imprisonment; threat of provincial collections efforts; and *de facto* indefinite criminal sanctions (para. 65).

67 But recognizing the suffering of *individuals* from harsh economic treatment by the state does not lead to the inference that s. 12 protects the economic interests of corporations. To answer that question requires a prior assessment of whether s. 12 applies to a corporation at all. This in turn requires 9147-0732 Québec inc. to "establish that it has an interest falling within the scope of the guarantee, and one which accords with the purpose of that provision" (*R. v. CIP Inc.*, [1992] 1 S.C.R. 843, at p. 852).

68 Unlike the approach applied by the majority of the Court of Appeal, with respect, determining the scope requires first determining the *purpose* of the right. A *Charter* right must be interpreted "by an analysis of the purpose of [the] guarantee" (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344 (emphasis deleted); *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 155-57; see also Peter W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), at s. 36.8(c)). *Big M Drug Mart* provides the definitive account of this approach:

> ... the proper approach to the definition of the rights and freedoms guaranteed by the *Charter* was a purposive one. *The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect*.
>
> In my view this analysis is to be undertaken, and *the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter*. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore, as this Court's decision in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, illustrates, *be placed in its proper linguistic, philosophic and historical contexts*. [Underlining in original; italics added; p. 344.]

69 Most recently, in *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, this Court endorsed the purposive approach set out in *Hunter* and *Big M Drug Mart*, describing the interpretive task as follows:

> Before turning to the facts of this appeal, I consider it necessary to review the background to the enactment of s. 23 and the principles that must inform the interpretation of that section.
>
> . . . . .
>
> The historical and social context at the root of language rights in education makes clear the unique role of s. 23 in Canada's constitutional landscape. In an oft quoted passage, Dickson C.J. illustrated the section's importance by stating that it represents a "linchpin in this nation's commitment to the values of bilingualism and biculturalism" (*Mahe v. Alberta*,

> [1990] 1 S.C.R. 342, at p. 350). More recently, in *Association des parents de l'école Rose-des-vents v. British Columbia (Education)*, 2015 SCC 21, [2015] 2 S.C.R. 139("*Rose-des-vents*"), Karakatsanis J. noted that Canada has a bicultural founding character and that its commitment to bilingualism sets it apart among nations (para. 25, citing *Assn. des Parents Francophones (Colombie Britannique) v. British Columbia* (1996), 27 B.C.L.R. (3d) 83 (S.C.), at para. 24).
>
> . . . . .
>
> I would add that in conducting the analysis under s. 23, a court must bear in mind that this section has three purposes, as it is at once preventive, remedial and unifying in nature. [paras. 4, 12 and 15]

70 As this passage illustrates, the principles and values underlying the enactment of the *Charter* provision are the primary interpretive tools.

71 This Court has always made clear that examining the text of the *Charter* is only the beginning of the interpretive exercise, an exercise which is fundamentally different from interpreting a statute. Dickson J. explained the reason for this in *Hunter*:

> The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a *Bill* or a *Charter of Rights*, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American courts "not to read the provisions of the Constitution like a last will and testament lest it become one". [p. 155]

Nonetheless, as *Big M Drug Mart* indicated, the text of the *Charter* matters since the purpose of the right in question is to be sought by reference "to the language chosen to articulate the specific right" (p. 344).

72 This Court has applied the balanced *Big M Drug Mart* framework when interpreting the scope of several *Charter* rights, without elevating the plain text of those guarantees to a factor of special significance. The Court resolved questions about the scope of s. 2(*a*) of the *Charter* without recourse to a dictionary definition of "religion", choosing instead to examine the "historical context" and "purpose" of freedom of religion and conscience (*Big M Drug Mart*, at pp. 344-48; see also *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, at paras. 41-42). In interpreting the presumption of innocence in s. 11(*d*), the Court focused on the "cardinal values" that the right embodies (*R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 119). And in marking the boundaries of freedom of expression under s. 2(*b*), the Court has always emphasized the "principles and values underlying the freedom", instead of the plain meaning of the term "expression" (see *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 976; see also *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at pp. 764-67; *R. v. Keegstra*, [1990] 3 S.C.R. 697, at pp. 727-28; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at pp. 499-500; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 53; *R. v. K.R.J.*, [2016] 1 S.C.R. 906, at paras. 37-38).

73 This purposive approach to interpreting *Charter* provisions continued in *R. v. Grant*, [2009] 2 S.C.R. 353, where the Court, while acknowledging that the "starting point" for constitutional interpretation is the language of the right being interpreted, proceeded to endorse the contextual approach from *Big M Drug Mart*, stating that "where questions of interpretation arise, a generous, purposive and contextual approach should be applied" (para. 15; see also para. 16). And more recently in *R. v. Stillman*, 2019 SCC 40, the Court reiterated that:

> A *Charter* right must be understood "in the light of the interests it was meant to protect" (*R. v. Big M Drug Mart Ltd.* ... at p. 344; see also *Hunter v. Southam Inc.* ... at p. 157), accounting for "the character and the larger objects of the *Charter* itself", "the language chosen to articulate the specific right or freedom", "the historical origins of the concepts enshrined" and, where applicable, "the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*" (*Big M*, at p. 344). It follows that *Charter* rights are to be interpreted "generous[ly]", aiming to

> "fulfi[l] the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection" (*ibid.*). At the same time, it is important not to overshoot the actual purpose of the right or freedom in question (*ibid.*).
>
> (para. 21; see also *R. v. Poulin*, 2019 SCC 47, at para. 32.)

74 The complete lack of support in our jurisprudence for an approach to constitutional interpretation focused on the primacy of the text is hardly surprising. Because *Charter* rights — like all constitutional rights — are meant to be capable of growth and adaptation (see *Hunter*, at pp. 155-57; *Re B.C. Motor Vehicle Act*, at p. 509; *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, at pp. 365-67; *Reference re Prov. Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, at pp. 179-81; Hogg, at s. 15.9(f)), many of them were drafted with vague, open-ended language (see *Hunter*, at p. 154; *Poulin*, at para. 70 (summarizing "evolving, open-ended standards" in the *Charter*, including s. 12)). The text of those provisions may accordingly be of comparatively limited assistance in interpreting their scope.

75 Not only is considering the text as prime unhelpful in interpreting constitutional guarantees, it could unduly constrain the scope of those rights, or even yield two irreconcilable conclusions leading, for example, to the interpretive triumph of the presence of a comma in expanding gun-owners' rights under the Second Amendment of the United States Constitution in *District of Columbia v. Heller*, 554 U.S. 570(2008) (see Brittany Occhipinti, "We the Militia of the United States of America: A Reanalysis of the Second Amendment" (2017), 53 *Willamette L. Rev*. 431, at pp. 438-42, discussing *Heller*).

76 Overemphasizing the plain text of *Charter* rights creates a risk that, over time, those rights will cease to represent the fundamental values of Canadian society and the purposes they were meant to uphold. As one scholar has noted, a "purely textual reading" of the Constitution "cuts against the grain of the living tree" (Lorne Neudorf, "Reassessing the Constitutional Foundation of Delegated Legislation in Canada" (2018), 41 *Dal. L.J*. 519, at p. 544). Aharon Barak has similarly warned that "[p]urely textual interpretation severs the constitution ... from the fundamental values of society" ("A Judge on Judging: The Role of a Supreme Court in a Democracy" (2002), 116 *Harv. L. Rev*. 19, at p. 83). He advocates a broader approach:

> ... to arrive at a proper system of interpretation, the horizons of the interpreter need to be widened beyond those of new textualism. The context of the text — the importance of which is noted by new textualism, albeit narrowly — includes society's principles, values, and fundamental views, both at the time of enactment and at the time of interpretation. These and other changes would be necessary to transform new textualism into a proper system of interpretation. At that point, however, it would cease to be new textualism and become purposive interpretation.
>
> (p. 84; see also Jonathan R. Siegel, "The Inexorable Radicalization of Textualism" (2009), 158 *U. Pa. L. Rev*. 117, at pp. 173-75.)

77 Justice Susanne Baer of the German Constitutional Court has also urged against a narrow focus on constitutional text:

> ... constitutional text matters, but ... constitutionalism should not be reduced to mere textualism.
>
> ("Dignity, liberty, equality: A fundamental rights triangle of *constitutionalism*" (2009), 59 *U.T.L.J*. 417, at p. 441)

78 A textualist approach would also make Canadian constitutional law more insular. Canadian constitutionalism "contains characteristics that make it objectively appealing to foreign constitution-makers and interpreters" (Adam M. Dodek, "The Protea and the Maple Leaf: The Impact of the *Charter* on South African Constitutionalism" (2004), 17 *N.J.C.L*. 353, at p. 373). Our model of constitutional interpretation is one of those characteristics. As Professor Dodek notes:

> The ... interpretation given to the Charter by the Supreme Court of Canada has served to reinforce rather than limit its international appeal. Specifically, purposive interpretation accompanied by the conception of a constitution as "a living tree" capable of growth and adaptation to new circumstances are doctrines that have captured the constitutional imaginations of other courts around the world. Outside of Canada, this has made the Canadian constitutional model amendable to various circumstances. Aspects of the Charter have thus proved to be "a living tree" abroad.

("Canada as Constitutional Exporter: The Rise of the 'Canadian Model' of Constitutionalism" (2007), 36 *S.C.L.R.* (2d) 309, at pp. 321-22)

79 Professor Karen Eltis makes the further point that the "living tree" approach helps explain Canada's willingness to consider "foreign jurisprudence and international instruments", a subject explored later in these reasons:

> Thus, for instance, *as distinguished from an enduring attachment to originalism* [7] *or textualism in the U.S.*, the living tree approach or the "multicultural values reflected and promoted in Canada's *Charter of Rights and Freedoms* are in fact indicative of a national experience that embraces looking outward to foreign jurisprudence and international instruments as a source of domestic jurisprudence" ...
>
> [Emphasis added; footnote added.]
>
> ("Comparative Constitutional Law and the 'Judicial Role in Times of Terror'" (2010-2011), 28 *N.J.C.L.* 61, at pp. 69-70)

80 Purpose, in other words, remains the "central" consideration when interpreting the scope and content of a *Charter* right (*Poulin*, at para. 85). Several factors — including the text — can help inform the exercise. But this Court has never endorsed a rigid hierarchy among these interpretative guides. Rather, all of them "can offer useful insights, and the best tools are likely to depend on [the] particular circumstances of the case" (David Landau, "Legal pragmatism and comparative constitutional law", in Gary Jacobsohn and Miguel Schor, eds., *Comparative Constitutional Theory* (2018), 208, at p. 211).

81 This brings me back to the central question in this appeal: whether the right to be free from "cruel and unusual treatment or punishment" in s. 12 of the *Charter* extends to corporations.

82 *Black's Law Dictionary* defines "cruelty" as "[t]he intentional and malicious infliction of mental or physical suffering on a living creature, esp. a human; abusive treatment; outrage" ((11th ed. 2019), at p. 475). The term "unusual", is not central to the analysis, but is nonetheless part of the "compendious expression of a norm" (*R. v. Smith (Edward Dewey)*, at p. 1072). It is defined as "[e]xtraordinary; abnormal" and "[d]ifferent from what is reasonably expected" (*Black's Law Dictionary*, at p. 1851). Together, the words "cruel and unusual punishment" are defined as "[p]unishment that is torturous, degrading, inhuman, grossly disproportionate to the crime in question, or otherwise shocking to the moral sense of the community" (*Black's Law Dictionary*, at p. 1490).

83 The *Oxford English Dictionary* defines "cruel", in relation to persons, as "[d]isposed to inflict suffering; indifferent to or taking pleasure in another's pain or distress, destitute of kindness or compassion; merciless, pitiless, hard-hearted" ((2nd ed. 1989), vol. IV, at p. 78). It is also used to describe actions that are "proceeding from or showing indifference to or pleasure in another's distress" ("cruel", at p. 78). When referring to conditions and circumstances, i.e. treatment or punishment, "cruel" means "[c]ausing or characterized by great suffering; extremely painful or distressing" (p. 78).

84 Similarly, "cruelty" is defined in the *Oxford English Dictionary* as referring to:

> 1. The quality of being cruel; disposition to inflict suffering, delight in or indifference to the pain or misery of others; mercilessness, hard-heartedness: *esp*. as exhibited in action. Also, with *pl.*, an instance of this, a cruel deed; ...
>
> 2. Severity of pain; excessive suffering; ...
>
> 3. Severity, strictness, rigour; ...
>
> [p. 79]

85 The term "*cruel*" is also defined in French by reference to the concept of suffering, which, as Chamberland J.A. noted, cannot be experienced by inanimate entities like corporations:

[TRANSLATION]

1. Taking pleasure in inflicting suffering, in witnessing suffering.

2. Denoting cruelty; showing the cruelty of humans.

3. Inflicting suffering through its harshness, its severity.

4. (Of persons). Without leniency, merciless.

5. (Of personified things). Inflicting suffering by manifesting a sort of hostility.

6. (Of persons). Indifferent, insensitive.

(*Le Grand Robert de la langue française* (2nd ed. 2001), at pp. 864-65)

86 In short, the ordinary meaning of the words cruel and unusual treatment or punishment centers on *human* pain and suffering. As Chamberland J.A., eloquently stated:

> [TRANSLATION] It would completely distort the ordinary meaning of the words, in my view, to say that it is possible to be cruel to a corporate entity.
>
> Cruelty is inflicted on living beings of flesh and blood, be they human beings or animals.
>
> And not on corporations.
>
> Suffering, whether physical or mental, is unique to living beings, not corporate entities and inanimate objects without a soul or emotional life. [paras. 53-56]

87 The fact that the word "everyone" is found in the text of s. 12 cannot, by virtue of its literal meaning, expand the protection to corporations, without any regard for the purpose of the right as protecting *human* dignity. It is worth remembering that in *Irwin Toy*, this Court explained that "'[e]veryone' ... must be read in light of the rest of the section and defined to exclude corporations and other artificial entities incapable of enjoying life, liberty or security of the person, and include only human beings" (p. 1004).

88 We turn then to the historical origins and values underlying the right, in compliance with Dickson C.J.'s direction in *Oakes*, that the exercise requires "understanding the cardinal values [the provision] embodies" (p. 119).

89 The values embodied by s. 12 can be traced back to the English *Bill of Rights*, 1688, 1 Will. & Mar. Sess. 2, c. 2, which, in art. 10, stipulated "[t]hat excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted".

90 The provision was incorporated almost verbatim into the Eighth Amendment of the United States Constitution in 1791, where its purpose was definitively discussed in *Furman v. Georgia*, 408 U.S. 238(1972), dealing with the constitutionality of the death penalty. Each of the judges in the majority wrote separate reasons explaining why the death penalty constituted cruel and unusual punishment in the cases before the court. Marshall J. reviewed the English antecedents of the clause and concluded that:

> Whether the English Bill of Rights prohibition against cruel and unusual punishments is properly read as a response to excessive or illegal punishments, as a reaction to barbaric and objectionable modes of punishment, or as both, there is no doubt whatever that in borrowing the language and in including it in the Eighth Amendment, our Founding Fathers intended to outlaw torture and other cruel punishments. [p. 319]

91 Brennan J.'s reasons described the Eighth Amendment's primary purpose as protecting the dignity of human beings. He concluded that the state "even as it punishes, must treat its members with respect for their intrinsic worth *as human beings*",

explaining that the reason barbaric punishments have been condemned by history "is that *they treat members of the human race as nonhumans*, as objects to be toyed with and discarded" and are "inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity" (pp. 270-73 (emphasis added)).

92 While there is some debate about the underlying purpose of the English *Bill of Rights* provision, it seems not to be disputed that in both the English and American contexts, protection for corporations was not contemplated. And, it is safe to say that at least in the United States, the historical purpose of prohibiting cruel and unusual punishment was to protect the inherent worth and dignity of *human beings*.

93 In Canada, similar language first appeared in s. 2(*b*) of the *Canadian Bill of Rights*, S.C. 1960, c. 44, which prohibited "the imposition of cruel and unusual treatment or punishment". The *Canadian Bill of Rights* was adopted in its own historical context, which included a profound emphasis on the need to protect human rights in a post-Second World War era. As then Professor Walter Tarnopolsky observed, "[n]oticeable interest in, and concern for the protection of certain human rights and fundamental freedoms began to increase in Canada during World War II, possibly as part of a world-wide interest in these values" since "civilized nations could revert to barbarity too easily" (Walter Surma Tarnopolsky, *The Canadian Bill of Rights* (2nd rev. ed. 1975), at p. 3; see also Hogg, at s. 35.1).

94 The *Canadian Bill of Rights* was introduced as *An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms*. Beyond its title, the *Canadian Bill of Rights*' preamble included specific references to "the dignity and worth of the human person":

> The Parliament of Canada, affirming that the Canadian Nation is founded upon principles that acknowledge ... *the dignity and worth of the human person* ...
>
> . . . . .
>
> And being desirous of enshrining these principles and the *human rights* and fundamental freedoms derived from them ...
>
> [Emphasis added.]

95 The wording of the s. 2(*b*) *Canadian Bill of Rights* provision and s. 12 of the *Charter* are almost identical. However, unlike the *Canadian Bill of Rights*, which is an ordinary statute, albeit of enormous philosophical significance, "the *Charter* must be regarded, because of its constitutional character, as a new affirmation of rights and freedoms and of judicial power and responsibility in relation to their protection" (*R. v. Therens*, [1985] 1 S.C.R. 613, at p. 638).

96 Like the *Canadian Bill of Rights*, the enactment of the *Charter* was influenced by the events of the Second World War. As Pierre Elliott Trudeau, then Minister of Justice, observed in 1968, these events were "disturbing proof of the need to safeguard the rights of individuals" (*A Canadian Charter of Human Rights* (1968), at pp. 10-11). Discussing "[t]he rights of the individual", Minister Trudeau reminded Canadians that "man [*sic*] has distinguished himself from other animals by directing his attention to those matters which affect his individual dignity" (p. 9). For Trudeau, an entrenched bill of rights would serve to "withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts" (p. 11; see also Lester B. Pearson, "Federalism for the Future: A Statement of Policy by the Government of Canada" (1968), in Anne F. Bayefsky, *Canada's Constitution Act 1982 & Amendments: A Document History* (1989), vol. 1, 61).

97 World War II's shocking indifference to human dignity and the devastating human rights abuses it tolerated, resulted not only in responsive protections in international human rights instruments, but also in domestic rights guarantees such as the *Canadian Bill of Rights* and, ultimately, the constitutional protection of rights and freedoms in the *Charter*.

98 Since Canada's rights protections emerged from the same chrysalis of outrage as other countries around the world, it is helpful to compare Canada's prohibition against cruel and unusual treatment or punishment with how courts around the world have interpreted the numerous international human rights instruments containing provisions that closely mirror the language of s. 12. As Professor Dodek points out, since courts face common problems, considering how other courts have addressed them can assist in determining how to exercise judicial discretion ("Comparative Law at the Supreme Court of Canada in 2008:

Limited Engagement and Missed Opportunities" (2009), 47 *S.C.L.R.* (2d) 445, at p. 454). In other words, "the search for wisdom is not to be circumscribed by national boundaries" (Hogg, at s. 36.9(c)).

99 This Court has frequently relied on international law sources to assist in delineating the breadth and content of *Charter* rights (see, e.g., *Divito v. Canada (Public Safety and Emergency Preparedness)*, [2013] 3 S.C.R. 157, at para. 22; *United States v. Burns*, [2001] 1 S.C.R. 283, at paras. 79-81; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at pp. 1056-57; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at pp. 348-49 (per Dickson C.J., dissenting); *Re B.C. Motor Vehicle Act*, at p. 512). As the majority noted in *Divito*, such sources can often be "instructive in defining the right" (para. 22). International human rights law, in particular, has been described by L'Heureux-Dubé J. as a "critical influence on the interpretation of the scope of the rights included in the *Charter*" (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 70).

100 In fact, both those sources which are binding and those which are not have proven to be indispensable in almost all areas of the law (*Oakes*, at pp. 120-21; *Reference re Public Service*, at pp. 348-49 (per Dickson C.J., dissenting); *R. v. Smith (Edward Dewey)*, at p. 1061; *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157, at para. 58; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, at paras. 59-75; *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391, at para. 70; *Kazemi Estate v. Islamic Republic of Iran*, [2014] 3 S.C.R. 176, at para. 129; *Saskatchewan Federation of Labour v. Saskatchewan*, [2015] 1 S.C.R. 245, at paras. 70-71; *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, [2017] 2 S.C.R. 386, at paras. 64-67). Significantly, this Court's use of international and comparative sources in the interpretation of the *Charter* has been lauded internationally (see, e.g., Ran Hirschl, "Going Global? Canada as Importer and Exporter of Constitutional Thought", in Richard Albert and David R. Cameron, eds., *Canada in the World: Comparative Perspectives on the Canadian Constitution* (2018), 305).

101 Consideration of international and comparative sources is a standard and accepted practice in this Court's constitutional interpretation jurisprudence. Between 2000 and 2016, this Court cited 1,791 decisions from foreign courts (Klodian Rado, "The use of non-domestic legal sources in Supreme Court of Canada judgments: Is this the *judicial slowbalization* of the Court?" (2020), 16 *Utrecht L. Rev*. 57 (online), at p. 61). During the same time period, this Court cited treaties on 336 occasions (Rado, at p. 73). Though Canada has not signed the European *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221, this instrument was the second most cited international treaty, and the case law of the European Court of Human Rights — which interprets and applies the European *Convention* — made up one third of the total number of all of this Court's international court citations (Rado, at pp. 72-75). While international and comparative sources are invaluable to this Court's work in all areas of the law,[8] references by this Court to these sources occurred in constitutional cases more than in any other field (Rado, at p. 75).

102 This is not quantum physics. Non-binding international sources are "relevant and persuasive", not obligatory. Simply put, such sources *attract* adherence rather than command it (Dodek (2009), at p. 446). Presumptively narrowing the significance of international and comparative sources, as the majority suggests, does a disservice to our Court's ability to continue to consider them with selective discernment.

103 The majority acknowledges that this Court has always been willing to treat non-binding international sources as "relevant and persuasive" in *Charter* interpretation (*United States v. Burns*, at para. 80). However, it inexplicably retreats from this long line of jurisprudence and concludes that non-binding sources should only be used to confirm a pre-established interpretation.

104 This Court has never required that these sources be sorted by weight before being considered; nor has it ever applied the kind of hierarchical sliding scale of persuasiveness proposed by the majority, segmenting non-binding international and comparative sources into categories worthy of more or less influence. This Court has had no difficulty in the past in deciding which sources it finds to be more relevant and persuasive than others without using a confusing multi-category chart.

105 It is true that there are those on the United States Supreme Court who have sought to curtail the influence and use of international sources by calling for more particularization about why, how and when those sources are applied (see, for instance, Antonin Scalia, "Keynote Address: Foreign Legal Authority in the Federal Courts" (2004), 98 *A.S.I.L. Proc.*

305, at p. 307; *Roper v. Simmons*, 543 U.S. 551(2005), at pp. 622-28 (Scalia J., dissenting); Cindy G. Buys, "Burying Our Constitution in the Sand? Evaluating the Ostrich Response to the Use of International and Foreign Law in U.S. Constitutional Interpretation" (2007), 21 *B.Y.U. J. Pub. L.* 1, at pp. 7-8). Justice Scalia, for example, "argues that interpretation ought to be focused solely on U.S. legal materials because of the practical difficulties created by consulting transnational sources" (Ryan C. Black et al., "Upending a Global Debate: An Empirical Analysis of the U.S. Supreme Court's Use of Transnational Law to Interpret Domestic Doctrine" (2014), 103 *Geo. L.J.* 1, at pp. 8-9). On the other hand, others, like Justice Breyer, consider that the use of non-binding sources merely "involves opening your eyes to what is going on elsewhere, taking what you learn for what it is worth, and using it as a point of comparison where doing so will prove helpful" (Black, at pp. 8-9).

106 Narrowing our approach by putting unnecessary barriers in the way of access to international and comparative sources gratuitously threatens to undermine Canada's leading voice internationally in constitutional adjudication, a role based on its willingness to go wide and deep in the global search for the best intellectual resources it can find, as Professor Ran Hirschl eloquently explains:

> The rise of a confident, distinctly Canadian approach to constitutionalism and a corresponding maturation of the Supreme Court, all enriched by general appreciation of and selective engagements with comparative constitutional ideas, mainly in the area of constitutional rights, brought about a sharp decline in judicial reliance on British constitutional ideals and jurisprudence. ... These changes are closely linked to the 1982 constitutional makeover, but also to broader transformations in Canada's self-perception, sense of collective identity, and the re-conceptualization of its place in the world.
>
> . . . . .
>
> ... a fuller understanding of how Canada has emerged from a humble former British colony into *its current role as comparative constitutional powerhouse* necessitates a broader look at the social and ideational transformation — specifically the profound multicultural and cosmopolitan shift in the national meta-narrative — that Canada has witnessed for more than half a century.
>
> [Emphasis added; pp. 305-6 and 317.]

107 All of the relevant international sources in this case lead to the irrefutable inference that the prohibition against cruel and unusual punishment is about protecting human beings from the infliction of inhuman and degrading punishment. None of them include, or have been held to include, protection for corporations. While this international consensus does not dictate the outcome, it provides compelling and relevant interpretive support. It is part of the development of an international perspective on how rights should be protected, a perspective developed pursuant to the global commitment made in 1945 to internationalize those protections, and a perspective in whose promotion Canada's jurisprudence has played a leading role. Considering what and how laws and decisions have been applied on related questions by other countries and institutions, is part not only of an ongoing global judicial conversation, but of the epistemological package constitutional courts routinely rely on.

108 Turning then to the international context for assessing the purpose of "cruel and unusual treatment or punishment", we start with Lord Bingham's observation in *Reyes v. The Queen*, [2002] 2 A.C. 235, that while s. 12's international siblings vary in language, a common meaning can be ascribed to their various formulations:

> Despite the semantic difference between the expressions "cruel and unusual treatment or punishment" (as in the Canadian Charter and the constitution of Trinidad and Tobago) and "cruel and unusual punishments" (as in the eighth amendment to the United States Constitution) and "inhuman or degrading treatment or punishment" (as in the European Convention), it seems clear that the essential thrust of these provisions, however expressed, is the same, and their meaning has been assimilated.
>
> (para. 30; see also *S. v. Williams*, 1995 (3) S.A. 632 (C.C.), at para. 35.)

109 The common meaning ascribed by the Privy Council to the various expressions was the one formulated by Lamer J. in *R. v. Smith (Edward Dewey)*:

> I would agree with Laskin C.J. in [*Miller v. The Queen*, [1977] 2 S.C.R. 680], where he defined the phrase "cruel and unusual" as a "compendious expression of a norm". The criterion which must be applied in order to determine whether a punishment is cruel and unusual within the meaning of s. 12 of the *Charter* is ... "whether the punishment prescribed is so excessive as to outrage standards of decency". In other words, though the state may impose punishment, the effect of that punishment must not be grossly disproportionate to what would have been appropriate.
>
> (p. 1072; see also *Reyes*, at para. 30.)

110 Article 5 of the *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), states that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". While there does not appear to be any judicial authority directly considering whether art. 5 applies to corporations, there are compelling reasons to believe it does not. As a whole, the *Universal Declaration of Human Rights*, as its title suggests, was intended to apply to human beings (Max Planck Institute for Comparative Public Law and International Law, *Who Turned Multinational Corporations into Bearers of Human Rights? On the Creation of Corporate "Human" Rights in International Law*, by Silvia Steininger and Jochen von Bernstorff, September 25, 2018 (online), at p. 5). Moreover, its adoption in a post-Second World War context, as well as its preamble which references human dignity, offer no basis to conclude that its art. 5 could apply to corporations.

111 Article 7 of the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47, which Canada ratified on May 19, 1976, includes the same prohibition against "torture [and] cruel, inhuman or degrading treatment or punishment". The United Nations Human Rights Committee identified the purpose of article 7 as being "to protect both the dignity and the physical and mental integrity of the individual" (*General Comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment) (1992)*, U.N. Doc. HRI/GEN/1/Rev.9, vol. 1, p. 200 (2008), at para. 2). It noted that "[t]he prohibition in art. 7 is complemented by the positive requirements of article 10, paragraph 1, of the [*Covenant*] which stipulates that '[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'" (para. 2).

112 Since the preamble of the *Covenant* asserts that human rights "derive from the inherent dignity of the human person", it is not surprising that the Human Rights Committee accepts complaints only from people (*A newspaper publishing company v. Trinidad and Tobago*, Communication No. 360/1989, reported in U.N. Doc. Supp. No. 40 (A/44/40), at para. 3.2; *A publication and a printing company v. Trinidad and Tobago*, Communication No. 361/1989, reported in U.N. Doc. Supp. No. 40 (A/44/40), at para. 3.2; *V.S. v. Belarus*, Communication No. 1749/2008, reported in U.N. Doc. CCPR/C/103/D (2011), at para. 7.3; *General Comment No. 31; The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13, May 26, 2004, at para. 9).

113 Article 5(2) of the *American Convention on Human Rights*, 1144 U.N.T.S. 123, which applies to approximately 24 countries in the Americas, similarly provides that: "No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person". The language of art. 1(2) states that "for the purposes of this Convention, 'person' means every human being". The Inter-American Court of Human Rights, the adjudicative body responsible for enforcing the *American Convention on Human Rights*, has held that the purpose of the *American Convention* was the "protection of the fundamental rights of human beings" (Angela B. Cornell, "Inter-American Court Recognizes Elevated Status of Trade Unions, Rejects Standing of Corporations" (2017), 3 *Intl Labor Rights Case L.* 39, at p. 40, citing *Titularidad de Derechos de las Personas Juridicas en el Sistema Interamericano de Derechos Humanos*, Advisory Opinion OC-22/16, February 26, 2016, at paras. 42-43).

114 The European *Convention* is the only international human rights treaty that has been interpreted to include corporate rights (Julian G. Ku, "The Limits of Corporate Rights under International Law" (2012), 12 *Chi. J. Int'l L.* 729, at p. 754).

115 Notably, however, art. 3, which states that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment", has been held *not* to apply to corporations. In *Kontakt-Information-Therapie v. Austria*, Application No. 11921/86, October 12, 1988, D.R. 57, p. 81 "*KIT*", the European Commission of Human Rights explained this conclusion when it stated

that the right not to be subjected to degrading treatment or punishment under art. 3 was "by [its] very nature not susceptible of being exercised" by a corporation (p. 88).

116 More recently, the European Court of Human Rights, applying *KIT*, called it "inconceivable" that a corporation could complain of attacks to its physical and mental integrity under art. 3 (*Identoba v. Georgia*, Application No. 73235/12, May 12, 2015 (HUDOC), at para. 45).

117 Article 16(1) of the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Can. T.S. 1987 No. 36, which provides that state parties "undertake to prevent in any territory under [their] jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1", has also never been extended to include corporations. Not only does the preamble recognize that human rights "derive from the inherent dignity of the human person", art. 1 defines torture with reference to "severe pain or suffering, whether physical or mental".

118 A review of foreign domestic law, while not determinative, also supports an interpretation of s. 12 of the *Charter* which excludes protections for corporations. Section 12(1)(e) of the South African Constitution, for example, mirrors the language in s. 12 of the *Charter*. Interpreting this provision, the South African Constitutional Court concluded that the right of "everyone ... not to be treated or punished in a cruel, inhuman, or degrading way", rests on the foundation of human dignity. In *Williams*, the Constitutional Court invalidated juvenile whipping provisions, connecting the dots between the Eighth Amendment of the United States Constitution, s. 12 of the Canadian *Charter*, and other international instruments to unite them in protecting "human dignity". As Langa J. observed:

> Whether one speaks of "cruel and unusual punishment" as in the Eighth Amendment of the United States Constitution and in art 12 of the Canadian Charter, or "inhuman or degrading punishment" as in the European Convention and the Constitution of Zimbabwe, or "cruel, inhuman or degrading punishment", as in the Universal Declaration of Human Rights, the ICCPR and the Constitution of Namibia, the common thread running through the assessment of each phrase is the identification and acknowledgement of society's concept of decency and human dignity. [para. 35]

119 The Constitutional Court held that juvenile whipping, "involving as it does the deliberate infliction of physical pain on the person of the accused, offends society's notions of decency and is a direct invasion of the right which every person has to human dignity" (para. 39; see also *S. v. Makwanyane*, 1995 (3) S.A. 391 (C.C.); *S. v. Dodo*, 2001 (3) S.A. 382 (C.C.)).

120 The *New Zealand Bill of Rights Act 1990* has a similar provision in s. 9, which states:

> Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.

121 The New Zealand Supreme Court considered this provision in *Taunoa v. Attorney-General*, [2008] 1 N.Z.L.R. 429, dealing with the treatment of prisoners held under a program operated in Auckland Prison by the Department of Corrections called the "Behaviour Management Regime". Segregation was at the heart of the program, which was known for imposing the most stringent conditions found in the New Zealand prison system. While a majority of the court did not find a breach of s. 9, both the majority and dissent emphasized that the purpose of the provision was to protect the dignity and worth of humans. Tipping J., writing as part of the majority, concluded that while s. 9 was not breached, it should be understood as "prohibiting inhuman treatment, that is, treating a person as less than human" (para. 297). Similarly, McGrath J., in the majority, expressed the view that its purpose is "universal protection against any form of treatment by the State which is incompatible with the dignity and worth of the human person" (para. 338).

122 Elias C.J., in dissent, found that s. 9, like its equivalents in the United States, Canada and Europe, is concerned with inhuman treatment, which "amounts to denial of humanity" (paras. 79-80). Inhuman treatment, she added, "is treatment that is not fitting for human beings" (para. 80). And in observing that the Canadian *Charter*'s s. 12 provision is a "compendious expression of a norm", Elias C.J. viewed this norm "as proscribing any treatment that is incompatible with humanity" (para. 82).

123 Internationally, then, it is widely acknowledged that the right to be free from cruel and unusual punishment is intended to protect human dignity by prohibiting degrading, inhuman, or dehumanizing treatment or punishment that causes physical or mental pain and suffering.

124 This global unity is not surprising. As Professor Anna Grear noted, "international human rights law arguably emerged from an instinct to protect the human — precisely because it is human — as a reaction to the Nazi genocide — at the end of the Second World War" (Anna Grear, "Human Rights — Human Bodies? Some Reflections on Corporate Human Rights Distortion, the Legal Subject, Embodiment and Human Rights Theory" (2006), 17 *Law Critique* 171 (online), at p. 173). Human rights, read in this light, "represent a mode of archetypal resistance to suffering" (Grear, at p. 174). In other words, there is a reason they are called *human* rights.

125 Ever since *Oakes*, where the Court said it was guided by "respect for the inherent dignity of the human person" as a value essential to a free and democratic society (p. 136), it has explicitly stated that "the protection of all of the rights guaranteed by the *Charter* has as its lodestar the promotion of *human* dignity" (*R. v. Kapp*, [2008] 2 S.C.R. 483, at para. 21 (emphasis added)).

126 Turning to s. 12's purpose by looking at "the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*" (*Big M Drug Mart*, at p. 344), s. 12 is grouped, along with ss. 7 to 11 and 13 to 14, under the heading "Legal Rights" ("*Garanties juridiques*"). All legal rights, as Lamer J. declared, "have been recognized as essential elements of a system for the administration of justice which is founded upon a belief in 'the dignity and worth of the human person' (preamble to the *Canadian Bill of Rights* ...) and on the 'rule of law' (preamble to the *Canadian Charter* ...)" (*Re B.C. Motor Vehicle Act*, at p. 503).

127 The broad purposes of the legal rights in ss. 7 to 14 were described by McLachlin J. as being two-fold, "to preserve the rights of the detained individual and to maintain the repute and integrity of our system of justice" (*R. v. Hebert*, [1990] 2 S.C.R. 151, at p. 179). These rights were "designed to ensure that individuals suspected of crime are dealt with fairly and humanely" (Robert J. Sharpe and Kent Roach, *The Charter of Rights and Freedoms* (6th ed. 2017), at p. 292; see also *Re B.C. Motor Vehicle Act*, at p. 503). They are, as Martin J. has recently put it, "the core tenets of fairness in our criminal justice system" (*Poulin*, at para. 5).

128 Only ss. 8 and 11(*b*) within the ss. 7 to 14 grouping have been found by this Court to apply to corporations. In *Hunter*, the Court accepted, without discussion or explanation, that the s. 8 right to be secure against unreasonable search or seizure could apply to corporations. Subsequently, in *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, at pp. 521-22, La Forest J. noted that an unlawful search or seizure could have a significant impact on the privacy rights of individuals within a corporation. He noted that since "[p]eople ... think of their own offices as personal space in a manner somewhat akin to the way in which they view their homes, and act accordingly", the requirement to submit to a search of business premises could "amount to a requirement to reveal aspects of one's personal life to the chilling glare of official inspection" (pp. 521-22).

129 The inference that breaches of s. 8 can have a direct impact on an individual in a corporation, however, is not logically available under s. 12. The individuals within the corporation are not the subject of any treatment or punishment imposed on the corporate entity. This is reinforced by the corporation's separate legal personality, as stressed by Lamer C.J. in *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154:

> The corporate form of business organization is chosen by individuals because of its numerous advantages (legal and otherwise). Those who cloak themselves in the corporate veil, and who rely on the legal distinction between themselves and the corporate entity when it is to their benefit to do so should not be allowed to deny this distinction in these circumstances (where the distinction is not to their benefit). [pp. 182-83]

130 In *CIP*, the Court extended the s. 11(*b*) right to be tried within a reasonable time to corporations on the basis that any accused, corporate or human, has, as Stevenson J. said, "a legitimate interest in being tried within a reasonable time", and the right to a fair trial (p. 856; see also pp. 857-59). He acknowledged, however, that some of the harms of a pending

criminal accusation, such as "'stigmatization of the accused, loss of privacy, *stress and anxiety* resulting from a multitude of factors, including possible disruption of family, social life and work'" were not "concerns [that] logically appl[ied] to corporate entities" (p. 862 (emphasis added), citing *Mills v. The Queen*, [1986] 1 S.C.R. 863, at p. 920). As a result, he concluded that a corporation could not rely on a presumption of prejudice.

131 Just as corporations cannot experience human reactions such as stress or anxiety, neither can they experience suffering, since, as Chamberland J.A. noted [TRANSLATION] "Suffering, whether physical or mental, is unique to living beings, not corporate entities and inanimate objects" (para. 56).

132 Significantly, corporations have been found *not* to be included under both ss. 7 and 11(*c*). In *R. v. Amway Corp.*, [1989] 1 S.C.R. 21, the Court concluded that the s. 11(*c*) right not to be compelled to be a witness in proceedings does not apply to corporations. Sopinka J. concluded that since a corporation cannot testify, the right of an accused person not to be compelled to be a witness against himself in s. 11(*c*) is not available to a corporation. Applying a purposive interpretation to s. 11(*c*), Sopinka J. was of the view that it was "intended to protect the individual against the affront to dignity and privacy inherent in a practice which enables the prosecution to force the person charged to supply the evidence out of his or her own mouth" (p. 40). In his words, "it would strain the interpretation of s. 11(*c*) if an artificial entity were held to be a witness" (p. 39).

133 In concluding that s. 7, which protects against deprivations of life, liberty and security of the person, does not apply to corporations (*Irwin Toy*, at p. 1004), Dickson C.J. and Lamer and Wilson JJ., for the Court, expressed their resistance to applying s. 7 to corporations as follows:

> In our opinion, a corporation cannot avail itself of the protection offered by s. 7 of the *Charter*. First, we would have to conceive of a manner in which a corporation could be deprived of its "life, liberty or security of the person". We have already noted that it is nonsensical to speak of a corporation being put in jail.
>
> . . . . .
>
> A plain, common sense reading of the phrase "Everyone has the right to life, liberty and security of the person" serves to underline the human element involved; only human beings can enjoy these rights. [pp. 1003-4]

134 The Court in *Irwin Toy* also concluded that bankruptcy and winding up proceedings did not engage s. 7, because that "would stretch the meaning of the right to life beyond recognition" (p. 1003). And it rejected the argument that corporations should be protected against deprivations of economic liberty:

> The intentional exclusion of property from s. 7, and the substitution therefor of "security of the person" has, in our estimation, a dual effect. First, it leads to a general inference that economic rights as generally encompassed by the term "property" are not within the perimeters of the s. 7 guarantee. ... In so stating, we find the second effect of the inclusion of "security of the person" to be that a corporation's economic rights find no constitutional protection in that section.
>
> That is, read as a whole, it appears to us that this section was intended to confer protection on a *singularly human level*. [Underlining in original; italics added; pp. 1003-4.]

135 As in *Irwin Toy*, the purpose of s. 12 is to confer protection on a "singularly human level". In line with the global consensus, its purpose is to prevent the state from inflicting physical or mental pain and suffering through degrading and dehumanizing treatment or punishment. It is meant to protect human dignity and respect the inherent worth of individuals. To paraphrase Sopinka J. in *Amway Corp.*, it would strain the interpretation of cruel and unusual treatment or punishment under s. 12 if a corporation, an artificial entity, could be said to experience it.

136 Corporations are, without question, entitled to robust legal protection, constitutional or otherwise. But protection for a quality it does not have, namely, human dignity or the ability to experience psychological or physical pain and suffering, is a remedy without a right. Since it cannot be said that corporations have an interest that falls within the purpose of the guarantee, they do not fall within s. 12's scope.

137 Accordingly, I would allow the appeal.

***Kasirer J.* (concurring):**

138 For the reasons given by Chamberland J.A., and with respect for those of a different opinion, I share my colleagues' view that the appeal must be allowed. I fully agree with Chamberland J.A. that the respondent, 9147-0732 Québec inc., a corporation, cannot avail itself of the protection of s. 12 of the *Canadian Charter of Rights and Freedoms* to challenge the constitutionality of s. 197.1 of the *Building Act*, CQLR, c. B-1.1.

139 Starting, quite rightly, from the language of s. 12, as Abella J. and Brown and Rowe JJ. propose to do in their respective reasons, Chamberland J.A. pointed to the word "cruel" and reasoned that it would distort the ordinary meaning of the words to say that it is possible to be cruel to a corporate entity (2019 QCCA 373, at para. 53 (CanLII)). I agree.

140 He was careful to adhere to the principle that *Charter* rights must be given a large, liberal and purposive interpretation, a principle whose relevance was emphasized again recently by Wagner C.J. in *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, at para. 4. At the conclusion of his analysis based primarily on the decisions of this Court, including *R. v. Smith (Edward Dewey)*, [1987] 1 S.C.R. 1045, Chamberland J.A. found that, although the scope of s. 12 has been broadened over the years, [TRANSLATION] "its evolution is still concerned only with human beings (human dignity) and provides no basis ... for extending its application to corporations" (para. 59). He further reasoned that "[t]he assertion that no one is to be subjected to cruel treatment or punishment cannot be dissociated from the concept of human dignity" (para. 59). In arriving at this interpretation of s. 12 — unassailable, in my opinion — Chamberland J.A. also relied on sources drawn from domestic law and international law, an approach perfectly in keeping with the principles of *Charter* interpretation.

141 With regard to the ground of appeal that a corporation might enjoy the protection of s. 12 through the natural persons closely related to it, Chamberland J.A. relied on this Court's decisions, but also on English case law and the *Civil Code of Québec*, to explain in a compelling manner that the respondent was [TRANSLATION] "asserting rights here that are not its own" (para. 75). Again, no error has been shown.

142 In this case, all the relevant factors are to the same effect, indicating that the protection offered by s. 12 does not extend to corporations. I therefore find it unnecessary to consider questions relating to the proper approach to constitutional interpretation or the place of international law and comparative law in that approach any further. In my view, Chamberland J.A.'s reasons permit us to conclude, without saying more, that the appeal must be allowed.

Appeal allowed.

Pourvoi accueilli.

Footnotes

1 CQLR, c. B-1.1, ss. 46 and 197.1.

2 S.C. 2018, ch. 16.

3 RLRQ, c. B-1.1, art. 46 et 197.1.

4 L.C. 2018, ch. 16.

5 The current provision states:
197.1 Any person who contravenes section 46 or 48 is guilty of an offence and is liable, as the case may be, to a fine

(1) of $5,841 to $29,200 in the case of an individual and $17,521 to $87,604 in the case of a legal person if the individual or legal person does not hold a licence of the appropriate class or subclass or uses the services of another person who does not hold a licence of the appropriate class or subclass; or

(2) of $11,682 to $87,604 in the case of an individual and $35,041 to $175,206 in the case of a legal person if the individual or legal person does not hold a licence or uses the services of another person who does not hold a licence.

6 See, e.g., *R. v. Smith (Edward Dewey)*, [1987] 1 S.C.R. 1045; *R. v. Lyons*, [1987] 2 S.C.R. 309; *R. v. Luxton*, [1990] 2 S.C.R. 711; *Steele v. Mountain Institution*, [1990] 2 S.C.R. 1385; *R. v. Goltz*, [1991] 3 S.C.R. 485; *R. v. Morrisey*, [2000] 2 S.C.R. 90; *R. v. Latimer*, [2001] 1 S.C.R. 3; *R. v. Ferguson*, [2008] 1 S.C.R. 96; *R. v. Nur*, [2015] 1 S.C.R. 773; *R. v Lloyd*, [2016] 1 S.C.R. 130; *R. v. Boudreault*, [2018] 3 S.C.R. 599.

7 Textualism has been described as a theory which shares "both the philosophy and the partisans of the 'originalist' method of constitutional interpretation" (see Stéphane Beaulac, "Parliamentary Debates in Statutory Interpretation: A Question of Admissibility or of Weight?" (1998), 43 *McGill L.J.* 287, at p. 300).

8 The Court has cited comparative legal sources in 50 different fields of both public and private law. The 10 fields of law that have generated the highest number of foreign precedents are: constitutional law, torts, criminal law, insurance, intellectual property, civil procedure, administrative law, evidence, courts and labour law (Rado, Figure 5, at p. 69; see also p. 67). Beyond comparative legal sources, the Court has cited international precedents in 13 different fields of both public and private law: constitutional law, immigration law, criminal law, administrative law, torts, labour law, statutes, civil procedure, intellectual property, courts, evidence, international law, contracts (Rado, Figure 6, at p. 76; see also p. 75) as well as international treaties in constitutional law, intellectual property, international law (public and private), immigration law, administrative law, civil procedure, labour law, statutes, arbitration and in 20 other fields of law (Rado, Figure 7, at p. 76).

End of Document

7.

International Covenant on Civil and Political Rights

International Covenant on Civil and Political Rights

Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49

Preamble

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

PART I

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

PART II

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Article 4

1 . In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

PART III

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 8

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.

2. No one shall be held in servitude.

3.

(a) No one shall be required to perform forced or compulsory labour;

(b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;

(c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:

(i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;

(ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;

(iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;

(iv) Any work or service which forms part of normal civil obligations.

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2.

(a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 11

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation. Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation. 5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15

1 . No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Article 16

Everyone shall have the right to recognition everywhere as a person before the law.

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 20

1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22

1. Everyone 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.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Article 24

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

2. Every child shall be registered immediately after birth and shall have a name.

3. Every child has the right to acquire a nationality.

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all

persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

PART IV

Article 28

1. There shall be established a Human Rights Committee (hereafter referred to in the present Covenant as the Committee). It shall consist of eighteen members and shall carry out the functions hereinafter provided.

2. The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.

3. The members of the Committee shall be elected and shall serve in their personal capacity.

Article 29

1. The members of the Committee shall be elected by secret ballot from a list of persons possessing the qualifications prescribed in article 28 and nominated for the purpose by the States Parties to the present Covenant.

2. Each State Party to the present Covenant may nominate not more than two persons. These persons shall be nationals of the nominating State.

3. A person shall be eligible for renomination.

Article 30

1. The initial election shall be held no later than six months after the date of the entry into force of the present Covenant.

2. At least four months before the date of each election to the Committee, other than an election to fill a vacancy declared in accordance with article 34, the Secretary-General of the United Nations shall address a written invitation to the States Parties to the present Covenant to submit their nominations for membership of the Committee within three months.

3. The Secretary-General of the United Nations shall prepare a list in alphabetical order of all the persons thus nominated, with an indication of the States Parties which have nominated them, and shall submit it to the States Parties to the present Covenant no later than one month before the date of each election.

4. Elections of the members of the Committee shall be held at a meeting of the States Parties to the present Covenant convened by the Secretary General of the United Nations at the Headquarters of the United Nations. At that meeting, for which two thirds of the States Parties to the present Covenant shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

Article 31

1. The Committee may not include more than one national of the same State.

2. In the election of the Committee, consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems.

Article 32

1. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these nine members shall be chosen by lot by the Chairman of the meeting referred to in article 30, paragraph 4. 2. Elections at the expiry of office shall be held in accordance with the preceding articles of this part of the present Covenant.

Article 33

1. If, in the unanimous opinion of the other members, a member of the Committee has ceased to carry out his functions for any cause other than absence of a temporary character, the Chairman of the Committee shall notify the Secretary-General of the United Nations, who shall then declare the seat of that member to be vacant.

2. In the event of the death or the resignation of a member of the Committee, the Chairman shall immediately notify the Secretary-General of the United Nations, who shall declare the seat vacant from the date of death or the date on which the resignation takes effect.

Article 34

1. When a vacancy is declared in accordance with article 33 and if the term of office of the member to be replaced does not expire within six months of the declaration of the vacancy, the Secretary-General of the United Nations shall notify each of the States Parties to the present Covenant, which may within two months submit nominations in accordance with article 29 for the purpose of filling the vacancy.

2. The Secretary-General of the United Nations shall prepare a list in alphabetical order of the persons thus nominated and shall submit it to the States Parties to the present Covenant. The

election to fill the vacancy shall then take place in accordance with the relevant provisions of this part of the present Covenant.

3. A member of the Committee elected to fill a vacancy declared in accordance with article 33 shall hold office for the remainder of the term of the member who vacated the seat on the Committee under the provisions of that article.

Article 35

The members of the Committee shall, with the approval of the General Assembly of the United Nations, receive emoluments from United Nations resources on such terms and conditions as the General Assembly may decide, having regard to the importance of the Committee's responsibilities.

Article 36

The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Covenant.

Article 37

1. The Secretary-General of the United Nations shall convene the initial meeting of the Committee at the Headquarters of the United Nations.

2. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.

3. The Committee shall normally meet at the Headquarters of the United Nations or at the United Nations Office at Geneva.

Article 38

Every member of the Committee shall, before taking up his duties, make a solemn declaration in open committee that he will perform his functions impartially and conscientiously.

Article 39

1. The Committee shall elect its officers for a term of two years. They may be re-elected.

2. The Committee shall establish its own rules of procedure, but these rules shall provide, inter alia, that:

(a) Twelve members shall constitute a quorum;

(b) Decisions of the Committee shall be made by a majority vote of the members present.

Article 40

1. The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights: (a) Within one year of the entry into force of the present Covenant for the States Parties concerned;

(b) Thereafter whenever the Committee so requests.

2. All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.

3. The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their field of competence.

4. The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.

5. The States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article.

Article 41

1. A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:

(a) If a State Party to the present Covenant considers that another State Party is not giving effect to the provisions of the present Covenant, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation, or any other statement in writing clarifying the matter which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending, or available in the matter;

(b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;

(c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged;

(d) The Committee shall hold closed meetings when examining communications under this article;

(e) Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for human rights and fundamental freedoms as recognized in the present Covenant;

(f) In any matter referred to it, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;

(g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered in the Committee and to make submissions orally and/or in writing;

(h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b), submit a report:

(i) If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

(ii) If a solution within the terms of subparagraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report. In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when ten States Parties to the present Covenant have made declarations under paragraph I of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 42

1.

(a) If a matter referred to the Committee in accordance with article 41 is not resolved to the satisfaction of the States Parties concerned, the Committee may, with the prior consent of the States Parties concerned, appoint an ad hoc Conciliation Commission (hereinafter referred to as the Commission). The good offices of the Commission shall be made available to the States Parties concerned with a view to an amicable solution of the matter on the basis of respect for the present Covenant;

(b) The Commission shall consist of five persons acceptable to the States Parties concerned. If the States Parties concerned fail to reach agreement within three months on all or part of the composition of the Commission, the members of the Commission concerning whom no agreement has been reached shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its members.

2. The members of the Commission shall serve in their personal capacity. They shall not be nationals of the States Parties concerned, or of a State not Party to the present Covenant, or of a State Party which has not made a declaration under article 41.

3. The Commission shall elect its own Chairman and adopt its own rules of procedure.

4. The meetings of the Commission shall normally be held at the Headquarters of the United Nations or at the United Nations Office at Geneva. However, they may be held at such other convenient places as the Commission may determine in consultation with the Secretary-General of the United Nations and the States Parties concerned.

5. The secretariat provided in accordance with article 36 shall also service the commissions appointed under this article.

6. The information received and collated by the Committee shall be made available to the Commission and the Commission may call upon the States Parties concerned to supply any other relevant information.

7. When the Commission has fully considered the matter, but in any event not later than twelve months after having been seized of the matter, it shall submit to the Chairman of the Committee a report for communication to the States Parties concerned:

(a) If the Commission is unable to complete its consideration of the matter within twelve months, it shall confine its report to a brief statement of the status of its consideration of the matter;

(b) If an amicable solution to the matter on tie basis of respect for human rights as recognized in the present Covenant is reached, the Commission shall confine its report to a brief statement of the facts and of the solution reached;

(c) If a solution within the terms of subparagraph (b) is not reached, the Commission's report shall embody its findings on all questions of fact relevant to the issues between the States Parties concerned, and its views on the possibilities of an amicable solution of the matter. This report shall also contain the written submissions and a record of the oral submissions made by the States Parties concerned;

(d) If the Commission's report is submitted under subparagraph (c), the States Parties concerned shall, within three months of the receipt of the report, notify the Chairman of the Committee whether or not they accept the contents of the report of the Commission.

8. The provisions of this article are without prejudice to the responsibilities of the Committee under article 41.

9. The States Parties concerned shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General of the United Nations.

10. The Secretary-General of the United Nations shall be empowered to pay the expenses of the members of the Commission, if necessary, before reimbursement by the States Parties concerned, in accordance with paragraph 9 of this article.

Article 43

The members of the Committee, and of the ad hoc conciliation commissions which may be appointed under article 42, shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

Article 44

The provisions for the implementation of the present Covenant shall apply without prejudice to the procedures prescribed in the field of human rights by or under the constituent instruments and the conventions of the United Nations and of the specialized agencies and shall not prevent the States Parties to the present Covenant from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

Article 45

The Committee shall submit to the General Assembly of the United Nations, through the Economic and Social Council, an annual report on its activities.

PART V

Article 46

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.

Article 47

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

PART VI

Article 48

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a Party to the present Covenant.

2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States which have signed this Covenant or acceded to it of the deposit of each instrument of ratification or accession.

Article 49

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.

2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 50

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

Article 51

1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General of the United Nations shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes. 3. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

Article 52

1. Irrespective of the notifications made under article 48, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph I of the same article of the following particulars:

(a) Signatures, ratifications and accessions under article 48;

(b) The date of the entry into force of the present Covenant under article 49 and the date of the entry into force of any amendments under article 51.

Article 53

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 48.

8.

Universal Declaration of Human Rights

Universal Declaration of Human Rights

Preamble

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,
Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,
Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,
Whereas it is essential to promote the development of friendly relations between nations,
Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,
Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,
Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,
Now, therefore,
The General Assembly,
Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by

teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article I

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3

Everyone has the right to life, liberty and the security of person.

Article 4

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Article 5

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6

Everyone has the right to recognition everywhere as a person before the law.

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9

No one shall be subjected to arbitrary arrest, detention or exile.

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11

1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier

penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 12

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 13

1. Everyone has the right to freedom of movement and residence within the borders of each State.
2. Everyone has the right to leave any country, including his own, and to return to his country.

Article 14

1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.
2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15

1. Everyone has the right to a nationality.
2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
2. Marriage shall be entered into only with the free and full consent of the intending spouses.
3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 17

1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitrarily deprived of his property.

Article 18

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20

1. Everyone has the right to freedom of peaceful assembly and association.
2. No one may be compelled to belong to an association.

Article 21

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right to equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 22

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 23

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
2. Everyone, without any discrimination, has the right to equal pay for equal work.
3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
4. Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 25

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 26

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
3. Parents have a prior right to choose the kind of education that shall be given to their children.

Article 27

1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 28

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Article 29

1. Everyone has duties to the community in which alone the free and full development of his personality is possible.
2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

9.

United Nations Declaration on the Rights of Indigenous Peoples

UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

United Nations

UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

United Nations

Resolution adopted by the General Assembly on 13 September 2007

[without reference to a Main Committee (A/61/L.67 and Add.1)]

61/295. United Nations Declaration on the Rights of Indigenous Peoples

The General Assembly,

Taking note of the recommendation of the Human Rights Council contained in its resolution 1/2 of 29 June 2006[1], by which the Council adopted the text of the United Nations Declaration on the Rights of Indigenous Peoples,

Recalling its resolution 61/178 of 20 December 2006, by which it decided to defer consideration of and action on the Declaration to allow time for further consultations thereon, and also decided to conclude its consideration before the end of the sixty-first session of the General Assembly,

---

1 See Official Records of the General Assembly, Sixty-first Session, Supplement No. 53 (A/61/53), part one, chap. II, sect. A.

Adopts the United Nations Declaration on the Rights of Indigenous Peoples as contained in the annex to the present resolution.

107th plenary meeting
13 September 2007

Annex

United Nations Declaration on the Rights of Indigenous Peoples

The General Assembly,

Guided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter,

Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Reaffirming that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,

Recognizing also the urgent need to respect and promote the rights of indigenous peoples

affirmed in treaties, agreements and other constructive arrangements with States,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Emphasizing the contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child,

Considering that the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character,

Considering also that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States,

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights[2] and the International Covenant on Civil and Political Rights,[2] as well as the Vienna Declaration and Programme of Action,[3] affirm the fundamental importance of the right to self-determination of all peoples, by

2 See resolution 2200 A (XXI), annex.

3 A/CONF.157/24 (Part I), chap. III.

virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law,

Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

Encouraging States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned,

Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,

Recognizing that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration,

Solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect:

Article 1

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all

human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights[4] and international human rights law.

Article 2

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

Article 3

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

4 Resolution 217 A (III).

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 6

Every indigenous individual has the right to a nationality.

Article 7

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.

2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

2. States shall provide effective mechanisms for prevention of, and redress for:

   (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

   (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

   (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;

   (d) Any form of forced assimilation or integration;

   (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 13

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future genera-

tions their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Article 14

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.

3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including

those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

Article 15

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.

2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

Article 16

1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.

2. States shall take effective measures to ensure that State-owned media duly reflect indigenous

cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

Article 17

1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.

2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.

3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect

their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 21

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.

2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Article 22

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.

2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 24

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.

2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take

the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 29

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 30

1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.

2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the

right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and

appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 33

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 34

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Article 35

Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

Article 36

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.

2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

Article 37

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and re-

spect such treaties, agreements and other constructive arrangements.

2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

Article 38

States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Article 39

Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

Article 40

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective

remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Article 41

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 42

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

Article 43

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Article 44

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Article 45

Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

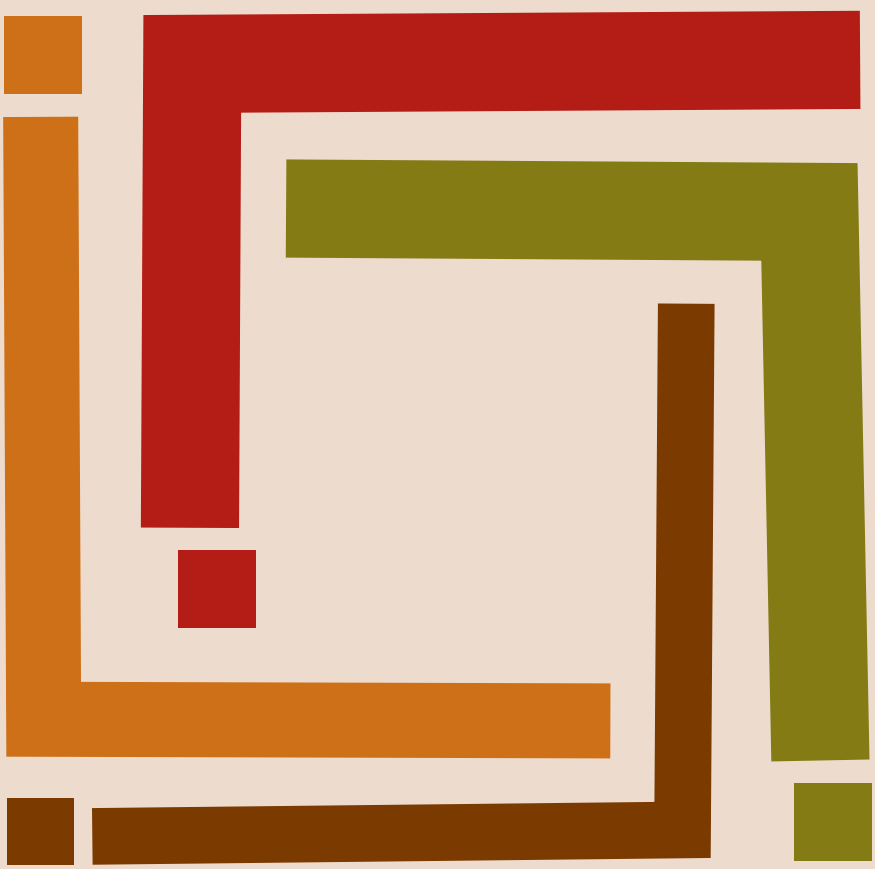
Article 46

1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismem-

ber or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.



Designed by the Graphic Design Unit, Department of Public Information, United Nations

10.

R v. Desautel 2021 Carswell BC 1185

2021 SCC 17, 2021 CSC 17
Supreme Court of Canada

R. v. Desautel

2021 CarswellBC 1185, 2021 CarswellBC 1186, 2021 SCC 17, 2021 CSC 17, [2021] 5 W.W.R. 259, 170 W.C.B. (2d) 325, 456 D.L.R. (4th) 1, 46 B.C.L.R. (6th) 215

Her Majesty The Queen (Appellant) and Richard Lee Desautel (Respondent) and Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of New Brunswick, Attorney General of Saskatchewan, Attorney General of Alberta, Attorney General of the YukonTerritory, Peskotomuhkati Nation, Indigenous Bar Association in Canada, Whitecap Dakota First Nation, Grand Council of the Crees (Eeyou Istchee), Cree Nation Government, Okanagan Nation Alliance, Mohawk Council of Kahnawà:ke, Assembly of First Nations, Métis National Council, Manitoba Metis Federation Inc., Nuchatlaht First Nation, Congress of Aboriginal Peoples, Lummi Nation and Métis Nation British Columbia (Interveners)

Wagner C.J.C., Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer JJ.

Heard: October 8, 2020
Judgment: April 23, 2021
Docket: 38734

Proceedings: affirming *R. v. Desautel* (2019), [2020] 2 W.W.R. 191, [2019] 4 C.N.L.R. 217, 433 D.L.R. (4th) 544, 24 B.C.L.R. (6th) 48, 2019 CarswellBC 1146, 2019 BCCA 151, D. Smith J.A., Fitch J.A., Willcock J.A. (B.C. C.A.); affirming *R. v. Desautel* (2017), [2018] 1 C.N.L.R. 135, 2017 BCSC 2389, 2017 CarswellBC 3648, Sewell J. (B.C. S.C.); affirming *R. v. DeSautel* (2017), [2018] 1 C.N.L.R. 97, 2017 BCPC 84, 2017 CarswellBC 769, L. Mrozinski Prov. J. (B.C. Prov. Ct.)

Counsel: Glen R. Thompson, Heather Cochran, for Appellant
Mark G. Underhill, Kate R. Phipps, for Respondent
Christopher Rupar, for Intervener, Attorney General of Canada
Manizeh Fancy, for Intervener, Attorney General of Ontario
Tania Clercq, for Intervener, Attorney General of Quebec
Rachelle Standing, for Intervener, Attorney General of New Brunswick
Richard James Fyfe, for Intervener, Attorney General of Saskatchewan
Angela Edgington, for Intervener, Attorney General of Alberta
Elaine Cairns (written), Katie Mercier (written), for Intervener, Attorney General of the Yukon Territory
Paul Williams, for Intervener, Peskotomuhkati Nation
Bruce McIvor, for Intervener, Indigenous Bar Association in Canada
Maxime Faille, for Intervener, Whitecap Dakota First Nation
Jessica Orkin, for Interveners, Grand Council of the Crees (Eeyou Istchee) and Cree Nation Government
Rosanne Kyle, for Intervener, Okanagan Nation Alliance
Francis Walsh, for Intervener, Mohawk Council of Kahnawà:ke
Julie McGregor, for Intervener, Assembly of First Nations
Kathy L. Hodgson-Smith, for Interveners, Métis National Council and Manitoba Metis Federation Inc.
Jack Woodward, Q.C., for Intervener, Nuchatlaht First Nation
Andrew Lokan, for Intervener, Congress of Aboriginal Peoples
John W. Gailus, for Intervener, Lummi Nation

Thomas Isaac, for Intervener, Métis Nation British Columbia

Subject: Civil Practice and Procedure; Constitutional; Natural Resources; Public
Related Abridgment Classifications
Aboriginal and Indigenous law
I Constitutional issues
I.5 Constitution Act, 1982
Aboriginal and Indigenous law
V Indigenous rights to natural resources and environmental protections
V.2 Right of access to natural resources
V.2.a Hunting
V.2.a.iv Prohibited location
Headnote
Aboriginal and indigenous law --- Constitutional issues — Constitution Act, 1982
D, US citizen and resident, was member of Lakes Tribe based in Washington, which was successor group of Sinixt people — While in British Columbia, D shot elk, advised that he had done so, and was charged under provincial wildlife legislation for hunting without licence and while not being resident — D raised defence that he had Aboriginal right to hunt which was protected under s. 35(1) of Constitution Act, 1982 (CA) — At trial, D was found to have been exercising Aboriginal right to hunt guaranteed by s. 35(1) of CA, and Crown's two later appeals were dismissed — On appeal, Crown raised, as constitutional question, whether impugned provisions of Wildlife Act were of no force or effect with respect to D by reason of Aboriginal right within meaning of s. 35 of CA — Appeal dismissed — Constitutional question answered in affirmative — Consistent development of s. 35(1) jurisprudence requires that groups located outside Canada can be Aboriginal peoples of Canada — Purposes of s. 35(1) of CA are to recognize prior occupation of Canada by autonomous societies and to reconcile their present existence with Crown's assertion of sovereignty over them — On such interpretation, scope of "aboriginal peoples of Canada" in s. 35(1) of CA must mean modern-day successors of Aboriginal societies that occupied Canadian territories at time of European contact — Interpretation of "aboriginal peoples of Canada" that includes Aboriginal peoples who were here at time of European contact and later moved or were forced elsewhere, or on whom international boundaries were imposed, reflects purpose of reconciliation — Modern-day members of Sinixt are not precluded from asserting rights under s. 35(1) of CA merely because they now live in US — D's claim satisfied relevant test for Aboriginal right under s. 35(1) of CA, and test for Aboriginal right is same whether claimant is inside or outside Canada — Unbroken chain of continuity is not required in test for Aboriginal right — D had s. 35(1) Aboriginal right to hunt in ancestral territory of Sinixt in British Columbia Constitution Act, 1982, s 35(1).
Aboriginal and indigenous law --- Indigenous rights to natural resources and environmental protections — Right of access to natural resources — Hunting — Prohibited location
D, US citizen and resident, was member of Lakes Tribe based in Washington, which was successor group of Sinixt people — While in British Columbia (BC), D shot elk, advised that he had done so, and was charged under provincial wildlife legislation for hunting without licence and while not being resident — D raised defence that he had Aboriginal right to hunt which was protected under s. 35(1) of Constitution Act, 1982 (CA) — At trial, D was found to have been exercising Aboriginal right to hunt guaranteed by s. 35(1) of CA, and Crown's two later appeals were dismissed — On appeal, Crown raised, as constitutional question, whether impugned provisions of Wildlife Act were of no force or effect with respect to D by reason of Aboriginal right within meaning of s. 35 of CA — Appeal dismissed — Constitutional question answered in affirmative — Consistent development of s. 35(1) jurisprudence requires that groups located outside Canada can be Aboriginal peoples of Canada — Purposes of s. 35(1) of CA are to recognize prior occupation of Canada by autonomous societies and to reconcile their present existence with Crown's assertion of sovereignty over them — On such interpretation, scope of "aboriginal peoples of Canada" in s. 35(1) of CA must mean modern-day successors of Aboriginal societies that occupied Canadian territories at time of European contact — Interpretation of "aboriginal peoples of Canada" that includes Aboriginal peoples who were here at time of European contact and later moved or were forced elsewhere, or on whom international boundaries were imposed, reflects purpose of reconciliation — Modern-day members of Sinixt are not precluded from asserting rights under s. 35(1) of CA merely because they now live in US — D's claim satisfied relevant test for Aboriginal right under s. 35(1) of CA, and test for Aboriginal right is same whether claimant is inside or outside Canada — Unbroken chain of continuity is not required in test for Aboriginal right — D had s. 35(1) Aboriginal right to hunt in ancestral territory of Sinixt in British Columbia.

Droit autochtone --- Questions d'ordre constitutionnel — Loi constitutionnelle de 1982
D était un citoyen américain et un membre de la tribu Lakes Tribe, un groupe successeur du peuple Sinixt, dans l'État de Washington — Alors qu'il se trouvait en Colombie-Britannique, D a abattu un wapiti et a informé les autorités provinciales de ce fait, et il a été inculpé d'avoir chassé sans permis et sans être résident, en contravention de la législation provinciale sur la chasse — Comme moyen de défense, D a fait valoir qu'il exerçait un droit ancestral de chasser protégé en vertu de l'art. 35(1) de la Loi constitutionnelle de 1982 (LC) — Lors du procès, on a conclu que D exerçait un droit ancestral de chasser garanti par l'art. 35(1) de la LC, et les deux appels interjetés subséquemment par la Couronne ont été rejetés — Dans le cadre de son pourvoi, la Couronne a soulevé une question constitutionnelle rendant nécessaire la détermination de la question de savoir si les dispositions contestées de la Wildlife Act étaient inopérantes ou inapplicables à l'égard de D en raison d'un droit ancestral au sens de l'art. 35 de la LC — Pourvoi rejeté — Question constitutionnelle répondue par l'affirmative — Interprétation cohérente de la jurisprudence relative à l'art. 35(1) exige que les groupes se trouvant à l'extérieur du Canada puissent être des peuples autochtones du Canada — Objectifs de l'art. 35(1) de la LC sont de reconnaître l'occupation antérieure du Canada par des sociétés autonomes, et de concilier leur existence contemporaine avec l'affirmation de la souveraineté de la Couronne sur elles — Selon cette interprétation, la portée de l'expression « peuples autochtones du Canada » figurant à l'art. 35(1) de la LC doit s'agir des successeurs contemporains des sociétés autochtones qui occupaient le territoire canadien à l'époque du contact avec les Européens — Interprétation de l'expression « peuples autochtones du Canada » qui englobe les peuples autochtones qui étaient ici à l'arrivée des Européens et qui se sont déplacés ou qui ont été forcés de se déplacer ailleurs, ou à qui des frontières internationales ont été imposées, reflète l'objectif de réconciliation — Membres contemporains des Sinixt ne sont pas empêchés de faire valoir des droits au titre de l'art. 35(1) du seul fait qu'ils vivent maintenant aux États-Unis — D remplissait le critère applicable à un droit ancestral en vertu de l'art. 35(1) de la LC, et le critère relatif aux droits ancestraux applicable à l'égard des groupes se trouvant à l'extérieur du Canada est le même que celui qui s'applique à l'endroit des groupes se trouvant au Canada — Critère applicable à un droit ancestral n'exige pas une présence continue — D jouissait du droit ancestral de chasser sur le territoire ancestral des Sinixt en Colombie-Britannique.
Droit autochtone --- Droits des Autochtones aux ressources naturelles et aux protections environnementales — Droit d'accès aux ressources naturelles — Chasse — Lieux interdits
D était un citoyen américain et un membre de la tribu Lakes Tribe, un groupe successeur du peuple Sinixt, dans l'État de Washington — Alors qu'il se trouvait en Colombie-Britannique, D a abattu un wapiti et a informé les autorités provinciales de ce fait, et il a été inculpé d'avoir chassé sans permis et sans être résident, en contravention de la législation provinciale sur la chasse — Comme moyen de défense, D a fait valoir qu'il exerçait un droit ancestral de chasser protégé en vertu de l'art. 35(1) de la Loi constitutionnelle de 1982 (LC) — Lors du procès, on a conclu que D exerçait un droit ancestral de chasser garanti par l'art. 35(1) de la LC, et les deux appels interjetés subséquemment par la Couronne ont été rejetés — Dans le cadre de son pourvoi, la Couronne a soulevé une question constitutionnelle rendant nécessaire la détermination de la question de savoir si les dispositions contestées de la Wildlife Act étaient inopérantes ou inapplicables à l'égard de D en raison d'un droit ancestral au sens de l'art. 35 de la LC — Pourvoi rejeté — Question constitutionnelle répondue par l'affirmative — Interprétation cohérente de la jurisprudence relative à l'art. 35(1) exige que les groupes se trouvant à l'extérieur du Canada puissent être des peuples autochtones du Canada — Objectifs de l'art. 35(1) de la LC sont de reconnaître l'occupation antérieure du Canada par des sociétés autonomes, et de concilier leur existence contemporaine avec l'affirmation de la souveraineté de la Couronne sur elles — Selon cette interprétation, la portée de l'expression « peuples autochtones du Canada » figurant à l'art. 35(1) de la LC doit s'agir des successeurs contemporains des sociétés autochtones qui occupaient le territoire canadien à l'époque du contact avec les Européens — Interprétation de l'expression « peuples autochtones du Canada » qui englobe les peuples autochtones qui étaient ici à l'arrivée des Européens et qui se sont déplacés ou qui ont été forcés de se déplacer ailleurs, ou à qui des frontières internationales ont été imposées, reflète l'objectif de réconciliation — Membres contemporains des Sinixt ne sont pas empêchés de faire valoir des droits au titre de l'art. 35(1) du seul fait qu'ils vivent maintenant aux États-Unis — D remplissait le critère applicable à un droit ancestral en vertu de l'art. 35(1) de la LC, et le critère relatif aux droits ancestraux applicable à l'égard des groupes se trouvant à l'extérieur du Canada est le même que celui qui s'applique à l'endroit des groupes se trouvant au Canada — Critère applicable à un droit ancestral n'exige pas une présence continue — D jouissait du droit ancestral de chasser sur le territoire ancestral des Sinixt en Colombie-Britannique.
D was a US citizen and a member of the Lakes Tribe, a successor group of the Sinixt people, in the State of Washington. While in British Columbia, D shot an elk and was charged under the Wildlife Act with hunting without a licence and hunting big game

while not being a resident. D raised as his defence that he was exercising his Aboriginal right to hunt in the traditional territory of his Sinixt ancestors, a protected right under s. 35(1) of the Constitution Act, 1982 (CA). At trial, D was found to have been exercising an Aboriginal right to hunt for food, social and ceremonial purposes as guaranteed by s. 35(1) of the CA. The Crown's two subsequent appeals were dismissed. The Crown raised a constitutional question on appeal, requesting determination of whether impugned provisions of the Wildlife Act were of no force or effect with respect to D by reason of s. 35 of the CA.

Held: The appeal was dismissed; the constitutional question was answered in the affirmative.

Per Rowe J. (Wagner C.J.C., Abella, Karakatsanis, Brown, Martin, Kasirer JJ. concurring): Consistent development of jurisprudence considering s. 35(1) of the CA requires that groups located outside Canada can be Aboriginal peoples of Canada. The two purposes of s. 35(1) are to recognize the prior occupation of Canada by autonomous societies and to reconcile their modern-day existence with the Crown's assertion of sovereignty over them. These purposes are reflected in the structure of Aboriginal rights and title doctrine and also reflected in the principle of the honour of the Crown.

On this interpretation, the scope of "aboriginal peoples of Canada" must mean the modern-day successors of Aboriginal societies that occupied Canadian territory at the time of European contact. Resultingly, groups whose members are neither Canadian residents nor citizens can be Aboriginal peoples of Canada. An interpretation of "aboriginal peoples of Canada" in s. 35(1) of the CA that includes Aboriginal peoples who were here when Europeans arrived and later moved or were forced to move elsewhere, or on whom international boundaries were imposed, reflects the purpose of reconciliation. By contrast, an interpretation excluding Aboriginal peoples forced to move out of Canada would risk perpetuating historical injustice. Section 35(1) of the CA did not create Aboriginal rights; rather, it gave already existing Aboriginal and treaty rights constitutional protection. Even though some s. 35(1) Aboriginal rights would not have been recognized under pre-1982 Canadian law, those practices, customs and traditions underlying those rights pre-dated 1982. An interpretation of s. 35(1) limiting its scope to Aboriginal peoples located in Canada in 1982 would fail to give effect to this point by treating s. 35(1) as the source of Aboriginal rights. The presumption of territoriality does not preclude the application of s. 35(1) to groups outside of Canada when claiming or exercising their rights within Canada.

A principle that ambiguities should be resolved in favour of Aboriginal peoples does not determine who those peoples are. The Aboriginal peoples of Canada under s. 35(1) of the CA are the modern-day successors of Aboriginal societies that occupied what is now Canada at the time of European contact. Where this is shown, the threshold question is met. The trial judge's finding that the Sinixt had occupied territory in what is now British Columbia at the time of European contact and that the Lakes Tribe were a modern successor of the Sinixt, was entitled to deference.

D's claim satisfied the relevant test for an Aboriginal right under s. 35(1) of the CA. The test for Aboriginal rights for groups outside Canada is the same as the test for groups within Canada, and the trial judge did not err in finding that the test was met. Continuity is different from the threshold question of whether a modern group is a successor of a historic group. Continuity does not require an ongoing presence in lands over which an Aboriginal right is asserted nor is there any basis for adding it to the test for an Aboriginal right, even where the claimant is outside Canada.

While Aboriginal communities outside of Canada can assert and hold s. 35(1) rights, it does not follow that their rights are the same as those of communities within Canada. While the test for Aboriginal rights is the same, different circumstances of communities outside Canada lead to different results.

Given the requirement of actual or constructive knowledge, the duty to consult may well operate differently as regards those outside Canada. There is no freestanding duty on the Crown to seek out Aboriginal groups in the absence of actual or constructive knowledge of a potential impact on their rights. Once the Crown is put on notice of a group's claims, however, it has to determine whether a duty to consult arises and what the scope of the duty is.

The fact that a holder of an Aboriginal right is located outside of Canada is a feature of the context to be considered in the justification analysis. Justifying an infringement involves reconciling the interests of an Aboriginal people with the interests of the broader community of which it is a part. The extent to which the fact that the holder of the right is an Aboriginal people located outside of the broader community makes a difference in the justification analysis is better determined where it is required on the facts, where there is an adequate evidentiary basis, and where the issues are the subject of full submissions. The present case was not one involving a claim for Aboriginal title.

Per Côté J. (dissenting): The question of whether a claimant falls within the meaning of "aboriginal peoples of Canada" in s. 35 of the CA is a threshold question to be answered separately from the analysis for determining whether a group has an Aboriginal right.

To be entitled to the protection of s. 35(1) of the CA, the modern-day successor groups cannot be located anywhere other than in Canada. A purposive analysis of s. 35(1) that has regard to the relevant context of that provision establishes that it only protects Aboriginal peoples within Canada. This approach is entirely consistent with guidance that s. 35(1) must be interpreted generously consistent with its intended purpose.

An intention to broaden the constitutional protections under s. 35(1) of the CA beyond what was contemplated cannot be imposed. If s. 35(1) was intended to include within its purview Aboriginal groups located outside Canada, then one would expect significant discussion of these broader issues of recognition and jurisdiction. There is no evidence that drafters or participants contemplated this novel constitutional measure. The language "aboriginal peoples of Canada" in s. 35(1) of the CA are Aboriginal peoples located within Canada. Since the Lakes Tribe is wholly located in Washington State in the US, it cannot be considered as part of the "aboriginal peoples of Canada" under s. 35(1). D was not a member of a collective forming part of the "aboriginal peoples of Canada" and thus could not exercise a constitutionally protected Aboriginal right to hunt in the traditional territory of the Sinixt in British Columbia.

If an Aboriginal group outside of Canada is entitled to exercise s. 35(1) Aboriginal rights inside Canada, it must have equal protection under the Constitution and exercise rights in the same fashion as Aboriginal rights holders within Canada. As such, extending constitutional protection of s. 35(1) of the CA to include Aboriginal groups outside of Canada leads to some concerning outcomes. Challenges would arise with respect to the Crown's duty to consult as the number of groups to consult would increase dramatically. The drafters of s. 35(1) could not have intended these deleterious consequences to arise, and these concerns militated against a finding that the Lakes Tribe is part of the "aboriginal peoples of Canada".

D, as a member of the Lakes Tribe, could not claim an Aboriginal right to hunt for ceremonial purposes within the traditional territory of the Sinixt in British Columbia, as the test for an aboriginal right under s. 35(1) of the CA was not met. The relevant test is the same for groups outside of Canada as the test for groups within Canada. The trial judge committed a reviewable error in the application of this test, in finding that the continuity requirement of the test was met.

Section 35(1) of the CA protects only those present-day practices that have a reasonable degree of continuity with the practices that existed prior to contact. While temporal gaps in actual practice do not necessarily preclude the establishment of an Aboriginal right, failing to tender sufficient evidence that the practice was maintained or that the connection to the historical practice was maintained during such gaps may be fatal. There was no direct evidence that the Lakes Tribe engaged in anything that could be considered a modern-day practice of hunting in British Columbia after 1930. Given the Lake Tribe's lengthy absence from British Columbia between 1930 and 2010, continuity was not made out.

The Crown's appeal should be allowed and the constitutional question should be answered in the negative. As a result, D should not be exempt from the Wildlife Act provisions under which he was charged.

Per Moldaver J. (dissenting): Assuming, without deciding, that as a member of an Aboriginal collective outside of Canada, D was entitled to claim the constitutional protection afforded by s. 35(1) of the CA, D had not met the onus of establishing the continuity element of his claim under the test for Aboriginal rights.

D était un citoyen américain et un membre de la tribu Lakes Tribe, un groupe successeur du peuple Sinixt, dans l'État de Washington. Alors qu'il se trouvait en Colombie-Britannique, D a abattu un wapiti et a été inculpé d'avoir chassé sans permis et d'avoir chassé le gros gibier sans être résident, en contravention de la Wildlife Act. Comme moyen de défense, D a fait valoir qu'il exerçait un droit ancestral de chasser dans le territoire traditionnel de ses ancêtres Sinixt, un droit protégé en vertu de l'art. 35(1) de la Loi constitutionnelle de 1982 (LC). Lors du procès, on a conclu que D exerçait un droit ancestral de chasser à des fins alimentaires, sociales et rituelles garanti par l'art. 35(1) de la LC. Les deux appels interjetés subséquemment par la Couronne ont été rejetés. La Couronne a soulevé une question constitutionnelle en appel, rendant nécessaire la détermination de la question de savoir si les dispositions contestées de la Wildlife Act étaient inopérantes ou inapplicables à l'égard de D en raison de l'art. 35 de la LC.

Arrêt: Le pourvoi a été rejeté; la question constitutionnelle a été répondue par l'affirmative.

Rowe, J. (Wagner, J.C.C., Abella, Karakatsanis, Brown, Martin, Kasirer, JJ., souscrivant à son opinion) : Une interprétation cohérente de la jurisprudence relative à l'art. 35(1) de la LC exige que les groupes se trouvant à l'extérieur du Canada puissent être des peuples autochtones du Canada. Les deux objectifs de l'art. 35(1) sont de reconnaître l'occupation antérieure du Canada par des sociétés autonomes, et de concilier leur existence contemporaine avec l'affirmation de la souveraineté de la Couronne sur elles. Ces objectifs se reflètent dans la structure de la théorie en matière de droits et de titres ancestraux et dans le principe de l'honneur de la Couronne.

Selon cette interprétation, la portée de l'expression « peuples autochtones du Canada » doit s'agir des successeurs contemporains des sociétés autochtones qui occupaient le territoire canadien à l'époque du contact avec les Européens. Par conséquent, les groupes dont les membres ne sont ni citoyens ni résidents du Canada peuvent être des peuples autochtones du Canada. Une interprétation de l'expression « peuples autochtones du Canada » à l'art. 35(1) qui englobe les peuples autochtones qui étaient ici à l'arrivée des Européens et qui se sont déplacés ou qui ont été forcés de se déplacer ailleurs, ou à qui des frontières internationales ont été imposées, reflète l'objectif de réconciliation. En revanche, une interprétation excluant les peuples autochtones qui ont été contraints de quitter le Canada risquerait de perpétuer une injustice historique. L'article 35 de la LC n'a pas créé les droits ancestraux; il a eu pour effet de donner aux droits ancestraux et droits issus de traités déjà existants une protection constitutionnelle. Même si certains droits ancestraux garantis à l'art. 35(1) n'auraient pas été reconnus en vertu du droit canadien antérieur à 1982, les pratiques, coutumes et traditions qui sous-tendent ces droits existaient avant 1982. Une interprétation de l'art. 35(1) qui limiterait sa portée aux peuples autochtones qui se trouvaient au Canada en 1982 ne rendrait pas compte de ce fait, en considérant l'art. 35(1) comme la source des droits ancestraux. La présomption de territorialité n'empêche pas l'application de l'art. 35 aux groupes se trouvant à l'extérieur du Canada lorsqu'ils revendiquent ou exercent leurs droits au Canada.

Un principe selon lequel les ambiguïtés devraient être résolues en faveur des peuples autochtones ne permet pas de déterminer qui sont ces mêmes peuples autochtones. Les peuples autochtones du Canada, au sens de l'art. 35(1) de la LC, sont les successeurs contemporains des peuples autochtones qui occupaient ce qui est maintenant le Canada au moment du contact avec les Européens. Une fois cela établi, la question préliminaire reçoit une réponse affirmative. Il fallait faire preuve de déférence à l'égard de la conclusion de la juge de première instance selon laquelle les Sinixt avaient occupé un territoire dans ce qui est aujourd'hui la Colombie-Britannique au moment du contact avec les Européens et que la Lakes Tribe était un successeur contemporain des Sinixt.

La revendication de D satisfaisait au critère applicable à un droit ancestral en vertu de l'art. 35(1) de la LC. Le critère relatif aux droits ancestraux applicable à l'égard des groupes se trouvant à l'extérieur du Canada est le même que celui qui s'applique à l'endroit des groupes se trouvant au Canada, et la juge de première instance n'a pas commis d'erreur en concluant que le critère était rempli en l'espèce. Le critère de continuité est différent de la question préliminaire de savoir si un groupe contemporain est le successeur d'un groupe historique. La continuité n'exige pas une présence continue sur les terres où un droit ancestral est revendiqué et rien ne justifie de l'ajouter au critère applicable à un droit ancestral, même lorsque le demandeur se trouve à l'extérieur du Canada.

Si les communautés autochtones à l'extérieur du Canada peuvent revendiquer et posséder des droits visés à l'art. 35(1), il ne s'ensuit pas que leurs droits sont les mêmes que ceux des communautés se trouvant au Canada. Bien que le critère relatif à un droit ancestral soit le même, les situations particulières des communautés se trouvant à l'extérieur du Canada peuvent mener à des résultats différents.

Étant donné l'exigence d'une connaissance réelle ou imputée, l'obligation de consulter pourrait fort bien fonctionner différemment en ce qui concerne les groupes se trouvant à l'extérieur du Canada. La Couronne n'a pas l'obligation indépendante de rechercher des groupes autochtones en l'absence de connaissance réelle ou imputée de répercussions potentielles sur leurs droits. Cependant, une fois que la Couronne est avisée, elle doit déterminer si une obligation de consulter prend naissance et, dans l'affirmative, quelle est la portée de cette obligation.

Le fait que le titulaire d'un droit ancestral se trouve à l'extérieur du Canada est une caractéristique du contexte qui peut être prise en compte dans l'analyse de la justification. Justifier une atteinte suppose de concilier les intérêts d'un peuple autochtone avec les intérêts de la communauté plus large dont il fait partie. La mesure dans laquelle le fait que le titulaire du droit ancestral est un peuple autochtone extérieur à cette communauté élargie influe sur l'analyse de la justification est une autre question qui serait mieux tranchée si les faits l'exigeaient, s'il existait des éléments de preuve suffisants et si les questions faisaient l'objet d'une argumentation complète. Le présent dossier ne concernait pas la revendication d'un titre ancestral.

Côté, J. (dissidente) : La question de savoir si un demandeur est visé par l'expression « peuples autochtones du Canada » qui figure à l'art. 35 de la LC constitue une question préliminaire; il faut répondre à cette question séparément de l'analyse pour déterminer si un groupe a un droit ancestral.

Pour avoir droit à la protection de l'art. 35(1) de la LC, les groupes de successeurs contemporains ne peuvent habiter nulle part ailleurs qu'au Canada. Une analyse téléologique de l'art. 35(1) qui tient compte des contextes propres à cette disposition permet d'établir qu'elle protège seulement les peuples autochtones habitant au Canada. Cette approche est tout à fait conforme à la directive voulant que l'art. 35(1) soit interprété de façon libérale, en accord avec son objet.

Une intention d'étendre les protections constitutionnelles prévues à l'art. 35(1) au-delà de ce qui était envisagé ne peut être imposée. Si l'art. 35(1) devait également s'appliquer aux groupes autochtones habitant à l'extérieur du Canada, alors on s'attendrait à ce que ces questions plus générales de reconnaissance et de compétence aient fait l'objet d'un long débat et d'un examen approfondi. Rien n'indique que les rédacteurs ou les participants aient envisagé cette nouvelle mesure constitutionnelle. Les « peuples autochtones du Canada » au sens de l'art. 35(1) sont des peuples autochtones qui habitent au Canada. Comme la Lakes Tribe se trouve entièrement dans l'État de Washington aux États-Unis d'Amérique, elle ne peut pas être considérée comme faisant partie des « peuples autochtones du Canada » au sens de l'art. 35(1). Puisque D n'appartenait pas à une collectivité qui faisait partie des « peuples autochtones du Canada », il ne pouvait exercer un droit ancestral protégé par la Constitution de chasser à des fins rituelles sur le territoire traditionnel des Sinixt en Colombie-Britannique.

S'il est loisible à un groupe autochtone de l'extérieur du Canada d'exercer au Canada un droit ancestral garanti par l'art. 35(1), alors ce groupe doit être protégé par la Constitution et être en mesure d'exercer toute la panoplie de droits au même titre que ceux qui sont titulaires de droits ancestraux au Canada. Par conséquent, étendre la protection constitutionnelle de l'art. 35(1) aux groupes autochtones hors du Canada donne des résultats pour le moins inquiétants. Des difficultés concernant l'obligation de consultation qui incombe à la Couronne se présenteraient puisque le nombre de groupes à consulter augmenterait considérablement. Les rédacteurs de l'art. 35(1) n'auraient pas pu souhaiter pareilles conséquences néfastes, et ces préoccupations militaient contre la conclusion selon laquelle la Lakes Tribe est un « peuple autochtone du Canada ».

D, en tant que membre de la Lakes Tribe, ne pouvait revendiquer le droit ancestral de chasser à des fins rituelles sur le territoire traditionnel des Sinixt en Colombie-Britannique puisque le test qui sert à établir l'existence d'un droit ancestral visé à l'art. 35(1) n'était pas rempli. Le test de reconnaissance de droits ancestraux à des groupes hors du Canada est le même que celui qui s'applique aux groupes du Canada. La juge de première instance a commis une erreur susceptible de révision dans son application de ce test en concluant que l'exigence de continuité du test avait été respectée.

L'article 35(1) de la LC ne protège que les pratiques contemporaines qui ont un degré raisonnable de continuité avec les pratiques antérieures au contact avec les Européens. Bien que des hiatus temporels dans la pratique n'empêchent pas forcément l'établissement d'un droit ancestral, le défaut de présenter suffisamment de preuve pour démontrer que la pratique s'est poursuivie ou, à tout le moins, qu'un lien avec la pratique historique a été maintenu durant ces hiatus temporels peut être fatal. Il n'existait aucune preuve directe que la Lakes Tribe se soit adonnée à quoi que ce soit qui puisse être considéré comme une pratique moderne de la chasse en Colombie-Britannique après 1930. Étant donné l'absence prolongée de la Lakes Tribe en Colombie-Britannique entre 1930 et 2010, la continuité n'a pas été établie.

Le pourvoi de la Couronne devrait être accueilli et la question constitutionnelle devrait être répondue par la négative. Conséquemment, D ne devrait pas être soustrait à l'application des dispositions de la Wildlife Act en vertu desquelles il a été accusé.

Moldaver, J. (dissident) : À supposer, sans trancher la question de manière définitive, qu'en tant que membre d'une communauté autochtone se trouvant à l'extérieur du Canada, D pouvait revendiquer la protection constitutionnelle offerte par l'art. 35(1) de la LC, D ne s'est pas acquitté de son fardeau d'établir l'élément de continuité de sa revendication, en fonction du critère relatif aux droits ancestraux.

Table of Authorities

Cases considered by *Rowe J.*:

Beckman v. Little Salmon/Carmacks First Nation (2010), 2010 SCC 53, 2010 CarswellYukon 140, 2010 CarswellYukon 141, 97 R.P.R. (4th) 1, 10 Admin. L.R. (5th) 163, 55 C.E.L.R. (3d) 1, *(*sub nom. *Little Salmon/Carmacks First Nation v. Beckman)* 408 N.R. 281, 326 D.L.R. (4th) 385, *(*sub nom. *Little Salmon/Carmacks First Nation v. Beckman)* 295 B.C.A.C. 1, *(*sub nom. *Little Salmon/Carmacks First Nation v. Beckman)* 501 W.A.C. 1, [2011] 1 C.N.L.R. 12, [2010] 3 S.C.R. 103 (S.C.C.) — referred to

Calder v. British Columbia (Attorney General) (1973), [1973] S.C.R. 313, [1973] 4 W.W.R. 1, 34 D.L.R. (3d) 145, 1973 CarswellBC 83, 1973 CarswellBC 263 (S.C.C.) — considered

Campbell v. British Columbia (Minister of Forests and Range) (2011), 2011 BCSC 448, 2011 CarswellBC 821, [2011] 3 C.N.L.R. 151 (B.C. S.C. [In Chambers]) — referred to

Canada (Attorney General) v. Ontario (Attorney General) (1895), 25 S.C.R. 434, 1895 CarswellNat 46 (S.C.C.) — referred to

Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc. (1984), [1984] 2 S.C.R. 145, (sub nom. *Hunter v. Southam Inc.)* 11 D.L.R. (4th) 641, (sub nom. *Hunter v. Southam Inc.)* 55 N.R. 241, 33 Alta. L.R. (2d) 193, (sub nom. *Hunter v. Southam Inc.)* 55 A.R. 291, 27 B.L.R. 297, (sub nom. *Hunter v. Southam Inc.)* 2 C.P.R. (3d) 1, 41 C.R. (3d) 97, (sub nom. *Hunter v. Southam Inc.)* 9 C.R.R. 355, 84 D.T.C. 6467, (sub nom. *Hunter v. Southam Inc.)* 14 C.C.C. (3d) 97, (sub nom. *Director of Investigations & Research Combines Investigation Branch v. Southam Inc.)* [1984] 6 W.W.R. 577, 1984 CarswellAlta 121, 1984 CarswellAlta 415 (S.C.C.) — considered

Clyde River (Hamlet) v. Petroleum Geo-Services Inc. (2017), 2017 SCC 40, 2017 CSC 40, 2017 CarswellNat 3470, 2017 CarswellNat 3471, 10 C.E.L.R. (4th) 1, 411 D.L.R. (4th) 571, 22 Admin. L.R. (6th) 181, [2017] 3 C.N.L.R. 65, [2017] 1 S.C.R. 1069 (S.C.C.) — considered

Daniels v. Canada (Minister of Indian Affairs and Northern Development) (2016), 2016 SCC 12, 2016 CSC 12, 2016 CarswellNat 1037, 2016 CarswellNat 1038, 395 D.L.R. (4th) 381, 481 N.R. 348, [2016] 1 S.C.R. 99, 355 C.R.R. (2d) 1, [2016] 3 C.N.L.R. 56 (S.C.C.) — considered

Delgamuukw v. British Columbia (1997), 153 D.L.R. (4th) 193, 220 N.R. 161, 99 B.C.A.C. 161, 162 W.A.C. 161, [1997] 3 S.C.R. 1010, 1997 CarswellBC 2358, 1997 CarswellBC 2359, [1998] 1 C.N.L.R. 14, [1999] 10 W.W.R. 34, 66 B.C.L.R. (3d) 285 (S.C.C.) — considered

First Nation of Nacho Nyak Dun v. Yukon (2017), 2017 SCC 58, 2017 CSC 58, 2017 CarswellYukon 135, 2017 CarswellYukon 136, 12 C.E.L.R. (4th) 183, 415 D.L.R. (4th) 389, [2017] 2 S.C.R. 576, [2018] 1 C.N.L.R. 1 (S.C.C.) — referred to

Guerin v. The Queen (1984), [1984] 6 W.W.R. 481, (sub nom. *Guerin v. Canada)* [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321, (sub nom. *Guerin v. Canada)* 55 N.R. 161, [1985] 1 C.N.L.R. 120, 20 E.T.R. 6, 36 R.P.R. 1, 59 B.C.L.R. 301, 1984 CarswellNat 813, 1984 CarswellNat 693 (S.C.C.) — referred to

Haida Nation v. British Columbia (Minister of Forests) (2004), 2004 SCC 73, 2004 CarswellBC 2656, 2004 CarswellBC 2657, 245 D.L.R. (4th) 33, 19 Admin. L.R. (4th) 195, 11 C.E.L.R. (3d) 1, [2005] 1 C.N.L.R. 72, 26 R.P.R. (4th) 1, [2005] 3 W.W.R. 419, [2004] 3 S.C.R. 511, 36 B.C.L.R. (4th) 282, 327 N.R. 53, 206 B.C.A.C. 52, 338 W.A.C. 52, 2004 CSC 73 (S.C.C.) — considered

Hwlitsum First Nation v. Canada (Attorney General) (2018), 2018 BCCA 276, 2018 CarswellBC 1784, 15 B.C.L.R. (6th) 91, [2019] 1 W.W.R. 275 (B.C. C.A.) — referred to

Lax Kw'alaams Indian Band v. Canada (Attorney General) (2011), 2011 SCC 56, 2011 CarswellBC 2861, 2011 CarswellBC 2862, 62 C.E.L.R. (3d) 1, [2011] 12 W.W.R. 209, (sub nom. *Lax Kw'alaams Indian Band v. Canada)* 338 D.L.R. (4th) 193, 23 B.C.L.R. (5th) 217, 423 N.R. 3, [2011] 3 S.C.R. 535, 313 B.C.A.C. 3, 533 W.A.C. 3, [2011] 4 C.N.L.R. 346 (S.C.C.) — followed

Manitoba Métis Federation Inc. v. Canada (Attorney General) (2013), 2013 SCC 14, 2013 CarswellMan 61, 2013 CarswellMan 62, 355 D.L.R. (4th) 577, [2013] 4 W.W.R. 665, 27 R.P.R. (5th) 1, 441 N.R. 209, [2013] 2 C.N.L.R. 281, 291 Man. R. (2d) 1, 570 W.A.C. 1, [2013] 1 S.C.R. 623 (S.C.C.) — referred to

Mikisew Cree First Nation v. Canada (Governor General in Council) (2018), 2018 SCC 40, 2018 CSC 40, 2018 CarswellNat 5579, 2018 CarswellNat 5580, 20 C.E.L.R. (4th) 1, 426 D.L.R. (4th) 647, [2019] 1 C.N.L.R. 277, [2018] 2 S.C.R. 765, 420 C.R.R. (2d) 285 (S.C.C.) — referred to

Mississaugas of Scugog Island First Nation v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (2007), 2007 ONCA 814, 2007 CarswellOnt 7576, (sub nom. *Mississaugas of Scugog Island First Nation v. C.A.W.-Canada, Local 444)* 287 D.L.R. (4th) 452, 2008 C.L.L.C. 220-031, [2007] O.L.R.B. Rep. 1197, (sub nom. *Mississaugas of Scugog Island First Nation v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada))* [2008] 1 C.N.L.R. 71, (sub nom. *Mississaugas of Scugog Island First Nation v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 444)* 231 O.A.C. 113, (sub nom. *Mississaugas of Scugog Island First Nation v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 444)* 88 O.R. (3d) 583 (Ont. C.A.) — referred to

Mitchell v. Minister of National Revenue (2001), 2001 SCC 33, 2001 CarswellNat 873, 2001 CarswellNat 874, (sub nom. *Mitchell v. M.N.R.)* 199 D.L.R. (4th) 385, (sub nom. *Mitchell v. M.N.R.)* 83 C.R.R. (2d) 1, 269 N.R. 207, (sub nom. *Mitchell v. M.N.R.)* [2001] 3 C.N.L.R. 122, (sub nom. *Mitchell v. M.N.R.)* [2001] 1 S.C.R. 911, 206 F.T.R. 160 (note), [2002] 3 C.T.C. 359, 2001 CSC 33 (S.C.C.) — considered

Native Council of Nova Scotia v. Canada (Attorney General) (2008), 2008 FCA 113, 2008 CarswellNat 785, [2008] 3 C.N.L.R. 286, 377 N.R. 247, 2008 CAF 113, 2008 CarswellNat 5625 (F.C.A.) — referred to
Native Women's Assn. of Canada v. Canada (1994), 1994 CarswellNat 1499, 1994 CarswellNat 1773, [1995] 1 C.N.L.R. 47, 24 C.R.R. (2d) 233, 119 D.L.R. (4th) 224, 84 F.T.R. 240 (note), 173 N.R. 241, [1994] 3 S.C.R. 627 (S.C.C.) — referred to
Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam) (2020), 2020 SCC 4, 2020 CSC 4, 2020 CarswellQue 640, 2020 CarswellQue 641, 443 D.L.R. (4th) 1 (S.C.C.) — referred to
Nowegijick v. The Queen (1983), [1983] 1 S.C.R. 29, 83 D.T.C. 5041, 46 N.R. 41, [1983] 2 C.N.L.R. 89, [1983] C.T.C. 20, 144 D.L.R. (3d) 193, 1983 CarswellNat 123, 1983 CarswellNat 520 (S.C.C.) — referred to
Ontario Mining Co. v. Seybold (1901), 32 S.C.R. 1, 1901 CarswellOnt 29 (S.C.C.) — referred to
R. v. Adams (1996), 202 N.R. 89, 138 D.L.R. (4th) 657, 110 C.C.C. (3d) 97, [1996] 3 S.C.R. 101, [1996] 4 C.N.L.R. 1, 1996 CarswellQue 912, 1996 CarswellQue 913 (S.C.C.) — referred to
R. v. Badger (1996), [1996] 4 W.W.R. 457, 37 Alta. L.R. (3d) 153, 195 N.R. 1, 105 C.C.C. (3d) 289, 133 D.L.R. (4th) 324, [1996] 2 C.N.L.R. 77, [1996] 1 S.C.R. 771, 181 A.R. 321, 116 W.A.C. 321, 1996 CarswellAlta 365F, 1996 CarswellAlta 587 (S.C.C.) — considered
R. v. Côté (1996), 202 N.R. 161, 138 D.L.R. (4th) 385, 110 C.C.C. (3d) 122, [1996] 3 S.C.R. 139, [1996] 4 C.N.L.R. 26, 1996 CarswellQue 1039, 1996 CarswellQue 1040 (S.C.C.) — considered
R. v. Frank (1977), [1978] 1 S.C.R. 95, 34 C.C.C. (2d) 209, [1977] 4 W.W.R. 294, 4 A.R. 271, 15 N.R. 487, 75 D.L.R. (3d) 481, 1977 CarswellAlta 217, 1977 CarswellAlta 278, 9 C.N.L.C. 532 (S.C.C.) — considered
R. v. Gladstone (1996), [1996] 9 W.W.R. 149, 23 B.C.L.R. (3d) 155, 50 C.R. (4th) 111, 200 N.R. 189, 137 D.L.R. (4th) 648, 109 C.C.C. (3d) 193, 79 B.C.A.C. 161, 129 W.A.C. 161, [1996] 2 S.C.R. 723, [1996] 4 C.N.L.R. 65, 1996 CarswellBC 2305, 1996 CarswellBC 2306 (S.C.C.) — considered
R. v. Marshall (1999), 1999 CarswellNS 349, 1999 CarswellNS 350, 553 A.P.R. 1, 139 C.C.C. (3d) 391, [1999] 4 C.N.L.R. 301, 179 D.L.R. (4th) 193, 247 N.R. 306, 179 N.S.R. (2d) 1, [1999] 3 S.C.R. 533 (S.C.C.) — considered
R. v. Marshall (2005), 2005 SCC 43, 2005 CarswellNS 317, 2005 CarswellNS 318, 15 C.E.L.R. (3d) 163, [2005] 3 C.N.L.R. 214, (sub nom. *R. v. Bernard)* 198 C.C.C. (3d) 29, (sub nom. *R. v. Bernard)* 255 D.L.R. (4th) 1, 336 N.R. 22, 287 N.B.R. (2d) 206, 750 A.P.R. 206, 235 N.S.R. (2d) 151, 747 A.P.R. 151, [2005] 2 S.C.R. 220, 15 C.C.E.L. (3d) 163, 2005 CSC 43 (S.C.C.) — considered
R. v. Meshake (2007), 2007 ONCA 337, 2007 CarswellOnt 2747, 223 O.A.C. 194, 219 C.C.C. (3d) 175, [2007] 3 C.N.L.R. 326, 85 O.R. (3d) 575, 155 C.R.R. (2d) 85 (Ont. C.A.) — referred to
R. v. Nikal (1996), [1996] 5 W.W.R. 305, 19 B.C.L.R. (3d) 201, 105 C.C.C. (3d) 481, 196 N.R. 1, 133 D.L.R. (4th) 658, 74 B.C.A.C. 161, 121 W.A.C. 161, [1996] 1 S.C.R. 1013, (sub nom. *Canada v. Nikal)* 35 C.R.R. (2d) 189, [1996] 3 C.N.L.R. 178, 1996 CarswellBC 950, 1996 CarswellBC 950F (S.C.C.) — referred to
R. v. Poulin (2019), 2019 SCC 47, 2019 CSC 47, 2019 CarswellQue 8570, 2019 CarswellQue 8571, 438 D.L.R. (4th) 1, 379 C.C.C. (3d) 513, 58 C.R. (7th) 249, 443 C.R.R. (2d) 225 (S.C.C.) — referred to
R. v. Powley (2003), 2003 SCC 43, 2003 CarswellOnt 3502, 2003 CarswellOnt 3503, 230 D.L.R. (4th) 1, 177 C.C.C. (3d) 193, [2003] 4 C.N.L.R. 321, 308 N.R. 201, 177 O.A.C. 201, 5 C.E.L.R. (3d) 1, 110 C.R.R. (2d) 92, 68 O.R. (3d) 255 (note), [2003] 2 S.C.R. 207, 68 O.R. (3d) 255, 2003 CSC 43 (S.C.C.) — considered
R. v. Sappier (2006), 2006 SCC 54, 2006 CarswellNB 676, 2006 CarswellNB 677, 50 R.P.R. (4th) 1, [2007] 1 C.N.L.R. 359, 274 D.L.R. (4th) 75, 355 N.R. 1, [2006] 2 S.C.R. 686, 214 C.C.C. (3d) 161, 309 N.B.R. (2d) 199, 799 A.P.R. 199 (S.C.C.) — referred to
R. v. Secretary of State for Foreign & Commonwealth Affairs (1982), [1982] Q.B. 892, [1982] 2 All E.R. 118, [1981] 4 C.N.L.R. 86, 1 C.R.R. 254, 1982 CarswellFor 2, [1982] 2 W.L.R. 641 (Eng. C.A.) — considered
R. v. Shipman (2007), 2007 ONCA 338, 2007 CarswellOnt 2746, 223 O.A.C. 283, 219 C.C.C. (3d) 161, [2007] 3 C.N.L.R. 375, 85 O.R. (3d) 585 (Ont. C.A.) — considered
R. v. Sparrow (1990), 70 D.L.R. (4th) 385, 111 N.R. 241, [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160, 46 B.C.L.R. (2d) 1, 56 C.C.C. (3d) 263, [1990] 4 W.W.R. 410, 1990 CarswellBC 105, 1990 CarswellBC 756 (S.C.C.) — considered
R. v. Van der Peet (1996), [1996] 9 W.W.R. 1, 23 B.C.L.R. (3d) 1, 50 C.R. (4th) 1, 1996 CarswellBC 2309, 1996 CarswellBC 2310, 80 B.C.A.C. 81, 109 C.C.C. (3d) 1, [1996] 4 C.N.L.R. 177, 137 D.L.R. (4th) 289, 200 N.R. 1, [1996] 2 S.C.R. 507, 130 W.A.C. 81 (S.C.C.) — followed

Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council (2010), 2010 SCC 43, 2010 CarswellBC 2867, 2010 CarswellBC 2868, 96 R.P.R. (4th) 1, [2010] 11 W.W.R. 577, 54 C.E.L.R. (3d) 1, 9 B.C.L.R. (5th) 205, 406 N.R. 333, 325 D.L.R. (4th) 1, 11 Admin. L.R. (5th) 246, 293 B.C.A.C. 175, 496 W.A.C. 175, [2010] 4 C.N.L.R. 250, 225 C.R.R. (2d) 75, [2010] 2 S.C.R. 650 (S.C.C.) — considered

Society of Composers, Authors & Music Publishers of Canada v. Canadian Assn. of Internet Providers (2004), 2004 SCC 45, 2004 CarswellNat 1919, 2004 CarswellNat 1920, *(*sub nom. *SOCAN v. Canadian Assn. of Internet Providers)* 32 C.P.R. (4th) 1, *(*sub nom. *SOCAN v. Canadian Assn. of Internet Providers)* 240 D.L.R. (4th) 193, 322 N.R. 306, *(*sub nom. *Socan v. Canadian Assn. of Internet Providers)* [2004] 2 S.C.R. 427, [2004] 2 F.C.R. xi, 2004 CSC 45 (S.C.C.) — referred to

Taku River Tlingit First Nation v. British Columbia (Project Assessment Director) (2004), 2004 SCC 74, 2004 CarswellBC 2654, 2004 CarswellBC 2655, 245 D.L.R. (4th) 193, 19 Admin. L.R. (4th) 165, 11 C.E.L.R. (3d) 49, [2005] 1 C.N.L.R. 366, 26 R.P.R. (4th) 50, [2005] 3 W.W.R. 403, *(*sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director))* [2004] 3 S.C.R. 550, 36 B.C.L.R. (4th) 370, *(*sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director))* 327 N.R. 133, 206 B.C.A.C. 132, 338 W.A.C. 132, 2004 CSC 74 (S.C.C.) — referred to

Tsilhqot'in Nation v. British Columbia (2014), 2014 SCC 44, 2014 CSC 44, 2014 CarswellBC 1814, 2014 CarswellBC 1815, [2014] 7 W.W.R. 633, 43 R.P.R. (5th) 1, 58 B.C.L.R. (5th) 1, *(*sub nom. *William v. British Columbia)* 459 N.R. 287, *(*sub nom. *Tsilhqot'in Nation v. British Columbia)* [2014] 3 C.N.L.R. 362, 374 D.L.R. (4th) 1, *(*sub nom. *William v. British Columbia)* 356 B.C.A.C. 1, *(*sub nom. *William v. British Columbia)* 610 W.A.C. 1, *(*sub nom. *Tsilhqot'in Nation v. British Columbia)* [2014] 2 S.C.R. 257, *(*sub nom. *Tsilhoqot'in Nation v. British Columbia)* 312 C.R.R. (2d) 309 (S.C.C.) — referred to

Wewayakum Indian Band v. R. (1989), 3 R.P.R. (2d) 1, 25 F.T.R. 161, 92 N.R. 241, *(*sub nom. *Roberts v. Canada)* 57 D.L.R. (4th) 197, *(*sub nom. *Roberts v. Canada)* [1989] 1 S.C.R. 322, *(*sub nom. *Roberts v. Canada)* [1989] 3 W.W.R. 117, *(*sub nom. *Roberts v. Canada)* [1989] 2 C.N.L.R. 146, *(*sub nom. *Roberts v. Canada)* 35 B.C.L.R. (2d) 1, 1989 CarswellNat 3, 1989 CarswellNat 692 (S.C.C.) — referred to

Cases considered by *Côté J.* (dissenting):

Beckman v. Little Salmon/Carmacks First Nation (2010), 2010 SCC 53, 2010 CarswellYukon 140, 2010 CarswellYukon 141, 97 R.P.R. (4th) 1, 10 Admin. L.R. (5th) 163, 55 C.E.L.R. (3d) 1, *(*sub nom. *Little Salmon/Carmacks First Nation v. Beckman)* 408 N.R. 281, 326 D.L.R. (4th) 385, *(*sub nom. *Little Salmon/Carmacks First Nation v. Beckman)* 295 B.C.A.C. 1, *(*sub nom. *Little Salmon/Carmacks First Nation v. Beckman)* 501 W.A.C. 1, [2011] 1 C.N.L.R. 12, [2010] 3 S.C.R. 103 (S.C.C.) — considered in a minority or dissenting opinion

British Columbia v. Imperial Tobacco Canada Ltd. (2005), 2005 SCC 49, 2005 CarswellBC 2207, 2005 CarswellBC 2208, 45 B.C.L.R. (4th) 1, 257 D.L.R. (4th) 193, [2006] 1 W.W.R. 201, 339 N.R. 129, [2005] 2 S.C.R. 473, 134 C.R.R. (2d) 46, 218 B.C.A.C. 1, 359 W.A.C. 1, 27 C.P.C. (6th) 13 (S.C.C.) — considered in a minority or dissenting opinion

Campbell v. British Columbia (Minister of Forests and Range) (2011), 2011 BCSC 448, 2011 CarswellBC 821, [2011] 3 C.N.L.R. 151 (B.C. S.C. [In Chambers]) — refered to in a minority or dissenting opinion

Haida Nation v. British Columbia (Minister of Forests) (2004), 2004 SCC 73, 2004 CarswellBC 2656, 2004 CarswellBC 2657, 245 D.L.R. (4th) 33, 19 Admin. L.R. (4th) 195, 11 C.E.L.R. (3d) 1, [2005] 1 C.N.L.R. 72, 26 R.P.R. (4th) 1, [2005] 3 W.W.R. 419, [2004] 3 S.C.R. 511, 36 B.C.L.R. (4th) 282, 327 N.R. 53, 206 B.C.A.C. 52, 338 W.A.C. 52, 2004 CSC 73 (S.C.C.) — refered to in a minority or dissenting opinion

Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations) (2017), 2017 CarswellBC 3020, 2017 CarswellBC 3021, 1 B.C.L.R. (6th) 223, 25 Admin. L.R. (6th) 1, 12 C.E.L.R. (4th) 1, [2017] 12 W.W.R. 1, 2017 SCC 54, 2017 CSC 54, 415 D.L.R. (4th) 52, [2017] 2 S.C.R. 386, 394 C.R.R. (2d) 293, [2018] 1 C.N.L.R. 19 (S.C.C.) — refered to in a minority or dissenting opinion

Lax Kw'alaams Indian Band v. Canada (Attorney General) (2011), 2011 SCC 56, 2011 CarswellBC 2861, 2011 CarswellBC 2862, 62 C.E.L.R. (3d) 1, [2011] 12 W.W.R. 209, *(*sub nom. *Lax Kw'alaams Indian Band v. Canada)* 338 D.L.R. (4th) 193, 23 B.C.L.R. (5th) 217, 423 N.R. 3, [2011] 3 S.C.R. 535, 313 B.C.A.C. 3, 533 W.A.C. 3, [2011] 4 C.N.L.R. 346 (S.C.C.) — refered to in a minority or dissenting opinion

Manitoba Métis Federation Inc. v. Canada (Attorney General) (2013), 2013 SCC 14, 2013 CarswellMan 61, 2013 CarswellMan 62, 355 D.L.R. (4th) 577, [2013] 4 W.W.R. 665, 27 R.P.R. (5th) 1, 441 N.R. 209, [2013] 2 C.N.L.R. 281, 291 Man. R. (2d) 1, 570 W.A.C. 1, [2013] 1 S.C.R. 623 (S.C.C.) — refered to in a minority or dissenting opinion

Mikisew Cree First Nation v. Canada (Governor General in Council) (2018), 2018 SCC 40, 2018 CSC 40, 2018 CarswellNat 5579, 2018 CarswellNat 5580, 20 C.E.L.R. (4th) 1, 426 D.L.R. (4th) 647, [2019] 1 C.N.L.R. 277, [2018] 2 S.C.R. 765, 420 C.R.R. (2d) 285 (S.C.C.) — refered to in a minority or dissenting opinion

Mitchell v. Minister of National Revenue (2001), 2001 SCC 33, 2001 CarswellNat 873, 2001 CarswellNat 874, (sub nom. *Mitchell v. M.N.R.)* 199 D.L.R. (4th) 385, (sub nom. *Mitchell v. M.N.R.)* 83 C.R.R. (2d) 1, 269 N.R. 207, (sub nom. *Mitchell v. M.N.R.)* [2001] 3 C.N.L.R. 122, (sub nom. *Mitchell v. M.N.R.)* [2001] 1 S.C.R. 911, 206 F.T.R. 160 (note), [2002] 3 C.T.C. 359, 2001 CSC 33 (S.C.C.) — considered in a minority or dissenting opinion

Placer Dome Canada Ltd. v. Ontario (Minister of Finance) (2006), 2006 SCC 20, 2006 CarswellOnt 3112, 2006 CarswellOnt 3113, (sub nom. *Ontario (Minister of Finance) v. Placer Dome Canada Limited)* 266 D.L.R. (4th) 513, 348 N.R. 148, 210 O.A.C. 342, 2006 D.T.C. 6532 (Eng.), [2006] 1 S.C.R. 715 (S.C.C.) — refered to in a minority or dissenting opinion

R. v. Big M Drug Mart Ltd. (1985), [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321, 58 N.R. 81, [1985] 3 W.W.R. 481, 37 Alta. L.R. (2d) 97, 60 A.R. 161, 18 C.C.C. (3d) 385, 85 C.L.L.C. 14,023, 13 C.R.R. 64, 1985 CarswellAlta 316, 1985 CarswellAlta 609 (S.C.C.) — refered to in a minority or dissenting opinion

R. v. Blais (2003), 2003 SCC 44, 2003 CarswellMan 386, 2003 CarswellMan 387, 230 D.L.R. (4th) 22, 177 C.C.C. (3d) 214, [2003] 4 C.N.L.R. 219, 308 N.R. 371, 180 Man. R. (2d) 3, 310 W.A.C. 3, [2003] 2 S.C.R. 236, [2004] 11 W.W.R. 199, 2003 CSC 44 (S.C.C.) — considered in a minority or dissenting opinion

R. v. Caron (2015), 2015 SCC 56, 2015 CSC 56, 2015 CarswellAlta 2116, 2015 CarswellAlta 2117, [2015] 12 W.W.R. 205, 23 Alta. L.R. (6th) 1, 477 N.R. 200, (sub nom. *Caron v. Alberta)* [2015] 3 S.C.R. 511, 393 D.L.R. (4th) 577, 331 C.C.C. (3d) 157, 606 A.R. 1, 652 W.A.C. 1 (S.C.C.) — considered in a minority or dissenting opinion

R. v. Frank (1977), [1978] 1 S.C.R. 95, 34 C.C.C. (2d) 209, [1977] 4 W.W.R. 294, 4 A.R. 271, 15 N.R. 487, 75 D.L.R. (3d) 481, 1977 CarswellAlta 217, 1977 CarswellAlta 278, 9 C.N.L.C. 532 (S.C.C.) — considered in a minority or dissenting opinion

R. v. Marshall (1999), 1999 CarswellNS 262, 1999 CarswellNS 282, 549 A.P.R. 201, 138 C.C.C. (3d) 97, [1999] 4 C.N.L.R. 161, 177 D.L.R. (4th) 513, 246 N.R. 83, 178 N.S.R. (2d) 201, [1999] 3 S.C.R. 456 (S.C.C.) — refered to in a minority or dissenting opinion

R. v. Poulin (2019), 2019 SCC 47, 2019 CSC 47, 2019 CarswellQue 8570, 2019 CarswellQue 8571, 438 D.L.R. (4th) 1, 379 C.C.C. (3d) 513, 58 C.R. (7th) 249, 443 C.R.R. (2d) 225 (S.C.C.) — refered to in a minority or dissenting opinion

R. v. Powley (2003), 2003 SCC 43, 2003 CarswellOnt 3502, 2003 CarswellOnt 3503, 230 D.L.R. (4th) 1, 177 C.C.C. (3d) 193, [2003] 4 C.N.L.R. 321, 308 N.R. 201, 177 O.A.C. 201, 5 C.E.L.R. (3d) 1, 110 C.R.R. (2d) 92, 68 O.R. (3d) 255 (note), [2003] 2 S.C.R. 207, 68 O.R. (3d) 255, 2003 CSC 43 (S.C.C.) — refered to in a minority or dissenting opinion

R. v. Sparrow (1990), 70 D.L.R. (4th) 385, 111 N.R. 241, [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160, 46 B.C.L.R. (2d) 1, 56 C.C.C. (3d) 263, [1990] 4 W.W.R. 410, 1990 CarswellBC 105, 1990 CarswellBC 756 (S.C.C.) — refered to in a minority or dissenting opinion

R. v. Stillman (2019), 2019 SCC 40, 2019 CSC 40, 2019 CarswellNat 3542, 2019 CarswellNat 3543, 436 D.L.R. (4th) 193, 56 C.R. (7th) 215, 439 C.R.R. (2d) 288 (S.C.C.) — refered to in a minority or dissenting opinion

R. v. Van der Peet (1996), [1996] 9 W.W.R. 1, 23 B.C.L.R. (3d) 1, 50 C.R. (4th) 1, 1996 CarswellBC 2309, 1996 CarswellBC 2310, 80 B.C.A.C. 81, 109 C.C.C. (3d) 1, [1996] 4 C.N.L.R. 177, 137 D.L.R. (4th) 289, 200 N.R. 1, [1996] 2 S.C.R. 507, 130 W.A.C. 81 (S.C.C.) — considered in a minority or dissenting opinion

Reference re Secession of Quebec (1998), 1998 CarswellNat 1299, 161 D.L.R. (4th) 385, 228 N.R. 203, 55 C.R.R. (2d) 1, [1998] 2 S.C.R. 217, 1998 CarswellNat 1300 (S.C.C.) — refered to in a minority or dissenting opinion

Tsilhqot'in Nation v. British Columbia (2014), 2014 SCC 44, 2014 CSC 44, 2014 CarswellBC 1814, 2014 CarswellBC 1815, [2014] 7 W.W.R. 633, 43 R.P.R. (5th) 1, 58 B.C.L.R. (5th) 1, (sub nom. *William v. British Columbia)* 459 N.R. 287, (sub nom. *Tsilhqot'in Nation v. British Columbia)* [2014] 3 C.N.L.R. 362, 374 D.L.R. (4th) 1, (sub nom. *William v. British Columbia)* 356 B.C.A.C. 1, (sub nom. *William v. British Columbia)* 610 W.A.C. 1, (sub nom. *Tsilhqot'in Nation v.*

British Columbia) [2014] 2 S.C.R. 257, *(*sub nom. *Tsilhoqot'in Nation v. British Columbia)* 312 C.R.R. (2d) 309 (S.C.C.) — refered to in a minority or dissenting opinion

Vancouver Island Railway, An Act Respecting, Re (1994), [1994] 6 W.W.R. 1, *(*sub nom. *British Columbia (Attorney General) v. Canada (Attorney General))* 91 B.C.L.R. (2d) 1, 166 N.R. 81, 21 Admin. L.R. (2d) 1, 114 D.L.R. (4th) 193, 44 B.C.A.C. 1, 71 W.A.C. 1, [1994] 2 S.C.R. 41, 1994 CarswellBC 188, 1994 CarswellBC 1239 (S.C.C.) — refered to in a minority or dissenting opinion

Cases considered by *Moldaver J.* (dissenting):

R. v. Van der Peet (1996), [1996] 9 W.W.R. 1, 23 B.C.L.R. (3d) 1, 50 C.R. (4th) 1, 1996 CarswellBC 2309, 1996 CarswellBC 2310, 80 B.C.A.C. 81, 109 C.C.C. (3d) 1, [1996] 4 C.N.L.R. 177, 137 D.L.R. (4th) 289, 200 N.R. 1, [1996] 2 S.C.R. 507, 130 W.A.C. 81 (S.C.C.) — refered to in a minority or dissenting opinion

Statutes considered by *Rowe 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

Generally — referred to

s. 25 — considered

Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

s. 91 ¶ 24 — referred to

Constitution Act, 1930 (U.K.), 20 & 21 Geo. 5, c. 26, reprinted R.S.C. 1985, App. II, No. 26

Sched. (1) — referred to

Sched. (2) — referred to

Sched. (3) — referred to

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44

Generally — considered

s. 35 — considered

s. 35(1) — considered

s. 35(2) "aboriginal peoples of Canada" — considered

s. 35.1 [en. SI/84-102] — referred to

s. 35.1(b) [en. SI/84-102] — referred to

s. 37 — referred to

s. 37(2) — referred to

s. 37.1 [en. SI/84-102] — referred to

s. 37.1(2) [en. SI/84-102] — referred to

s. 52 — referred to

Game Protection Act, 1895, An Act to Amend the, S.B.C. 1896, c. 22

Generally — considered

Royal Proclamation, 1763 (U.K.), reprinted R.S.C. 1985, App. II, No. 1

Generally — referred to

Wildlife Act, R.S.B.C. 1996, c. 488

Generally — referred to

s. 11(1) — referred to

s. 47(a) — referred to

Statutes considered by *Côté J.* (dissenting):

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 — considered

s. 3 — referred to

s. 6 — referred to

s. 16 — referred to

s. 20 — referred to

s. 21 — referred to

s. 23 — referred to

s. 32 — referred to

Constitution Act, 1930 (U.K.), 20 & 21 Geo. 5, c. 26, reprinted R.S.C. 1985, App. II, No. 26

Sched. 1 — referred to

Sched. 2 — referred to

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44

Generally — considered

s. 35 — considered

s. 35(1) — considered

s. 35(2) — referred to

s. 35.1 [en. SI/84-102] — considered

s. 36 — referred to

s. 37 — referred to

s. 37.1 [en. SI/84-102] — referred to

s. 52 — referred to

Game Protection Act, 1895, An Act to Amend the, S.B.C. 1896, c. 22

Generally — referred to

Wildlife Act, R.S.B.C. 1996, c. 488

s. 11(1) — referred to

s. 47(a) — referred to

Statutes considered by *Moldaver J.* (dissenting):

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44

s. 35(1) — referred to

APPEAL by Crown from judgment reported at *R. v. Desautel* (2019), 2019 BCCA 151, 2019 CarswellBC 1146, 433 D.L.R. (4th) 544, 24 B.C.L.R. (6th) 48, [2020] 2 W.W.R. 191, [2019] 4 C.N.L.R. 217 (B.C. C.A.), regarding constitutional question of whether provisions of *Wildlife Act* were of no force or effect respecting individual by reason of Aboriginal right within meaning of s. 35 of *Constitution Act, 1982*.

POURVOI formé par la Couronne à l'encontre d'un jugement publié à *R. v. Desautel* (2019), 2019 BCCA 151, 2019 CarswellBC 1146, 433 D.L.R. (4th) 544, 24 B.C.L.R. (6th) 48, [2020] 2 W.W.R. 191, [2019] 4 C.N.L.R. 217 (B.C. C.A.), concernant la question constitutionnelle de savoir si les dispositions de la *Wildlife Act* étaient inopérantes ou inapplicables à l'égard d'un individu en raison d'un droit ancestral au sens de l'art. 35 de la *Loi constitutionnelle de 1982*.

Rowe J. **(Wagner C.J.C. and Abella, Karakatsanis, Brown, Martin and Kasirer JJ. concurring):**

1 Richard Lee Desautel entered Canada legally from the United States of America. He shot an elk contrary to provincial wildlife rules and advised provincial authorities that he had done so. As he expected, he was charged for this. He defended the charges on the basis that he had an Aboriginal right to hunt the elk, one which is protected by s. 35(1) of the Constitution Act, 1982. Thus, this is a test case, the central issue being whether persons who are not Canadian citizens and who do not reside in Canada can exercise an Aboriginal right that is protected by s. 35(1). For the reasons that follow, I would say yes. On a purposive interpretation of s. 35(1), the scope of "aboriginal peoples of Canada" is clear: it must mean the modern-day successors of Aboriginal societies that occupied Canadian territory at the time of European contact.

2 Beyond agreeing with Mr. Desautel on this central issue, I will say little more about what that means for the exercise of rights protected under s. 35(1). That follows for two reasons. First, questions of law are better resolved in cases where there is a dispute that requires the answering of those questions. And, second, the defence of a prosecution for a provincial regulatory offence, while it may serve as a test case (as here), is not well-suited to deal with such broader issues. Such issues are better dealt with in an action setting out the right claimed, with a full evidentiary record, and seeking declaratory relief. I will return to such matters toward the end of my reasons.

I. Background

3 On October 14, 2010, Mr. Desautel shot one cow-elk near Castlegar, British Columbia. He was charged with hunting without a licence contrary to s. 11(1) of the Wildlife Act, R.S.B.C. 1996, c. 488, and hunting big game while not being a resident contrary to s. 47(a) of the Act. He did not have a licence and was not a resident of British Columbia. Mr. Desautel is a citizen of the United States, and a resident of Ichelium in the State of Washington. Mr. Desautel admitted the *actus reus* of the offences, but raised a defence that he was exercising his Aboriginal right to hunt in the traditional territory of his Sinixt ancestors, a right protected under s. 35(1).

4 Mr. Desautel is a member of the Lakes Tribe of the Colville Confederated Tribes based in the State of Washington in the United States, a successor group of the Sinixt people. At trial, the year 1811 was accepted as the date of first contact between the Sinixt and Europeans. At this time, the Sinixt were engaged in a seasonal round of hunting, fishing, and gathering, travelling largely by canoe in their ancestral territory. This territory ran as far south as an island just above Kettle Falls, in what is now Washington State, and as far north as the Big Bend of the Columbia River, north of Revelstoke in what is now British Columbia. The place where Mr. Desautel shot the elk in October 2010 was within the ancestral territory of the Sinixt.

5 Over the course of the latter half of the 19th century, the Sinixt gradually moved to occupy the southern portion of their territory full-time, the portion that lies in the United States. Until around the year 1870, the Sinixt continued their seasonal round in the northern portion of their territory, located in Canada. In the course of time, a "constellation of factors" made the Sinixt people move to the United States (2017 BCPC 84, [2018] 1 C.N.L.R. 97. By 1872, a number of members of the Sinixt were living for the most part in Washington State. The trial judge did not find that the Sinixt were forced out of Canada "at gunpoint" (para. 101), but nor did she find that the move was voluntary, as the Lakes Tribe never gave up their claim to their traditional territory in Canada. Until the year 1930, the evidence clearly showed that members of the Lakes Tribe continued to hunt in British Columbia, despite living on the Colville Reserve in Washington State and in the face of the creation of an

international border by the 1846 Oregon Boundary Treaty and the outlawing of their hunting by British Columbia through the Game Protection Amendment Act, 1896, S.B.C., c. 22. From 1930 until 1972, there may have been a period of dormancy. As was found at trial, the Lakes Tribe continues to have a connection to the land where their ancestors hunted in British Columbia.

6 Meanwhile, the population of Sinixt who had remained in Canada was small. By 1902, only 21 Sinixt still lived on their traditional territory in Canada, in the Arrow Lakes Band reserve. By 1930, only one person remained on the rolls of the Arrow Lakes Band, and after her death in 1956, the government of Canada declared the Arrow Lakes Band extinct, and the reserve lands reverted to the provincial Crown.

II. Judicial History

A. British Columbia Provincial Court, 2017 BCPC 84, [2018] 1 C.N.L.R. 97 (Mrozinski J.)

7 The trial judge held that there was no doubt that Mr. Desautel is a member of the Lakes Tribe, and saw the Lakes Tribe as a clear successor group to the Sinixt, such that the communal rights of the Sinixt could continue with the Lakes Tribe. The trial judge applied the test this Court set out in *R. v. Van der Peet*, [1996] 2 S.C.R. 507. She held that Mr. Desautel was exercising an Aboriginal right to hunt for food, social and ceremonial purposes guaranteed by s. 35(1) of the Constitution Act, 1982.

8 Despite the Lakes Tribe's departure from the northern part of their traditional territory, its members remained connected to that geographical area. The evidence demonstrated that the land and the traditions were not forgotten, and that the connection to the land was still present in the minds of the members of the Lakes Tribe. The trial judge found that the requirement of continuity was met, notwithstanding a period of dormancy between 1930 and 1972, because there is no requirement of "an unbroken chain of continuity" (*Van der Peet*, at para. 65).

9 Moreover, the trial judge decided it was not necessary to define the Aboriginal right as including a mobility right, so no issue of sovereign incompatibility arose. Mr. Desautel's Aboriginal right remained in existence and was protected by s. 35(1). The trial judge held that the right was infringed by the provisions of the *Wildlife Act* and the infringement was not justified. Mr. Desautel was acquitted.

B. British Columbia Superior Court, 2017 BCSC 2389, [2018] 1 C.N.L.R. 135 (Sewell J.)

10 The appeal was dismissed. The summary conviction appeal judge held that the Sinixt people are the relevant collective and that modern-day Lakes Tribe members are entitled to assert the Aboriginal rights held by the Sinixt, based on practices that were part of their distinctive culture at the time of contact, in their traditional territory in British Columbia. According to the summary conviction appeal judge, the words "aboriginal peoples of Canada" in s. 35(1) must be interpreted in a purposive way, and mean Aboriginal peoples who, prior to contact, occupied what became Canada. Therefore, modern-day members of the Sinixt are not precluded from asserting rights under s. 35(1) merely because they now live in the United States. This interpretation of s. 35(1) is consistent with the objective of reconciliation. To establish an Aboriginal right to hunt, Mr. Desautel had to meet the requirements of the *Van der Peet* test. The summary conviction appeal judge found that the trial judge made no error in applying the *Van der Peet* test.

11 The summary conviction appeal judge held that Mr. Desautel's Aboriginal right to hunt is not incompatible with Canadian sovereignty. The fact that the government of Canada has the right to control its borders is not fatal to the assertion of an Aboriginal right to hunt in Canada by an Aboriginal group located in the United States. Mr. Desautel was not charged with coming into Canada unlawfully and there was no evidence that he was denied entry. In contrast with the claimant in *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911, Mr. Desautel was not asserting an Aboriginal right to cross the border.

C. British Columbia Court of Appeal, 2019 BCCA 151 (B.C. C.A.) , 24 B.C.L.R. (6th) 48 (Smith, Willcock and Fitch JJ.A.)

12 The Crown's appeal was dismissed. Under a purposive approach, the Court of Appeal concluded that an Aboriginal group that does not reside in Canada and whose members are neither residents nor citizens of Canada can claim constitutional rights under s. 35(1) of the Constitution Act, 1982. It is not a requirement that there be a present-day Aboriginal community in the

geographic area where the claimed right is exercised. In this case, the Court of Appeal found that the relevant historic collective is the Sinixt and that the Lakes Tribe is a modern collective descended from the Sinixt. The finding of the trial judge that the chain of continuity had not been broken was entitled to deference. There is no requirement under the *Van der Peet* test, according to the Court of Appeal, that the claimant must be a member of a contemporary Aboriginal community currently located in the geographic area where the right was historically exercised. Imposing such a requirement would fail to take into account the Aboriginal perspective, the realities of colonization and displacement, and the goal of reconciliation. The Court of Appeal concluded that the rights of Mr. Desautel's community to hunt on their ancestral lands in British Columbia were never voluntarily surrendered, abandoned or extinguished. Therefore, Mr. Desautel has an Aboriginal right to hunt in British Columbia.

13 It was further held that practical concerns about the expansion of Canada's duty to consult to Aboriginal groups in the United States could not prevent a court from recognizing their inherent rights. Finally, the Court of Appeal determined that it was not necessary to consider Mr. Desautel's incidental mobility right to cross the border and the compatibility of such a right with Canadian sovereignty, because this issue was not addressed at trial and its resolution was not necessary for the determination of the appeal.

III. Issue

14 The appellant Her Majesty the Queen in Right of British Columbia (hereinafter "the Crown") raises the following constitutional question:

> Are ss. 11(1) and 47(a) of the *Wildlife Act*, R.S.B.C. 1996, c. 488, as they read in October 2010, of no force or effect with respect to the respondent, being a member of the Lakes Tribe of the Confederated Tribes of the Colville Reservation in Washington State, U.S.A., in virtue of s. 52 of the *Constitution Act, 1982*, by reason of an Aboriginal right within the meaning of s. 35 of the *Constitution Act, 1982*, invoked by the respondent?
>
> (A.R., vol. I, at p. 139)

15 To answer this question, the Court must determine whether an Aboriginal people located outside Canada can assert rights protected under s. 35(1) of the Constitution Act, 1982.

IV. Submissions of the Parties

A. Appellant: Her Majesty the Queen in Right of British Columbia

16 The Crown's main submission is that Mr. Desautel cannot assert Aboriginal rights under s. 35(1) because the scope of this provision is limited to Aboriginal peoples located in Canada. At best, Mr. Desautel can claim a common law right to hunt, which would not constitute a defence to the regulatory charges against him. In the Crown's submission, the *Van der Peet* test for the recognition of rights under s. 35(1) requires the presence of a present-day collective in the area where the right was exercised historically. In the present case, the relevant modern collective would be the Lakes Tribe, a group located in the State of Washington, not in British Columbia. Moreover, because Mr. Desautel is a resident of the United States, the exercise of the right to hunt in British Columbia necessarily involves an incidental mobility right to cross the border, which is incompatible with Canadian sovereignty, and the result is that the s. 35(1) Aboriginal right claimed by Mr. Desautel never came into existence.

B. Respondent: Mr. Desautel

17 Mr. Desautel argues that he has an Aboriginal right to hunt in the ancestral territory of the Sinixt, the relevant modern-day collective, in British Columbia. This right is protected under s. 35(1). To assert s. 35(1) rights, he argues, the only test that an Aboriginal people has to pass is the *Van der Peet* test. Therefore, there is no threshold issue distinct from the test elaborated by this Court for the recognition of Aboriginal rights. Moreover, the *Van der Peet* test has never required an additional requirement of geographic continuity. The fact that an Aboriginal people is solely based outside Canada has no impact on the recognition of the right as long as the requirements of the *Van der Peet* test are met. Finally, Mr. Desautel submits that there is no mobility right at issue in this case.

V. Analysis

A. The Scope of Section 35(1)

(1) The Threshold Question

18 Section 35(1) of the Constitution Act, 1982, says:

> The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés.

It is clear from the text of s. 35(1) that, to fall within its scope, an Aboriginal group must be an "aboriginal peopl[e] of Canada". The question raised by this appeal is whether a group whose members are neither Canadian citizens nor Canadian residents can meet this condition. The text of s. 35(1) does not provide a clear answer to this question. The words "of Canada" are capable of different meanings, as "of" can be used to express a range of different relationships.

19 Whether a group is an Aboriginal people of Canada is, analytically speaking, a different question from whether the group has an Aboriginal right. This Court's decision in *Van der Peet* was about the latter question. It set out a test for having an Aboriginal right, not for being an Aboriginal people of Canada. The *Van der Peet* test by itself is not, therefore, dispositive of this appeal. That said, evidence that is relevant to the question whether a group has an Aboriginal right may also be relevant to the question whether the group is an Aboriginal people of Canada.

20 Whether a group is an Aboriginal people of Canada is a threshold question, in the sense that if a group is *not* an Aboriginal people of Canada, there is no need to proceed to the *Van der Peet* test. But this threshold question does not arise in every case. In most cases there is no doubt that the claimant belongs to an Aboriginal people of Canada, so there is no need to address the threshold question. The threshold question is likely to arise only where there is some ground for doubt, such as where the group is located outside of Canada. It should not be construed as an additional burden on rights claimants that has to be satisfied in every case.

21 No previous decision of this Court interprets the scope of the words "aboriginal peoples of Canada" in s. 35(1). That is our task here. As this Court has often recognized, s. 35(1) must be interpreted in a purposive way (*R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1106; *Van der Peet* , at paras. 21-22; Manitoba Metis Federation Inc. v. Canada (Attorney General) 2013 SCC 14, [2013] 1 S.C.R. 623, at para. 76).

22 For the reasons that follow, I am of the view that a consistent development of this Court's s. 35(1) jurisprudence requires that groups located outside Canada can be Aboriginal peoples of Canada. As I will explain, the two purposes of s. 35(1) are to recognize the prior occupation of Canada by organized, autonomous societies and to reconcile their modern-day existence with the Crown's assertion of sovereignty over them. These purposes are reflected in the structure of Aboriginal rights and title doctrine, which first looks back to the practices of groups that occupied Canadian territory prior to European contact, sovereignty or effective control, and then expresses those practices as constitutional rights held by modern-day successor groups within the Canadian legal order. The same purposes are reflected in the principle of the honour of the Crown, under which the Crown's historic assertion of sovereignty over Aboriginal societies gives rise to continuing obligations to their successors as part of an ongoing process of reconciliation.

23 On this interpretation, the scope of "aboriginal peoples of Canada" is clear: it must mean the modern-day successors of Aboriginal societies that occupied Canadian territory at the time of European contact. As a result, groups whose members are neither citizens nor residents of Canada can be Aboriginal peoples of Canada.

(2) A Purposive Interpretation of Section 35(1)

24 The prior occupation of Canadian territory by organized Aboriginal societies was recognized before s. 35(1) was enacted. In *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313, the claimants sought a declaration of Aboriginal title in their traditional territory. While the claim was unsuccessful, Judson J. characterized the source of Aboriginal title in comments that have been repeatedly cited by this Court: "the fact is that when the settlers came, *the Indians were there, organized in societies and occupying the land* as their forefathers had done for centuries. This is what Indian title means" (*Calder*, at p. 328 (emphasis added); see also *Roberts v. Canada*, [1989] 1 S.C.R. 322, at p. 340; *Guerin v. The Queen*, [1984] 2 S.C.R. 335, at pp. 377-78). This point was taken up in *Sparrow*, where this Court laid out the analysis for justified infringements of Aboriginal rights. In finding that the Musqueam had an Aboriginal right protected by s. 35(1), Dickson C.J. and La Forest J. observed that they "*have lived in the area as an organized society long before* the coming of European settlers" (*Sparrow*, at p. 1094 (emphasis added)).

25 In *R. v. Badger*, [1996] 1 S.C.R. 771, this Court confirmed that the *Sparrow* test applies to infringements of treaty rights. In arriving at this conclusion, Cory J. drew on a second theme from the pre-1982 jurisprudence. The Crown's assertion of sovereignty over Aboriginal societies, he held, gave rise to a distinctive legal relationship. "[B]oth aboriginal and treaty rights possess in common a unique, *sui generis* nature. In each case, *the honour of the Crown is engaged through its relationship with the native people*" (*Badger* , at para. 78 (emphasis added; citations omitted)). In the treaty context, this principle can be traced back to the dissenting reasons of Gwynne J. in *Province of Ontario v. Dominion of Canada and Province of Quebec*, (1895), 25 S.C.R. 434, at pp. 511-12; and in *Ontario Mining Co. v. Seybold*, (1901), 32 S.C.R. 1, at p. 2.

26 These two themes were brought out explicitly in *Van der Peet* , where Lamer C.J. set out the test for Aboriginal rights. Lamer C.J. first observed, at para. 30, that "when Europeans arrived in North America, aboriginal peoples *were already here*, living in communities on the land, and participating in distinctive cultures, as they had done for centuries" (emphasis in original). Second, he wrote at para. 31, s. 35(1) is "the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown". In short,

> the aboriginal rights recognized and affirmed by s. 35(1) are best understood as, first, the means by which the Constitution recognizes the fact that prior to the arrival of Europeans in North America the land was already occupied by distinctive aboriginal societies, and as, second, the means by which that prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory. [para. 43]

27 The two purposes of s. 35(1) underlie the test for Aboriginal rights set out in *Van der Peet* . The court first looks back to the historic practices of Aboriginal societies in Canada prior to contact, and second, recognizes those practices as Aboriginal rights held by their modern-day successors within the Canadian legal order: R. v. Gladstone [1996] 2 S.C.R. 723, at para. 73; *Mitchell*, at para. 12. In R. v. Sappier 2006 SCC 54, [2006] 2 S.C.R. 686, at para. 45, Bastarache J. explained that the doctrine of Aboriginal rights "arises from the simple fact of prior occupation of the lands now forming Canada". He added that "[t]he 'distinctive aboriginal culture' must be taken to refer to the reality that, *despite British sovereignty, aboriginal people were the original organized society occupying and using Canadian lands*" (para. 45, quoting the dissenting reasons of L'Heureux-Dubé J. in Van der Peet, at para. 159 (emphasis added)).

28 The test for Aboriginal title, a variation of the *Van der Peet* test, reflects the same two purposes. In *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, this Court explained that Aboriginal title has two sources: first, Aboriginal possession of the land before the assertion of Crown sovereignty, and second, "the relationship between common law and pre-existing systems of aboriginal law" (para. 114). As LeBel J., concurring in R. v. Marshall 2005 SCC 43, [2005] 2 S.C.R. 220, at para. 129, explained:

> As with all aboriginal rights protected by s. 35(1) of the *Constitution Act, 1982*, aboriginal title arises from the prior possession of land and the prior social organization and distinctive cultures of aboriginal peoples on that land. It originates from "the prior occupation of Canada by aboriginal peoples" and from "the relationship between common law and pre-existing systems of aboriginal law". [Citations omitted.]

The test for title looks back to the historic occupation of Canadian territory by Aboriginal societies at the date of Crown sovereignty and recognizes this occupation as Aboriginal title, "a burden on the Crown's underlying title" (*Delgamuukw*, at para. 145), within the Canadian legal order.

29 The two purposes of s. 35(1) were reiterated in *Mitchell* by McLachlin C.J., who said:

> Long before Europeans explored and settled North America, aboriginal peoples were occupying and using most of this vast expanse of land in organized, distinctive societies with their own social and political structures. ... [T]he Crown asserted that sovereignty over the land, and ownership of its underlying title, vested in the Crown. With this assertion arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation, a duty characterized as "fiduciary" in *Guerin*. [Emphasis added; citations omitted; para 9.]

30 In this Court's recent jurisprudence, the special relationship between Aboriginal peoples and the Crown has been articulated in terms of the honour of the Crown. As was explained by McLachlin C.J. and Karakatsanis J. in Manitoba Metis, at para. 67:

> The honour of the Crown [...] recognizes the impact of the "superimposition of European laws and customs" on pre-existing Aboriginal societies. Aboriginal peoples were here first, and they were never conquered; yet, they became subject to a legal system that they did not share. Historical treaties were framed in that unfamiliar legal system, and negotiated and drafted in a foreign language. The honour of the Crown characterizes the "special relationship" that arises out of this colonial practice. [Emphasis added; citations omitted.]

While the honour of the Crown looks back to this historic impact, it also looks forward to reconciliation between the Crown and Aboriginal peoples in an ongoing, "mutually respectful long-term relationship" (Beckman v. Little Salmon/Carmacks First Nation 2010 SCC 53, [2010] 3 S.C.R. 103, at para. 10; see also Mikisew Cree First Nation v. Canada (Governor General in Council) 2018 SCC 40, [2018] 2 S.C.R. 765, at para. 21, per Karakatsanis J.; and Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam) 2020 SCC 4, at paras. 21 and 28, per Wagner C.J. and Abella and Karakatsanis JJ.; and at paras. 207-8, per Brown and Rowe JJ., dissenting). The honour of the Crown requires that Aboriginal rights be determined and respected, and may require the Crown to consult and accommodate while the negotiation process continues (Haida Nation v. British Columbia (Minister of Forests) 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 25; see also Taku River Tlingit First Nation v. British Columbia (Project Assessment Director) 2004 SCC 74, [2004] 3 S.C.R. 550, at para. 24). It also requires that the Crown act diligently to fulfill its constitutional obligations to Aboriginal peoples (*Manitoba Metis*, at para. 75).

31 As this review of the jurisprudence shows, s. 35(1) serves to recognize the prior occupation of Canada by Aboriginal societies and to reconcile their contemporary existence with Crown sovereignty. These purposes are expressed in the doctrinal structure of Aboriginal law, which gives effect to rights and relationships that arise from the prior occupation of Canada by Aboriginal societies. Implicit in this doctrinal structure, and the purposes that underlie it, is the answer to our question. The Aboriginal peoples of Canada under s. 35(1) are the modern successors of those Aboriginal societies that occupied Canadian territory at the time of European contact. This may include Aboriginal groups that are now outside Canada.

32 I hasten to add that this criterion will need to be modified in the case of the Métis. Because Métis communities arose after contact between other Aboriginal peoples and Europeans, "the manner in which the aboriginal rights of other aboriginal peoples are defined is not necessarily determinative of the manner in which the aboriginal rights of the Métis are defined" (*Van der Peet*, at para. 67). Given that the present case is not about Métis s. 35(1) rights, I leave for another day precisely what criterion should be applied to determine whether a Métis community is an "aboriginal peopl[e] of Canada", in cases where there is doubt.

33 I would add that an interpretation of "aboriginal peoples of Canada" in s. 35(1) that includes Aboriginal peoples who were here when the Europeans arrived and later moved or were forced to move elsewhere, or on whom international boundaries were imposed, reflects the purpose of reconciliation. The displacement of Aboriginal peoples as a result of colonization is well acknowledged:

> Aboriginal peoples were displaced physically — they were denied access to their traditional territories and in many cases actually forced to move to new locations selected for them by colonial authorities. They were also displaced socially and culturally, subject to intensive missionary activity and the establishment of schools — which undermined their ability to pass on traditional values to their children, imposed male-oriented Victorian values, and attacked traditional activities such as significant dances and other ceremonies. In North America they were also displaced politically, forced by colonial laws to abandon or at least disguise traditional governing structures and processes in favour of colonial-style municipal institutions.
>
> (*Report of the Royal Commission on Aboriginal Peoples*, vol. 1, *Looking Forward, Looking Back* (1996), at pp. 139-40)

By contrast, an interpretation that excludes Aboriginal peoples who were forced to move out of Canada would risk "perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers" (R. v. Côté [1996] 3 S.C.R. 139, at para. 53).

34 Moreover, it bears emphasis that s. 35(1) did not create Aboriginal rights. As *Calder* and indeed the Royal Proclamation, 1763 (G.B.), 3 Geo. 3 (reproduced in R.S.C. 1985, App. II, No. 1), show, Aboriginal rights long predated 1982 (see M. D. Walters, "The 'Golden Thread' of Continuity: Aboriginal Customs at Common Law and Under the Constitution Act, 1982" (1999), 44 McGill L.J. 711). What s. 35(1) did was to give Aboriginal and treaty rights — which it explicitly recognizes as already "existing" — constitutional protection (*Van der Peet*, at paras. 28-29). Even though some s. 35(1) Aboriginal rights would not have been recognized under pre-1982 Canadian law (*Côté*, at para. 52), the practices, customs and traditions that underlie these rights existed before 1982. An interpretation of s. 35(1) that limits its scope to those Aboriginal peoples who were located in Canada in 1982 would fail to give effect to this point by treating s. 35(1) as the source of Aboriginal rights.

(3) Additional Arguments

35 The parties and interveners made a range of additional arguments about the scope of s. 35(1). I do not take any of these arguments to be determinative, but will explain how they are consistent with the interpretation set out above.

(a) Alternative Wording for Section 35(1)

36 Several parties made submissions on what the words "of Canada" in s. 35(1) must mean. Both the Crown and Mr. Desautel suggested alternative wording that might have been used instead, had the drafters of the *Constitution Act, 1982*, wished to exclude their favoured interpretations. I give these arguments no weight. As I explained earlier, the words used in s. 35(1) are capable of different meanings when considered in isolation.

37 However, the phrase "*aboriginal* peoples" does perhaps suggest those who were here *originally* — before the Europeans — in line with the interpretation I have set out. As Lord Denning once wrote, "[t]he Indian peoples of Canada have been there from the beginning of time. So they are called the 'aboriginal peoples'": R. v. Secretary of State for Foreign & Commonwealth Affairs1982[1981] 4 C.N.L.R. 86 (E.W.C.A.).

(b) Context Within the Constitution Act, 1982

38 The phrase "aboriginal peoples of Canada" is used elsewhere in the *Constitution Act, 1982*. It is used in ss. 25 ("The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to *the aboriginal peoples of Canada*"), 35(2) ("In this Act, *aboriginal peoples of Canada* includes the Indian, Inuit and Métis peoples of Canada"), 35.1(*b*) ("the Prime Minister of Canada will invite representatives of *the aboriginal peoples of Canada* to participate in the discussions on [certain amendments to the Constitution]"), and the now-spent and repealed ss. 37(2) ("[The planned constitutional conference] shall have included in its agenda an item respecting constitutional matters that directly affect *the aboriginal peoples of Canada*, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on that item") and 37.1(2) ("[Each other planned constitutional conference] shall have included in its agenda constitutional matters that directly affect *the aboriginal*

peoples of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on those matters").

39 While there may be reason to interpret the phrase "aboriginal peoples of Canada" in the same way across the *Constitution Act, 1982*, this provides little assistance in the present appeal. Section 25 shields the rights and freedoms that pertain to Aboriginal peoples of Canada from being abrogated by the *Canadian Charter of Rights and Freedoms*, but it does not tell us who those peoples are. While the text of s. 35(2) defines Aboriginal peoples to include the Indian, Inuit and Métis peoples of Canada, this does not specify whether they must be citizens or residents of Canada.

40 Nor do I take anything from the requirement under s. 35.1 and the repealed ss. 37 and 37.1 that the Aboriginal peoples of Canada be represented at constitutional conferences. The Crown points out that representatives of the Lakes Tribe have not been invited to the constitutional conferences held so far. But the practice at these conferences was for Aboriginal peoples to be represented by umbrella organizations (see *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627, and R. Romanow, "Aboriginal Rights in the Constitutional Process", in M. Boldt and J. A. Long, eds., *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (1985), 73). It is not clear that there would be any obstacle to Aboriginal peoples outside of Canada being represented in such processes. The requirement of representation at constitutional conferences thus offers no guidance here.

(c) Legislative History

41 The Crown suggested that insight into the scope of s. 35(1) can be drawn from the *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*. I agree that drafting history can be relevant to constitutional interpretation (see R. v. Poulin 2019 SCC 47, at para. 78). But in this case it sheds no light. There is nothing in the record to show that the members of the Committee turned their minds at all to the question of non-citizen or non-resident Aboriginal peoples of Canada.

(d) The 1930 Natural Resources Transfer Agreements

42 The Crown and the Attorney General of Saskatchewan submit that s. 35(1) should be interpreted similarly to the Natural Resources Transfer Agreements ("NRTAs"), which were entered into between Canada and each of the Prairie provinces using nearly identical language, and added as schedules to the Constitution. The NRTAs use both the phrases "Indians of the Province" and "Indians within the boundaries thereof". [1] In *Frank v. The Queen*, [1978] S.C.R. 95, at pp. 101-2, this Court explained that the former was narrower than the latter, in that the latter included "Indians" who were passing through the province, not just those ordinarily resident in the province. Respectfully, there is no reason why "aboriginal peoples of Canada" in s. 35(1) of the Constitution Act, 1982, should be interpreted the same way as "Indians of the Province" in the NRTAs. In Daniels v. Canada (Indian Affairs and Northern Development) 2016 SCC 12, [2016] 1 S.C.R. 99, this Court held that s. 91(24) of the Constitution Act, 1867, was broader than the NRTAs: the Métis are "Indians" under s. 91(24), but not under the NRTAs. The NRTAs, this Court explained, are "constitutional agreement[s], not the Constitution", which requires "a completely different interpretive exercise" (para. 44).

(e) The Presumption of Territoriality

43 The Crown notes that there is a presumption, rebuttable only by clear words or necessary implication, that legislation does not apply extraterritorially (Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers 2004 SCC 45, [2004] 2 S.C.R. 427, at paras. 54-55). As a result, it argues, s. 35(1) should be presumed to apply only to groups within Canada, and nothing in the text rebuts that presumption. But the presumption has no effect here. Section 35(1) applies to groups outside of Canada only when claiming or exercising their rights within Canada. The presumption of territoriality does not preclude such application, any more than it precludes the application of Canadian land laws to foreign owners of Canadian property.

(f) Principles of Construction and the Aboriginal Perspective

44 Several interveners suggest that interpretive principles in favour of Aboriginal peoples are relevant here. Relatedly, Mr. Desautel and some interveners also suggest that Aboriginal perspectives should be taken into account in interpreting s. 35(1).

45 The relevant interpretive principle is that, in interpreting s. 35(1), any doubt or ambiguity should be resolved in favour of Aboriginal peoples (*Van der Peet*, at para. 25; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 36). In my view, this principle does not help settle the question at issue here. A principle that ambiguities should be resolved in favour of Aboriginal peoples does not determine who those very Aboriginal peoples are. To attempt to use the principle in this way would be circular.

46 That said, Mr. Desautel and several interveners explain that Aboriginal perspectives involve a strong connection to ancestral territory, even where the Aboriginal group has been dispossessed of that territory, or where the territory is now divided by international borders. As this Court held in *Sparrow*, at p. 1112, it is "crucia[l] to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake". Therefore, "a morally and politically defensible conception of aboriginal rights will incorporate both [Aboriginal and non-Aboriginal] legal perspectives" (*Van der Peet* , at para. 49, citing M. Walters, “British Imperial Constitutional Law and Aboriginal Rights: A Comment on Delgamuukw v. British Columbia”, (1992) 17 Queen's L.J. 350, at p. 413; see also J. Borrows, “Creating an Indigenous Legal Community” (2005), 50 McGill L.J. 153, at p. 173). This perspective confirms the interpretation of s. 35(1) which I set out above.

(4) Application

47 I have concluded that the Aboriginal peoples of Canada under s. 35(1) are the modern-day successors of Aboriginal societies that occupied what is now Canada at the time of European contact (subject to modifications that may be necessary in the case of the Métis). Where this is shown, the threshold question is met and the court ascertains the claimants' rights using the *Van der Peet* test. The threshold question remains relevant in future cases where the claimant group is outside Canada, as *Van der Peet* does not address the required link between the modern-day collective (outside Canada) and the historic collective (that was inside what is now Canada).

48 In the present case, the trial judge found as a fact that the Sinixt had occupied territory in what is now British Columbia at the time of European contact. She also found that the Lakes Tribe were a modern successor of the Sinixt — leaving open the possibility that there may be others. I would defer to this factual finding. The migration of the Lakes Tribe from British Columbia to a different part of their traditional territory in Washington did not cause the group to lose its identity or its status as a successor to the Sinixt.

49 This case does not require the Court to set out criteria for successorship of Aboriginal communities. This is a complex issue that should be dealt with on a fuller factual record, with the benefit of legal argument. For example, consideration would have to be given to the possibility that a community may split over time, or, that two communities may merge into one, as well as to the relative significance of factors such as ancestry, language, culture, law, political institutions and territory in connecting a modern community to its historical predecessor. Some of the difficulties here are brought out in the academic literature (see P. L. A. H. Chartrand, "Background", in P. L. A. H. Chartrand, ed., *Who are Canada's Aboriginal Peoples? Recognition, Definition, and Jurisdiction* (2002), 27; R. K. Groves, “The Curious Instance of the Irregular Band: A Case Study of Canada's Missing Recognition Policy” (2007), 70 Sask. L.R. 153; and B. Olthuis, "The Constitution's Peoples: Approaching Community in the Context of Section 35 of the Constitution Act, 1982” (2009), 54 McGill L.J. 1).

B. The Test for Aboriginal Rights

50 Having found that the Lakes Tribe is an Aboriginal people of Canada, the next question is whether Mr. Desautel's claim satisfies the *Van der Peet* test for an Aboriginal right under s. 35(1). As I will explain, the test for Aboriginal rights for groups outside Canada is the same as the test for groups within Canada, and the trial judge did not err in finding that the test was satisfied here.

(1) The Van der Peet Test

51 The analysis under *Van der Peet* was restated by this Court in Lax Kw'alaams Indian Band v. Canada (Attorney General) 2011 SCC 56, [2011] 3 S.C.R. 535, at para. 46:

> (a) Characterize the right claimed in light of the pleadings and evidence (*Van der Peet*, at para. 53; *Gladstone*, at para. 24; *Mitchell* at paras. 14-19).
>
> (b) Determine whether the claimant has proven that a relevant pre-contact practice, tradition or custom existed and was integral to the distinctive culture of the pre-contact society (*Van der Peet*, at para. 46; *Mitchell*, at para. 12; *Sappier*, at paras. 40-45).
>
> (c) Determine whether the claimed modern right is "demonstrably connected to, and reasonably regarded as a continuation of, the pre-contact practice" (*Lax Kw'alaams*, at para. 46).

52 This analysis has been elaborated in detail in this Court's jurisprudence. For present purposes, it will suffice to comment on the role of continuity in the analysis. Continuity is about whether a modern practice is a continuation of a historic practice. It is different from the threshold question discussed earlier, about whether a modern group is a successor of a historic group. It plays a role both at the second and the third stages of the *Van der Peet* analysis.

53 At the second stage of the *Van der Peet* analysis, continuity can play a role in proof. Showing that a practice is integral to the claimant's culture today, and that it has continuity with pre-contact times, can count as proof that the practice was integral to the claimant's culture pre-contact (*Van der Peet*, at paras. 62-63; *Gladstone*, at para. 28; *Delgamuukw*, at para. 152; Tsilhqot'in Nation v. British Columbia 2014 SCC 44, [2014] 2 S.C.R. 257, at para. 45). As Kent McNeil explains, "continuity of this sort has to be shown only when Aboriginal peoples rely on post-sovereignty occupation or post-contact practices, customs, and traditions as evidence of their pre-sovereignty occupation or pre-contact practices, customs, and traditions" ("Continuity of Aboriginal Rights", in K. Wilkins, ed., *Advancing Aboriginal Claims: Visions/Strategies/Directions* (2004), 127, at p. 138).

54 At the third stage, the question is whether the modern practice which is claimed to be an exercise of an Aboriginal right is connected to, and reasonably seen as a continuation of, the pre-contact practice. At this stage, continuity with the pre-contact practice is required in order for the claimed activity to fall within the scope of the right. It serves to avoid frozen rights, allowing the practice to evolve into modern forms (*Van der Peet*, at para. 64; *Mitchell*, at para. 13). The right claimed "must be allowed to evolve", because "[i]f aboriginal rights are not permitted to evolve and take modern forms, then they will become utterly useless" (*Sappier*, at paras. 48-49).

55 I would emphasize that the assessment of continuity, both at the second and third stages, is a highly fact-specific exercise. As McLachlin C.J. wrote in Mitchell, at para. 36, the weighing of evidence in Aboriginal claims "is generally the domain of the trial judge, who is best situated to assess the evidence as it is presented, and is consequently accorded significant latitude in this regard" (see also Côté, at para. 59).

(2) The Attorney General of Canada's Proposed Framework

56 The intervener Attorney General of Canada submits that the proper approach to determine under what circumstances an Aboriginal claimant located outside Canada can claim rights under s. 35(1) is a contextual one. In particular, it would require non-resident rights claimants to find a connection with a contemporary Aboriginal collective residing in Canada, and to obtain recognition and authorization by that collective to exercise the claimed s. 35(1) rights. The proposed test draws on *R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207, and on the jurisprudence on sheltering rights. As I will explain, I would not give effect to this proposal.

57 In *Powley*, the Court modified, though it did not overrule, the *Van der Peet* test to accommodate the particular situation of the Métis (see paras. 14 and 18). It also offered some comments on how courts can determine membership in the Métis community in the absence of formalized procedures (para. 29). Importantly, these comments were not about *who* is an "aboriginal peopl[e] of Canada" under s. 35(1), but rather about *how* courts can identify Métis individuals. The Court noted that "groups

of Métis have often lacked political structures and have experienced shifts in their members' self-identification" (para. 23), such that "determining membership in the Métis community might not be as simple as verifying membership in ... an Indian band" (para. 29). The Court in *Powley* suggested that an individual who self-identified as Métis also needed to show a link to a historic Métis community and acceptance by a modern successor of that community. This reflected the fact that not all people with both First Nations and European ancestry are Métis.

58 The idea of "sheltering" emerges from case law concerning "whether an Aboriginal person can lawfully 'shelter' under a treaty he is not a signatory to" (R. v. Shipman 2007 ONCA 338, 85 O.R. (3d) 585, at para. 2; R. v. Meshake 2007 ONCA 337, 85 O.R. (3d) 575, at paras. 1-2). In these cases, the Ontario Court of Appeal held that Aboriginal people from other communities can exercise treaty rights only if they have the permission or consent of the community that is a signatory to the treaty (*Shipman*, at paras. 41-46), or as a result of marriage and acceptance in that community (*Meshake*, at paras. 31-33). As this makes clear, the idea of sheltering arises from the specific context of treaty rights.

59 The Attorney General of Canada proposes that we adapt the *Powley* and sheltering frameworks to govern the situation of Aboriginal rights claimants outside Canada. In my view, there is no need to do so in this case. I certainly accept that Aboriginal rights must be grounded in the existence of a historic and present-day community (*Powley*, at para. 24). As this Court wrote in Marshall, at para. 67, "[m]odern-day claimants must establish a connection with the pre-sovereignty group upon whose practices they rely". But this is so for Aboriginal groups inside or outside Canada. It does not support an additional requirement, for groups outside Canada, of recognition by a related Aboriginal collective residing in Canada.

60 This requirement would place a higher burden on Aboriginal communities who seek to claim rights if the group moved, was forced to move, or was divided by the creation of an international border between Canada and the United States. It would risk defining Aboriginal rights "in a manner which excludes some of those the provision was intended to protect" (R. v. Adams [1996] 3 S.C.R. 101, at para. 27). Moreover, it would raise myriad practical difficulties, such as which group within Canada has a say in the recognition of a claimant located outside Canada, where there are competing groups (Hwlitsum First Nation v. Canada (Attorney General)2018 BCCA 276B.C. C.A., 15 B.C.L.R. (6th) 91), which body can represent a collective residing in Canada (*Campbell v. British Columbia (Minister of Forests and Range)*, 2011 BCSC 448, [2011] 3 C.N.L.R. 151), and what happens if there is no related modern collective residing in Canada.

61 For these reasons, the test for an Aboriginal right is the same whether the claimant is inside or outside Canada.

(3) Application

62 In the present case, the Aboriginal right claimed is a right to hunt for food, social and ceremonial purposes within the traditional territory of the Sinixt in British Columbia. The trial judge found, based on the evidence before her, that at the time of contact this practice was integral to the distinctive culture of the Sinixt. She also found that the modern-day practice of hunting in this territory, as Mr. Desautel did, is a continuation of this pre-contact practice. Indeed, setting aside the periods in which no hunting took place, there was no significant dissimilarity between the pre-contact practice and the modern one (as there was, for example, in *Lax Kw'alaams*). As a result, she found that Mr. Desautel was exercising an Aboriginal right.

63 The Crown and the intervener Attorney General of Alberta submit that this was an error, because continuity requires an ongoing presence in the lands over which an Aboriginal right is asserted. As my discussion of continuity should make clear, this has never been part of the test for an Aboriginal right. Nor is there any basis for adding it to the test, even where the claimant is outside Canada. As Lamer C.J. explained in Van der Peet, at para. 65, "an unbroken chain of continuity" is not required. Indeed, as McLachlin J. (dissenting, but not on this point) noted in Van der Peet, at para. 249, "it is not unusual for the exercise of a right to lapse for a period of time".

64 In effect, we are asked to hold that an Aboriginal right can be lost or abandoned by non-use: a proposition that Lamer C.J. left undecided in Van der Peet, at para. 63. Would accepting this proposition risk "undermining the very purpose of s. 35(1) by perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers" (*Côté*, at para. 53; see also McNeil, at pp. 133-35)? It is better not to decide the issue here, as it does not arise in light of the factual findings of the trial judge. The

law should be developed through cases where determination of such issues is required, where there is an adequate evidentiary basis, and where the issues are the subject of full submissions and thorough consideration at trial and at the appellate level.

C. Sovereign Incompatibility

65 The Crown submits that even if Mr. Desautel's claim would otherwise meet the test for an Aboriginal right, this right is incompatible with Canadian sovereignty because the right encompasses other rights necessary for its meaningful exercise, which means a right to cross the Canada-U.S. border. This submission is supported by the Attorney General of Quebec, the Attorney General of New Brunswick and the Attorney General of Alberta. As a result, the Crown argues, Mr. Desautel's right to hunt never came into existence.

66 I am of the view that, *unlike* the right claimed in *Mitchell*, the very purpose of the right claimed by Mr. Desautel is not to cross the border. The mobility right, if it exists, is incidental in this case. Sovereign incompatibility would relate solely to the issue of whether there can be an Aboriginal right to enter Canada — an issue that is not raised here, because Mr. Desautel was not denied entry to Canada. Moreover, this issue was not fully addressed by the courts below. Therefore, the question of whether the appropriate framework is sovereign incompatibility or infringement/justification under *Sparrow* should be left for another day, when the Court has a proper set of facts to answer the question.

D. Common Law Aboriginal Rights

67 The Crown contends that while Mr. Desautel cannot have a s. 35(1) Aboriginal right, because he is not a member of an Aboriginal people of Canada, he can still have common law Aboriginal rights, albeit these rights would not constitute a defence to the regulatory charges against him. Recognizing common law Aboriginal rights alongside s. 35(1) Aboriginal rights would introduce additional difficulties. In particular, the Crown seems to assume that the test for a common law Aboriginal right would be the same as the test for a s. 35(1) Aboriginal right, that is, the *Van der Peet* test. But this is far from clear.

68 Before 1982, common law Aboriginal rights were recognized in Canada under British imperial law (*Calder*, at pp. 328 and 402; *Mitchell*, at paras. 62-64). Under the imperial doctrine of succession, when Britain took possession of a new territory, the laws in force in that territory were presumed to continue (subject to some exceptions). This doctrine was not limited to practices, traditions or customs that were "integral to the distinctive culture" of the Aboriginal people, as in *Van der Peet* . This suggests, on the one hand, that the test for a common law right may be met even where the *Van der Peet* test is not.

69 On the other hand, this Court has held that the existence of a common law Aboriginal right is sufficient to ground a s. 35(1) right (*Delgamuukw*, at para. 136). Recognizing common law Aboriginal rights alongside s. 35(1) rights would require the Court to resolve this apparent tension. As Richard Ogden writes,

> while a legal historian might one day accept that the effect of the *Van der Peet* trilogy was to create a new test, and a new doctrine, the Supreme Court has stated that the doctrine which gives rise to section 35 rights is the same doctrine that gave rise to common law Aboriginal rights.
>
> ("'Existing' Aboriginal Rights in Section 35 of the *Constitution Act, 1982*" (2009), 88 *Can. Bar Rev*. 51, at p. 84; see also G. Otis, "Le titre aborigène: émergence d'une figure nouvelle et durable du foncier autochtone?" (2005), 46 *C. de D*. 795, at p. 800.)

70 However, in light of my conclusion that Mr. Desautel has a s. 35(1) Aboriginal right to hunt in the ancestral territory of the Sinixt in British Columbia, it is not necessary to address this matter here.

E. The Consequences of This Decision

71 The Crown and several attorneys general raised concerns about the possible consequences of groups like the Lakes Tribe being held to be Aboriginal peoples of Canada. In this section, I explain why these concerns do not justify any change to the law as set out in these reasons. While Aboriginal communities outside Canada can assert and hold s. 35(1) rights, it does not

follow that their rights are the same as those of communities within Canada. While the test for an Aboriginal right is the same, the different circumstances of communities outside Canada may lead to different results.

(1) The Duty to Consult

72 The duty to consult "arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it" (*Haida*, at para. 35). In other words, three conditions must exist for the duty to arise: actual or constructive knowledge, contemplated Crown conduct and a potential adverse effect on an Aboriginal or treaty right. The requirement of actual or constructive knowledge was clarified in Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council 2010 SCC 43, [2010] 2 S.C.R. 650, at para. 40:

> Actual knowledge arises when a claim has been filed in court or advanced in the context of negotiations, or when a treaty right may be impacted. Constructive knowledge arises when lands are known or reasonably suspected to have been traditionally occupied by an Aboriginal community or an impact on rights may reasonably be anticipated. [Citations omitted.]

73 As I will explain, given the requirement of actual or constructive knowledge, the duty to consult may well operate differently as regards those outside Canada.

74 Given the long history of Crown-Aboriginal relations in Canada, the Crown will often be aware of the existence of Aboriginal groups within Canada and may have some sense of their claims. The situation is different when it comes to Aboriginal groups outside of Canada. In the absence of some historical interaction with them, the Crown may not know, or have any reason to know, that they exist, let alone that they have potential rights within Canadian territory.

75 There is no freestanding duty on the Crown to seek out Aboriginal groups, including those outside Canada, in the absence of actual or constructive knowledge of a potential impact on their rights. In the absence of such knowledge, the Crown is free to act. It is for the groups involved to put the Crown on notice of their claims (*Native Council of Nova Scotia v. Canada (Attorney General)*, 2008 FCA 113, [2008] 3 C.N.L.R. 286; Mississaugas of Scucog Island First Nation v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 444 2007 ONCA 814, 88 O.R. (3d) 583, at para. 59).

76 Once the Crown is put on notice, however, it has to determine whether a duty to consult arises and, if so, what the scope of the duty is. As I mentioned earlier, consultation is part of a "process of fair dealing and reconciliation" which "arises ... from the Crown's assertion of sovereignty" (*Haida*, at para. 32). Because groups outside Canada are not implicated in this process to the same degree, the scope of the Crown's duty to consult with them, and the manner in which it is given effect, may differ. Integrating groups outside Canada into consultations by the Crown with groups inside Canada may involve discussions within Aboriginal communities and with the Crown. While the consultation process may be more challenging when it involves groups outside Canada, as this Court said in Powley, at para. 49, "the difficulty of identifying members of the [Aboriginal] community must not be exaggerated as a basis for defeating their rights under the Constitution of Canada".

(2) Justifying Infringements of Aboriginal Rights

77 The fact that an Aboriginal group is outside Canada is relevant to the *Sparrow* test for justifying an infringement of an Aboriginal or treaty right.

78 This Court has emphasized the role of context in determining whether an infringement of an Aboriginal right is justified. In *Sparrow*, at p. 1111, the Court noted "the importance of context and a case-by-case approach to s. 35(1)", writing that "in light of the complexities of aboriginal history, society and rights, the contours of a justificatory standard must be defined in the specific factual context of each case." This point was applied in Gladstone, at para. 56, where Lamer C.J. wrote that

> the framework for analysing aboriginal rights laid out in *Sparrow* depends to a considerable extent on the legal and factual context of that appeal. In this case, where ... the context varies significantly from that in *Sparrow*, it will be necessary to revisit the *Sparrow* test and to adapt the justification test it lays out ....

79 The fact that the holder of an Aboriginal right is located outside of Canada is a feature of the context that may be taken into account in the justification analysis. The government's power to infringe Aboriginal rights reflects the fact that "rights do not exist in a vacuum" (R. v. Nikal [1996] 1 S.C.R. 1013, at para. 92). Rather, Aboriginal peoples are part of "a broader social, political and economic community" whose interests may, where sufficiently important, justify infringement of Aboriginal rights (*Gladstone*, at para. 73). In sum, justifying an infringement involves reconciling the interests of an Aboriginal people with the interests of the broader community of which it is a part (*Tsilhqot'in*, at para. 118). The extent to which the fact that the holder of the Aboriginal right is an Aboriginal people located outside this broader community makes a difference in the justification analysis is another issue better determined where on the facts this is required, where there is an adequate evidentiary basis, and where the issues are the subject of full submissions and thorough consideration at trial and at the appellate level.

(3) Aboriginal Title

80 The present case involves an Aboriginal right to hunt for food, social and ceremonial purposes. It does not involve a claim for Aboriginal title. Aboriginal title is not a right to carry out an activity, but a right to the land itself (*Delgamuukw*, at paras. 137-41). While the test for Aboriginal title has the same basic structure as the test for other Aboriginal rights, it also has some important differences (paras. 144-45 and 150-51). First, unlike other Aboriginal rights, the historic date for proof of Aboriginal title is the date of Crown sovereignty, not the date of contact. Second, while other Aboriginal rights require proving that a practice was integral to the distinctive culture of the Aboriginal society, Aboriginal title requires proof of exclusive occupation of territory, without any additional need to show that this occupation was culturally integral.

81 Given these special features of the test for Aboriginal title, and given that the present case does not involve a title claim, I would leave for another day the differences that may exist between the test for Aboriginal title claims by Aboriginal peoples within Canada and the test for such claims by peoples outside Canada.

(4) Modern Treaties

82 Some modern treaties make provision for Aboriginal individuals who are not Canadian citizens to have treaty rights. [2] Other treaties exclude this possibility. [3] The intervener Attorney General of the Yukon Territory asks us to be mindful of these treaties in deciding the present case. I agree that modern treaties, being the result of lengthy negotiations, should be considered with great respect (*Beckman*, at paras. 9-10 and 12, per Binnie J.; at paras. 111-12 and 203, per Deschamps J. (concurring); First Nation of Nacho Nyak Dun v. Yukon 2017 SCC 58, [2017] 2 S.C.R. 576, at paras. 1, 33 and 38). However, the content of these treaties does not determine the proper interpretation of "aboriginal peoples of Canada" under s. 35(1). Nor does the proper interpretation of "aboriginal peoples of Canada" under s. 35(1) undermine the rights set out in these modern treaties.

F. The Vindication of Aboriginal Rights

83 As I mentioned at the outset of these reasons, beyond agreeing with Mr. Desautel on the central issue, I have said little more about what this means for the exercise of s. 35(1) Aboriginal rights. I end with some comments on the means available for the vindication of Aboriginal rights.

(1) It Is for the Courts to Interpret Section 35(1)

84 This Court has to be mindful of its proper role in the vindication of Aboriginal rights. As this Court held in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 169, "the courts are guardians of the Constitution and of individuals' rights under it". The role of giving an authoritative interpretation of laws and of the Constitution belongs to the courts (H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (6th ed. 2014), at pp. 808-9, no. X.11 and X.13).

85 When the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada were recognized and affirmed by the enactment of the *Constitution Act, 1982*, this gave rise to an obligation for the courts to "give effect to that national commitment" (R. v. Marshall [1999] 3 S.C.R. 533 ("Marshall No. 2"), at para. 45). As the majority of this Court recently confirmed in *Uashaunnuat*, at para. 24:

> Although s. 35(1) recognizes and affirms "the existing aboriginal and treaty rights of the aboriginal peoples of Canada", defining those rights is a task that has fallen largely to the courts. The honour of the Crown requires a generous and purposive interpretation of this provision in furtherance of the objective of reconciliation. [Emphasis added, citation omitted.]

86 In my view, the authoritative interpretation of s. 35(1) of the Constitution Act, 1982, is for the courts. It is for Aboriginal peoples, however, to define themselves and to choose by what means to make their decisions, according to their own laws, customs and practices.

(2) Negotiation Can Foster Reconciliation

87 Negotiation has significant advantages for both the Crown and Aboriginal peoples as a way to obtain clarity about Aboriginal rights:

> Negotiation ... has the potential of producing outcomes that are better suited to the parties' interests, while the range of remedies available to a court is narrower. ... The settlement of indigenous claims [has] an inescapable political dimension that is best handled through direct negotiation.
>
> (S. Grammond, *Terms of Coexistence, Indigenous Peoples and Canadian Law* (2013), at p. 139)

Negotiation also provides certainty for both parties (*Beckman*, at para. 109, per Deschamps J., concurring). As the Court said in Clyde River (Hamlet) v. Petroleum Geo-Services Inc. 2017 SCC 40, [2017] 1 S.C.R. 1069, at para. 24, "[t]rue reconciliation is rarely, if ever, achieved in courtrooms".

88 Good faith from both parties is required. As the Court said in Haida, at para. 25, the honour of the Crown "requires the Crown ... to participate in processes of negotiation" (see also B. Slattery, "Aboriginal Rights and the Honour of the Crown" (2005), 29 *S.C.L.R.* (2d) 434, at pp. 436-37). Reconciliation requires the Crown and Aboriginal people to "work together to reconcile their interests" (*Rio Tinto*, at para. 34; see also Nacho Nyak Dun, at para. 1).

89 As this Court has held on many occasions, the Crown has an "obligation to achieve the just settlement of Aboriginal claims through the treaty process" (*Rio Tinto*, at para. 32; see also Haida, at para. 20) because other remedies "have proven time-consuming, expensive, and are often ineffective" (*Rio Tinto*, at para. 33). Nonetheless, a test case or a claim for declaratory relief are also appropriate means to ask courts to determine rights under s. 35(1).

90 When parties are considering possible courses of action, it is useful to bear in mind that criminal and regulatory proceedings have inherent limits proper to their nature. In these types of cases, the evidence administered at trial is generally less extensive and the rules are different than in a reference or a declaratory action (see *Sparrow*, at p. 1095; *Marshall No. 2*, at para. 13). As LeBel J. stressed in his concurring reasons in Marshall, at para. 142:

> Although many of the aboriginal rights cases that have made their way to this Court began by way of summary conviction proceedings, it is clear to me that we should re-think the appropriateness of litigating aboriginal treaty, rights and title issues in the context of criminal trials. The issues that are determined in the context of these cases have little to do with the criminality of the accused's conduct; rather, the claims would properly be the subject of civil actions for declarations. Procedural and evidentiary difficulties inherent in adjudicating aboriginal claims arise not only out of the rules of evidence, the interpretation of evidence and the impact of the relevant evidentiary burdens, but also out of the scope of appellate review of the trial judge's findings of fact. These claims may also impact on the competing rights and interests of a number of parties who may have a right to be heard at all stages of the process. In addition, special difficulties come up when

dealing with broad title and treaty rights claims that involve geographic areas extending beyond the specific sites relating to the criminal charges. [Emphasis added.]

91 Therefore, [TRANSLATION] "[t]he negotiating table should not be seen as a substitute for the courtroom, nor the courtroom as an alternative to the negotiating table" (P. Dionne, "La reconnaissance et la définition contemporaines des droits ancestraux: négocier ou s'adresser au juge?", in G. Otis, ed., *Droit, territoire et gouvernance des peuples autochtones* (2005), 71, at p. 78). Both processes are complementary to each other and must interact with each other within their proper limits.

92 All this said, it is for the parties themselves to decide how they wish to proceed.

VI. Disposition

93 The appeal is dismissed. The constitutional question is answered in the affirmative.

***Côté J.* (dissenting):**

94 Does the constitutional protection of Aboriginal rights contained in s. 35(1) of the Constitution Act, 1982, extend to an Aboriginal group located outside of Canada, and whose member claiming to exercise an Aboriginal right is neither a resident nor a citizen of Canada? The courts below, and my colleague Rowe J., say that it does, but in my view, and with respect, that conclusion is contrary to a purposive analysis of s. 35(1) that examines the linguistic, philosophic, and historical contexts of that provision. This Court's s. 35(1) jurisprudence has characterized — properly, in my view — reconciliation in terms of the relationship between non-Aboriginal Canadians and Aboriginal peoples as full and equal members of, and participants in, Canadian society. In addition, s. 35(1) elevated to constitutional status the common law rights of the "aboriginal peoples of Canada" that were "existing" in 1982 (Mitchell v. M.N.R. 2001 SCC 33, [2001] 1 S.C.R. 911, at para. 11). Aboriginal groups located outside of Canada's borders do not fit within this understanding.

95 Further, even if I would agree with my colleague's conclusion that the scope of the phrase "aboriginal peoples of Canada" includes groups located outside of Canada, I would disagree with his application of the test set out in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, to the claim brought in this case by the respondent, Richard Lee Desautel. In my view, Mr. Desautel, as a member of the Lakes Tribe, cannot establish that he was exercising an Aboriginal right to hunt in the Sinixt traditional territory in British Columbia, as the modern group's claim lacks continuity with the pre-contact group's practices. Given that there was nothing in existence in 1982 to which s. 35(1) protection could attach, Mr. Desautel's claim must fail.

96 Therefore, I would answer the constitutional question in the negative and allow the appeal.

I. Background

97 This was a test case brought by the Lakes Tribe of the Colville Confederated Tribes ("CCT") based in Washington State in the United States of America. Acting on the instructions of the Fish and Wildlife Director of the CCT, Mr. Desautel — a United States citizen and resident, and a member of the Lakes Tribe — shot a cow-elk near Castlegar, British Columbia, to secure ceremonial meat. He reported the kill to conservation officers and was subsequently charged with hunting without a licence and hunting big game while not being a resident of British Columbia, contrary to ss. 11(1) and 47(a) of the Wildlife Act, R.S.B.C. 1996, c. 488.

98 An agreed statement of facts was entered at trial. Mr. Desautel admitted the *actus reus* of each offence. His sole defence was that he was exercising his Aboriginal right to hunt for ceremonial purposes in the traditional territory of his Sinixt ancestors pursuant to s. 35(1) of the Constitution Act, 1982. As such, the trial became, as intended, a test case on whether the Lakes Tribe is part of the "aboriginal peoples of Canada".

II. Issue

99 The following constitutional question is raised by this appeal:

> Are ss. 11(1) and 47(a) of the *Wildlife Act*, R.S.B.C. 1996, c. 488, as they read in October 2010, of no force or effect with respect to the respondent, being a member of the Lakes Tribe of the Confederated Tribes of the Colville Reservation in Washington State, U.S.A., in virtue of s. 52 of the *Constitution Act, 1982*, by reason of an Aboriginal right within the meaning of s. 35 of the *Constitution Act, 1982*, invoked by the respondent?
>
> (A.R., vol. I, at p. 139)

III. Analysis

A. A Purposive Interpretation of Section 35 Establishes That It Protects Only Aboriginal Peoples Located in Canada

100 Constitutional provisions conferring rights ought to be interpreted generously, but must also be placed in their proper contexts in order to avoid overshooting their actual purposes. As noted in *R. v. Blais*, 2003 SCC 44, [2003] 2 S.C.R. 236, "this Court is not free to invent new obligations foreign to the original purpose of the provision at issue. The analysis must be anchored in the historical context of the provision" (para. 40). Such judicial caution is entirely appropriate and in line with Binnie J.'s emphasis on the fact that "'[g]enerous' rules of interpretation should not be confused with a vague sense of after-the-fact largesse" (R. v. Marshall [1999] 3 S.C.R. 456, at para. 14).

101 Section 35(1) accords constitutional protection only to the rights of the "aboriginal peoples of Canada". The courts below correctly held that s. 35(1) is to be interpreted purposively, but rather than undertaking a purposive analysis to determine the meaning of the phrase "aboriginal peoples of Canada", they relied on the *Van der Peet* test to conceptualize the rights referred to in s. 35(1). As stated by the Court of Appeal (2019 BCCA 151 (B.C. C.A.), 24 B.C.L.R. (6th) 48, at para. 57): "Simply put, if the *Van der Peet* requirements are met, the modern Indigenous community will be an '[a]boriginal peoples of Canada'."

102 I am in agreement with my colleague Rowe J. on the following point: the question of whether a claimant falls within the meaning of "aboriginal peoples of Canada" in s. 35 is a threshold question; this question should be answered separately from the *Van der Peet* analysis for determining whether a group has an Aboriginal right; and the trial judge was required to address this threshold question to determine whether the Lakes Tribe fell within s. 35's purview. As noted by the appellant, Her Majesty the Queen in Right of British Columbia (the "Crown"), "the *Van der Peet* test identifies *what* comes within the scope of s. 35 as a right, not *who* comes within the scope of s. 35 as a rights holder" (A.F., at para. 59 (emphasis in original)). The *Van der Peet* test addresses the scope of Aboriginal rights but does not speak to treaty rights, Aboriginal title, or the rights of the Métis, which are also encompassed within s. 35(1). Using the test as proposed by the courts below defines "aboriginal peoples of Canada" solely in terms of occupation prior to contact, which is inconsistent with this Court's acknowledgment that s. 35(1) rights "may only be exercised by virtue of an individual's ancestrally based membership in the present community" (R. v. Powley 2003 SCC 43, [2003] 2 S.C.R. 207, at para. 24).

103 However, I disagree with my colleague's conclusion that the scope of "aboriginal peoples of Canada" for the purposes of s. 35(1) must mean the modern-day successors of Aboriginal societies that occupied Canadian territory at the time of European contact and that, as a result, groups that are not located in Canada or whose members are not and never have been citizens or residents of Canada can be "aboriginal peoples of Canada".

104 In my view, to be entitled to the protection of s. 35(1), the modern-day successor groups cannot be located anywhere other than in Canada. A purposive analysis of s. 35(1) that has regard to the relevant linguistic, philosophic, and historical contexts of that provision establishes that it protects only Aboriginal peoples located within Canada. This approach, while dismissed by the Court of Appeal as "formalistic", is entirely consistent with this Court's guidance that s. 35(1) must be interpreted in a generous manner consistent with its intended purpose (Manitoba Metis Federation Inc. v. Canada (Attorney General) 2013 SCC 14, [2013] 1 S.C.R. 623, at para. 76; see also *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1106; *Van der Peet*, at para. 23).

105 As Rowe J. recently confirmed, "[s.] 35 rights are not absolute. Like other provisions of the Constitution Act, 1982, s. 35 is both supported and confined by broader constitutional principles" (Mikisew Cree First Nation v. Canada (Governor General in Council) 2018 SCC 40, [2018] 2 S.C.R. 765, at para. 153). As I will outline below, the framers' intent was to protect the

rights of Aboriginal groups that are members of, and participants in, Canadian society. It has no interest in protecting groups that, plainly, have no connection to it.

(1) Linguistic Context

106 It is a well-established presumption of statutory and constitutional interpretation that each and every word of a text must be given meaning. This follows from the assumption that the legislature avoids tautology: "it does not use words solely for rhetorical or aesthetic effect" (R. Sullivan, *Statutory Interpretation* (3rd ed. 2016), at p. 43). As Sullivan explains, "[i]t is presumed that every feature of a legislative text has been deliberately chosen and has a particular role to play in the legislative design" (p. 43). This is consonant with this Court's direction in *Caron v. Alberta*, 2015 SCC 56, [2015] 3 S.C.R. 511, that the guiding principles of purposive interpretation "do not undermine the primacy of the written text of the Constitution" (para. 36, citing Reference re Secession of Quebec [1998] 2 S.C.R. 217, at para. 53), and that "constitutional interpretation must nonetheless begin with the language of the constitutional law or provision in question" (para. 37, quoting *British Columbia (Attorney General) v. Canada (Attorney General)*, [1994] 2 S.C.R. 41, at p. 88).

107 The summary conviction appeal judge held that "the meaning of s. 35 is not plain and obvious" with respect to the term "aboriginal peoples of Canada", because the section does not expressly limit the protection of rights to Aboriginal peoples who reside in Canada or whose members are Canadian citizens (2017 BCSC 2389, [2018] 1 C.N.L.R. 135). However, a textual analysis reveals the significance of the drafters' choice to include the phrase "of Canada" and "*du Canada*" rather than leaving the term "aboriginal peoples" and "*peuples autochtones*" without any qualifier. For one, the use of the word "of" with reference to a place imports dwelling "and is ordinarily taken to mean that the person spoken of dwells at the place named" (*Stroud's Judicial Dictionary of Words and Phrases* (10th ed. 2020), vol. 2, at p. 889). The presumption against tautology carries considerable weight (Placer Dome Canada Ltd. v. Ontario (Minister of Finance) 2006 SCC 20, [2006] 1 S.C.R. 715, at para. 46). It follows that the inclusion of the words "of Canada" cannot be seen as superfluous. This is particularly true when the word "of", which is ordinarily taken to import dwelling, is used in combination with a clear geographical location such as "Canada".

108 The presumption of consistent expression also sheds light on how the phrase "of Canada" in s. 35 ought to be interpreted. As Sullivan notes:

> It is presumed that the legislature uses language carefully and consistently so that within a statute or other legislative instrument the same words have the same meaning and different words have different meanings. Another way of understanding this presumption is to say that the legislature is presumed to avoid stylistic variation. Once a particular way of expressing a meaning has been adopted, it is used each time that meaning is intended.
>
> (*Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 217)

Similar limiting language is used repeatedly in the *Constitution Act, 1982*, as a geographical qualifier: for example, "citizen of Canada" (ss. 3, 6 and 23), "official languages of Canada" (s. 16), "government of Canada" (ss. 20, 32 and 36), and "Constitution of Canada" (s. 21). Interpreting "aboriginal peoples of Canada" in a more expansive fashion would be incongruent with this presumption and contrary to the intention of the drafters.

109 This Court considered the meaning of similar language in *Blais* and in *Frank v. The Queen*, [1978] 1 S.C.R. 95. In *Blais*, the Court did not accept that Métis peoples fell within the meaning of "Indians" in the harvesting clause of the Manitoba *Natural Resources Transfer Agreement* ("*NRTA*"), in part because of how that term was used elsewhere in the agreement:

> The placement of para. 13 in the part of the *NRTA* entitled "Indian Reserves", along with two other provisions that clearly do not apply to the Métis, supports the view that the term "Indian" as used throughout this part was not seen as including the Métis. This placement weighs against the argument that we should construe the term "Indians" more broadly than otherwise suggested by the historical context of the *NRTA* and the common usage of the term at the time of the *NRTA*'s enactment. [Emphasis added; para. 30.]

In *Frank*, this Court interpreted the phrase "Indians of the Province" in Alberta's *NRTA* as having a narrower meaning than "Indians within the boundaries thereof", a phrase also used in the agreement. In finding that "Indians of the Province" meant Alberta Indians, this Court read the phrase in its ordinary grammatical sense and appropriately imposed a geographical qualifier.

110 In British Columbia v. Imperial Tobacco Canada Ltd. 2005 SCC 49, [2005] 2 S.C.R. 473, at para. 65, this Court cautioned against an interpretation that would "render ... constitutional rights redundant and, in doing so, undermine the delimitation of those rights chosen by our constitutional framers". In my view, the majority's approach would do just that. An interpretation of "aboriginal peoples of Canada" that includes groups not located in Canada or whose members are not and never were citizens or residents of Canada gives the words "of Canada" no meaning. The words are not necessary for logic or for grammatical purposes, in opposition to the presumption against tautology. The explicit inclusion of the Métis peoples in s. 35(2) is a further indication that the intent of the framers was not to constitutionalize, as my colleague notes, "rights and relationships that arise from the prior occupation of Canada by Aboriginal societies" (para. 31), but instead to elevate all existing Aboriginal rights held by Aboriginal peoples who were in Canada in 1982 to constitutional status, regardless of whether their societies existed pre-contact or pre-control. The use of the words "of Canada" in the rest of the *Constitution Act, 1982*, is clearly meant to narrow the scope of the rights being constitutionalized through geographical qualifier. It would be incongruent to interpret "aboriginal peoples of Canada" differently.

(2) Philosophic Context

111 The philosophic context helps explain why residence or citizenship is not referenced in s. 35, but is assumed. As this Court noted in *Van der Peet*, at paras. 18-19, whereas *Charter* rights are, in the liberal enlightenment view, "general and universal",

> [a]boriginal rights cannot ... be defined on the basis of the philosophical precepts of the liberal enlightenment. Although equal in importance and significance to the rights enshrined in the *Charter*, aboriginal rights must be viewed differently from *Charter* rights because they are rights held only by aboriginal members of Canadian society. [Emphasis added; emphasis in original deleted.]

112 This characterization has been reflected in this Court's view of reconciliation between the Aboriginal peoples of Canada and the Crown. Writing for the majority in Beckman v. Little Salmon/Carmacks First Nation 2010 SCC 53, [2010] 3 S.C.R. 103, at para. 10, Binnie J. described s. 35's "grand purpose" as being the "reconciliation of Aboriginal and non-Aboriginal *Canadians* in a mutually respectful long-term relationship" (emphasis added). Later in *Beckman*, Binnie J. expanded on s. 35's purpose, implicitly signalling the centrality of residency in the formulation of s. 35:

> The decision to entrench in s. 35 of the *Constitution Act, 1982* the recognition and affirmation of existing Aboriginal and treaty rights, signalled a commitment by Canada's political leaders to protect and preserve constitutional space for Aboriginal peoples to be Aboriginal. At the same time, Aboriginal people do not, by reason of their Aboriginal heritage, cease to be citizens who fully participate with other Canadians in their collective governance. [para. 33]

113 By framing s. 35(1) as a provision "granting special constitutional protection to one part of Canadian society" (*Van der Peet*, at para. 20), this Court has consistently understood s. 35(1) to import a residency or citizenship requirement. As Binnie J. stated in *Mitchell*, Aboriginal rights, as defined by this Court, "find their source in an earlier age, but they have not been frozen in time .... They are projected into modern Canada where they are exercised as group rights in the 21st century by modern Canadians who wish ... to protect their aboriginal identity" (para. 132).

114 As Lamer C.J. held in Van der Peet, at para. 21, s. 35(1)'s purpose should be understood in relation to "the interests it was meant to protect" (citing *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344). Section 35 protects Aboriginal peoples "as full participants with non-aboriginal peoples in a shared Canadian sovereignty" (*Mitchell*, at para. 135). The protections, therefore, do not and cannot apply to Aboriginal groups in other countries. It cannot be said that these groups "fully participate with other Canadians in their collective governance" (*Beckman*, at para. 33), nor do they "live and contribute as part of our national diversity" (*Mitchell*, at para. 132). It is this reality which must colour the scope and content of the expression "aboriginal peoples of Canada".

(3) Historical Context

115 Additionally, the historical record does not show that expanding the protections of s. 35(1) to non-Canadian Aboriginal groups was ever considered. In fact, the limited historical sources that could provide guidance as to the meaning of the expression "aboriginal peoples of Canada" show an intention to limit the constitutional protection of Aboriginal rights to only those groups located within Canada.

116 The *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada* ("*Minutes*"), at the time of discussions around the patriation of Canada's Constitution, reflect an implicit shared understanding among committee participants, including governmental and Aboriginal representatives, that s. 35(1) was intended to protect the rights of Aboriginal communities located in Canada at that time. For instance, the Honourable Jean Chrétien, then the Minister of Justice and Attorney General of Canada, described how the *Constitution Act, 1982*, would protect "the rights of all the native Canadians" that exist under the treaties or the Royal Proclamation, "the two sources of rights that exist for the natives in Canada" (*Minutes*, No. 3, 1st Sess., 32nd Parl., November 12, 1980, at p. 84; *Minutes*, No. 4, 1st Sess., 32nd Parl., November 13, 1980, at p. 13). George Braden, representing the Northwest Territories government, noted that "Native people in Canada have enjoyed a special status which must be clearly recognized in the constitution of Canada" (*Minutes*, No. 12, 1st Sess., 32nd Parl., November 25, 1980, at p. 60). The statements made by Aboriginal representatives before the committee similarly assumed the existence of a geographical limitation. When discussing proposed amendments, Mary Simon, a representative of the Inuit Committee on National Issues, stated the following:

> Subsection (1) of section 23A [a proposed Aboriginal rights and freedoms provision] merely provides for the obvious, namely, that the aboriginal peoples of Canada include Canada's three groups of indigenous peoples. Presently, there exist other artificial distinctions under Canadian law which have posed considerable problems for a great number of aboriginal people in Canada and for which we must seek alternative solutions.
>
> (*Minutes*, No. 16, 1st Sess., 32nd Parl., December 1, 1980, at p. 13)

Logically, Ms. Simon's reference to "Canada's three groups" could only refer to present-day Aboriginal groups residing and present in Canada, thus implying a geographical component.

117 There are also some remarks in the *Minutes* that explicitly reference a geographical limitation on the meaning of "aboriginal peoples of Canada". For example, in response to a question about defining the word "Indian", Nellie Carlson, the Western Vice President of Indian Rights for Indian Women, stated that "[m]y definition of an Indian across Canada is ... an Indian who had been born and raised in this country, who had never come from across the ocean to immigrate into this country, but was born and raised, had lived through the hardships" (*Minutes*, No. 17, 1st Sess., 32nd Parl., December 2, 1980, at p. 97).

118 The Court of Appeal dismissed the *Minutes* as "non-specific in their application" and as not informing the constitutional interpretation of s. 35(1) (para. 64). My colleague concurs, finding that the *Minutes* "she[d] no light" (Rowe J.'s reasons, at para. 41). Respectfully, this view overlooks the compelling evidence outlined above of a shared assumption amongst committee participants that the constitutional protections accorded by s. 35(1) were intended to apply only to Aboriginal groups located in Canada, as reflected in their use of "in Canada" and "Canadian" synonymously with "of Canada". Drafting history is relevant to constitutional interpretation (R. v. Poulin 2019 SCC 47, at para. 78; R. v. Stillman 2019 SCC 40, at para. 77), and I see no reason to depart from this Court's prior reliance on the *Minutes* in the instant case.

119 This Court cannot impose an intention to broaden the constitutional protections under s. 35(1) beyond what was contemplated. If s. 35(1) was intended to include within its purview Aboriginal groups located outside of Canada, then one would expect there to have been significant discussion and consideration of these broader issues of recognition and jurisdiction, including hearing from the communities outside of Canada about their interests. There is no evidence that any drafters or participants contemplated this novel constitutional measure, which belies any intention to include Aboriginal groups outside of Canada within s. 35(1)'s purview.

120 As a result, I would find that "aboriginal peoples of Canada" under s. 35(1) are Aboriginal peoples who are located in Canada. In the present case, the Lakes Tribe is wholly located in Washington State in the United States of America, and therefore cannot be considered to be part of the "aboriginal peoples of Canada" under s. 35(1). As Mr. Desautel is not a member of a collective that is part of the "aboriginal peoples of Canada", he cannot exercise a constitutionally-protected Aboriginal right to hunt for ceremonial purposes in the traditional territory of the Sinixt in British Columbia.

B. Failing to Adopt a Purposive Interpretation of Section 35 Leads to Implausible and Problematic Results

121 The conclusion that the enactment of s. 35(1) did not constitutionalize Aboriginal rights held by collectives located outside of Canada is further bolstered by the deleterious consequences that would arise from the opposite conclusion. My colleague is of the view that these concerns do not justify any change to the law because "[w]hile Aboriginal communities outside Canada can assert and hold s. 35(1) rights, it does not follow that their rights are the same as those of communities within Canada" (para. 71). With the greatest of respect, I cannot agree. If an Aboriginal group outside of Canada is entitled to exercise s. 35(1) Aboriginal rights in Canada, then it must have equal protection under the Constitution and be able to access and exercise a full panoply of rights in the same fashion as Aboriginal right holders within Canada. Nothing less would uphold the honour of the Crown and further Canada's ongoing process of reconciliation with its first peoples.

122 As such, extending the constitutional protection of s. 35(1) to include Aboriginal groups located outside of Canada leads to some concerning outcomes. First, s. 35.1 of the Constitution Act, 1982, uses the phrase "aboriginal peoples of Canada" in setting out an obligation to invite representatives of these groups to constitutional conferences, as did ss. 37 and 37.1 prior to their repeal (P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp. (loose-leaf), vol. 1, at pp. 28-65 to 28-66). There is no reason in principle why Aboriginal groups holding s. 35(1) rights would be denied a constitutional right to democratic participation under s. 35.1 simply by virtue of their geographical location. While the lower courts were seemingly unconcerned by this prospect, in my view, it is contrary to the organizing constitutional principle of democracy and inconsistent with the purpose of patriation to allow Aboriginal groups located outside of Canada to participate in Canadian democracy as required by s. 35.1 (*Reference re Secession of Quebec*).

123 Additionally, a multitude of challenges would arise with respect to the Crown's duty to consult. The numbers of groups to consult and, where appropriate, accommodate would dramatically increase, and it can be anticipated that in some cases accommodating the interests of s. 35(1) rights holders outside of Canada would run counter to accommodating the interests of s. 35(1) rights holders within Canada. Once an Aboriginal group outside of Canada has established a s. 35(1) right, one would assume that the Crown would be put on notice. As such, I cannot agree with my colleague's view that "[b]ecause groups outside Canada are not implicated in this process to the same degree, the scope of the Crown's duty to consult with them, and the manner in which it is given effect, may differ" (para. 76). Aboriginal groups outside of Canada would in fact be implicated to the same degree, and thus the Crown's duty to consult could not differ unless a two-tiered consultation process were established, which would run afoul of its obligation to engage in a "process of fair dealing and reconciliation" (Haida Nation v. British Columbia (Minister of Forests) 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 32) with all Aboriginal rights holders.

124 Given that the Aboriginal rights recognized and affirmed by s. 35(1) include not only site-specific rights but also rights to the land itself, finding that Aboriginal groups outside of Canada are "aboriginal peoples of Canada" raises the possibility that these groups may, in principle, hold constitutionally protected Aboriginal title to Canadian lands. Aboriginal title confers on the group holding it "the exclusive right to decide how the land is used and the right to benefit from those uses" (Tsilhqot'in Nation v. British Columbia 2014 SCC 44, [2014] 2 S.C.R. 257, at para. 88). While this is not an issue raised directly in this case, it is by no means hypothetical. The CCT — of which the Lakes Tribe is a member — have already filed two title claims in British Columbia courts (see *Campbell v. British Columbia (Minister of Forest and Range)*, 2011 BCSC 448, [2011] 3 C.N.L.R. 151). It would be a remarkable proposition that a foreign group could hold constitutionally protected title to Canadian territory, as the required incidental mobility right would be fundamentally incompatible with Canadian sovereignty (see *Mitchell*, at paras. 159-64, per Binnie J.).

125 The drafters of s. 35(1) could not have intended these deleterious consequences to arise. As such, these concerns militate against the conclusion that the Lakes Tribe is part of the "aboriginal peoples of Canada". I would therefore allow the appeal on that basis.

C. Even If the Lakes Tribe Is Part of the "Aboriginal Peoples of Canada", Mr. Desautel Cannot Claim an Aboriginal Right to Hunt for Ceremonial Purposes

126 Even assuming that the Lakes Tribe is part of the "aboriginal peoples of Canada", as the majority concludes, I would nevertheless allow the appeal on the basis that Mr. Desautel, as a member of the Lakes Tribe, cannot claim an Aboriginal right to hunt for ceremonial purposes within the traditional territory of the Sinixt in British Columbia. In my view, the *Van der Peet* test for an Aboriginal right under s. 35(1) is not satisfied in this case.

127 I agree with my colleague that the test for Aboriginal rights for groups outside of Canada is the same as the test for groups within Canada. In accordance with the *Van der Peet* analysis, if an Aboriginal group outside of Canada can show that the pre-contact practice, tradition or custom supporting the claimed modern right is integral to its distinctive pre-contact Aboriginal society, and that the right has a reasonable degree of continuity with the "integral" pre-contact practice, tradition or custom, then the Aboriginal group must receive full recognition of its s. 35(1) rights (Lax Kw'alaams Indian Band v. Canada (Attorney General) 2011 SCC 56, [2011] 3 S.C.R. 535, at para. 46).

128 However, in my view, the trial judge committed a reviewable error in her application of the *Van der Peet* test. In particular, she erred in finding that the continuity requirement of the test was met.

(1) Continuity

129 Section 35(1) protects only those present-day practices that have a reasonable degree of continuity with the practices that existed prior to contact (*Van der Peet*, at paras. 63-65). Granted, as the Court stated in *Van der Peet*, the concept of continuity does not require an "unbroken chain of continuity" (para. 65, per Lamer C.J.) or a "year-by-year chronicle of how the event has been exercised since time immemorial" (para. 249, per McLachlin J., dissenting on other grounds). Continuity must be interpreted flexibly. Such flexibility, however, has its limits.

130 As I see it, while temporal gaps in the actual practice do not necessarily preclude the establishment of an Aboriginal right (*Van der Peet*, at para. 65), failing to tender sufficient evidence that the practice was maintained or, at least, that a connection to the historical practice was maintained during such gaps may be fatal. Aboriginal rights claims require that proper and sufficient evidence be gathered and adduced to meet the legal requirements for such rights (Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations) 2017 SCC 54, [2017] 2 S.C.R. 386, at para. 84).

(2) Application

131 Turning to the appeal before us, it is important to review the findings of fact made by the trial judge. The trial judge found that the Sinixt had continued their seasonal harvesting round in the northern part of their territory from the time of contact (1811) until around 1870. Around 1880 and 1890, the majority of the Lakes peoples moved to the Colville Reservation in Washington State. By 1902, only 21 Sinixt remained living in their traditional territory in Canada when the federal government set aside a reserve for the "Arrow Lakes Band", including Sinixt, Ktunaxa, and Secwepemc members. In 1956, after the last member of the Arrow Lakes Band died, the federal government declared the Band extinct.

132 The record clearly shows that after 1930, the Lakes Tribe did not travel to or hunt in British Columbia. Today, the Lakes Tribe does not, as their ancestors did, "exercise a robust seasonal round in all of their traditional territory including those lands now in British Columbia" (para. 119). The only evidence proffered at trial about the Lakes Tribe's presence in British Columbia at all before 2010 was a singular event in November 1972, when Charlie Quintasket, "a Lakes Indian from the Colville reservation", walked into the office of Aboriginal scholar Dr. Dorothy Kennedy and asked why the Lakes people had no Indian reserves in Canada (para. 49). The only evidence that the Lakes Tribe *maintained a connection* to the claimed right was the fact

that "the land was not forgotten" (para. 50) in the minds of the Lakes Tribe members and that the Lakes Tribe engaged in the practice of hunting in Washington State at the time of contact.

133 Mr. Desautel pointed to the creation of the international border by the 1846 Oregon Boundary Treaty and the outlawing of hunting by British Columbia through the Game Protection Amendment Act, 1896, S.B.C., c. 22 ("*1896 Act*"), to explain why the Lakes Tribe had gradually ceased hunting in the Sinixt traditional territory. The trial judge held that the Sinixt had continued to hunt in British Columbia up to the 1930s despite the passing of the 1896 Act. Therefore, it cannot be said that the *1896 Act* prevented the Sinixt from hunting. But even if this is accepted to be so, it does not explain the Lakes Tribe's absence from the province for a period of almost 30 years — from 1982, when existing Aboriginal rights were elevated to constitutional status by the *Constitution Act, 1982*, to 2010, when Mr. Desautel travelled to British Columbia for the purpose of shooting a cow-elk to launch this test case.

134 Quite simply, there is no direct evidence between 1930 and 1982 and between 1982 and 2010 that the Lakes Tribe engaged in anything that could be considered a modern-day practice of hunting in this territory. This was not a case whereby the Lakes Tribe could not provide a "year-by-year chronicle of how the event has been exercised since time immemorial"; rather, the Lakes Tribe did not hunt, let alone exercise a seasonal round, in British Columbia after 1930.

135 I am of the view that the trial judge made a legal error in concluding that the chain of continuity had not been broken and that Mr. Desautel had established an Aboriginal right to hunt in British Columbia. While the trial judge's findings of fact are owed deference because the weighing of evidence in an Aboriginal rights claim is "generally the domain of the trial judge, who is best situated to assess the evidence as it is presented" (*Mitchell*, at para. 36), the facts as she found them do not meet the continuity requirement necessary to establish an Aboriginal right.

136 Continuity cannot be established simply because there is evidence that "the land was not forgotten" in the minds of the Lakes Tribe members. This is not, and cannot be, the standard. Even if the fact that the Lakes Tribe engaged in some hunting practices in Washington State is considered, the evidence is inconclusive. Further, without an explanation as to its meaning, the evidence that Mr. Quintasket asked Dr. Kennedy about Lakes Tribe reserves in Canada simply has no legal significance or relevance. Given that the evidence of continuity is amorphous and imprecise in many respects, there was no basis upon which the trial judge could have drawn an inference of continuity. As the Court explained in Mitchell, at para. 39:

> There is a boundary that must not be crossed between a sensitive application and a complete abandonment of the rules of evidence. As Binnie J. observed in the context of treaty rights, "[g]enerous rules of interpretation should not be confused with a vague sense of after-the-fact largesse" (*R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 14). In particular, the *Van der Peet* approach does not operate to amplify the cogency of evidence adduced in support of an aboriginal claim. Evidence advanced in support of aboriginal claims, like the evidence offered in any case, can run the gamut of cogency from the highly compelling to the highly dubious. Claims must still be established on the basis of persuasive evidence demonstrating their validity on the balance of probabilities. Placing "due weight" on the aboriginal perspective, or ensuring its supporting evidence an "equal footing" with more familiar forms of evidence, means precisely what these phrases suggest: equal and due treatment. While the evidence presented by aboriginal claimants should not be undervalued "simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case" (*Van der Peet*, *supra*, at para. 68), neither should it be artificially strained to carry more weight than it can reasonably support. If this is an obvious proposition, it must nonetheless be stated. [Emphasis in original; text in brackets in original.]

137 Given the Lakes Tribe's lengthy and unaccounted-for absence from British Columbia between 1930 and 2010, continuity is not made out. A single shot cannot create the Lakes Tribe's modern exercise of the right. In the absence of even minimally cogent evidence, this conclusion seems inescapable.

138 Therefore, even if the Lakes Tribe were found to be part of the "aboriginal peoples of Canada", the lack of continuity would be fatal to Mr. Desautel's claim for a constitutionally-protected s. 35(1) Aboriginal right to hunt for ceremonial purposes in the Lakes Tribe's traditional territory in British Columbia. I would allow the appeal on this alternative basis as well.

D. Common Law Aboriginal Rights

139 It is well established that "s. 35(1) did not create the legal doctrine of aboriginal rights; aboriginal rights existed and were recognized under the common law" (*Van der Peet*, at para. 28), subject to the exceptions of sovereign incompatibility, surrender, and extinguishment (*Mitchell*, at para. 10). However, this Court has not previously considered the effect of s. 35(1) on the common law rights of an Aboriginal group located outside of Canada. Until now, this Court has only ever considered s. 35(1) in relation to claimants who were indisputably "aboriginal peoples of Canada".

140 The above reasons should not be taken as meaning that an Aboriginal collective located outside of Canada that is found not to be part of the "aboriginal peoples of Canada", such as the Lakes Tribe, is foreclosed from establishing common law Aboriginal rights in Canada. However, I find it unnecessary to decide this issue in this case. Mr. Desautel did not assert that he had a common law Aboriginal right to hunt. Indeed, he resisted this notion for a number of reasons, one being that a common law right would not have exempted him from the *Wildlife Act* provisions at issue. Therefore, I consider it unnecessary to determine whether Mr. Desautel holds a common law Aboriginal right to hunt in British Columbia, and I leave the question of whether the common law continues to protect Aboriginal rights not constitutionalized by the enactment of s. 35(1) for another day.

IV. Conclusion

141 In summary, I would find that the expression "aboriginal peoples of Canada" in s. 35(1) means present-day Aboriginal peoples who are located in Canada, and I would allow the appeal for that reason. But even if this was not the case, Mr. Desautel cannot establish that he was exercising a s. 35(1) Aboriginal right to hunt in the Sinixt traditional territory in British Columbia, as he has failed to establish reasonable continuity between the pre-contact practice, custom or tradition and the contemporary claim. I would therefore allow the appeal on this alternative basis as well.

142 I would allow the Crown's appeal and answer the constitutional question in the negative. As a result, Mr. Desautel should not be exempt from the *Wildlife Act* provisions under which he was charged. I would enter a verdict of guilty on both counts of hunting without a licence contrary to s. 11(1) of the Act and hunting big game while not being a resident contrary to s. 47(a) of the Act, and remit the matter to the trial court for sentencing.

***Moldaver J.* (dissenting):**

143 I have had the benefit of reading the reasons of my colleagues Rowe and Côté JJ. For the purposes of this appeal, I am prepared to assume, without finally deciding, that Rowe J. is correct in holding that, as a member of an Aboriginal collective located outside Canada, Mr. Desautel is entitled to claim the constitutional protection provided by s. 35(1) of the Constitution Act, 1982. I nevertheless agree with Côté J., for the reasons she has expressed, that Mr. Desautel has not met his onus of establishing the continuity element of his claim, under the test for Aboriginal rights pursuant to *R. v. Van der Peet*, [1996] 2 S.C.R. 507. Accordingly, I would allow the appeal on that basis and impose the same remedy as Côté J.

Appeal dismissed.

Pourvoi rejeté.

Footnotes

1 *Natural Resources Transfer Agreement* (Manitoba) (Schedule 1 of Constitution Act, 1930, R.S.C. 1985, App. II, No. 26), at paras. 11 and 13; *Natural Resources Transfer Agreement* (Alberta) (Schedule 2 of Constitution Act, 1930, R.S.C. 1985, App. II, No. 26), at paras. 10 and 12; *Natural Resources Transfer Agreement* (Saskatchewan) (Schedule 3 of Constitution Act, 1930, R.S.C. 1985, App. II, No. 26), at paras. 10 and 12.

2 See for example: Carcross/Tagish First Nation Final Agreement (2005), vol. 1, c. 3, ss. 3.2.2 to 3.2.3; Champagne and Aishihik First Nations Final Agreement (1993), vol. 1, c. 3, ss. 3.2.2 to 3.2.3; Kluane First Nation Final Agreement (2003), vol. 1, c. 3, ss. 3.2.2 to 3.2.3; Kwanlin Dun First Nation Final Agreement (2005), vol. 1, c. 3, ss. 3.2.2 to 3.2.3; Little Salmon/Carmacks First Nation Agreement(1997), vol. 1, c. 3, ss. 3.2.2 to 3.2.3; First Nation of Nacho Nyak Dun Final Agreement (1993), vol. 1, c. 3, ss. 3.2.2 to

3.2.3; Selkirk First Nation Final Agreement (1997), vol. 1, c. 3, ss. 3.2.2 to 3.2.3; Ta'an Kwach'an Council Final Agreement (2002), vol. 1, c. 3, ss. 3.2.2 to 3.2.3; Teslin Tlingit Council Final Agreement (1993), vol. 1, c. 3, ss. 3.2.2 to 3.2.3; Tr'ondëk Hwëch'in Final Agreement (1998), vol. 1, c. 3, ss. 3.2.2 to 3.2.3; Vuntut Gwitchin First Nation Final Agreement (1993), vol. 1, c. 3, ss. 3.2.2 to 3.2.3.

3 See for example: Gwich'in Comprehensive Land Claim Agreement (1992), vol. 1, c. 4; Sahtu Dene and Metis Comprehensive Land Claim Agreement (1993), vol. 1, c. 4.

End of Document

11.

Beaver v. Hill 2018 ONCA Carswell ONT 16797

2018 ONCA 816
Ontario Court of Appeal

Beaver v. Hill

2018 CarswellOnt 16797, 2018 ONCA 816, [2019] 2 C.N.L.R. 1,
17 R.F.L. (8th) 123, 298 A.C.W.S. (3d) 76, 428 D.L.R. (4th) 288

Brittany Beaver (Applicant / Respondent) and Kenneth Hill (Respondent / Appellant)

P. Lauwers, K. van Rensburg, I.V.B. Nordheimer JJ.A.

Heard: September 11, 2018
Judgment: October 12, 2018
Docket: CA C64766

Proceedings: reversing in part *Beaver v. Hill* (2017), 400 C.R.R. (2d) 267, 4 R.F.L. (8th) 53, [2018] 2 C.N.L.R. 1, 2017 CarswellOnt 19385, 2017 ONSC 7245, Deborah L. Chappel J. (Ont. S.C.J.); additional reasons at *Beaver v. Hill* (2018), [2018] O.J. No. 2845, 8 R.F.L. (8th) 288, 2018 ONSC 3352, 2018 CarswellOnt 8612, Deborah L. Chappel J. (Ont. S.C.J.)

Counsel: Chris G. Paliare, Bryan R.G. Smith, Andrew K. Lokan, for Appellant
Harold Niman, Martha McCarthy, Sarah Strathopolous, Joanna Radbord, Scott Byers, for Respondent
Manizeh Fancy, Estée L. Garfin, for Attorney General of Ontario, Intervenor

Subject: Civil Practice and Procedure; Constitutional; Family; International; Public
Related Abridgment Classifications
Aboriginal and Indigenous law
VI Family law
VI.5 Miscellaneous
Conflict of laws
III Family law
III.5 Support
III.5.c Miscellaneous
Conflict of laws
III Family law
III.6 Children
III.6.d Custody
III.6.d.vi Miscellaneous
Family law
I Constitutional issues
I.3 Miscellaneous
Family law
XVII Practice and procedure
XVII.1 Jurisdiction
XVII.1.c Support
XVII.1.c.i Child support
Family law
XVII Practice and procedure
XVII.1 Jurisdiction

XVII.1.c Support
XVII.1.c.ii Spousal support
Family law
XVII Practice and procedure
XVII.1 Jurisdiction
XVII.1.d Parentage, custody and access
Family law
XVII Practice and procedure
XVII.11 Costs
XVII.11.e Costs of particular proceedings
XVII.11.e.iii Support
Family law
XVII Practice and procedure
XVII.11 Costs
XVII.11.e Costs of particular proceedings
XVII.11.e.iv Custody and access

Headnote

Aboriginal and indigenous law --- Family law — Miscellaneous

Parties were Haudenosaunee and members of Six Nations of Grand River who were in relationship from 2008 to 2013 and had one child, born 2009 — Wife applied for interim custody pursuant to Children's Law Reform Act and child and spousal support pursuant to Family Law Act — Husband claimed that he had constitutional right under s. 35(1) of Constitution Act, 1982 to have parties' family law dispute decided through "Haudenosaunee governance processes and protocols and according to Haudenosaunee laws" and brought motion to dismiss wife's family law action or to stay application for interim relief to allow him to allow constitutional challenge to proceed first — Motion judge granted wife's application and based on his non-taxable income in 2014 of $2,109,000, husband was ordered to pay $33,183 per month in interim child support and 100 per cent of s. 7 expenses under Federal Child Support Guidelines — In dismissing husband's stay application, motion judge held Superior Court had jurisdiction to hear family law dispute as well as his constitutional challenge — Husband appealed — Appeal allowed in part — It was not appropriate to apply conflict of laws concepts to determine whether Superior Court had jurisdiction over husband as Aboriginal rights or Indigenous law did not constitute "foreign law" — Husband's constitutional claim should not have been struck out without leave to amend, given general right to amend pleadings absent non-compensable prejudice — It was not clear that husband did not have standing or that his claim was not justiciable — Full hearing was required to determine claim as Aboriginal and treaty claims were complex — Husband was required to comply with interim orders respecting custody and support pending determination of his constitutional claims.

Family law --- Constitutional issues — General principles

Parties were Haudenosaunee and members of Six Nations of Grand River who were in relationship from 2008 to 2013 and had one child, born 2009 — Wife applied for interim custody pursuant to Children's Law Reform Act and child and spousal support pursuant to Family Law Act — Husband claimed that he had constitutional right under s. 35(1) of Constitution Act, 1982 to have parties' family law dispute decided through "Haudenosaunee governance processes and protocols and according to Haudenosaunee laws" and brought motion to dismiss wife's family law action or to stay application for interim relief to allow him to allow constitutional challenge to proceed first — Motion judge granted wife's application and based on his non-taxable income in 2014 of $2,109,000, husband was ordered to pay $33,183 per month in interim child support and 100 per cent of s. 7 expenses under Federal Child Support Guidelines — In dismissing husband's stay application, motion judge held Superior Court had jurisdiction to hear family law dispute as well as his constitutional challenge — Husband appealed — Appeal allowed in part — It was not appropriate to apply conflict of laws concepts to determine whether Superior Court had jurisdiction over husband as Aboriginal rights or Indigenous law did not constitute "foreign law" — Husband's constitutional claim should not have been struck out without leave to amend, given general right to amend pleadings absent non-compensable prejudice — It was not clear that husband did not have standing or that his claim was not justiciable — Full hearing was required to determine claim as Aboriginal and treaty claims were complex — Husband was required to comply with interim orders respecting custody and support pending determination of his constitutional claims.

Family law --- Custody and access — Jurisdiction of courts — General principles
Parties were Haudenosaunee and members of Six Nations of Grand River who were in relationship from 2008 to 2013 and had one child, born 2009 — Mother applied for interim custody pursuant to Children's Law Reform Act and child and spousal support pursuant to Family Law Act — Father claimed that he had constitutional right under s. 35(1) of Constitution Act, 1982 to have parties' family law dispute decided through "Haudenosaunee governance processes and protocols and according to Haudenosaunee laws" and brought motion to dismiss mother's family law action or to stay application for interim relief to allow him to allow constitutional challenge to proceed first — Motion judge granted mother's application and based on his non-taxable income in 2014 of $2,109,000, father was ordered to pay $33,183 per month in interim child support and 100 per cent of s. 7 expenses under Federal Child Support Guidelines — In dismissing father's stay application, motion judge held Superior Court had jurisdiction to hear family law dispute as well as his constitutional challenge — Father appealed — Appeal allowed in part — It was not appropriate to apply conflict of laws concepts to determine whether Superior Court had jurisdiction over father as Aboriginal rights or Indigenous law did not constitute "foreign law" — Father's constitutional claim should not have been struck out without leave to amend, given general right to amend pleadings absent non-compensable prejudice — It was not clear that father did not have standing or that his claim was not justiciable — Full hearing was required to determine claim as Aboriginal and treaty claims were complex — Father was required to comply with interim orders respecting custody and support pending determination of his constitutional claims.
Family law --- Support — Spousal support under Divorce Act and provincial statutes — Practice and procedure — Jurisdiction of courts
Parties were Haudenosaunee and members of Six Nations of Grand River who were in relationship from 2008 to 2013 and had one child, born 2009 — Wife applied for spousal pursuant to Family Law Act — Husband claimed that he had constitutional right under s. 35(1) of Constitution Act, 1982 to have parties' family law dispute decided through "Haudenosaunee governance processes and protocols and according to Haudenosaunee laws" and brought motion to dismiss wife's family law action or to stay application for interim relief to allow him to allow constitutional challenge to proceed first — Motion judge granted wife's application and dismissed husband's stay application concluding that Superior Court had jurisdiction to hear family law dispute as well as his constitutional challenge — Husband appealed — Appeal allowed in part — It was not appropriate to apply conflict of laws concepts to determine whether Superior Court had jurisdiction over husband as Aboriginal rights or Indigenous law did not constitute "foreign law" — Husband's constitutional claim should not have been struck out without leave to amend given general right to amend pleadings absent non-compensable prejudice — It was not clear that Husband did not have standing or that his claim was not justiciable — Full hearing was required to determine claim as Aboriginal and treaty claims were complex — Husband was required to comply with interim order respecting spousal support pending determination of his constitutional claims.
Family law --- Support — Child support under federal and provincial guidelines — Practice and procedure — Jurisdiction of courts
Parties were Haudenosaunee and members of Six Nations of Grand River who were in relationship from 2008 to 2013 and had one child, born 2009 — Mother applied for interim child support pursuant to Family Law Act — Father claimed that he had constitutional right under s. 35(1) of Constitution Act, 1982 to have parties' family law dispute decided through "Haudenosaunee governance processes and protocols and according to Haudenosaunee laws" and brought motion to dismiss mother's family law action or to stay application for interim relief to allow him to allow constitutional challenge to proceed first — Motion judge granted mother's application and based on his non-taxable income in 2014 of $2,109,000, father was ordered to pay $33,183 per month in interim child support and 100 per cent of s. 7 expenses under Federal Child Support Guidelines — In dismissing father's stay application, motion judge held Superior Court had jurisdiction to hear family law dispute as well as his constitutional challenge — Father appealed — Appeal allowed in part — It was not appropriate to apply conflict of laws concepts to determine whether Superior Court had jurisdiction over husband as Aboriginal rights or Indigenous law did not constitute "foreign law" — Father's constitutional claim should not have been struck out without leave to amend given general right to amend pleadings absent non-compensable prejudice — It was not clear that father did not have standing or that his claim was not justiciable — Full hearing was required to determine claim as Aboriginal and treaty claims were complex — Father was required to comply with interim order respecting child support pending determination of his constitutional claims.
Conflict of laws --- Family law — Support — Miscellaneous
Conflict of laws --- Family law — Children — Custody — Miscellaneous

Family law --- Costs — Support
Family law --- Costs — Custody and access

Table of Authorities

Cases considered by *P. Lauwers J.A.*:

Behn v. Moulton Contracting Ltd. (2013), 2013 SCC 26, 2013 CarswellBC 1158, 2013 CarswellBC 1159, 357 D.L.R. (4th) 236, 43 B.C.L.R. (5th) 1, [2013] 7 W.W.R. 1, 443 N.R. 303, (sub nom. *Behn v. Moulton Contracting Ltd.)* [2013] 3 C.N.L.R. 125, 333 B.C.A.C. 34, 571 W.A.C. 34, (sub nom. *Behn v. Moulton Contracting Ltd.)* [2013] 2 S.C.R. 227 (S.C.C.) — referred to

CAW-Canada, Local 444 v. Great Blue Heron Gaming Co. (2008), 2008 CarswellOnt 2357, 2008 CarswellOnt 2358, (sub nom. *Mississaugas of Scugog Island First Nation v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 444)* 386 N.R. 400 (note), (sub nom. *Mississaugas of Scugog Island First Nation v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 444)* 255 O.A.C. 390 (note) (S.C.C.) — considered

Canada (Attorney General) v. Law Society (British Columbia) (1982), [1982] 2 S.C.R. 307, 37 B.C.L.R. 145, [1982] 5 W.W.R. 289, 19 B.L.R. 234, 43 N.R. 451, 137 D.L.R. (3d) 1, 66 C.P.R. (2d) 1, 1982 CarswellBC 133, 1982 CarswellBC 743 (S.C.C.) — referred to

Delgamuukw v. British Columbia (1997), 153 D.L.R. (4th) 193, 220 N.R. 161, 99 B.C.A.C. 161, 162 W.A.C. 161, [1997] 3 S.C.R. 1010, 1997 CarswellBC 2358, 1997 CarswellBC 2359, [1998] 1 C.N.L.R. 14, [1999] 10 W.W.R. 34, 66 B.C.L.R. (3d) 285 (S.C.C.) — considered

Fisher v. District Court (1976), 424 U.S. 382 (U.S. Sup. Ct.) — referred to

Haida Nation v. British Columbia (Minister of Forests) (2004), 2004 SCC 73, 2004 CarswellBC 2656, 2004 CarswellBC 2657, 245 D.L.R. (4th) 33, 19 Admin. L.R. (4th) 195, 11 C.E.L.R. (3d) 1, [2005] 1 C.N.L.R. 72, 26 R.P.R. (4th) 1, [2005] 3 W.W.R. 419, [2004] 3 S.C.R. 511, 36 B.C.L.R. (4th) 282, 327 N.R. 53, 206 B.C.A.C. 52, 338 W.A.C. 52, 2004 CSC 73 (S.C.C.) — referred to

L. (S.R.) v. T. (K.J.) (2014), 2014 BCSC 1562, 2014 CarswellBC 2455 (B.C. S.C.) — considered

Lax Kw'alaams Indian Band v. Canada (Attorney General) (2011), 2011 SCC 56, 2011 CarswellBC 2861, 2011 CarswellBC 2862, 62 C.E.L.R. (3d) 1, [2011] 12 W.W.R. 209, (sub nom. *Lax Kw'alaams Indian Band v. Canada)* 338 D.L.R. (4th) 193, 23 B.C.L.R. (5th) 217, 423 N.R. 3, [2011] 3 S.C.R. 535, 313 B.C.A.C. 3, 533 W.A.C. 3, [2011] 4 C.N.L.R. 346 (S.C.C.) — referred to

Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832 (1987), 38 D.L.R. (4th) 321, 73 N.R. 341, (sub nom. *Manitoba (Attorney General) v. Metropolitan Stores (M.T.S.) Ltd.)* [1987] 3 W.W.R. 1, 46 Man. R. (2d) 241, (sub nom. *Manitoba (Attorney General) v. Metropolitan Stores (M.T.S.) Ltd.)* 25 Admin. L.R. 20, (sub nom. *Manitoba (Attorney General) v. Metropolitan Stores (M.T.S.) Ltd.)* 87 C.L.L.C. 14,015, 18 C.P.C. (2d) 273, [1987] D.L.Q. 235, 1987 CarswellMan 176, (sub nom. *Manitoba (Attorney General) v. Metropolitan Stores Ltd.)* [1987] 1 S.C.R. 110, 1987 CarswellMan 272 (S.C.C.) — considered

Mississaugas of Scugog Island First Nation v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (2007), 2007 ONCA 814, 2007 CarswellOnt 7576, (sub nom. *Mississaugas of Scugog Island First Nation v. C.A.W.-Canada, Local 444)* 287 D.L.R. (4th) 452, 2008 C.L.L.C. 220-031, [2007] O.L.R.B. Rep. 1197, (sub nom. *Mississaugas of Scugog Island First Nation v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada))* [2008] 1 C.N.L.R. 71, (sub nom. *Mississaugas of Scugog Island First Nation v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 444)* 231 O.A.C. 113, (sub nom. *Mississaugas of Scugog Island First Nation v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 444)* 88 O.R. (3d) 583 (Ont. C.A.) — considered

R. v. Sparrow (1990), 70 D.L.R. (4th) 385, 111 N.R. 241, [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160, 46 B.C.L.R. (2d) 1, 56 C.C.C. (3d) 263, [1990] 4 W.W.R. 410, 1990 CarswellBC 105, 1990 CarswellBC 756 (S.C.C.) — considered

R. v. Van der Peet (1996), [1996] 9 W.W.R. 1, 23 B.C.L.R. (3d) 1, 50 C.R. (4th) 1, 1996 CarswellBC 2309, 1996 CarswellBC 2310, 80 B.C.A.C. 81, 109 C.C.C. (3d) 1, [1996] 4 C.N.L.R. 177, 137 D.L.R. (4th) 289, 200 N.R. 1, [1996] 2 S.C.R. 507, 130 W.A.C. 81 (S.C.C.) — referred to

RJR-MacDonald Inc. v. Canada (Attorney General) (1994), 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 60 Q.A.C. 241, 54 C.P.R. (3d) 114, 111 D.L.R. (4th) 385, 1994 CarswellQue 120F, [1994] 1 S.C.R. 311, 1994 CarswellQue 120 (S.C.C.) — considered

Spar Roofing & Metal Supplies Ltd. v. Glynn (2016), 2016 ONCA 296, 2016 CarswellOnt 6407, 348 O.A.C. 330, 401 D.L.R. (4th) 318 (Ont. C.A.) — referred to

Titova v. Titov (2012), 2012 ONCA 864, 2012 CarswellOnt 15666, 299 O.A.C. 215, 29 R.F.L. (7th) 267 (Ont. C.A.) — referred to

Statutes considered:

Children's Law Reform Act, R.S.O. 1990, c. C.12

Generally — referred to

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44

s. 35 — considered

s. 35(1) — considered

Family Law Act, R.S.O. 1990, c. F.3

Generally — referred to

Rules considered:

Family Law Rules, O. Reg. 114/99

Generally — referred to

R. 2 — considered

R. 2(3) — considered

R. 11 — referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 26.01 — referred to

Regulations considered:

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)

Federal Child Support Guidelines, SOR/97-175

s. 7 — considered

APPEAL by father from judgments reported at *Beaver v. Hill* (2017), 2017 ONSC 7245, 2017 CarswellOnt 19385, 4 R.F.L. (8th) 53, 400 C.R.R. (2d) 267, [2018] 2 C.N.L.R. 1 (Ont. S.C.J.) and *Beaver v. Hill* (2018), 2018 ONSC 3352, 2018 CarswellOnt 8612, 8 R.F.L. (8th) 288, [2018] O.J. No. 2845 (Ont. S.C.J.), respecting Aboriginal constitutional matters and family law proceedings.

***P. Lauwers J.A.*:**

1 Brittany Beaver and Kenneth Hill are Haudenosaunee and are members of the Six Nations of the Grand River. They were in an intimate relationship from 2008 to 2013. Together, they had one child — B., who was born in August 2009.

2 In the order under appeal, the motion judge struck out Mr. Hill's amended answer and dismissed the constitutional claim he brought under s. 35 of the *Constitution Act, 1982*, to have the parties' family law dispute decided through "Haudenosaunee governance processes and protocols and according to Haudenosaunee laws." Under the motion judge's order, Ms. Beaver's application for custody, spousal and child support would proceed in the ordinary course under the *Children's Law Reform Act*, R.S.O. 1990, c. C.12 ("*CLRA*") and *Family Law Act*, R.S.O. 1990, c. F. 3 ("*FLA*") and associated rules and practices, without regard to Mr. Hill's constitutional claim.

3 For the reasons set out below, I would allow the appeal in part. I would dismiss Ms. Beaver's motion before this court to dismiss the appeal as an abuse of process.

A. THE PROCEEDINGS TO DATE

4 In December 2015, Ms. Beaver brought an application for B.'s custody under the *CLRA* and child and spousal support under the *FLA*. Mr. Hill filed an answer and defence in the usual form in February 2016. However, in March 2016, he filed a notice of constitutional question challenging the jurisdiction of the Superior Court, as well as the applicability of the *CLRA* and *FLA*, on the basis that he had an Aboriginal and treaty right, protected by s. 35 of the *Constitution Act, 1982*, to have his family law disputes resolved pursuant to Haudenosaunee law. He claimed what might be characterized as a constitutional exemption from the application of Ontario family law and the jurisdiction of the Superior Court to determine the parties' dispute. Mr. Hill also gave notice of his constitutional claim to the Chief of the Six Nations and to the Haudenosaunee Confederacy Council but neither has taken steps to intervene or participate.

5 In pursuit of the constitutional question, Mr. Hill filed an amended answer consistent with his constitutional claim. He moved for an order dismissing Ms. Beaver's family law application, or, in the alternative, for an order staying her application for interim relief in order to allow his constitutional challenge to proceed first.

6 Ms. Beaver moved for interim spousal and child support. She sought additional relief including:

(i) a declaration that the Superior Court has jurisdiction to deal with the family law issues raised by the parties;

(ii) an order striking the amended answer; or

(iii) an order staying Mr. Hill's constitutional challenge.

7 The motion judge granted Ms. Beaver's motion and dismissed Mr. Hill's stay motion. She held that the Superior Court had jurisdiction to hear the family law dispute. She struck Mr. Hill's amended answer without leave to amend and dismissed his claim under s. 35(1) of the *Constitution Act, 1982*. The motion judge left Mr. Hill to decide whether to proceed with a conventional answer as he suggested he might do in his amended answer.

8 Based on the appellant's non-taxable income in 2014 of $2,109,000, by order dated May 28, 2018, Sloan J. required the appellant to pay $33,183 per month interim child support, and 100% of the s. 7 expenses.

B. OVERVIEW

9 It is axiomatic that a person who has a constitutional right has the right to assert it in ordinary legal proceedings subject to the limitations in the jurisprudence to which I will refer later.

10 The constitutional issue to which Mr. Hill's claim gives rise is whether s. 35 of the *Constitution Act, 1982*, together with any applicable treaties, completely displace or otherwise modify the application of the *FLA*, the *CLRA* and associated rules to this family law dispute between Indigenous parties who live in Ontario. This is a complex legal issue with serious implications for the immediate parties and more broadly.

11 The Superior Court of Justice has jurisdiction to decide the constitutional issue. It is a court of inherent and plenary jurisdiction, and has authority over disputes between citizens and residents subject to the provisions of legislation and the Constitution, with associated rights of appeal: *Canada (Attorney General) v. Law Society (British Columbia)*, [1982] 2 S.C.R. 307 (S.C.C.) at pp. 326-27. This appears to be trite law and is now common ground on the appeal, although the appellant at first instance mounted a comprehensive challenge to the jurisdiction of the Superior Court, including its ability to make any order in the family law proceedings in the face of his s. 35 claim.

12 The prospective delay in resolving Mr. Hill's constitutional claim added urgency. Ms. Beaver needed support for herself and B., and Mr. Hill's proposed stay would have exempted him from any obligation to pay support under provincial law while the constitutional claim proceeded. He implicitly recognized how untenable that position was by undertaking to pay support voluntarily at the rate of $10,000 monthly, considerably less than the amount required by the applicable Ontario guidelines.

13 The version of Mr. Hill's amended answer considered by the motion judge was poorly pleaded and lacking in detail. Neither Mr. Hill's pleading, nor the ramshackle way in which the constitutional claim was asserted and is being developed, does justice to the seriousness of the claim. The appellant provided this court with a draft "Amended Answer and Claim," which would amend extensively the version considered by the motion judge. Nonetheless, as I will explain, it was premature to dispose of the constitutional claim at this early stage. It is difficult to evaluate Mr. Hill's claim under s. 35 of the *Constitution Act, 1982* at this early stage of the proceeding. It would be unwise to dismiss the claim summarily on such a scanty record.

14 In the end result, I would permit Mr. Hill to seek leave before another Superior Court judge to amend his answer to address the motion judge's criticisms of his pleading and the requirements of the jurisprudence. I would refuse to stay the interim support order and would permit Ms. Beaver to pursue any other remedy open to her short of a final order while the constitutional challenge is pending. This would properly balance the contending interests: Ms. Beaver's immediate interest in obtaining interim support for herself and B., and Mr. Hill's interest in having the constitutional claim determined.

C. THE ISSUES

15 The appeal raises the following issues:

1. Should conflict of laws concepts be applied to determine whether the Superior Court had jurisdiction over Mr. Hill?

2. Was it appropriate for the motion judge to strike Mr. Hill's constitutional claim without leave to amend?

3. Does Mr. Hill have standing to assert the constitutional claim, and is it justiciable?

4. Was Mr. Hill entitled to a stay of Ms. Beaver's family law claims pending disposition of his constitutional claims?

D. ANALYSIS

16 I address each issue in turn.

(1) Should conflict of laws concepts be applied to determine whether the Superior Court had jurisdiction over Mr. Hill?

17 I agree with the appellant and with the Attorney General of Ontario that it was an error of law for the motion judge to take into account general conflict of laws principles in her analysis of the jurisdiction issue raised by the appellant. These principles do not provide an apt framework for reconciling Aboriginal rights with the family law of Ontario. For the purpose of applying s. 35 of the *Constitution Act, 1982*, Aboriginal rights or Indigenous law do not constitute "foreign law", even conceptually.

18 I note here, to be fair, that the appellant's approach to the motions at first instance was to deny that the general common law rules respecting jurisdiction apply where the challenge is founded on a s. 35 right. The motion judge described the appellant's assertion, at para. 37, that it was premature for the court to issue a declaration respecting jurisdiction at that stage, in the absence of "a full and fair hearing of [the appellant's] aboriginal rights case on the merits, . . . [which] can only occur in this case if the court has the benefit of a complete evidentiary record respecting relevant current and pre-European contact practices, customs and traditions of the Haudenosaunee and the people of the Six Nations." This might explain the motion judge's resort to the concept of "attornment". In any event the appellant conceded on appeal the plenary jurisdiction of the court.

(2) Was it appropriate for the motion judge to strike Mr. Hill's constitutional claim without leave to amend?

19 The motion judge found Mr. Hill's amended answer to be woefully inadequate with respect to his constitutional claim. I generally agree with the motion judge's analysis of the deficiencies in the amended answer, at paras. 76-92 of the reasons.

20 The motion judge did not give Mr. Hill leave to amend the answer in relation to the constitutional claim, presumably on the basis that she had dismissed it. In the circumstances of this case, this was an error in principle. There is a general right to amend pleadings absent non-compensable prejudice: r. 26.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194; r. 11 of the *Family Law Rules*, 0. Reg. 114/99. Even where the motion is to strike the pleading for failure to disclose a cause of action,

the court should consider whether an amendment could remedy the deficiency: *Spar Roofing & Metal Supplies Ltd. v. Glynn*, 2016 ONCA 296, 348 O.A.C. 330 (Ont. C.A.), at para. 37. Even in this case, where the appellant had already amended his answer, the motion judge ought to have considered whether he should be given the opportunity to further amend the answer in an effort to address the serious deficiencies she identified.

21 As noted, the appellant provided this court with a draft "Amended Answer and Claim." It is not our role to decide whether the draft passes pleadings muster. That decision lies with the Superior Court of Justice on a proper motion. But I will make occasional references to it in these reasons because it clarifies somewhat the appellant's constitutional claim.

(3) Does Mr. Hill have standing to assert the constitutional claim, and is it justiciable?

22 The issues of standing and justiciability are best addressed together because the motion judge's logic for her disposition of both stems from the same root: in her view Mr. Hill impermissibly makes a comprehensive claim to self-government for the particular Aboriginal community, the Haudenosaunee, to which he, Ms. Beaver and B. belong by blood.

23 As I will explain, the motion judge's decision that Mr. Hill does not have standing to assert the claim he is making and that it is not justiciable cannot be sustained on the record before us. This is a determination that should usually (but not invariably) be made on the basis of evidence, as the Supreme Court jurisprudence urges.

(a) The Motion Judge's Reasons

24 The motion judge characterized Mr. Hill's constitutional claim under s. 35(1) of the *Constitution Act, 1982*, at para. 100, as a "broad claim" to have his family law dispute dealt with "through Haudenosaunee processes and laws." She concluded, at para. 99, that Mr. Hill did not have standing to make the claim, and dismissed the constitutional claim. She added a second reason, at para. 122, that the constitutional claim was not justiciable.

25 On the standing issue, the motion judge noted the uncertainty in the law regarding the right of an individual member of an Aboriginal community to pursue personally a claim based on Aboriginal rights: paras. 96-97. She rejected Mr. Hill's argument that his claim "is essentially individual in nature": para. 98. She noted that:

> [H]is claim is in essence that the Haudenosaunee and the people of the Six Nations as a collective group, or as two separate communities, have an inherent right of self-government with respect to the management, adjudication and resolution of inter and intra-familial disputes, and that he as an individual member of these communities is entitled to avail himself of the benefit of that right.

She added, at para. 99:

> The Respondent's attempt to describe his claim as being purely individual to him does not in my view make sense given that aboriginal rights derive from practices, customs and traditions that are integral to the distinctive culture of the collective *community*. Furthermore, if he were to succeed in advancing such a broad right to be governed by Haudenosaunee adjudicative processes and laws, the decision would have precedential value for all other Haudenosaunee peoples, which would in essence render any established right a communal one. . . . The notion that an individual member of an aboriginal group can on their own initiative and for their sole benefit seek to define the content of broad Haudenosaunee rights of self-government in Family Law matters is simply not tenable.

26 On justiciability, the motion judge again characterized Mr. Hill's claim as essentially a claim to self-government. She noted, at para. 123, that courts cannot adjudicate "upon claims involving broadly framed rights of self-governance." She referred, at para. 124, to Lamer C.J.'s statement "that aboriginal rights claims to self-government, if they exist, are "not cognizable under s. 35(1)" if they are cast in overly broad terms": *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (S.C.C.), at para 170. She also cited this court's decision to the same effect in *Mississaugas of Scugog Island First Nation v. National Automobile, Aerospace, Transportation and General Workers Union of Canada*, 2007 ONCA 814, 231 O.A.C. 113 (Ont. C.A.) (at paras.

18 and 47), leave to appeal to the S.C.C. denied, [*CAW-Canada, Local 444 v. Great Blue Heron Gaming Co.*] [2008] S.C.C.A. No. 35 (S.C.C.).

27 The motion judge analyzed and rejected Ms. Beaver's argument that some of the claims Mr. Hill makes in his answer should be struck as incompatible with Crown sovereignty, at paras. 108-121. Although I do not necessarily agree with the text of every paragraph in her reasons on this point, in my view she correctly refused to strike the amended answer on this basis.

(b) Discussion

(i) The Governing Principles

28 I pick out five relevant principles from the jurisprudence. First, courts have been instructed to keep in mind the basic purpose of s. 35(1) of the *Constitution Act, 1982*, which is "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown": per Lamer C.J. in *R. v. Van der Peet*, [1996] 2 S.C.R. 507 (S.C.C.) at para. 31, see also *Delgamuukw*, at para. 186, and *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 (S.C.C.), at para. 17. Proceedings in this area call for "a measure of flexibility not always present" in ordinary litigation: *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, [2011] 3 S.C.R. 535 (S.C.C.), at para. 46.

29 Second, because we are still feeling our way in this delicate area, courts should avoid making definitive pronouncements where a case is in the early stages and where the applicable law is yet in the early stage of development: *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26, [2013] 2 S.C.R. 227 (S.C.C.), at paras. 32 and 35.

30 Such caution is consistent with the decision in *Lax Kw'alaams Indian Band*. Binnie J. noted, at para. 11, that Aboriginal and treaty claims are complex. They are best suited to civil actions for declaratory relief, where there are pleadings, pre-trial discovery and "procedural advantages afforded by the civil rules of practice to facilitate a full hearing of all relevant issues." He added an important caution:

> Such potential advantages are dissipated, however, if the ordinary rules governing civil litigation, including the rules of pleading, are not respected. It would not be in the public interest to permit a civil trial to lapse into a sort of free-ranging general inquiry into the practices and customs of pre-contact Aboriginal peoples from which, at the end of the day, the trial judge would be expected to put together a report on what Aboriginal rights might, if properly raised in the pleadings, have been established.

The pleadings play an important role in defining the issues.

31 Third, Binnie J. concluded his observations in *Lax Kw'alaams Indian Band* with a clear direction, at para. 12: "The existence and scope of Aboriginal rights protected as they are under s. 35(1) of the *Constitution Act, 1982*, must be determined after a full hearing that is fair to all the stakeholders." This direction should give courts some pause before employing summary processes such as pleadings motions to dismiss claims involving Aboriginal and treaty rights.

32 Fourth, the four-stage structure for analyzing s. 35(1) claims was set out by the Supreme Court in *Lax Kw'alaams Indian Band*, at para. 46. The decision built on the framework initiated in *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (S.C.C.) and developed further in *Van der Peet*. This structure would apply with necessary modifications to Mr. Hill:

> First, at the characterization stage, identify the precise nature of the First Nation's claim to an Aboriginal right based on the pleadings. If necessary, in light of the evidence, refine the characterization of the right claimed on terms that are fair to all parties.
>
> Second, determine whether the First Nation has proved, based on the evidence adduced at trial:
>
> > (a) the existence of the pre-contact practice, tradition or custom advanced in the pleadings as supporting the claimed right; and

(b) that this practice was integral to the distinctive pre-contact Aboriginal society.

Third, determine whether the claimed modern right has a reasonable degree of continuity with the "integral" pre-contact practice. In other words, is the claimed modern right demonstrably connected to, and reasonably regarded as a continuation of, the pre-contact practice? At this step, the court should take a generous though realistic approach to matching pre-contact practices to the claimed modern right. As will be discussed, the pre-contact practices must engage the essential elements of the modern right, though of course the two need not be exactly the same.

33 The fourth stage is to consider whether any infringement of the right established on the evidence could be justified.

34 Finally, how the individual and collective aspects of Aboriginal and treaty rights are to be reconciled practically in live litigation like this case is an unresolved issue.

35 In *Behn*, the Supreme Court considered when and how an individual might personally claim the shelter of a communal constitutional right under s. 35, which is the issue we face here. While acknowledging, at para. 31, that the duty to consult is "owed to the Aboriginal community" and cannot be asserted by an individual, the court resisted the invitation of intervenors to classify or categorize "Aboriginal or treaty rights" into those that are "exclusively collective", those that are "predominantly individual" and those that are "mixed": paras. 34-35.

36 The analysis is subtle, and can best be seen by considering together several passages. LeBel J. noted the Crown's argument, at para. 33, "that claims in relation to treaty rights must be brought by, or on behalf of, the Aboriginal community." He rejected this argument: "This general proposition is too narrow." While accepting that "Aboriginal and treaty rights are collective in nature", LeBel J. left the door ajar for individuals to assert or protect such rights:

However, certain rights, despite being held by the Aboriginal community, are nonetheless exercised by individual members or assigned to them. These rights may therefore have both collective and individual aspects. Individual members of a community may have a vested interest in the protection of these rights. It may well be that, in appropriate circumstances, individual members can assert certain Aboriginal or treaty rights, as some of the interveners have proposed.

37 LeBel J. noted, at para. 35, that despite the "collective aspect of Aboriginal and treaty rights, rights may sometimes be assigned to or exercised by individual members of Aboriginal communities, and entitlements may sometimes be created in their favour." Consequently, he observed: "it could be said that these rights might belong to them or that they have an individual aspect regardless of their collective nature."

38 The Supreme Court was not required in *Behn* to make a definitive ruling on how the individual and collective aspects of Aboriginal and treaty rights are to be reconciled practically in live actions because the case, which was about fishing rights, was decided on the ground of abuse of process. But the court's observations are instructive.

(ii) The Principles Applied

39 Mr. Hill has no authority to pursue a constitutional claim on behalf of the Haudenosaunee or the people of Six Nations. He is not a "representative plaintiff". However, this is not necessarily fatal to Mr. Hill's personal claim to have the parties' family law dispute decided through "Haudenosaunee governance processes and protocols and according to Haudenosaunee laws." Consistent with LeBel J.'s observations in *Behn*, some Aboriginal and treaty rights might be capable of being asserted by an individual. The claim Mr. Hill makes could fall into that category, depending on how the evidence unfolds.

40 The *Sparrow* framework requires the court first to characterize the Aboriginal and treaty claim, and then to refine it if necessary. This can only be done by looking at the pleading, which has changed significantly.

A Moving Target?

41 Earlier, I made the observation that Mr. Hill's claim had been pursued in a ramshackle way. Counsel for Ms. Beaver argues that Mr. Hill continues to present a moving target, which changes as success eludes him. It could be said that his position is evolving as his lawyers grasp more clearly the full implications of his claim and what he will need to prove in order to be successful. The case we are asked to consider is not the same as the one before the motion judge.

42 The case has changed in two ways. First, as I have already observed, the thrust of Mr. Hill's argument to the motion judge was that the Superior Court had no jurisdiction over this family law dispute, based on s. 35 of the *Constitution Act, 1982*. The Superior Court's undoubted jurisdiction is now conceded by Mr. Hill. Second, Mr. Hill insisted before the motion judge that he was asserting an essentially individual claim, although his pleading could arguably be characterized as a claim to "self-government". Mr. Hill's draft amended answer clarifies his claim somewhat.

43 I proceed by considering first the amended answer before the motion judge and then the draft amended answer filed with this court.

The Amended Answer Assessed by the Motion Judge

44 In the amended answer Mr. Hill began by describing the dispute as one "concerning quantum of child support" and whether he has "any spousal support obligations" to Ms. Beaver.

45 In relation to the constitutional claim, Mr. Hill's pleading largely tracked the *Sparrow* framework. He asserted "an Aboriginal and treaty right to be bound by the laws of the Haudenosaunee and the people of the Six Nations of the Grand River, including with respect to the care and support of children, and obligations from intimate relationships." He claimed the right to have this dispute "resolved through processes, and pursuant to protocols, that are determined and specific to the Haudenosaunee and the people of the Six Nations of the Grand River."

46 Mr. Hill asserted the historical dimension:

> The Haudenosaunee and the people of the Six Nations have, since prior to the arrival of European settlers and colonization, a robust law, a dispute resolution system, which, among other things, determined how disputes within and between families were to be resolved.

47 He added a reference to continuity:

> This system of law and governance has been practiced continuously since the time of contact with European settlers, despite the operation of other, colonial legal systems. It is distinct to the Haudenosaunee and the Iroquois people of the Six Nations of the Grand River. It is comprehensive and exclusive, in its application to the Haudenosaunee and the people of the Six Nations of the Grand River within their lands and territory. The right of the Haudenosaunee and the people of the Six Nations of the Grand River [to] be governed, and to have intra- and inter-familial disputes resolved through and according to this system has never been extinguished nor surrendered.

48 Finally, Mr. Hill asserted that: "the application and imposition of the *Family Law Act* of Ontario, and associated laws, regulations, and legal processes to this dispute" infringe his right, and the infringement is not justified.

49 I agree with the motion judge's trenchant and accurate criticisms of the version of Mr. Hill's pleading before her. I make no substantive comments on the adequacy of the draft amended pleading; that is the task of a Superior Court judge. But it factors into the analysis.

The Draft Amended Answer and Claim

50 The pleading considered by the motion judge was sparse and consisted of 20 paragraphs. The draft pleading now consists of 176 paragraphs. The first 119 paragraphs respond in conventional terms to the application. The thrust of these paragraphs

is to address what Mr. Hill continues to call a dispute "concerning quantum of child support" and whether he has "any spousal support obligations" to Ms. Beaver.

51 There is a lengthy new section on constitutional issues that is 56 paragraphs long and elaborates considerably on the earlier pleading. The appellant's constitutional claim has been clarified somewhat. In self-government terms, the draft pleading describes an organization known as the "Haudenosaunee Confederacy Council", which is said to be the "peak body that acts as a forum for resolution of disputes, and coordinates discussions and deliberations leading to decisions of the Haudenosaunee". It adds that "the Confederacy Council does function as the highest forum for resolving disputes", including family disputes.

52 The draft pleading states in paras. 150 and 151:

> In or about 2016, the Respondent gave notice of the Dispute to the Confederacy Council.
>
> The Confederacy Council has not yet determined the Dispute, in part because the Applicant has brought these proceedings in the Ontario Superior Court of Justice. It is the stated position of the Confederacy Council that no Haudenosaunee person should compromise their sovereignty by appearing before courts of another jurisdiction. (Emphasis added.)

53 This would appear to be a sweeping claim by the Haudenosaunee Confederacy Council to a form of sovereign immunity from the laws of Ontario and of Canada. In oral argument, counsel advanced the claim that Haudenosaunee laws in relation to this family dispute are "exclusive and compulsory" for Haudenosaunee people including the appellant, the respondent, and B. This is the upshot of the draft pleading, which states at paras. 163 and 164:

> The Respondent pleads that, as a Haudenosaunee person and as a member of the Six Nations of the Grand River, he has a right to be governed by Haudenosaunee law and governance systems, and to have the dispute resolved within and pursuant to the jurisdiction and authority of his own government, rather than by or pursuant to the Province of Ontario, a provincially or federally mandated adjudicative body, and provincial or federal law. He pleads that these rights are recognized and affirmed under s. 35(1) of Canada's *Constitution Act, 1982*.
>
> Further, the Applicant, as a Haudenosaunee person and a member of the Six Nations, cannot avoid her responsibilities to her community by opting out of Haudenosaunee laws, processes, and protocols. Under Haudenosaunee law, once the Respondent has invoked the laws, processes, and protocols of the Haudenosaunee by notifying the Confederacy Council of the dispute, as he did in 2016, he has the right to have the dispute determined according to these laws, processes, and protocols, and the Confederacy Council has the responsibility to determine the dispute under Haudenosaunee laws, processes, and protocols by the means set out above. Both parties have the responsibility to comply with the results. (Emphasis added.)

54 Mr. Hill asserts that neither the *FLA* nor the *CLRA* apply to him or to Ms. Beaver and B., and, in fact, any effort to apply Ontario law would infringe his s. 35 rights as a Haudenosaunee person. In oral argument counsel sharpened the claim by referring to several American authorities, which rest on a theory of complete Aboriginal sovereignty in some spheres: *Fisher v. District Court*, 424 U.S. 382 (U.S. Sup. Ct. 1976), *Davis v. Means*, Indian Law Reporter 6125 (Navajo Nation Supreme Court 1994). This is evidently the claim Mr. Hill wants to pursue.

55 Counsel pointed out that some limited recognition has been given to this feature of American law in Canada. In *L. (S.R.) v. T. (K.J.)*, 2014 BCSC 1562 (B.C. S.C.), with respect to a First Nations couple and their two children who resided in British Columbia, Fenlon J. recognized the jurisdiction of the Shakopee Mdewakanton Sioux (Dakota) Community Tribal Court in Minnesota respecting divorce, property division and spousal support, but took jurisdiction over parenting and child support; this outcome was accepted by the judge of the Tribal Court whose analysis of American law led to the same result.

56 This is quite different from the constitutional basis of reconciliation heretofore understood to be the Canadian vision under s. 35 as expressed in *Van der Peet*, *Delgamuukw*, and *Haida Nation*.

57 In oral argument, the appellant's counsel agreed that characterizing Haudenosaunee laws as "exclusive and compulsory" in relation to this family dispute was the strongest form of Aboriginal right Mr. Hill could claim, but he allowed that the case might not pan out for Mr. Hill that way based on the evidence and the development of the law.

Do the Clarifications Affect the Analysis?

58 I agree with the motion judge that Mr. Hill's constitutional claim does draw on an aspect of self-government, because in order to succeed, he must establish the existence, in reality, of a functioning family dispute resolution system, personal access to which qualifies as an Aboriginal right under s. 35 of the *Constitution Act, 1982*.

59 On their face, the clarifications of Mr. Hill's position in the draft pleading appear to support Ms. Beaver's argument that he is really making a strong claim to self-government, one that is no longer veiled or unclear. Accordingly, her counsel argued, the motion judge got it right on the self-government issue and on standing. She added that Mr. Hill's assertions do not seek reconciliation of two systems, which the Supreme Court envisaged as the essential spirit of s. 35 of the *Constitution Act, 1982* in its decisions on reconciliation. He is not seeking the accommodation of Aboriginal perspectives in Ontario family law, but the exclusion of Ontario law. This is not reconciliation but repudiation, and on that basis alone is constitutionally unsound.

60 I do not see it that way, for four reasons. First, Mr. Hill is not personally or by proxy representing the Haudenosaunee Confederacy Conference. The Conference is not a party to these proceedings, nor at this stage has the Confederacy chosen to intervene. How the Confederacy actually sees its s. 35 rights is not known.

61 Second, Mr. Hill's personal rights depend on the proven existence of a functioning Indigenous family dispute resolution system, access to which qualifies as an Aboriginal right under s. 35 of the *Constitution Act, 1982*. How the constitutional claim fares on the evidence is not the issue before us. That is for another forum. Mr. Hill's focus now is not so much on self-government at large, but on having whatever support obligations he might owe determined through the Indigenous family dispute resolution system. Consequently, despite his own earlier characterization of the claim, Mr. Hill's claim is not exclusively a claim to self-government.

62 Third, although it is true that the determination of Mr. Hill's claim might affect other Haudenosaunee people, this does not make this constitutional dispute different from any other. This feature is common to much constitutional litigation. Consider the example of minority language education rights.

63 Fourth, I would note that the recognition of separate spheres of jurisdiction is a form of reconciliation, albeit not the one that Ms. Beaver seeks.

64 It is not clear to me at this early stage of the litigation that Mr. Hill lacks standing to make the constitutional claim, or that it is not justiciable. I noted above that it is axiomatic that a person who has a constitutional right has the right to assert it in ordinary legal proceedings, as Mr. Hill has done, subject to the limitations in the jurisprudence.

65 If Mr. Hill's factual assertions about the existence of Haudenosaunee laws and protocols are true, and if he can prove they do qualify as Aboriginal rights under s. 35 of the *Constitution Act, 1982*, then I see no way for him to obtain access to the alleged Aboriginal family dispute resolution system to which he claims entitlement other than by the means he has pursued in this case.

66 However, Mr. Hill's claim faces some serious, perhaps insuperable obstacles raised by the jurisprudence, including the following. First, the underlying facts are disputed. Ms. Beaver's evidence is that there is no such "robust law" that Aboriginal persons from Six Nations have used and are using to resolve their family law issues, as the motion judge pointed out at para. 24. She noted Mr. Hill's failure to adduce "any evidence as to the Haudenosaunee laws and protocols that he relies on", at para 151. This might turn out to be fatal to Mr. Hill's claim under the *Sparrow* framework.

67 Second, it is not yet clear whether the Aboriginal law to which Mr. Hill refers, if it exists, would entirely displace Ontario family law or only modify it, a possibility to which the motion judge alluded at para. 89. Indeed, many of the assertions he

makes in the draft pleading could easily inform the process under Ontario law, leading to the form of reconciliation to which Ms. Beaver's counsel alluded.

68 Third, it is not clear whether the Aboriginal law would bind Ms. Beaver and B., who do not live on the reserve, if they do not consent to its application to them.

69 In short, neither the constitutional claim, nor the standing issue, is ripe for disposition on this record. I would set aside the motion judge's dismissal of the claim and her determination of the standing issue. It would be open to Ms. Beaver to pursue a motion for summary judgment after the pleadings have been improved and the evidence has been adequately developed.

(4) Is Mr. Hill entitled to a stay of Ms. Beaver's family law claims pending disposition of his constitutional claims?

70 The motion judge based her analysis of Mr. Hill's entitlement to a stay on the Supreme Court's decisions in *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110 (S.C.C.) and *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.).

71 The motion judge said, at para. 140: "I would have declined to grant him a stay of the Family Law proceedings even if I had not struck out his Amended Answer." I largely agree with her analysis.

72 The Superior Court of Justice clearly has jurisdiction to grant interim relief incidental to its plenary inherent jurisdiction to decide questions of law in private and constitutional matters while the s. 35 claim is being determined.

73 If Mr. Hill wishes to pursue his constitutional claim, he will have to do so while at all times abiding fully with the terms of any and all interim orders. Ms. Beaver and B. are entitled to enforceable support pending the determination of the constitutional claim.

E. THE MOTION TO DISMISS THE APPEAL AS AN ABUSE OF PROCESS

74 Ms. Beaver brought a motion to dismiss the appeal as an abuse of process on the basis that Mr. Hill had not paid arrears of support and had not complied with disclosure orders. This court has held that it would not grant a right of audience to an appellant in such a position. Aware of the possibility that this would deny him an audience, Mr. Hill paid up the arrears and largely complied with the disclosure orders before the hearing of this appeal.

75 Ms. Beaver nonetheless persisted in the motion on two grounds. First, she pointed to the primary objective of family law proceedings as set out in Rule 2 of the *Family Law Rules*, which is "to deal with cases justly". This includes "ensuring that the procedure is fair to all parties"; "saving expense and time"; "dealing with the case in ways that are appropriate to its importance and complexity"; and "giving appropriate court resources to the case while taking account of the need to give resources to other cases." Her counsel argued that the protracted proceedings in a full bore constitutional case on s. 35 of the *Constitution Act, 1982* would defeat the primary objective. Ms. Beaver and B. need their support issues to be finally determined.

76 The second ground advanced by counsel for dismissing on the basis of abuse of process is that, quite apart from the constitutional claim, Mr. Hill has taken a scorched earth approach to every step of this case, including seven motions in this court alone. The "moving target" characterization applies to Mr. Hill's changing positions on paternity and custody, for example. He initially denied paternity, but in the draft pleading says he "is not certain he is [B.]'s biological father." Before Roberts J.A. on March 14, 2018, she noted that he "no longer disputes paternity." He seeks access in the draft pleading, but before Sloan J. in May he sought leave to amend the answer to include a claim for custody of B. The judge refused on the basis that the new custody claim "was meant to intimidate [Ms. Beaver] and for [Mr. Hill] to get more leverage than he already has over the financial issues."

77 Nonetheless, I would dismiss the abuse of process motion. The appellant has the right to advance his constitutional claim, as inconvenient to the respondent, time-consuming and expensive as that might be, even in view of the primary objective of family law proceedings. However, that does not relieve the judiciary or the parties from making every effort to adhere to

the primary objective where possible. As for controlling abuse of process, that is a matter of case management as well as the ordinary application of the *Family Law Rules*, including costs consequences.

F. GOING FORWARD

78 This case has developed into a procedural morass, to which both sides have contributed. A phalanx of lawyers appeared before us. The parties have made no effort to save expense or time as required by ss. 2(3) of the *Family Law Rules*: *Titova v. Titov*, 2012 ONCA 864, 299 O.A.C. 215 (Ont. C.A.), at para. 54. Their tactics have led to a proliferation of materials, skirmishes and arguments that the Rules seek to avoid. This must not be permitted to continue.

79 The case going forward requires active and determined case management, with a view, in particular, to avoiding the sort of free-ranging general inquiry Binnie J. deplored in *Lax Kw'alaams Indian Band*. We were told that this matter is now being case-managed. It will fall to the case management judge, in the first instance, to ensure that this objective is met.

80 Mr. Hill can easily afford constitutional litigation, it would appear. Not so Ms. Beaver. She is simply seeking support under provincial legislation for herself and B. in her family dispute; she should not be left to defend the constitutionality of provincial legislation as important as the *FLA* and the *CLRA* on her own.

81 The Attorney General of Ontario has intervened, thus far only on the conflicts of laws issue, which has now been resolved. If the Attorney General chooses not to become involved in the substantive constitutional issues, in my view it may well be an appropriate case for *amicus* to be considered to assist the court regarding the constitutionality of the impugned provincial legislation.

82 I would also observe that this might well be an appropriate case to consider the trial of an issue regarding the appellant's constitutional claim, which could proceed independently of the support and custody issues.

G. DISPOSITION

83 In light of these reasons, I would allow the appeal in part by setting aside paragraph 4 of the order, which dismissed the constitutional claim, and substituting the following: "The Respondent's Amended Answer and Claim dated June 8, 2016 is struck, with leave to amend."

84 I would otherwise dismiss the appeal.

***K. van Rensburg J.A.*:**

I agree.

***I.V.B. Nordheimer J.A.*:**

I agree.

Appeal allowed in part.

12.

Nevsun Resources Ltd. v. Araya 2020 Carswell BC 447
17

2020 SCC 5, 2020 CSC 5
Supreme Court of Canada

Nevsun Resources Ltd. v. Araya

2020 CarswellBC 447, 2020 CarswellBC 448, 2020 SCC 5, 2020 CSC 5, [2020] 4 W.W.R. 1, 314 A.C.W.S. (3d) 722, 32 B.C.L.R. (6th) 1, 443 D.L.R. (4th) 183, 44 C.P.C. (8th) 225, 462 C.R.R. (2d) 87

Nevsun Resources Ltd. (Appellant) and Gize Yebeyo Araya, Kesete Tekle Fshazion and Mihretab Yemane Tekle (Respondents) and International Human Rights Program, University of Toronto Faculty of Law, EarthRights International, Global Justice Clinic at New York University School of Law, Amnesty International Canada, International Commission of Jurists, Mining Association of Canada and MiningWatch Canada (Interveners)

Wagner C.J.C., Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe, Martin JJ.

Heard: January 23, 2019
Judgment: February 28, 2020
Docket: 37919

Proceedings: affirming *Araya v. Nevsun Resources Ltd.* (2017), 419 D.L.R. (4th) 631, 4 B.C.L.R. (6th) 91, [2018] 2 W.W.R. 221, 12 C.P.C. (8th) 225, 2017 CarswellBC 3232, 2017 BCCA 401, Dickson J.A., Newbury J.A., Willcock J.A. (B.C. C.A.); affirming *Araya v. Nevsun Resources Ltd.* (2016), 408 D.L.R. (4th) 383, 2016 CarswellBC 2786, 2016 BCSC 1856, Abrioux J. (B.C. S.C.); additional reasons at *Araya v. Nevsun Resources Ltd.* (2017), 2017 BCSC 336, 2017 CarswellBC 526, Abrioux J. (B.C. S.C.)

Counsel: Mark D. Andrews, Q.C., Andrew I. Nathanson, Gavin R. Cameron, Caroline L. Senini, for Appellant
Joe Fiorante, Q.C., Reider M. Mogerman, Jen Winstanley, James Yap, Nicholas C. Baker, for Respondents
Cory Wanless, Yolanda Song, for Intervener, International Human Rights Program, University of Toronto Faculty of Law
Tamara Morgenthau, Alison M. Latimer, for Interveners, EarthRights International and the Global Justice Clinic at New York University School of Law
Paul Champ, Jennifer Klinck, Penelope Simons, for Interveners, Amnesty International Canada and the International Commission of Jurists
Luis Sarabia, Steven Frankel, for Intervener, Mining Association of Canada
Bruce W. Johnston, Andrew E. Cleland, Jean-Marc Lacourcière, Clara Poissant-Lespérance, for Intervener, MiningWatch Canada

Subject: Civil Practice and Procedure; Evidence; International; Natural Resources; Property; Public; Torts; Labour
Related Abridgment Classifications
Civil practice and procedure
X Pleadings
X.2 Statement of claim
X.2.f Striking out for absence of reasonable cause of action
X.2.f.ii Plain and obvious
Civil practice and procedure
XVI Disposition without trial
XVI.3 Stay or dismissal of action
XVI.3.c Grounds
XVI.3.c.i Lack of jurisdiction

International law
I Application of international law
I.2 Miscellaneous
International law
IV Immunities of foreign states
IV.4 Miscellaneous

Headnote

Civil practice and procedure --- Disposition without trial — Stay or dismissal of action — Grounds — Lack of jurisdiction
Plaintiffs, who were refugees and former Eritrean nationals, claimed that they were indefinitely conscripted through their military service into forced labour regime where they were required to work at mine in Eritrea and subjected to violent, cruel, inhuman and degrading treatment — Mine was owned by defendant, Canadian company — Plaintiffs started proceedings in British Columbia, seeking damages for breaches of domestic torts and for breaches of customary international law prohibitions — Defendant brought motion to strike pleadings on basis of act of state doctrine — It also took position that claims based on customary international law should be struck because they had no reasonable prospect of success — Chambers judge dismissed defendant's motion to strike on these bases — Defendant's appeal was dismissed — Defendant appealed — Appeal dismissed — Act of state doctrine was not part of Canadian common law, and neither it nor its underlying principles as developed in Canadian jurisprudence were bar to plaintiffs' claims — It was not plain and obvious that plaintiffs' claims against defendant based on breaches of customary international law could not succeed.
Civil practice and procedure --- Pleadings — Statement of claim — Striking out for absence of reasonable cause of action — Plain and obvious
Plaintiffs, who were refugees and former Eritrean nationals, claimed that they were indefinitely conscripted through their military service into forced labour regime where they were required to work at mine in Eritrea and subjected to violent, cruel, inhuman and degrading treatment — Mine was owned by defendant, Canadian company — Plaintiffs started proceedings in British Columbia, seeking damages for breaches of domestic torts and for breaches of customary international law prohibitions — Defendant brought motion to strike pleadings on basis of act of state doctrine — It also took position that claims based on customary international law should be struck because they had no reasonable prospect of success — Chambers judge dismissed defendant's motion to strike on these bases — Defendant's appeal was dismissed — Defendant appealed — Appeal dismissed — Act of state doctrine was not part of Canadian common law, and neither it nor its underlying principles as developed in Canadian jurisprudence were bar to plaintiffs' claims — It was not plain and obvious that plaintiffs' claims against defendant based on breaches of customary international law could not succeed.
International law --- Immunities of foreign states — General principles
Plaintiffs, who were refugees and former Eritrean nationals, claimed that they were indefinitely conscripted through their military service into forced labour regime where they were required to work at mine in Eritrea and subjected to violent, cruel, inhuman and degrading treatment — Mine was owned by defendant, Canadian company — Plaintiffs started proceedings in British Columbia, seeking damages for breaches of domestic torts and for breaches of customary international law prohibitions — Defendant brought motion to strike pleadings on basis of act of state doctrine — It also took position that claims based on customary international law should be struck because they had no reasonable prospect of success — Chambers judge dismissed defendant's motion to strike on these bases — Defendant's appeal was dismissed — Defendant appealed — Appeal dismissed — Act of state doctrine was not part of Canadian common law, and neither it nor its underlying principles as developed in Canadian jurisprudence were bar to plaintiffs' claims — Canadian jurisprudence had addressed principles underlying act of state doctrine within conflict of laws and judicial restraint jurisprudence, with no attempt to have them united as single doctrine — Act of state doctrine in Canada had been completely absorbed by this jurisprudence.
International law --- Application of international law — Miscellaneous
Plaintiffs, who were refugees and former Eritrean nationals, claimed that they were indefinitely conscripted through their military service into forced labour regime where they were required to work at mine in Eritrea and subjected to violent, cruel, inhuman and degrading treatment — Mine was owned by defendant, Canadian company — Plaintiffs started proceedings in British Columbia, seeking damages for breaches of domestic torts and for breaches of customary international law prohibitions — Defendant brought motion to strike pleadings on basis of act of state doctrine — It also took position that claims based on customary international law should be struck because they had no reasonable prospect of success — Chambers judge dismissed

defendant's motion to strike on these bases — Defendant's appeal was dismissed — Defendant appealed — Appeal dismissed — It was not plain and obvious that plaintiffs' claims against defendant based on breaches of customary international law could not succeed — In absence of any contrary law, customary international law norms raised by plaintiffs formed part of Canadian common law and potentially applied to defendant — It was not plain and obvious that Canadian courts could not develop civil remedy in domestic law for corporate violations of customary international law norms adopted in Canadian law.

Procédure civile --- Jugement rendu sans procès — Arrêt des procédures ou rejet de l'action — Motifs — Absence de compétence

Demandeurs, qui étaient des réfugiés et d'anciens ressortissants érythréens, affirmaient avoir été conscrits indéfiniment, par l'entremise de leur service militaire, dans un régime de travail forcé dans le cadre duquel ils ont dû travailler dans une mine en Érythrée et ont subi un traitement violent, cruel, inhumain et dégradant — Mine appartenait à la défenderesse, une société canadienne — Demandeurs ont entamé des procédures en Colombie-Britannique visant à obtenir des dommages-intérêts pour des délits de droit interne et pour la violation des interdictions de droit international coutumier — Défenderesse a déposé une requête en radiation des actes de procédure sur le fondement de la doctrine de l'acte de gouvernement — Elle a également fait valoir que les demandes fondées sur le droit international coutumier devaient être radiées parce qu'elles ne présentaient aucune perspective raisonnable de succès — Juge siégeant en son cabinet a rejeté la requête en radiation de la défenderesse fondée sur ces bases — Appel interjeté par la défenderesse a été rejeté — Défenderesse a formé un pourvoi — Pourvoi rejeté — Doctrine de l'acte de gouvernement ne fait pas partie de la common law canadienne et ni la doctrine ni ses principes sous-jacents élaborés dans la jurisprudence canadienne ne faisaient obstacle aux réclamations des demandeurs — Il n'était pas évident et manifeste que la réclamation des demandeurs à l'encontre de la défenderesse fondée sur des violations du droit international coutumier était vouée à l'échec.

Procédure civile --- Procédures écrites — Déclaration — Radiation pour absence de cause d'action raisonnable — Évident et manifeste

Demandeurs, qui étaient des réfugiés et d'anciens ressortissants érythréens, affirmaient avoir été conscrits indéfiniment, par l'entremise de leur service militaire, dans un régime de travail forcé dans le cadre duquel ils ont dû travailler dans une mine en Érythrée et ont subi un traitement violent, cruel, inhumain et dégradant — Mine appartenait à la défenderesse, une société canadienne — Demandeurs ont entamé des procédures en Colombie-Britannique visant à obtenir des dommages-intérêts pour des délits de droit interne et pour la violation des interdictions de droit international coutumier — Défenderesse a déposé une requête en radiation des actes de procédure sur le fondement de la doctrine de l'acte de gouvernement — Elle a également fait valoir que les demandes fondées sur le droit international coutumier devaient être radiées parce qu'elles ne présentaient aucune perspective raisonnable de succès — Juge siégeant en son cabinet a rejeté la requête en radiation de la défenderesse fondée sur ces bases — Appel interjeté par la défenderesse a été rejeté — Défenderesse a formé un pourvoi — Pourvoi rejeté — Doctrine de l'acte de gouvernement ne fait pas partie de la common law canadienne et ni la doctrine ni ses principes sous-jacents élaborés dans la jurisprudence canadienne ne faisaient obstacle aux réclamations des demandeurs — Il n'était pas évident et manifeste que la réclamation des demandeurs à l'encontre de la défenderesse fondée sur des violations du droit international coutumier était vouée à l'échec.

Droit international --- Immunités dont jouissent les États étrangers — Principes généraux

Demandeurs, qui étaient des réfugiés et d'anciens ressortissants érythréens, affirmaient avoir été conscrits indéfiniment, par l'entremise de leur service militaire, dans un régime de travail forcé dans le cadre duquel ils ont dû travailler dans une mine en Érythrée et ont subi un traitement violent, cruel, inhumain et dégradant — Mine appartenait à la défenderesse, une société canadienne — Demandeurs ont entamé des procédures en Colombie-Britannique visant à obtenir des dommages-intérêts pour des délits de droit interne et pour la violation des interdictions de droit international coutumier — Défenderesse a déposé une requête en radiation des actes de procédure sur le fondement de la doctrine de l'acte de gouvernement — Elle a également fait valoir que les demandes fondées sur le droit international coutumier devaient être radiées parce qu'elles ne présentaient aucune perspective raisonnable de succès — Juge siégeant en son cabinet a rejeté la requête en radiation de la défenderesse fondée sur ces bases — Appel interjeté par la défenderesse a été rejeté — Défenderesse a formé un pourvoi — Pourvoi rejeté — Doctrine de l'acte de gouvernement ne fait pas partie de la common law canadienne et ni la doctrine ni ses principes sous-jacents élaborés dans la jurisprudence canadienne ne faisaient obstacle aux réclamations des demandeurs — Jurisprudence canadienne a traité des principes qui sous-tendent la doctrine dans la jurisprudence portant sur le conflit de lois et la retenue judiciaire, sans tenter de les joindre en une seule doctrine — Au Canada, la doctrine de l'acte de gouvernement a été complètement absorbée par cette jurisprudence.

Droit international --- Application du droit international — Divers

Demandeurs, qui étaient des réfugiés et d'anciens ressortissants érythréens, affirmaient avoir été conscrits indéfiniment, par l'entremise de leur service militaire, dans un régime de travail forcé dans le cadre duquel ils ont dû travailler dans une mine en Érythrée et ont subi un traitement violent, cruel, inhumain et dégradant — Mine appartenait à la défenderesse, une société canadienne — Demandeurs ont entamé des procédures en Colombie-Britannique visant à obtenir des dommages-intérêts pour des délits de droit interne et pour la violation des interdictions de droit international coutumier — Défenderesse a déposé une requête en radiation des actes de procédure sur le fondement de la doctrine de l'acte de gouvernement — Elle a également fait valoir que les demandes fondées sur le droit international coutumier devaient être radiées parce qu'elles ne présentaient aucune perspective raisonnable de succès — Juge siégeant en son cabinet a rejeté la requête en radiation de la défenderesse fondée sur ces bases — Appel interjeté par la défenderesse a été rejeté — Défenderesse a formé un pourvoi — Pourvoi rejeté — Il n'était pas évident et manifeste que la réclamation des demandeurs à l'encontre de la défenderesse fondée sur des violations du droit international coutumier était vouée à l'échec — Sauf disposition législative contraire, les normes de droit international coutumier invoquées par les demandeurs faisaient partie de la common law canadienne et étaient susceptibles de s'appliquer à la défenderesse — Il n'était pas évident et manifeste que les tribunaux canadiens ne pouvaient pas élaborer un recours civil en droit interne pour les violations par une société des normes de droit international coutumier adoptées en droit canadien.

The plaintiffs, who were refugees and former Eritrean nationals, claimed that they were indefinitely conscripted through their military service into a forced labour regime where they were required to work at a mine in Eritrea and subjected to violent, cruel, inhuman and degrading treatment. The mine was owned by the defendant, a Canadian company. The plaintiffs started proceedings in British Columbia, seeking damages for breaches of domestic torts and for breaches of customary international law prohibitions against forced labour, slavery, cruel, inhuman or degrading treatment, and crimes against humanity. The defendant brought a motion to strike the pleadings on the basis of the act of state doctrine, which precludes domestic courts from assessing the sovereign acts of a foreign government. It also took the position that the claims based on customary international law should be struck because they had no reasonable prospect of success. The chambers judge dismissed the defendant's motion to strike on these bases. The defendant's appeal was dismissed. The defendant appealed.

Held: The appeal was dismissed.

Per Abella J. (Wagner C.J.C., Karakatsanis, Gascon, Martin JJ. concurring): The act of state doctrine was not part of Canadian common law, and neither it nor its underlying principles as developed in Canadian jurisprudence were a bar to the plaintiffs' claims. Canadian jurisprudence had addressed the principles underlying the act of state doctrine within conflict of laws and judicial restraint jurisprudence, with no attempt to have them united as a single doctrine. The act of state doctrine in Canada had been completely absorbed by this jurisprudence.

It was not plain and obvious that the plaintiffs' claims against the defendant based on breaches of customary international law could not succeed. In the absence of any contrary law, the customary international law norms raised by the plaintiffs formed part of the Canadian common law and potentially applied to the defendant. It was not plain and obvious that Canadian courts could not develop a civil remedy in domestic law for corporate violations of the customary international law norms adopted in Canadian law. It was at least arguable that the plaintiffs' allegations encompassed conduct not captured by certain existing domestic torts.

Per Brown, Rowe JJ. (dissenting in part): The appeal should be allowed in part. The dismissal of the defendant's application should be upheld as it regarded the foreign act of state doctrine. The appeal should be allowed on the matter of the use of customary international law in creating tort liability.

The plaintiffs' claims for damages based on breach of customary international law disclosed no reasonable cause of action and were bound to fail. The majority explained that the pleadings were broadly worded and identified two separate theories upon which they could be upheld. The plaintiffs' claims were bound to fail on either theory. The claims ran contrary to how norms of international law become binding in Canada. According to the doctrine of adoption, the courts of this country recognize legal prohibitions that mirror the prohibitive rules of customary international law. Courts do not convert prohibitive rules into liability rules. Changing the doctrine of adoption to do so ran into the second problem, which was that doing so would be inconsistent with the doctrine of incrementalism and the principle of legislative supremacy. Developing a theory of the case that did not rely on the doctrine of adoption did not rescue the pleadings. Some of the claims were addressed by extant torts. The viability of other claims required changing the common law in a manner that would infringe the separation of powers and place courts in the unconstitutional position of conducting foreign relations, which was the executive's domain.

Per Côté J. (dissenting) (Moldaver J. concurring): The appeal should be allowed and the plaintiffs' claims dismissed.
The widespread, representative and consistent state practice and opinio juris required to establish a customary rule did not presently exist to support the proposition that international human rights norms had horizontal application between individuals and corporations.
It was plain and obvious that the plaintiffs' claims were bound to fail, because private law claims which are founded upon a foreign state's internationally wrongful acts are not justiciable, and the plaintiffs' claims were dependent upon a determination that Eritrea had violated its international obligations. It was plain and obvious that the plaintiffs' causes of action inspired by customary international law were bound to fail.
Les demandeurs, qui étaient des réfugiés et d'anciens ressortissants érythréens, affirmaient avoir été conscrits indéfiniment, par l'entremise de leur service militaire, dans un régime de travail forcé dans le cadre duquel ils ont dû travailler dans une mine en Érythrée et ont subi un traitement violent, cruel, inhumain et dégradant. La mine appartenait à la défenderesse, une société canadienne. Les demandeurs ont entamé des procédures en Colombie-Britannique visant à obtenir des dommages-intérêts pour des délits de droit interne et pour la violation des interdictions de droit international coutumier relatives au travail forcé, à l'esclavage, aux traitements cruels, inhumains ou dégradants et aux crimes contre l'humanité. La défenderesse a déposé une requête en radiation des actes de procédure sur le fondement de la doctrine de l'acte de gouvernement, qui empêche les tribunaux nationaux de porter un jugement sur les actes souverains d'un gouvernement étranger. Elle a également fait valoir que les demandes fondées sur le droit international coutumier devaient être radiées parce qu'elles ne présentaient aucune perspective raisonnable de succès. Le juge siégeant en son cabinet a rejeté la requête en radiation de la défenderesse fondée sur ces bases. L'appel interjeté par la défenderesse a été rejeté. La défenderesse a formé un pourvoi.
Arrêt: Le pourvoi a été rejeté.
Abella, J. (Wagner, J.C.C., Karakatsanis, Gascon, Martin, JJ., souscrivant à son opinion) : La doctrine de l'acte de gouvernement ne fait pas partie de la common law canadienne et ni la doctrine ni ses principes sous-jacents élaborés dans la jurisprudence canadienne ne faisaient obstacle aux réclamations des demandeurs. La jurisprudence canadienne a traité des principes qui sous-tendent la doctrine dans la jurisprudence portant sur le conflit de lois et la retenue judiciaire, sans tenter de les joindre en une seule doctrine. Au Canada, la doctrine de l'acte de gouvernement a été complètement absorbée par cette jurisprudence.
Il n'était pas évident et manifeste que la réclamation des demandeurs à l'encontre de la défenderesse fondée sur des violations du droit international coutumier était vouée à l'échec. Sauf disposition législative contraire, les normes de droit international coutumier invoquées par les demandeurs faisaient partie de la common law canadienne et étaient susceptibles de s'appliquer à la défenderesse. Il n'était pas évident et manifeste que les tribunaux canadiens ne pouvaient pas élaborer un recours civil en droit interne pour les violations par une société des normes de droit international coutumier adoptées en droit canadien. On pouvait à tout le moins soutenir que les allégations des demandeurs englobaient une conduite qui n'était pas visée par ces délits internes existants.
Brown, Rowe, JJ. (dissidents en partie) : Le rejet de la requête en radiation de la défenderesse devrait être confirmé en ce qui concerne la doctrine de l'acte de gouvernement étranger. Le pourvoi devrait être accueilli sur la question du recours au droit international coutumier dans la création d'une responsabilité délictuelle.
Les réclamations en dommages-intérêts des demandeurs fondées sur la violation du droit international coutumier ne révélaient aucune cause d'action raisonnable et étaient vouées à l'échec. Les juges majoritaires ont expliqué que les actes de procédure étaient formulés en termes généraux et exposaient deux thèses distinctes sur la base desquelles ceux-ci pourraient être maintenus. Les réclamations des demandeurs étaient vouées à l'échec, peu importe qu'elles soient fondées sur l'une ou l'autre des théories. Les réclamations allaient à l'encontre de la façon dont les normes de droit international deviennent contraignantes au Canada. Selon la doctrine de l'adoption, les tribunaux canadiens reconnaissent les interdictions juridiques qui correspondent aux règles prohibitives du droit international coutumier. Les tribunaux ne convertissent pas les règles prohibitives en règles de responsabilité. Changer la doctrine de l'adoption à cette fin se heurtait au deuxième problème, à savoir l'incompatibilité d'un tel changement avec la théorie du gradualisme et le principe de la suprématie législative. L'élaboration d'une thèse qui ne reposait pas sur la doctrine de l'adoption ne permettait pas non plus de sauver les actes de procédure. Certaines des réclamations relevaient de délits existants. Et, enfin, les chances de succès d'autres réclamations exigeraient de modifier la common law d'une manière qui porterait atteinte à la séparation des pouvoirs et qui placerait les tribunaux dans la situation inconstitutionnelle où ils auraient à assurer la conduite des relations internationales, ce qui était du ressort de l'exécutif

Côté, J. (dissidente) (Moldaver, J., souscrivant à son opinion) : Le pourvoi devrait être accueilli et les réclamations des demandeurs rejetées.

La pratique étatique répandue, représentative et uniforme et l'opinio juris, qui étaient les conditions à respecter pour établir une règle coutumière, n'existaient pas en l'espèce pour étayer la proposition voulant que les normes internationales relatives aux droits de la personne s'appliquaient horizontalement entre les individus et les sociétés.

Il était évident et manifeste que les réclamations des demandeurs étaient vouées à l'échec, parce que les recours de droit privé qui reposaient sur les actes illicites à l'échelle internationale d'un État étranger ne sont pas justiciables, et que les réclamations des demandeurs étaient tributaires de la conclusion que l'Érythrée avait violé ses obligations internationales. Il était évident et manifeste que les causes d'action des demandeurs, qui s'inspiraient du droit international coutumier, étaient vouées à l'échec.

Table of Authorities

Cases considered by *Abella J.*:

"Paquette Habana" (The), Re (1900), 44 L.Ed. 320, 20 S.Ct. 290, 175 U.S. 677 (U.S. Sup. Ct.) — referred to

Belhaj v. Straw (2014), [2014] EWCA Civ 1394 (Eng. & Wales C.A. (Civil)) — referred to

Belhaj v. Straw (2017), [2017] 3 All E.R. 337, [2017] 2 W.L.R. 456, [2017] UKSC 3, [2017] A.C. 964 (U.K. S.C.) — considered

Blad v. Bamfield (1674), 36 E.R. 992, 3 Swans. 604 (Eng. Ch.) — considered

Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd. (1997), 1997 CarswellNfld 207, 1997 CarswellNfld 208, 153 D.L.R. (4th) 385, 221 N.R. 1, 158 Nfld. & P.E.I.R. 269, 490 A.P.R. 269, [1997] 3 S.C.R. 1210, 48 C.C.L.I. (2d) 1, 37 B.L.R. (2d) 1, 40 C.C.L.T. (2d) 235, 1999 A.M.C. 108 (S.C.C.) — considered

Brown v. Great Western Railway (1879), 3 S.C.R. 159, 1879 CarswellOnt 254 (S.C.C.) — considered

Buttes Gas & Oil v. Hammer (1981), [1981] 3 All E.R. 616, [1981] 3 W.L.R. 787, [1982] A.C. 888 (Eng. H.L.) — considered

Doucet-Boudreau v. Nova Scotia (Department of Education) (2003), 2003 SCC 62, 2003 CarswellNS 375, 2003 CarswellNS 376, (sub nom. *Doucet-Boudreau v. Nova Scotia (Minister of Education))* 232 D.L.R. (4th) 577, 312 N.R. 1, 218 N.S.R. (2d) 311, 687 A.P.R. 311, (sub nom. *Doucet-Boudreau v. Nova Scotia (Minister of Education))* [2003] 3 S.C.R. 3, 112 C.R.R. (2d) 202, 45 C.P.C. (5th) 1 (S.C.C.) — considered

Duke of Brunswick v. King of Hanover (1848), 6 Beav. 1, 9 E.R. 993, 2 H.L. Cas. 1 (U.K. H.L.) — considered

Dunlea v. Attorney General (2000), [2000] 3 N.Z.L.R. 136, [2000] NZCA 84 (New Zealand C.A.) — referred to

Estonian State Cargo & Passenger Steamship Line v. "Elise" (The) (1949), [1949] S.C.R. 530, [1949] 2 D.L.R. 641, 1949 CarswellNat 79 (S.C.C.) — considered

Exemption of United States Forces from Proceedings in Canadian Criminal Courts, Re (1943), [1943] S.C.R. 483, 80 C.C.C. 161, [1943] 4 D.L.R. 11, 1943 CarswellNat 35 (S.C.C.) — considered

Friedmann Equity Developments Inc. v. Final Note Ltd. (2000), 2000 SCC 34, 2000 CarswellOnt 2458, 2000 CarswellOnt 2459, 48 O.R. (3d) 800 (headnote only), 188 D.L.R. (4th) 269, 34 R.P.R. (3d) 159, 255 N.R. 80, [2000] 1 S.C.R. 842, 7 B.L.R. (3d) 153, 134 O.A.C. 280, 2000 CSC 34, 48 O.R. (3d) 800 (S.C.C.) — considered

German interests in Polish Upper Silesia (The Merits), Re (1925), [1926] P.C.I.J. Ser. A 7 (P.C.I.J.) — considered

Habib v. Commonwealth of Australia (2010), [2010] FCAFC 12 (Australia Fed. Ct.) — considered

Henry v. British Columbia (Attorney General) (2015), 2015 SCC 24, 2015 CSC 24, 2015 CarswellBC 1121, 2015 CarswellBC 1122, 383 D.L.R. (4th) 383, 18 C.R. (7th) 338, 70 B.C.L.R. (5th) 1, 470 N.R. 200, [2015] 6 W.W.R. 407, 18 C.C.L.T. (4th) 177, 369 B.C.A.C. 47, 634 W.A.C. 47, [2015] 2 S.C.R. 214, 336 C.R.R. (2d) 270 (S.C.C.) — considered

Hunt v. T & N plc (1993), [1994] 1 W.W.R. 129, 21 C.P.C. (3d) 269, (sub nom. *Hunt v. Lac d'Amiante du Québec Ltée)* 37 B.C.A.C. 161, (sub nom. *Hunt v. Lac d'Amiante du Québec Ltée)* 60 W.A.C. 161, (sub nom. *Hunt v. T&N plc)* [1993] 4 S.C.R. 289, (sub nom. *Hunt v. T&N plc)* 109 D.L.R. (4th) 16, 85 B.C.L.R. (2d) 1, (sub nom. *Hunt v. Lac d'Amiante du Québec Ltée)* 161 N.R. 81, 1993 CarswellBC 1271, 1993 CarswellBC 294 (S.C.C.) — considered

Hunt v. T & N plc (1990), 4 C.C.L.T. (2d) 1, 43 C.P.C. (2d) 105, 117 N.R. 321, 4 C.O.H.S.C. 173 (headnote only), (sub nom. *Hunt v. Carey Canada Inc.)* [1990] 6 W.W.R. 385, 49 B.C.L.R. (2d) 273, (sub nom. *Hunt v. Carey Canada Inc.)* 74 D.L.R. (4th) 321, [1990] 2 S.C.R. 959, 1990 CarswellBC 759, 1990 CarswellBC 216 (S.C.C.) — followed

India v. Badesha (2017), 2017 SCC 44, 2017 CSC 44, 2017 CarswellBC 2440, 2017 CarswellBC 2441, 22 Admin. L.R. (6th) 1, 412 D.L.R. (4th) 411, 40 C.R. (7th) 1, (sub nom. *India v. Dadesha)* 388 C.R.R. (2d) 230, [2017] 2 S.C.R. 127 (S.C.C.) — followed

Kazemi (Estate) v. Islamic Republic of Iran (2014), 2014 SCC 62, 2014 CSC 62, 2014 CarswellQue 9440, 2014 CarswellQue 9441, 375 D.L.R. (4th) 519, 463 N.R. 1, [2014] 3 S.C.R. 176, 83 Admin. L.R. (5th) 1, 320 C.R.R. (2d) 269 (S.C.C.) — distinguished

Khadr v. Canada (Minister of Justice) (2008), 2008 SCC 28, 2008 CarswellNat 1400, 2008 CarswellNat 1401, 56 C.R. (6th) 255, 72 Admin. L.R. (4th) 1, 375 N.R. 47, 232 C.C.C. (3d) 101, 293 D.L.R. (4th) 629, (sub nom. *Canada (Justice) v. Khadr)* [2008] 2 S.C.R. 125, (sub nom. *Canada (Minister of Justice) v. Khadr)* 172 C.R.R. (2d) 1 (S.C.C.) — followed

Khadr v. Canada (Prime Minister) (2010), 2010 SCC 3, 2010 CarswellNat 121, 2010 CarswellNat 122, 71 C.R. (6th) 201, 251 C.C.C. (3d) 435, 397 N.R. 294, 315 D.L.R. (4th) 1, (sub nom. *Canada (Prime Minister) v. Khadr)* [2010] 1 S.C.R. 44, (sub nom. *Canada (Prime Minister) v. Khadr)* 206 C.R.R. (2d) 1 (S.C.C.) — followed

Kindler v. Canada (Minister of Justice) (1991), 8 C.R. (4th) 1, [1991] 2 S.C.R. 779, 67 C.C.C. (3d) 1, 84 D.L.R. (4th) 438, 129 N.R. 81, 6 C.R.R. (2d) 193, 1991 CarswellNat 3, 45 F.T.R. 160 (note), 1991 CarswellNat 831 (S.C.C.) — followed

Knight v. Imperial Tobacco Canada Ltd. (2011), 2011 SCC 42, 2011 CarswellBC 1968, 2011 CarswellBC 1969, 21 B.C.L.R. (5th) 215, [2011] 11 W.W.R. 215, 25 Admin. L.R. (5th) 1, 86 C.C.L.T. (3d) 1, (sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.)* 335 D.L.R. (4th) 513, (sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.)* 419 N.R. 1, (sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.)* 308 B.C.A.C. 1, (sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.)* 521 W.A.C. 1, 83 C.B.R. (5th) 169, [2011] 3 S.C.R. 45 (S.C.C.) — followed

Kuwait Airways Corp. v. Iraqi Airways Co. (No. 6) (2002), [2002] UKHL 19, [2002] 2 A.C. 883, [2002] 3 All E.R. 209, [2002] 1 All E.R. (Comm) 843, [2003] 1 C.L.C. 183, [2002] 2 W.L.R. 1353 (U.K. H.L.) — considered

Moti v. R. (2011), 245 C.L.R. 456, [2011] HCA 50 (Australia H.C.) — considered

Odhavji Estate v. Woodhouse (2003), 2003 SCC 69, 2003 CarswellOnt 4851, 2003 CarswellOnt 4852, 19 C.C.L.T. (3d) 163, 233 D.L.R. (4th) 193, 312 N.R. 305, 180 O.A.C. 201, [2003] 3 S.C.R. 263, 11 Admin. L.R. (4th) 45, 70 O.R. (3d) 253 (note), [2004] R.R.A. 1, 2003 CSC 69 (S.C.C.) — followed

Ontario v. 974649 Ontario Inc. (2001), 2001 SCC 81, 2001 CarswellOnt 4251, 2001 CarswellOnt 4252, (sub nom. *R. v. 974649 Ontario Ltd.)* 56 O.R. (3d) 359 (headnote only), (sub nom. *R. v. 974649 Ontario Inc.)* 206 D.L.R. (4th) 444, (sub nom. *R. v. 974649 Ontario Inc.)* 159 C.C.C. (3d) 321, 47 C.R. (5th) 316, (sub nom. *R. v. 974649 Ontario Inc.)* 88 C.R.R. (2d) 189, (sub nom. *R. v. 974649 Ontario Inc.)* 279 N.R. 345, (sub nom. *R. v. 974649 Ontario Inc.)* 154 O.A.C. 345, (sub nom. *R. v. 974649 Ontario Inc.)* [2001] 3 S.C.R. 575 (S.C.C.) — considered

Operation Dismantle Inc. v. R. (1985), [1985] 1 S.C.R. 441, 59 N.R. 1, 18 D.L.R. (4th) 481, 12 Admin. L.R. 16, 13 C.R.R. 287, 1985 CarswellNat 151, 1985 CarswellNat 664 (S.C.C.) — followed

Oppenheimer v. Cattermole (1975), [1976] A.C. 249 (U.K. H.L.) — considered

Prosecutor v. Erdemovic (October 7, 1997), Doc. IT-96-22-A (Int. Criminal Trib.) — referred to

Prosecutor v. Jelisi (December 14, 1999), Doc. IT-95-10-T (Int. Criminal Trib.) — referred to

Prosecutor v. Krstic (August 2, 2001), Doc. IT-98-33-T (Int. Criminal Trib.) — referred to

R. v. "North" (The) (1906), 37 S.C.R. 385, 26 C.L.T. 380, 1906 CarswellNat 47 (S.C.C.) — considered

R. v. Bow Street Metropolitan Stipendiary Magistrate (No. 3) (1999), [1999] 2 W.L.R. 827, [1999] 2 All E.R. 97, [2000] 1 A.C. 147, 119 I.L.R. 135 (U.K. H.L.) — considered

R. v. Chung Chi Cheung (1938), [1939] 1 W.W.R. 232, [1939] A.C. 160, [1938] 4 All E.R. 786, 1938 CarswellFor 6 (Hong Kong P.C.) — considered

R. v. Hape (2007), 2007 SCC 26, 2007 CarswellOnt 3563, 2007 CarswellOnt 3564, 220 C.C.C. (3d) 161, 47 C.R. (6th) 96, 280 D.L.R. (4th) 385, 363 N.R. 1, 227 O.A.C. 191, 160 C.R.R. (2d) 1, [2007] 2 S.C.R. 292 (S.C.C.) — followed

R. v. Schmidt (1987), 76 N.R. 12, (sub nom. *Canada v. Schmidt)* [1987] 1 S.C.R. 500, 39 D.L.R. (4th) 18, 20 O.A.C. 161, 33 C.C.C. (3d) 193, (sub nom. *Schmidt v. R.)* 58 C.R. (3d) 1, (sub nom. *Schmidt v. Canada)* 28 C.R.R. 280, 61 O.R. (2d) 530, 1987 CarswellOnt 95, 1987 CarswellOnt 961 (S.C.C.) — followed

Reference re Secession of Quebec (1998), 1998 CarswellNat 1299, 161 D.L.R. (4th) 385, 228 N.R. 203, 55 C.R.R. (2d) 1, [1998] 2 S.C.R. 217, 1998 CarswellNat 1300 (S.C.C.) — considered

Sidaway v. Bethlem Royal Hospital Governors (1985), [1985] 1 All E.R. 643, [1985] A.C. 871, [1985] 2 W.L.R. 480, 61 N.R. 51 (U.K. H.L.) — referred to

Suresh v. Canada (Minister of Citizenship & Immigration) (2002), 2002 SCC 1, 2002 CarswellNat 7, 2002 CarswellNat 8, 18 Imm. L.R. (3d) 1, 208 D.L.R. (4th) 1, 281 N.R. 1, 90 C.R.R. (2d) 1, 37 Admin. L.R. (3d) 159, [2002] 1 S.C.R. 3, 2002 CSC 1 (S.C.C.) — followed

Tolofson v. Jensen (1994), [1995] 1 W.W.R. 609, 22 C.C.L.T. (2d) 173, 100 B.C.L.R. (2d) 1, 32 C.P.C. (3d) 141, 7 M.V.R. (3d) 202, 26 C.C.L.I. (2d) 1, 175 N.R. 161, 120 D.L.R. (4th) 289, (sub nom. *Lucas (Litigation Guardian of) v. Gagnon)* [1994] 3 S.C.R. 1022, 77 O.A.C. 81, 51 B.C.A.C. 241, 84 W.A.C. 241, 1994 CarswellBC 1, 1994 CarswellBC 2578 (S.C.C.) — followed

Trendtex Trading Corp. v. Central Bank of Nigeria (1977), [1977] 1 Q.B. 529, [1977] 1 All E.R. 881, [1977] 1 Lloyd's Rep. 581, [1977] 2 W.L.R. 356 (Eng. C.A.) — referred to

Triquet v. Bath (1764), 3 Burr. 1478 (Eng. K.B.) — considered

United States v. Burns (2001), 2001 SCC 7, 2001 CarswellBC 272, 2001 CarswellBC 273, 85 B.C.L.R. (3d) 1, 151 C.C.C. (3d) 97, 195 D.L.R. (4th) 1, 39 C.R. (5th) 205, [2001] 3 W.W.R. 193, 265 N.R. 212, 148 B.C.A.C. 1, 243 W.A.C. 1, 81 C.R.R. (2d) 1, [2001] 1 S.C.R. 283 (S.C.C.) — followed

Ward v. Vancouver (City) (2010), 2010 SCC 27, 2010 CarswellBC 1947, 2010 CarswellBC 1948, 75 C.C.L.T. (3d) 1, [2010] 9 W.W.R. 195, 321 D.L.R. (4th) 1, 7 B.C.L.R. (5th) 203, 76 C.R. (6th) 207, 404 N.R. 1, 290 B.C.A.C. 222, 491 W.A.C. 222, (sub nom. *Vancouver (City) v. Ward)* 213 C.R.R. (2d) 166, (sub nom. *Vancouver (City) v. Ward)* [2010] 2 S.C.R. 28 (S.C.C.) — considered

Watkins v. Olafson (1989), 50 C.C.L.T. 101, [1989] 2 S.C.R. 750, [1989] 6 W.W.R. 481, 61 D.L.R. (4th) 577, 100 N.R. 161, 39 B.C.L.R. (2d) 294, 61 Man. R. (2d) 81, 1989 CarswellMan 333, 1989 CarswellMan 1 (S.C.C.) — considered

Willow v. Chong (2013), 2013 BCSC 1083, 2013 CarswellBC 1832 (B.C. S.C.) — considered

Yukos Capital S.A.R.L. v. OJSC Rosneft Oil Co. (2012), [2012] EWCA Civ 855, [2013] 1 All E.R. 223, [2014] Q.B. 458, [2014] 1 Q.B. 458, [2013] W.L.R. 1329, [2012] 2 C.L.C. 549, 143 Con. L.R. 1, [2013] 1 All E.R. (Comm) 327, [2012] 2 Lloyd's Rep. 208, 165 I.L.R. 554 (Eng. & Wales C.A. (Civil)) — considered

Cases considered by *Brown J., Rowe J.* (dissenting):

Bhadauria v. Seneca College of Applied Arts & Technology (1981), [1981] 2 S.C.R. 181, (sub nom. *Seneca College of Applied Arts & Technology v. Bhadauria)* 124 D.L.R. (3d) 193, 37 N.R. 455, 14 B.L.R. 157, 81 C.L.L.C. 14,117, 22 C.P.C. 130, 17 C.C.L.T. 106, 2 C.H.R.R. D/468, 1981 CarswellOnt 117, 1981 CarswellOnt 616 (S.C.C.) — considered in a minority or dissenting opinion

Bouzari v. Iran (Islamic Republic) (2004), 2004 CarswellOnt 2681, 243 D.L.R. (4th) 406, (sub nom. *Bouzari v. Islamic Republic of Iran)* 71 O.R. (3d) 675, 122 C.R.R. (2d) 26, 220 O.A.C. 1 (Ont. C.A.) — considered in a minority or dissenting opinion

Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd. (1997), 1997 CarswellNfld 207, 1997 CarswellNfld 208, 153 D.L.R. (4th) 385, 221 N.R. 1, 158 Nfld. & P.E.I.R. 269, 490 A.P.R. 269, [1997] 3 S.C.R. 1210, 48 C.C.L.I. (2d) 1, 37 B.L.R. (2d) 1, 40 C.C.L.T. (2d) 235, 1999 A.M.C. 108 (S.C.C.) — considered in a minority or dissenting opinion

Bram Enterprises Ltd. v. A.I. Enterprises Ltd. (2014), 2014 SCC 12, 2014 CarswellNB 17, 2014 CarswellNB 18, 366 D.L.R. (4th) 573, 2014 CSC 12, 453 N.R. 273, 48 C.P.C. (7th) 227, 1079 A.P.R. 1, 416 N.B.R. (2d) 1, 21 B.L.R. (5th) 173, (sub nom. *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.)* [2014] 1 S.C.R. 177, 7 C.C.L.T. (4th) 1 (S.C.C.) — considered in a minority or dissenting opinion

British Columbia/Yukon Assn. of Drug War Survivors v. Abbotsford (City) (2015), 2015 BCCA 142, 2015 CarswellBC 948, 37 M.P.L.R. (5th) 12, 369 B.C.A.C. 315, 634 W.A.C. 315, [2015] 10 W.W.R. 227, 75 B.C.L.R. (5th) 69 (B.C. C.A.) — considered in a minority or dissenting opinion

Bruno Appliance and Furniture Inc. v. Hryniak (2014), 2014 SCC 8, 2014 CarswellOnt 642, 2014 CarswellOnt 643, 37 R.P.R. (5th) 63, 27 C.L.R. (4th) 65, 47 C.P.C. (7th) 1, 2014 CSC 8, 12 C.C.E.L. (4th) 63, 21 B.L.R. (5th) 311, 128 O.R. (3d) 799 (note), 366 D.L.R. (4th) 671, 453 N.R. 101, 314 O.A.C. 49, [2014] 1 S.C.R. 126 (S.C.C.) — refered to in a minority or dissenting opinion

Canada (Minister of Citizenship and Immigration) v. Vavilov (2019), 2019 SCC 65, 2019 CSC 65, 2019 CarswellNat 7883, 2019 CarswellNat 7884, 59 Admin. L.R. (6th) 1, 441 D.L.R. (4th) 1, 69 Imm. L.R. (4th) 1 (S.C.C.) — refered to in a minority or dissenting opinion

Dhillon v. Dhillon (2006), 2006 BCCA 524, 2006 CarswellBC 3200, 232 B.C.A.C. 249, 385 W.A.C. 249 (B.C. C.A.) — refered to in a minority or dissenting opinion

Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580 (1986), 38 C.C.L.T. 184, 71 N.R. 83, (sub nom. *R.W.D.S.U. v. Dolphin Delivery Ltd.)* [1986] 2 S.C.R. 573, (sub nom. *R.W.D.S.U. v. Dolphin Delivery Ltd.)* 9 B.C.L.R. (2d) 273, (sub nom. *R.W.D.S.U., Local 580 v. Dolphin Delivery Ltd.)* 87 C.L.L.C. 14,002, (sub nom. *R.W.D.S.U., Local 580 v. Dolphin Delivery Ltd.)* [1987] 1 W.W.R. 577, (sub nom. *R.W.D.S.U., Local 580 v. Dolphin Delivery Ltd.)* 33 D.L.R. (4th) 174, (sub nom. *R.W.D.S.U., Local 580 v. Dolphin Delivery Ltd.)* 25 C.R.R. 321, [1987] D.L.Q. 69 (note), 1986 CarswellBC 411, 1986 CarswellBC 764 (S.C.C.) — refered to in a minority or dissenting opinion

Frame v. Smith (1987), 78 N.R. 40, [1987] 2 S.C.R. 99, 42 D.L.R. (4th) 81, 23 O.A.C. 84, 42 C.C.L.T. 1, [1988] 1 C.N.L.R. 152, 9 R.F.L. (3d) 225, 1987 CarswellOnt 347, 1987 CarswellOnt 969 (S.C.C.) — considered in a minority or dissenting opinion

Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd. (1999), 1999 CarswellBC 1927, 1999 CarswellBC 1928, [1999] 9 W.W.R. 380, 11 C.C.L.I. (3d) 1, 176 D.L.R. (4th) 257, 245 N.R. 88, [1999] I.L.R. I-3717, 67 B.C.L.R. (3d) 213, 47 C.C.L.T. (2d) 1, 127 B.C.A.C. 287, 207 W.A.C. 287, [1999] 3 S.C.R. 108, 50 B.L.R. (2d) 169, [2000] 1 Lloyd's Rep. 199, 1999 A.M.C. 2840 (S.C.C.) — refered to in a minority or dissenting opinion

Harris v. GlaxoSmithKline Inc. (2010), 2010 ONSC 2326, 2010 CarswellOnt 2501, 101 O.R. (3d) 665 (Ont. S.C.J.) — considered in a minority or dissenting opinion

Harris v. GlaxoSmithKline Inc. (2010), 2010 ONCA 872, 2010 CarswellOnt 9696, 78 C.C.L.T. (3d) 52, 272 O.A.C. 214, 106 O.R. (3d) 661 (Ont. C.A.) — refered to in a minority or dissenting opinion

Harris v. GlaxoSmithKline Inc. (2011), 2011 CarswellOnt 6308, 2011 CarswellOnt 6309, 426 N.R. 391 (note), [2011] 2 S.C.R. vii (note) (S.C.C.) — refered to in a minority or dissenting opinion

Holland v. Saskatchewan (Minister of Agriculture, Food & Rural Revitalization) (2008), 2008 SCC 42, 2008 CarswellSask 431, 2008 CarswellSask 432, 294 D.L.R. (4th) 193, (sub nom. *Holland v. Saskatchewan)* 376 N.R. 316, [2008] 9 W.W.R. 193, 58 C.C.L.T. (3d) 1, (sub nom. *Holland v. Saskatchewan)* 311 Sask. R. 197, (sub nom. *Holland v. Saskatchewan)* 428 W.A.C. 197, (sub nom. *Holland v. Saskatchewan)* [2008] 2 S.C.R. 551 (S.C.C.) — refered to in a minority or dissenting opinion

Hryniak v. Mauldin (2014), 2014 CarswellOnt 640, 2014 CarswellOnt 641, 37 R.P.R. (5th) 1, 46 C.P.C. (7th) 217, 27 C.L.R. (4th) 1, 2014 CSC 7, 453 N.R. 51, 12 C.C.E.L. (4th) 1, 314 O.A.C. 1, 95 E.T.R. (3d) 1, 21 B.L.R. (5th) 248, [2014] 1 S.C.R. 87, 2014 SCC 7, 366 D.L.R. (4th) 641 (S.C.C.) — considered in a minority or dissenting opinion

Hunt v. T & N plc (1990), 4 C.C.L.T. (2d) 1, 43 C.P.C. (2d) 105, 117 N.R. 321, 4 C.O.H.S.C. 173 (headnote only), (sub nom. *Hunt v. Carey Canada Inc.)* [1990] 6 W.W.R. 385, 49 B.C.L.R. (2d) 273, (sub nom. *Hunt v. Carey Canada Inc.)* 74 D.L.R. (4th) 321, [1990] 2 S.C.R. 959, 1990 CarswellBC 759, 1990 CarswellBC 216 (S.C.C.) — considered in a minority or dissenting opinion

Jones v. Tsige (2012), 2012 ONCA 32, 2012 CarswellOnt 274, 108 O.R. (3d) 241, 89 C.C.L.T. (3d) 221, 6 R.F.L. (7th) 247, 2012 C.L.L.C. 210-012, 287 O.A.C. 56, 346 D.L.R. (4th) 34, 96 B.L.R. (4th) 1, 251 C.R.R. (2d) 124 (Ont. C.A.) — considered in a minority or dissenting opinion

Kadic v. Karadzic (1995), 70 F.3d 232 (U.S. C.A. 2nd Cir.) — considered in a minority or dissenting opinion

Kazemi (Estate) v. Islamic Republic of Iran (2014), 2014 SCC 62, 2014 CSC 62, 2014 CarswellQue 9440, 2014 CarswellQue 9441, 375 D.L.R. (4th) 519, 463 N.R. 1, [2014] 3 S.C.R. 176, 83 Admin. L.R. (5th) 1, 320 C.R.R. (2d) 269 (S.C.C.) — considered in a minority or dissenting opinion

Khadr v. Canada (Prime Minister) (2010), 2010 SCC 3, 2010 CarswellNat 121, 2010 CarswellNat 122, 71 C.R. (6th) 201, 251 C.C.C. (3d) 435, 397 N.R. 294, 315 D.L.R. (4th) 1, (sub nom. *Canada (Prime Minister) v. Khadr)* [2010] 1 S.C.R. 44, (sub nom. *Canada (Prime Minister) v. Khadr)* 206 C.R.R. (2d) 1 (S.C.C.) — considered in a minority or dissenting opinion

Khulumani v. Barclay National Bank Ltd. (2007), 504 F.3d 254 (U.S. C.A. 2nd Cir.) — considered in a minority or dissenting opinion

Knight v. Imperial Tobacco Canada Ltd. (2011), 2011 SCC 42, 2011 CarswellBC 1968, 2011 CarswellBC 1969, 21 B.C.L.R. (5th) 215, [2011] 11 W.W.R. 215, 25 Admin. L.R. (5th) 1, 86 C.C.L.T. (3d) 1, (sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.)* 335 D.L.R. (4th) 513, (sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.)* 419 N.R. 1, (sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.)* 308 B.C.A.C. 1, (sub nom. *British Columbia v.*

Imperial Tobacco Canada Ltd.) 521 W.A.C. 1, 83 C.B.R. (5th) 169, [2011] 3 S.C.R. 45 (S.C.C.) — considered in a minority or dissenting opinion

Kripps v. Touche Ross & Co. (1992), 69 B.C.L.R. (2d) 62, 94 D.L.R. (4th) 284, 15 B.C.A.C. 184, 27 W.A.C. 184, 1992 CarswellBC 191 (B.C. C.A.) — considered in a minority or dissenting opinion

London Drugs Ltd. v. Kuehne & Nagel International Ltd. (1992), [1993] 1 W.W.R. 1, [1992] 3 S.C.R. 299, *(*sub nom. *London Drugs Ltd. v. Brassart)* 143 N.R. 1, 73 B.C.L.R. (2d) 1, 43 C.C.E.L. 1, 13 C.C.L.T. (2d) 1, *(*sub nom. *London Drugs Ltd. v. Brassart)* 18 B.C.A.C. 1, *(*sub nom. *London Drugs Ltd. v. Brassart)* 31 W.A.C. 1, 97 D.L.R. (4th) 261, 1992 CarswellBC 315, 1992 CarswellBC 913 (S.C.C.) — refered to in a minority or dissenting opinion

McLean v. McLean (2019), 2019 SKCA 15, 2019 CarswellSask 42, [2019] 5 W.W.R. 67 (Sask. C.A.) — considered in a minority or dissenting opinion

Merrifield v. Canada (Attorney General) (2019), 2019 ONCA 205, 2019 CarswellOnt 3716, 53 C.C.E.L. (4th) 193, 54 C.C.L.T. (4th) 25, 432 D.L.R. (4th) 433, 145 O.R. (3d) 494, 2019 C.L.L.C. 210-046 (Ont. C.A.) — considered in a minority or dissenting opinion

Miller v. Secretary of State for Exiting the European Union (2017), [2017] 2 W.L.R. 583, [2017] UKSC 5, [2018] A.C. 61, [2017] 1 All E.R. 593, [2017] 2 C.M.L.R. 15, [2017] N.I. 141 (U.K. S.C.) — refered to in a minority or dissenting opinion

Moran v. Pyle National (Canada) Ltd. (1973), [1975] 1 S.C.R. 393, [1974] 2 W.W.R. 586, 43 D.L.R. (3d) 239, 1 N.R. 122, 1973 CarswellSask 132, 1973 CarswellSask 146 (S.C.C.) — considered in a minority or dissenting opinion

Non-Marine Underwriters, Lloyd's London v. Scalera (2000), 2000 SCC 24, 2000 CarswellBC 885, 2000 CarswellBC 886, 75 B.C.L.R. (3d) 1, 18 C.C.L.I. (3d) 1, 185 D.L.R. (4th) 1, 50 C.C.L.T. (2d) 1, [2000] 5 W.W.R. 465, [2000] I.L.R. I-3810, *(*sub nom. *Scalera v. Lloyd's of London)* 253 N.R. 1, *(*sub nom. *Scalera v. Lloyd's of London)* 135 B.C.A.C. 161, *(*sub nom. *Scalera v. Lloyd's of London)* 221 W.A.C. 161, [2000] 1 S.C.R. 551, 2000 CSC 24 (S.C.C.) — considered in a minority or dissenting opinion

Peter Merrifield v. Attorney General of Canada, et al. (2019), 2019 CarswellOnt 14956, 2019 CarswellOnt 14957 (S.C.C.) — refered to in a minority or dissenting opinion

R. c. Vaillancourt (1987), 81 N.R. 115, [1987] 2 S.C.R. 636, 47 D.L.R. (4th) 399, 68 Nfld. & P.E.I.R. 281, 10 Q.A.C. 161, 39 C.C.C. (3d) 118, 60 C.R. (3d) 289, *(*sub nom. *Vallaincourt v. R.)* 32 C.R.R. 18, 209 A.P.R. 281, 1987 CarswellQue 18, 1987 CarswellQue 98 (S.C.C.) — considered in a minority or dissenting opinion

R. v. Chung Chi Cheung (1938), [1939] 1 W.W.R. 232, [1939] A.C. 160, [1938] 4 All E.R. 786, 1938 CarswellFor 6 (Hong Kong P.C.) — refered to in a minority or dissenting opinion

R. v. Find (2001), 2001 SCC 32, 2001 CarswellOnt 1702, 2001 CarswellOnt 1703, 42 C.R. (5th) 1, 154 C.C.C. (3d) 97, 199 D.L.R. (4th) 193, 269 N.R. 149, 146 O.A.C. 236, [2001] 1 S.C.R. 863, 82 C.R.R. (2d) 247 (S.C.C.) — considered in a minority or dissenting opinion

R. v. Finta (1994), 28 C.R. (4th) 265, [1994] 1 S.C.R. 701, 20 C.R.R. (2d) 1, 70 O.A.C. 241, 88 C.C.C. (3d) 417, 112 D.L.R. (4th) 513, 165 N.R. 1, 1994 CarswellOnt 61, 1994 CarswellOnt 1154 (S.C.C.) — considered in a minority or dissenting opinion

R. v. Hape (2007), 2007 SCC 26, 2007 CarswellOnt 3563, 2007 CarswellOnt 3564, 220 C.C.C. (3d) 161, 47 C.R. (6th) 96, 280 D.L.R. (4th) 385, 363 N.R. 1, 227 O.A.C. 191, 160 C.R.R. (2d) 1, [2007] 2 S.C.R. 292 (S.C.C.) — considered in a minority or dissenting opinion

R. v. Jones (2006), [2006] UKHL 16 (U.K. H.L.) — refered to in a minority or dissenting opinion

R. v. Salituro (1991), 9 C.R. (4th) 324, 8 C.R.R. (2d) 173, 50 O.A.C. 125, [1991] 3 S.C.R. 654, 131 N.R. 161, 68 C.C.C. (3d) 289, 1991 CarswellOnt 124, 1991 CarswellOnt 1031 (S.C.C.) — refered to in a minority or dissenting opinion

R. v. Saskatchewan Wheat Pool (1983), [1983] 1 S.C.R. 205, *(*sub nom. *Saskatchewan Wheat Pool v. Canada)* 45 N.R. 425, *(*sub nom. *Canada v. Saskatchewan Wheat Pool)* [1983] 3 W.W.R. 97, *(*sub nom. *Canada v. Saskatchewan Wheat Pool)* 23 C.C.L.T. 121, *(*sub nom. *Canada v. Saskatchewan Wheat Pool)* 143 D.L.R. (3d) 9, 1983 CarswellNat 92, 1983 CarswellNat 521 (S.C.C.) — refered to in a minority or dissenting opinion

R. v. Spence (2005), 2005 SCC 71, 2005 CarswellOnt 6824, 2005 CarswellOnt 6825, 33 C.R. (6th) 1, 259 D.L.R. (4th) 474, 202 C.C.C. (3d) 1, 206 O.A.C. 150, 135 C.R.R. (2d) 318, [2005] 3 S.C.R. 458, 342 N.R. 126 (S.C.C.) — considered in a minority or dissenting opinion

R. v. W. (D.L.) (2016), 2016 SCC 22, 2016 CSC 22, 2016 CarswellBC 1552, 2016 CarswellBC 1553, 335 C.C.C. (3d) 269, 398 D.L.R. (4th) 193, 29 C.R. (7th) 344, 484 N.R. 81, 388 B.C.A.C. 1, 670 W.A.C. 1, [2016] 1 S.C.R. 402 (S.C.C.) — considered in a minority or dissenting opinion

Tolofson v. Jensen (1994), [1995] 1 W.W.R. 609, 22 C.C.L.T. (2d) 173, 100 B.C.L.R. (2d) 1, 32 C.P.C. (3d) 141, 7 M.V.R. (3d) 202, 26 C.C.L.I. (2d) 1, 175 N.R. 161, 120 D.L.R. (4th) 289, (sub nom. *Lucas (Litigation Guardian of) v. Gagnon)* [1994] 3 S.C.R. 1022, 77 O.A.C. 81, 51 B.C.A.C. 241, 84 W.A.C. 241, 1994 CarswellBC 1, 1994 CarswellBC 2578 (S.C.C.) — considered in a minority or dissenting opinion

Wallace v. United Grain Growers Ltd. (1997), 152 D.L.R. (4th) 1, 219 N.R. 161, 1997 CarswellMan 455, 1997 CarswellMan 456, 123 Man. R. (2d) 1, 159 W.A.C. 1, 97 C.L.L.C. 210-029, [1997] 3 S.C.R. 701, 36 C.C.E.L. (2d) 1, 3 C.B.R. (4th) 1, [1999] 4 W.W.R. 86, [1997] L.V.I. 2889-1 (S.C.C.) — considered in a minority or dissenting opinion

Watkins v. Olafson (1989), 50 C.C.L.T. 101, [1989] 2 S.C.R. 750, [1989] 6 W.W.R. 481, 61 D.L.R. (4th) 577, 100 N.R. 161, 39 B.C.L.R. (2d) 294, 61 Man. R. (2d) 81, 1989 CarswellMan 333, 1989 CarswellMan 1 (S.C.C.) — refered to in a minority or dissenting opinion

West Rand Central Gold Mining Co. v. R. (1905), [1905] 2 K.B. 391 (Eng. K.B.) — refered to in a minority or dissenting opinion

Whiten v. Pilot Insurance Co. (2002), 2002 SCC 18, 2002 CarswellOnt 537, 2002 CarswellOnt 538, [2002] I.L.R. I-4048, 20 B.L.R. (3d) 165, 209 D.L.R. (4th) 257, 283 N.R. 1, 35 C.C.L.I. (3d) 1, 156 O.A.C. 201, [2002] 1 S.C.R. 595, 58 O.R. (3d) 480 (note), 2002 CSC 18 (S.C.C.) — considered in a minority or dissenting opinion

6165347 Manitoba Inc. et al v. Jenna Vandal et al (2019), 2019 MBQB 69, 2019 CarswellMan 414 (Man. Q.B.) — considered in a minority or dissenting opinion

Cases considered by *Côté J.* (dissenting):

Belhaj v. Straw (2017), [2017] 3 All E.R. 337, [2017] 2 W.L.R. 456, [2017] UKSC 3, [2017] A.C. 964 (U.K. S.C.) — considered in a minority or dissenting opinion

Blad v. Bamfield (1674), 36 E.R. 992, 3 Swans. 604 (Eng. Ch.) — considered in a minority or dissenting opinion

Buck v. Attorney General (1965), [1965] 1 All E.R. 882, [1965] Ch. 745 at 760 (Eng. C.A.) — considered in a minority or dissenting opinion

Buttes Gas & Oil v. Hammer (1981), [1981] 3 All E.R. 616, [1981] 3 W.L.R. 787, [1982] A.C. 888 (Eng. H.L.) — refered to in a minority or dissenting opinion

Duke of Brunswick v. King of Hanover (1848), 6 Beav. 1, 9 E.R. 993, 2 H.L. Cas. 1 (U.K. H.L.) — considered in a minority or dissenting opinion

Estonian State Cargo & Passenger Steamship Line v. "Elise" (The) (1949), [1949] S.C.R. 530, [1949] 2 D.L.R. 641, 1949 CarswellNat 79 (S.C.C.) — considered in a minority or dissenting opinion

Fraser v. Canada (Treasury Board, Department of National Revenue) (1985), [1985] 2 S.C.R. 455, 23 D.L.R. (4th) 122, 63 N.R. 161, 18 Admin. L.R. 72, 9 C.C.E.L. 233, 86 C.L.L.C. 14,003, 19 C.R.R. 152, [1986] D.L.Q. 84 (note), 1985 CarswellNat 669, 1985 CarswellNat 145 (S.C.C.) — considered in a minority or dissenting opinion

Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall (2018), 2018 SCC 26, 2018 CSC 26, 2018 CarswellAlta 1044, 2018 CarswellAlta 1045, 33 Admin. L.R. (6th) 175, 16 C.P.C. (8th) 223, [2018] 6 W.W.R. 427, 68 Alta. L.R. (6th) 1, 421 D.L.R. (4th) 381, [2018] 1 S.C.R. 750 (S.C.C.) — considered in a minority or dissenting opinion

Hunt v. T & N plc (1993), [1994] 1 W.W.R. 129, 21 C.P.C. (3d) 269, (sub nom. *Hunt v. Lac d'Amiante du Québec Ltée)* 37 B.C.A.C. 161, (sub nom. *Hunt v. Lac d'Amiante du Québec Ltée)* 60 W.A.C. 161, (sub nom. *Hunt v. T&N plc)* [1993] 4 S.C.R. 289, (sub nom. *Hunt v. T&N plc)* 109 D.L.R. (4th) 16, 85 B.C.L.R. (2d) 1, (sub nom. *Hunt v. Lac d'Amiante du Québec Ltée)* 161 N.R. 81, 1993 CarswellBC 1271, 1993 CarswellBC 294 (S.C.C.) — considered in a minority or dissenting opinion

International Association of Machinists and Aerospace Workers v. Organization of Petroleum Exporting Countries (1981), 649 F.2d 1354 (U.S. C.A. 9th Cir.) — considered in a minority or dissenting opinion

Johnstone v. Pedlar (1921), [1921] 2 A.C. 262 (Ireland H.L.) — refered to in a minority or dissenting opinion

Jones v. Kingdom of Saudi Arabia (2006), [2007] 1 A.C. 270, [2007] 1 All E.R. 113, [2006] 2 W.L.R. 1424, [2006] UKHL 26 (U.K. H.L.) — refered to in a minority or dissenting opinion

Kazemi (Estate) v. Islamic Republic of Iran (2014), 2014 SCC 62, 2014 CSC 62, 2014 CarswellQue 9440, 2014 CarswellQue 9441, 375 D.L.R. (4th) 519, 463 N.R. 1, [2014] 3 S.C.R. 176, 83 Admin. L.R. (5th) 1, 320 C.R.R. (2d) 269 (S.C.C.) — considered in a minority or dissenting opinion

Khadr v. Canada (Minister of Justice) (2008), 2008 SCC 28, 2008 CarswellNat 1400, 2008 CarswellNat 1401, 56 C.R. (6th) 255, 72 Admin. L.R. (4th) 1, 375 N.R. 47, 232 C.C.C. (3d) 101, 293 D.L.R. (4th) 629, (sub nom. *Canada (Justice) v. Khadr)* [2008] 2 S.C.R. 125, (sub nom. *Canada (Minister of Justice) v. Khadr)* 172 C.R.R. (2d) 1 (S.C.C.) — considered in a minority or dissenting opinion

Khadr v. Canada (Prime Minister) (2010), 2010 SCC 3, 2010 CarswellNat 121, 2010 CarswellNat 122, 71 C.R. (6th) 201, 251 C.C.C. (3d) 435, 397 N.R. 294, 315 D.L.R. (4th) 1, (sub nom. *Canada (Prime Minister) v. Khadr)* [2010] 1 S.C.R. 44, (sub nom. *Canada (Prime Minister) v. Khadr)* 206 C.R.R. (2d) 1 (S.C.C.) — considered in a minority or dissenting opinion

Kiobel v. Royal Dutch Petroleum Co. (2010), 621 F.3d 111 (U.S. C.A. 2nd Cir.) — refered to in a minority or dissenting opinion

Kiobel v. Royal Dutch Petroleum Co. (2013), 185 L.Ed.2d 671, 133 S.Ct. 1659, 569 U.S. 108 (U.S. Sup. Ct.) — refered to in a minority or dissenting opinion

Kuwait Airways Corp. v. Iraqi Airways Co. (No. 6) (2002), [2002] UKHL 19, [2002] 2 A.C. 883, [2002] 3 All E.R. 209, [2002] 1 All E.R. (Comm) 843, [2003] 1 C.L.C. 183, [2002] 2 W.L.R. 1353 (U.K. H.L.) — refered to in a minority or dissenting opinion

New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly) (1993), 146 N.R. 161, 13 C.R.R. (2d) 1, 100 D.L.R. (4th) 212, 118 N.S.R. (2d) 181, 327 A.P.R. 181, [1993] 1 S.C.R. 319, 1993 CarswellNS 417, 1993 CarswellNS 417F (S.C.C.) — considered in a minority or dissenting opinion

Oppenheimer v. Cattermole (1975), [1976] A.C. 249 (U.K. H.L.) — refered to in a minority or dissenting opinion

Powers of Ottawa & Rockcliffe Park to Levy Rates on Foreign Legations & High Commissioners' Residences, Re (1943), [1943] S.C.R. 208, [1943] 2 D.L.R. 481, 1943 CarswellNat 31 (S.C.C.) — considered in a minority or dissenting opinion

Presbyterian Church of Sudan v. Talisman Energy Inc. (August 30, 2005), Doc. No. 01 Civ.9882(DLC) (U.S. Dist. Ct. S.D. N.Y.) — considered in a minority or dissenting opinion

R. v. Imona-Russell (2013), 2013 SCC 43, 2013 CarswellOnt 10507, 2013 CarswellOnt 10508, (sub nom. *R. v. Russel (W.I.))* 447 N.R. 111, (sub nom. *Ontario v. Criminal Lawyers' Association of Ontario)* 4 C.R. (7th) 1, 300 C.C.C. (3d) 137, (sub nom. *R. v. Russel)* 308 O.A.C. 347, 363 D.L.R. (4th) 17, (sub nom. *Ontario v. Criminal Lawyers' Association of Ontario)* 291 C.R.R. (2d) 265, (sub nom. *Ontario v. Criminal Lawyers' Association of Ontario)* [2013] 3 S.C.R. 3 (S.C.C.) — considered in a minority or dissenting opinion

Reference re Offshore Mineral Rights (British Columbia) (1967), [1967] S.C.R. 792, 62 W.W.R. 21, 65 D.L.R. (2d) 353, 1967 CarswellNat 258 (S.C.C.) — considered in a minority or dissenting opinion

Reference re Seabed & Subsoil of Continental Shelf Offshore Newfoundland (1984), [1984] 1 S.C.R. 86, 5 D.L.R. (4th) 385, 51 N.R. 362, 1984 CarswellNat 698, 1984 CarswellNat 698F (S.C.C.) — considered in a minority or dissenting opinion

Reference re Secession of Quebec (1998), 1998 CarswellNat 1299, 161 D.L.R. (4th) 385, 228 N.R. 203, 55 C.R.R. (2d) 1, [1998] 2 S.C.R. 217, 1998 CarswellNat 1300 (S.C.C.) — considered in a minority or dissenting opinion

Suresh v. Canada (Minister of Citizenship & Immigration) (2002), 2002 SCC 1, 2002 CarswellNat 7, 2002 CarswellNat 8, 18 Imm. L.R. (3d) 1, 208 D.L.R. (4th) 1, 281 N.R. 1, 90 C.R.R. (2d) 1, 37 Admin. L.R. (3d) 159, [2002] 1 S.C.R. 3, 2002 CSC 1 (S.C.C.) — considered in a minority or dissenting opinion

W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., International (1990), 107 L.Ed. 816, 110 S.Ct. 701, 493 U.S. 400, 88 I.L.R. 93 (U.S. C.A. 3rd Cir.) — considered in a minority or dissenting opinion

Statutes considered by *Abella J.*:

Business Corporations Act, S.B.C. 2002, c. 57

Generally — referred to

Law and Equity Act, R.S.B.C. 1996, c. 253

s. 2 — considered

State Immunity Act, R.S.C. 1985, c. S-18

Generally — referred to

Statutes considered by *Brown J., Rowe J.* (dissenting):

Alien Tort Claims Act, 28 U.S.C. 85
s. 1350 — referred to
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
Children's Law Reform Act, R.S.O. 1980, c. 68
Generally — referred to
Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5
s. 96 — considered
Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44
s. 52(1) — considered
Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24
Generally — referred to
Criminal Code, R.S.C. 1985, c. C-46
Generally — referred to

s. 9 — considered
European Communities Act, 1972, c. 68
Generally — referred to
Human Rights Act, 1998, c. 42
s. 6(1) — referred to

s. 6(3) — referred to
Justice for Victims of Terrorism Act, S.C. 2012, c. 1, s. 2
s. 4 — considered
Ontario Human Rights Code, R.S.O. 1970, c. 318
Generally — referred to
Statutes considered by *Côté J.* (dissenting):
Law and Equity Act, R.S.B.C. 1996, c. 253
s. 2 — considered
Rules considered by *Abella J.*:
Supreme Court Civil Rules, B.C. Reg. 168/2009
Generally — referred to

R. 9-5 — considered

R. 9-5(1)(a) — considered

R. 9-5(1)(b) — considered

R. 21-8 — considered
Treaties considered by *Abella J.*:
African Charter on Human and Peoples' Rights, 21 I.L.M. 58; 1520 U.N.T.S. 217
Article 5 — referred to
American Convention on Human Rights, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, 9 I.L.M. 673
Article 5 — referred to
American Declaration on the Rights and Duties of Man, 1948
Article 26 — referred to
Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, C.T.S. 1987/36; 23 I.L.M. 1027; 1465 U.N.T.S. 85; U.N. Doc. A/39/51
Article 16 — referred to

Convention on the Rights of the Child, 1989, C.T.S. 1992/3; 28 I.L.M. 1456; 3 U.N.T.S. 1577; G.A. Res. 44/25
Article 37 — referred to
European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 1987; ETS No. 126; 1561 U.N.T.S. 363
Generally — referred to
European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222; E.T.S. No. 5
Article 3 — referred to
Inter-American Convention to Prevent and Punish Torture, 1985; O.A.S.T.S. No. 67
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 2 — considered

Article 7 — referred to
Statute of the International Court of Justice, 1945
Article 38 ¶ 1 — considered
Vienna Convention on the Law of Treaties, 1969, C.T.S. 1980/37; 1155 U.N.T.S. 331; (1969) 63 A.J.I.L. 875
Generally — referred to

Article 53 — considered

Treaties considered by *Brown J., Rowe J.* (dissenting):

European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222; E.T.S. no. 5
Generally — referred to
North American Free Trade Agreement, 1992, C.T.S. 1994/2; 32 I.L.M. 296,612
Generally — referred to
Statute of the International Court of Justice, 1945
Article 38 ¶ 1(a) — considered

APPEAL by defendant from judgment reported at *Araya v. Nevsun Resources Ltd.* (2017), 2017 BCCA 401, 2017 CarswellBC 3232, 4 B.C.L.R. (6th) 91, [2018] 2 W.W.R. 221, 12 C.P.C. (8th) 225, 419 D.L.R. (4th) 631 (B.C. C.A.), dismissing defendant's appeal from judgment dismissing defendant's motion to strike on certain bases.

POURVOI formé par la défenderesse à l'encontre d'une décision publiée à *Araya v. Nevsun Resources Ltd.* (2017), 2017 BCCA 401, 2017 CarswellBC 3232, 4 B.C.L.R. (6th) 91, [2018] 2 W.W.R. 221, 12 C.P.C. (8th) 225, 419 D.L.R. (4th) 631 (B.C. C.A.), ayant rejeté l'appel interjeté par la défenderesse à l'encontre d'un jugement ayant rejeté la requête en radiation de la défenderesse fondée sur certaines bases.

***Abella J.* (Wagner C.J.C. and Karakatsanis, Gascon and Martin JJ. concurring):**

1 This appeal involves the application of modern international human rights law, the phoenix that rose from the ashes of World War II and declared global war on human rights abuses. Its mandate was to prevent breaches of internationally accepted norms. Those norms were not meant to be theoretical aspirations or legal luxuries, but moral imperatives and legal necessities. Conduct that undermined the norms was to be identified and addressed.

2 The process of identifying and responsively addressing breaches of international human rights law involves a variety of actors. Among them are courts, which can be asked to determine and develop the law's scope in a particular case. This is one of those cases.

3 Gize Yebeyo Araya, Kesete Tekle Fshazion and Mihretab Yemane Tekle are refugees and former Eritrean nationals. They claim that they were indefinitely conscripted through their military service into a forced labour regime where they were required

to work at the Bisha mine in Eritrea and subjected to violent, cruel, inhuman and degrading treatment. The mine is owned by a Canadian company, Nevsun Resources Ltd.

4 The Eritrean workers started these proceedings in British Columbia as a class action against Nevsun on behalf of more than 1,000 individuals who claim to have been compelled to work at the Bisha mine between 2008 and 2012. In their pleadings, the Eritrean workers sought damages for breaches of domestic torts including conversion, battery, "unlawful confinement" (false imprisonment), conspiracy and negligence. They also sought damages for breaches of customary international law prohibitions against forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity. [1]

5 Nevsun brought a motion to strike the pleadings on the basis of the "act of state doctrine", which precludes domestic courts from assessing the sovereign acts of a foreign government. This, Nevsun submits, includes Eritrea's National Service Program. Its position was also that the claims based on customary international law should be struck because they have no reasonable prospect of success. [2]

6 Both the Chambers Judge and the Court of Appeal dismissed Nevsun's motions to strike on these bases. For the reasons that follow, I see no reason to disturb those conclusions.

Background

7 The Bisha mine in Eritrea produces gold, copper and zinc. It is one of the largest sources of revenue for the Eritrean economy. The construction of the mine began in 2008. It was owned and operated by an Eritrean corporation, the Bisha Mining Share Company, which is 40 percent owned by the Eritrean National Mining Corporation and, through subsidiaries, 60 percent owned by Nevsun, a publicly-held corporation incorporated under British Columbia's *Business Corporations Act*, S.B.C. 2002, c. 57.

8 The Bisha Company hired a South African company called SENET as the Engineering, Procurement and Construction Manager for the construction of the mine. SENET entered into subcontracts on behalf of the Bisha Company with Mereb Construction Company, which was controlled by the Eritrean military, and Segen Construction Company which was owned by Eritrea's only political party, the People's Front for Democracy and Justice. Mereb and Segen were among the construction companies that received conscripts from Eritrea's National Service Program.

9 The National Service Program was established by a 1995 decree requiring all Eritreans, when they reached the age of 18, to complete 6 months of military training followed by 12 months of "military development service" (2016 BCSC 1856 (B.C. S.C.), at para. 26). Conscripts were assigned to direct military service and/or "to assist in the construction of public projects that are in the national interest".

10 In 2002, the period of military conscription in Eritrea was extended indefinitely and conscripts were forced to provide labour at subsistence wages for various companies owned by senior Eritrean military or party officials, such as Mereb and Segen.

11 For those conscripted to the Bisha mine, the tenure was indefinite. The workers say they were forced to provide labour in harsh and dangerous conditions for years and that, as a means of ensuring the obedience of conscripts at the mine, a variety of punishments were used. They say these punishments included "being ordered to roll in the hot sand while being beaten with sticks until losing consciousness" and the "'helicopter' which consisted of tying the workers' arms together at the elbows behind the back, and the feet together at the ankles, and being left in the hot sun for an hour".

12 The workers claim that those who became ill — a common occurrence at the mine — had their pay docked if they failed to return to work after five days. When not working, the Eritrean workers say they were confined to camps and not allowed to leave unless authorized to do so. Conscripts who left without permission or who failed to return from authorized leave faced severe punishment and the threat of retribution against their families. They say their wages were as low as US$30 per month.

13 Gize Yebeyo Araya says he voluntarily enlisted in the National Service Program in 1997 but instead of being released after completing his 18 months of service, was forced to continue his military service and was deployed as a labourer to various

sites, including the Bisha mine in February 2010. At the mine, he says he was required to work 6 days a week from 5:00 a.m. to 6:00 p.m., often outside in temperatures approaching 50 degrees Celsius. He escaped from Eritrea in 2011.

14 Kesete Tekle Fshazion says he was conscripted in 2002 and remained under the control of the Eritrean military until he escaped from Eritrea in 2013. He says he was sent to the Bisha mine in 2008 where he worked from 6:00 a.m. to 6:00 p.m. six days a week and 6:00 a.m. to 2:00 p.m. on the seventh day.

15 Mihretab Yemane Tekle says he was conscripted in 1994 and, after completing his 18 months of service, was deployed to several positions, mainly within the Eritrean military. He says he was transported to the Bisha mine in February 2010 where he worked 6 days a week from 6:00 a.m. to 6:00 p.m., often outside, uncovered, in temperatures approaching 50 degrees Celsius. He escaped Eritrea in 2011.

Prior Proceedings

16 Nevsun brought a series of applications seeking: an order denying the proceeding the status of a representative action; a stay of the proceedings on the basis that Eritrea was a more appropriate forum (*forum non conveniens*); an order striking portions of the evidence — first-hand affidavit material and secondary reports — filed by the Eritrean workers; an order dismissing or striking the pleadings pursuant to rule 21-8 or, alternatively, rule 9-5 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, on the grounds that British Columbia courts lacked subject matter jurisdiction as a result of the operation of the act of state doctrine; and an order striking that part of the pleadings based on customary international law as being unnecessary and disclosing no reasonable cause of action, pursuant to rule 9-5 of the *Supreme Court Civil Rules*.

17 The Chambers Judge, Abrioux J., observed that since it controlled a majority of the Board of the Bisha Company and Nevsun's CEO was its Chair, Nevsun exercised effective control over the Bisha Company. He also observed that there was operational control: "Through its majority representation on the board of [the Bisha Company, Nevsun] is involved in all aspects of Bisha operations, including exploration, development, extraction, processing and reclamation".

18 He denied Nevsun's *forum non conveniens* application, concluding that Nevsun had not established that convenience favours Eritrea as the appropriate forum. There was also a real risk of an unfair trial occurring in Eritrea. Abrioux J. admitted some of the first-hand affidavit material and the secondary reports for the limited purpose of providing the required social, historical and contextual framework, but he denied the proceeding the status of a representative action, meaning the Eritrean workers were not permitted to bring claims on behalf of the other individuals, many of whom are still in Eritrea.

19 As to the act of state doctrine, Abrioux J. noted that it has never been applied in Canada, but was nonetheless of the view that it formed part of Canadian common law. Ultimately, however, he concluded that it did not apply in this case.

20 In dealing with Nevsun's request to strike the claims based on customary international law, Abrioux J. characterized the issue as "whether claims for damages arising out of the alleged breach of *jus cogens* or peremptory norms of customary international law ... may form the basis of a civil proceeding in British Columbia". He said that claims should only be struck if, assuming the pleaded facts to be true, it is "plain and obvious" that the pleadings disclose no reasonable likelihood of success and are bound to fail. He rejected Nevsun's argument that there is no reasonable prospect at trial that the court would recognize either "claims based on breaches of [customary international law]" or claims for "new torts based on the adoption of the customary norms advanced by the [workers]". He held that customary international law is incorporated into and forms part of Canadian common law unless there is domestic legislation to the contrary. Neither the *State Immunity Act*, R.S.C. 1985, c. S-18, nor any other legislation bars the Eritrean workers' claims. In his view, while novel, the claims stemming from Nevsun's breaches of customary international law should proceed to trial where they can be evaluated in their factual and legal context, particularly since the prohibitions on slavery, forced labour and crimes against humanity are *jus cogens*, or peremptory norms of customary international law, from which no derogation is permitted.

21 On appeal, Nevsun argued that Abrioux J. erred in refusing to decline jurisdiction on the *forum non conveniens* application; in admitting the Eritrean workers' reports, even for a limited purpose; in holding that the Eritrean workers' claims were not barred

by the act of state doctrine; and in declining to strike the Eritrean workers' claims that were based on customary international law. The Eritrean workers did not appeal from Abrioux J.'s ruling denying the proceeding the status of a representative action.

22 Writing for a unanimous court, Newbury J.A. upheld Abrioux J.'s rulings on the *forum non conveniens* and evidence applications (2017 BCCA 401 (B.C. C.A.)). As for the act of state doctrine, Newbury J.A. noted that no Canadian court has ever directly applied the doctrine, but that it was adopted in British Columbia by virtue of what is now s. 2 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, which recognizes that the common law of England as it was in 1858 is part of the law of British Columbia. She concluded, however, that the act of state doctrine did not apply in this case because the Eritrean workers' claims were not a challenge to the legal validity of a foreign state's laws or executive acts. Even if the act of state doctrine did apply, it would not bar the Eritrean workers' claims since one or more of the doctrine's acknowledged exceptions would apply.

23 Turning to the international law issues, Newbury J.A. noted that in actions brought against foreign states, courts in both England and Canada have not recognized a private law cause of action since they involved the principle of state immunity, codified in Canada by the *State Immunity Act*. But because the Eritrean workers' customary international law claims were not brought against a foreign state, they were not barred by the *State Immunity Act*.

24 Finally, Newbury J.A. was alert to what she referred to as a fundamental change that has occurred in public international law, whereby domestic courts have become increasingly willing to address issues of public international law when appropriate. With this in mind, she characterized the central issue on appeal as being "whether Canadian courts, which have thus far not grappled with the development of what is now called 'transnational law', might also begin to participate in the change described". She concluded that the fact that aspects of the Eritrean workers' claims were actionable as private law torts, did not mean that they had no reasonable chance of success on the basis of customary international law.

25 Ultimately, Newbury J.A. held that since the law in this area is developing, it cannot be said that the Eritrean workers' claims based on breaches of customary international law were bound to fail.

Analysis

26 Nevsun's appeal focussed on two issues:

(1) Does the act of state doctrine form part of Canadian common law?

(2) Can the customary international law prohibitions against forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity ground a claim for damages under Canadian law?

Nevsun did not challenge the Court of Appeal's decision on the admissibility of the reports or on *forum non conveniens*. As a result, there is no dispute that if the act of state doctrine does not bar the matter from proceeding, British Columbia courts are the appropriate forum for resolving the claims.

The Act of State Doctrine

27 Nevsun's first argument is that the entire claim should be struck because the act of state doctrine makes it non-justiciable.

28 The act of state doctrine is a known (and heavily criticized) doctrine in England and Australia. It has, by contrast, played no role in Canadian law. Nonetheless, Nevsun asserts that these proceedings are barred by its operation. It is helpful, then, to start by examining what the doctrine is.

29 There is no single definition that captures the unwieldly collection of principles, limitations and exceptions that have been given the name "act of state" in English law. A useful starting point, however, is Lord Millett's description: "the act of state doctrine is a rule of domestic law which holds the national court incompetent to adjudicate upon the lawfulness of the sovereign acts of a foreign state" (*R. v. Bow Street Metropolitan Stipendiary Magistrate (No. 3)* (1999), [2000] 1 A.C. 147 (U.K. H.L.), at p. 269).

30 The act of state doctrine shares some features with state immunity, which extends personal immunity to state officials for acts done in their official capacity. But the two are distinct, as Lord Sumption explained in *Belhaj v. Straw*, [2017] UKSC 3 (U.K. S.C.):

> Unlike state immunity, act of state is not a personal but a subject matter immunity. It proceeds from the same premise as state immunity, namely mutual respect for the equality of sovereign states. *But it is wholly the creation of the common law*. Although international law requires states to respect the immunity of other states from their domestic jurisdiction, it does not require them to apply any particular limitation on their subject matter jurisdiction in litigation to which foreign states are not parties and in which they are not indirectly impleaded. *The foreign act of state doctrine is at best permitted by international law*. [Emphasis added; para. 200.]

31 The outlines of the act of state doctrine can be traced to the early English authorities of *Blad v. Bamfield* (1674), 3 Swans. 604 (Eng. Ch.), and *Duke of Brunswick v. King of Hanover* (1848), 2 H.L. Cas. 1 (U.K. H.L.), (see also *Yukos Capital S.A.R.L. v. OJSC Rosneft Oil Co.*, [2012] EWCA Civ 855 (Eng. & Wales C.A. (Civil)), at para. 40).

32 In *Blad*, Bamfield and other English traders brought a claim in the English courts against a Danish trader who had been granted letters patent by the King of Denmark as ruler of Iceland "for the sole trade of Iceland" (p. 993). The trader seized Bamfield's goods in Iceland for allegedly fishing contrary to his letters patent. Bamfield challenged the validity of the letters patent. Lord Nottingham ruled that Bamfield's action was barred on the grounds that "to send it to a trial at law, where either the Court must pretend to judge of the validity of the king's letters patent in Denmark, or of the exposition and meaning of the articles of peace; or that a common jury should try whether the English have a right to trade in Iceland, is monstrous and absurd" (p. 993).

33 In the subsequent case of *Duke of Brunswick*, the deposed Duke sued the King of Hanover in England, alleging that, through acts done in Hanover and elsewhere abroad, he had aided in depriving the Duke of his land and title. The House of Lords refused to judge the acts of a sovereign in his own country. In the words of the Lord Chancellor:

> [A] foreign Sovereign, coming into this country, cannot be made responsible here for an act done in his sovereign character in his own country; whether it be an act right or wrong, whether according to the constitution of that country or not, the Courts of this country cannot sit in judgment upon an act of a Sovereign, effected by virtue of his Sovereign authority abroad, an act not done as a British subject, but supposed to be done in the exercise of his authority vested in him as Sovereign. [pp. 998-99]

34 Since then, the English act of state doctrine has developed a number of qualifications and limitations, and it no longer includes the sweeping proposition that domestic courts cannot adjudicate the lawfulness of foreign state acts. This became clear in the case of *Oppenheimer v. Cattermole* (1975), [1976] A.C. 249 (U.K. H.L.), where the House of Lords refused to recognize and apply a Nazi decree depriving Jews of their German citizenship and leading to the confiscation of all their property on which the state could "lay its hands" (p. 278). Lord Cross held that such a discriminatory law "constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all", noting that it is "part of the public policy of this country that our courts should give effect to clearly established rules of international law" (p. 278). The House of Lords elaborated on this principle in *Kuwait Airways Corp. v. Iraqi Airways Co. (No. 6)*, [2002] UKHL 19 (U.K. H.L.), where Lord Nicholls held that foreign laws "may be fundamentally unacceptable for reasons other than human rights violations" (para. 18).

35 There has also been a proliferation of limitations on, and exceptions to, the act of state doctrine in England, reflecting an attempt to respond to the difficulties of applying a single doctrine to a heterogeneous collection of issues. This challenge was identified by Lord Wilberforce in his influential account of the English act of state doctrine in *Buttes Gas & Oil v. Hammer* (1981), [1982] A.C. 888 (Eng. H.L.), a defamation action that arose in the context of two conflicting oil concessions granted by neighbouring states in the Arabian Gulf. He referred to the act of state doctrine as "a generally confused topic", adding that "[n]ot the least of its difficulty has lain in the indiscriminating use of 'act of state' to cover situations which are quite distinct, and different in law" (p. 930). He explained that, though often referred to using the general terminology of "act of state", English

law differentiates between Crown acts of state (concerning the acts of officers of the Crown committed abroad) and foreign acts of state (concerning the justiciability in domestic courts of actions of foreign states). He went on to observe that within the foreign act of state doctrine, the cases support the existence of two separate principles: a more specific principle guiding courts to consider the choice of law in cases involving whether and when a domestic court will give effect in its law to a rule of foreign law; and the more general principle that courts refrain from adjudicating the transactions of foreign states.

36 And in the 2012 *Yukos* case, Rix L.J., writing for the Court of Appeal of England and Wales, modernized the description of the doctrine*:*

> It would seem that, generally speaking, the doctrine is confined to acts of state within the territory of the sovereign, but in special and perhaps exceptional circumstances ... may even go beyond territorial boundaries and for that very reason give rise to issues which have to be recognised as non-justiciable. The various formulations of the paradigm principle are apparently wide, and prevent adjudication on the validity, legality, lawfulness, acceptability or motives of state actors. It is a form of immunity *ratione materiae*, closely connected with analogous doctrines of sovereign immunity and, although a domestic doctrine of English (and American) law, is founded on analogous concepts of international law, both public and private, and of the comity of nations. It has been applied in a wide variety of situations, but often arises by way of defence or riposte: as where a dispossessed owner sues in respect of his property, the defendant relies on a foreign act of state as altering title to that property, and the claimant is prevented from calling into question the effectiveness of that act of state. [para. 66]

37 Rix L.J. noted the numerous limitations or exceptions to the doctrine which he grouped into five categories. First, the impugned act must occur within the territory of the foreign state for the doctrine to apply. Second, "the doctrine will not apply to foreign acts of state which are in breach of clearly established rules of international law, or are contrary to English principles of public policy, as well as where there is a grave infringement of human rights" (para. 69). Third, judicial acts are not "acts of state" for the purposes of the doctrine. Fourth, the doctrine will not apply to the conduct of a state that is of a commercial (rather than sovereign) character. Fifth, the doctrine does not apply where the only issue is whether certain acts have occurred, not the legal effectiveness of those acts.

38 *The effect of all these limitations, as he noted, was to dilute the doctrine substantially:*

> The important thing is to recognise that increasingly in the modern world the doctrine is being defined, like a silhouette, by its limitations, rather than to regard it as occupying the whole ground save to the extent that an exception can be imposed. That after all would explain why it has become wholly commonplace to adjudicate upon or call into question the acts of a foreign state in relation to matters of international convention, whether it is the persecution of applicant asylum refugees, or the application of the Rome Statute with regard to international criminal responsibility or other matters .... That is also perhaps an element in the naturalness with which our courts have been prepared, in the face of cogent evidence, to adjudicate upon allegations relating to the availability of substantive justice in foreign courts. *It also has to be remembered that the doctrine was first developed in an era which predated the existence of modern international human rights law*. The idea that the rights of a state might be curtailed by its obligations in the field of human rights would have seemed somewhat strange in that era. That is perhaps why our courts have sometimes struggled, albeit ultimately successfully, to give effective support to their abhorrence of the persecutions of the Nazi era [as in *Oppenheimer*]. [Emphasis added; para. 115.]

39 The doctrine was again recently assessed by the English courts in *Belhaj*, where Mr. Belhaj and his wife alleged that English officials were complicit with the Libyan State in their illegal detention, abduction and removal to Libya in 2004. The court of first instance concluded that most of the claims were barred by the foreign act of state doctrine. On appeal, Lloyd Jones L.J. for the court cited with approval the modern description of the doctrine and its limitations set out in *Yukos* and held that the action could proceed in light of compelling public policy reasons ([2014] EWCA Civ 1394 (Eng. & Wales C.A. (Civil))).

40 Upholding the Court of Appeal, a divided Supreme Court provided four separate sets of reasons, each seeking to clarify the doctrine but disagreeing on how to do so.

41 Lord Mance held that the doctrine should be disaggregated into three separate rules, subject to limitations. He concluded that the doctrine did not apply to the circumstances of the case and, if it did, a public policy exception like the one articulated in *Yukos* would apply. Lord Neuberger separated the doctrine into different rules from those of Lord Mance. Like Lord Mance, he concluded that the doctrine did not apply in this case and, even if it did, a public policy exception would preclude its application. Lady Hale and Lord Clarke agreed with Lord Neuberger and Lord Mance that the foreign act of state doctrine did not apply to the case and, notwithstanding the differing list of rules provided by Lords Mance and Neuberger, considered their reasons on the matter to be substantially the same. Lord Sumption maintained a more unified version of the doctrine, holding that it would have applied but for a public policy exception.

42 As the conflicting judgments in *Belhaj* highlight, the attempt to house several unique concepts under the roof of the act of state doctrine in English jurisprudence has led to considerable confusion. *Attempting to apply a doctrine which is largely* defined by its limitations has also caused some confusion in *Australia*. In *Habib v. Commonwealth of Australia*, [2010] FCAFC 12 (Australia Fed. Ct.), Jagot J. observed that the act of state doctrine has been described as "a common law principle of uncertain application" (para. 51 (AustLII)).

43 Similarly, in *Moti v. R.*, [2011] H.C.A. 50 (Australia H.C.), the court rejected the contention that the act of state doctrine jurisprudence established "a general and universally applicable rule that Australian courts may not be required (or do not have or may not exercise jurisdiction) to form a view about the lawfulness of conduct that occurred outside Australia by reference to foreign law" (para. 50 (AustLII)). The court noted that "the phrase 'act of State', must not be permitted to distract attention from the need to identify the issues that arise in each case at a more particular level than is achieved by applying a single, all-embracing formula" (para. 52).

44 The Canadian common law has grown from the same roots. As in England, the foundational cases concerning foreign act of state are *Blad* and *Duke of Brunswick*. But since then, whereas English jurisprudence continually reaffirmed and reconstructed the foreign act of state doctrine, Canadian law has developed its own approach to addressing the twin principles underlying the doctrine articulated in *Buttes Gas & Oil*: conflict of laws and judicial restraint. Both principles have developed separately in Canadian jurisprudence rather than as elements of an all-encompassing "act of state doctrine". As such, in Canada, the principles underlying the act of state doctrine have been completely subsumed within this jurisprudence.

45 Our courts determine questions dealing with the enforcement of foreign laws according to ordinary private international law principles which generally call for deference, but allow for judicial discretion to decline to enforce foreign laws where such laws are contrary to public policy, including respect for public international law.

46 *Estonian State Cargo & Passenger Steamship Line v. "Elise" (The)*, [1949] S.C.R. 530 (S.C.C.), is an early example of how the law has developed in Canada (see Martin Bühler, "The Emperor's New Clothes: Defabricating the Myth of `Act of State' in Anglo-Canadian Law", in Craig Scott, ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001), 343, at pp. 346-48 and 351). In *Laane*, this Court considered whether Canada would give effect to a 1940 decree of the Estonian Soviet Socialist Republic purporting to nationalize all Estonian merchant ships, including those in foreign ports, with compensation to the owners at a rate of 25 percent of each ship's value. One of the ships was in the port of Saint John, New Brunswick, when it was sold by court order at the insistence of crew members who were owed wages. The balance of the sale proceeds was claimed by the Estonian State Cargo and Passenger Steamship Line. This Court refused to enforce the 1940 decree because it was confiscatory and contrary to Canadian public policy. None of the four judges who gave reasons had any hesitation in expressing views about the lawfulness of Estonia's conduct, whether as a matter of international law or Canadian public policy. As Rand J. noted: ". . . there is the general principle that no state will apply a law of another which offends against some fundamental morality or public policy" (p. 545). No act of state concerns about Estonia's sovereignty or non-interference in its affairs were even raised by the Court. Instead, the case was dealt with as a straightforward private international law matter about whether to enforce the foreign law despite its penal and confiscatory nature.

47 Our courts also exercise judicial restraint when considering foreign law questions. This restraint means that courts will refrain from making findings which purport to be legally binding on foreign states. But our courts are free to inquire into foreign law questions when doing so is necessary or incidental to the resolution of domestic legal controversies properly before the court.

48 In *Hunt v. T & N plc*, [1993] 4 S.C.R. 289 (S.C.C.), this Court confirmed that Canadian courts should not hesitate to make determinations about the validity of "foreign" laws where such determinations are incidental to the resolution of legal controversies properly before the courts. The issue in *Hunt* was whether the courts in British Columbia had the authority to determine the constitutionality of a Quebec statute. In concluding that British Columbia courts did have such authority and, ultimately, that the statute in question was constitutionally inapplicable to other provinces, La Forest J. made no reference to act of state:

> In determining what constitutes foreign law, there seems little reason why a court cannot hear submissions and receive evidence as to the constitutional status of foreign legislation. There is nothing in the authorities cited by the respondents that goes against this proposition. Quite the contrary, *Buck v. Attorney-General*, [1965] 1 All E.R. 882 (C.A.), holds only that a court has no jurisdiction to make a declaration as to the validity of the constitution of a foreign state. That would violate the principles of public international law. But here nobody is trying to challenge the constitution itself. The issue of constitutionality arises incidentally in the course of litigation. ...
>
> . . . . .
>
> The policy reasons for allowing consideration of constitutional arguments in determining foreign law that incidentally arises in the course of litigation are well founded. The constitution of another jurisdiction is clearly part of its law, presumably the most fundamental part. A foreign court in making a finding of fact should not be bound to assume that the mere enactment of a statute necessarily means that it is constitutional. [pp. 308-9]

49 The decision in *Hunt* confirms that there is no jurisdictional bar to a Canadian court dealing with the laws or acts of a foreign state where "the question arises merely incidentally" (p. 309). And in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (S.C.C.), this Court noted that, in certain circumstances, the adjudication of questions of international law by Canadian courts will be necessary to determine rights or obligations within our legal system, and in these cases, adjudicating these questions is "not only permissible but unavoidable" (para. 23; see also Gib van Ert, "The Domestic Application of International Law in Canada", in Curtis A. Bradley, ed., *The Oxford Handbook of Comparative Foreign Relations Law* (2019), 501).

50 Our courts are also frequently asked to evaluate foreign laws in extradition and deportation cases. In these instances, our courts consider comity but, as in other contexts, the deference accorded by comity to foreign legal systems "ends where clear violations of international law and fundamental human rights begin" (*R. v. Hape*, [2007] 2 S.C.R. 292 (S.C.C.), at para. 52; see also *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 (S.C.C.), at p. 1047; *Khadr v. Canada (Minister of Justice)*, [2008] 2 S.C.R. 125 (S.C.C.), at paras. 18 and 26; *Khadr v. Canada (Prime Minister)*, [2010] 1 S.C.R. 44 (S.C.C.), at para. 16). In *R. v. Schmidt*, [1987] 1 S.C.R. 500 (S.C.C.), an extradition case, La Forest J. recognized that

> in some circumstances the manner in which the foreign state will deal with the fugitive on surrender, whether that course of conduct is justifiable or not under the law of that country, may be such that it would violate the principles of fundamental justice to surrender an accused under those circumstances. [p. 522]

51 McLachlin J. endorsed this principle in *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779 (S.C.C.), where she explained that "[t]he test for whether an extradition law or action offends s. 7 of the *Charter* on account of the penalty which may be imposed in the requesting state, is whether the imposition of the penalty by the foreign state 'sufficiently shocks' the Canadian conscience" (p. 849, citing *Schmidt*, at p. 522). As part of the inquiry, the reviewing court must consider "the nature of the justice system in the requesting jurisdiction" in light of "the Canadian sense of what is fair, right and just" (*Kindler*, at pp. 849-50).

52 And in *United States v. Burns*, [2001] 1 S.C.R. 283 (S.C.C.), this Court unanimously held that "[a]n extradition that violates the principles of fundamental justice will *always* shock the conscience" (para. 68 (emphasis in original)). The Court

concluded that it was a violation of s. 7 of the *Canadian Charter of Rights and Freedoms* for the Minister to extradite Canadian citizens to the United States without, as a condition of extradition, assurances that the death penalty would not be sought.

53 In the deportation context, the Court's unanimous decision in *Suresh v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 3 (S.C.C.), concluded that the Minister, and by extension the reviewing court, should consider the human rights record of the foreign state when assessing whether the potential deportee will be subject to torture there.

54 The question of whether and when it is appropriate for a Canadian court to scrutinize the human rights practices of a foreign state in the context of deportation hearings was also squarely before the Court in *India v. Badesha*, [2017] 2 S.C.R. 127 (S.C.C.). Moldaver J., writing for the Court, said: "I am unable to accept ... that evidence of systemic human rights abuses in a receiving state amounts to a general indictment of that state's justice system", concluding that the Minister and the reviewing court are entitled to "consider evidence of the general human rights situation" in a foreign state (para. 44).

55 Even though all of these cases dealt to some extent with questions about the lawfulness of foreign state acts, none referred to the "act of state doctrine".

56 Despite the absence of any cases applying the act of state doctrine in Canada, Nevsun argues that the doctrine was part of the English common law received into the law of British Columbia in 1858.

57 While the English common law, including some of the cases which are now recognized as forming the basis of the act of state doctrine, was generally received into Canadian law at various times in our legal history, as the preceding analysis shows, Canadian jurisprudence has addressed the principles underlying the doctrine within our conflict of laws and judicial restraint jurisprudence, with no attempt to have them united as a single doctrine. The act of state doctrine in Canada has been completely absorbed by this jurisprudence.

58 To now import the English act of state doctrine and jurisprudence into Canadian law would be to overlook the development that its underlying principles have received through considered analysis by Canadian courts.

59 The doctrine is not part of Canadian common law, and neither it nor its underlying principles as developed in Canadian jurisprudence are a bar to the Eritrean workers' claims.

Customary International Law

60 The Eritrean workers claim in their pleadings that customary international law is part of the law of Canada and, as a result, a "breach of customary international law ... is actionable at common law". Specifically, the workers' pleadings claim:

> 7. The plaintiffs bring this action for damages against Nevsun under customary international law as incorporated into the law of Canada and domestic British Columbia law.
>
> . . . . .
>
> 53. The plaintiffs seek damages under customary international law, as incorporated into the law [of] Canada, from Nevsun for the use of forced labour, slavery, cruel, inhuman or degrading treatment, and crimes against humanity.
>
> . . . . .
>
> 56. The plaintiffs claim:
>
> (a) damages at customary international law as incorporated into the law of Canada;
>
> . . . . .
>
> 60. The use of forced labour is a breach of customary international law and *jus cogens* and is actionable at common law.
>
> . . . . .
>
> 63. Slavery is a breach of customary international law and *jus cogens* and is actionable at common law.
>
> . . . . .
>
> 66. Cruel, inhuman or degrading treatment is a breach of customary international law and is actionable at common law.
>
> . . . . .

70. Crimes against humanity are a breach of customary international law and *jus cogens* and are actionable at common law.

61 As these excerpts from the pleadings demonstrate, the workers broadly seek damages from Nevsun for breaches of customary international law as incorporated into the law of Canada.

62 As the Chambers Judge and the Court of Appeal noted, this Court is not required to determine definitively whether the Eritrean workers should be awarded damages for the alleged breaches of customary international law. The question before us is whether Nevsun has demonstrated that the Eritrean workers' claims based on breaches of customary international law should be struck at this preliminary stage.

63 Nevsun's motion to strike these customary international law claims was based on British Columbia's *Supreme Court Civil Rules* permitting pleadings to be struck if they disclose no reasonable claim (rule 9-5(1)(a)), or are unnecessary (rule 9-5(1)(b)).

64 A pleading will only be struck for disclosing no reasonable claim under rule 9-5(1)(a) if it is "plain and obvious" that the claim has no reasonable prospect of success (*Knight v. Imperial Tobacco Canada Ltd.*, [2011] 3 S.C.R. 45 (S.C.C.), at para. 17; *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263 (S.C.C.), at paras. 14-15). When considering an application to strike under this provision, the facts as pleaded are assumed to be true "unless they are manifestly incapable of being proven" (*Imperial Tobacco*, at para. 22, citing *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 (S.C.C.), at p. 455).

65 Under rule 9-5(1)(b), a pleading may be struck if "it is unnecessary, scandalous, frivolous or vexatious". Fisher J. articulated the relevant considerations in *Willow v. Chong*, 2013 BCSC 1083 (B.C. S.C.), stating:

> Under Rule 9-5(1)(b), a pleading is unnecessary or vexatious if it does not go to establishing the plaintiff's cause of action, if it does not advance any claim known in law, where it is obvious that an action cannot succeed, or where it would serve no useful purpose and would be a waste of the court's time and public resources: *Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress*, [1999] BCJ No. 2160(SC (in chambers)); *Skender v. Farley*, 2007 BCCA 629. [at para. 20 (CanLII)]

66 This Court admonished in *Imperial Tobacco* that the motion to strike

> is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. ... Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial. [para. 21]

67 The Chambers Judge in this case summarized the issues as follows:

> The proceeding raises issues of transnational law being the term used for the convergence of customary international law and private claims for human rights redresses and which include:
>
> > (a) whether claims for damages arising out of the alleged breach of *jus cogens* or peremptory norms of customary international law such as forced labour and torture may form the basis of a civil proceeding in British Columbia;
> >
> > (b) the potential corporate liability for alleged breaches of both private and customary international law. This in turn raises issues of corporate immunity and whether the act of state doctrine raises a complete defence to the plaintiffs' claims.

He concluded that though the workers' claims raised novel and difficult issues, the claims were not bound to fail and should be allowed to proceed for a full contextual analysis at trial.

68 In the British Columbia Court of Appeal, Newbury J.A. also believed that a private law remedy for breaches of the international law norms alleged by the workers may be possible. In her view, recognizing such a remedy may be an incremental

first step in the development of this area of the law and, as a result, held that the claims based on breaches of customary international law should not be struck at this preliminary stage.

69 For the reasons that follow, I agree with the Chambers Judge and the Court of Appeal that the claims should be allowed to proceed. As the Chambers Judge put it: "The current state of the law in this area remains unsettled and, assuming that the facts set out in the [notice of civil claim] are true, Nevsun has not established that the [customary international law] claims have no reasonable likelihood of success".

70 Canadian courts, like all courts, play an important role in the ongoing development of international law. As La Forest J. wrote in a 1996 article in the *Canadian Yearbook of International Law*:

> [I]n the field of human rights, and of other laws impinging on the individual, our courts are assisting in developing general and coherent principles that apply in very significant portions of the globe. These principles are applied consistently, with an international vision and on the basis of international experience. Thus our courts — and many other national courts — are truly becoming international courts in many areas involving the rule of law. They will become all the more so as they continue to rely on and benefit from one another's experience. Consequently, it is important that, in dealing with interstate issues, national courts fully perceive their role in the international order and national judges adopt an international perspective.
>
> (Hon. Gérard V. La Forest, "The Expanding Role of the Supreme Court of Canada in International Law Issues" (1996), 34 *Can. Y.B. Intl Law* 89, at pp. 100-1)

71 Since "[i]nternational law not only percolates down from the international to the domestic sphere, but ... also bubbles up", there is no reason for Canadian courts to be shy about implementing and advancing international law (Anthea Roberts, "Comparative International Law? The Role of National Courts in Creating and Enforcing International Law" (2011), 60 *I.C.L.Q.* 57, at p. 69; Jutta Brunnée and Stephen J. Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2002), 40 *Can. Y.B. Intl Law* 3, at pp. 4-6, 8 and 56; see also Hugh M. Kindred, "The Use and Abuse of International Legal Sources by Canadian Courts: Searching for a Principled Approach", in Oonagh E. Fitzgerald, ed., *The Globalized Rule of Law: Relationships between International and Domestic Law* (2006), 5, at p. 7).

72 Understanding and embracing our role in implementing and advancing customary international law allows Canadian courts to meaningfully contribute, as we already assertively have, to the "choir" of domestic court judgments around the world shaping the "substance of international law" (Osnat Grady Schwartz, "International Law and National Courts: Between Mutual Empowerment and Mutual Weakening" (2015), 23 *Cardozo J. Intl & Comp. L.* 587, at p. 616; see also René Provost, "Judging in Splendid Isolation" (2008), 56 *Am. J. Comp. L.* 125, at p. 171).

73 Given this role, we must start by determining whether the prohibitions on forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity, the violations of which form the foundation of the workers' customary international law claims, are part of Canadian law, and, if so, whether their breaches may be remedied. To determine whether these prohibitions are part of Canadian law, we must first determine whether they are part of customary international law.

74 Customary international law has been described as "the oldest and original source of international law" (Philip Alston and Ryan Goodman, *International Human Rights* (2013), at p. 72). It is the common law of the international legal system — constantly and incrementally evolving based on changing practice and acceptance. As a result, it sometimes presents a challenge for definitional precision.

75 But in the case of the norms the Eritrean workers claim Nevsun breached, the task is less onerous, since these norms emerged seamlessly from the origins of modern international law, which in turn emerged responsively and assertively after the brutality of World War II. It brought with it acceptance of new laws like prohibitions against genocide and crimes against humanity, new institutions like the United Nations, and new adjudicative bodies like the International Court of Justice and eventually the International Criminal Court, all designed to promote a just rule of law and all furthering liberal democratic

principles (Philippe Sands, *East West Street: On the Origins of "Genocide" and "Crimes Against Humanity"* (2016), at pp. 361-64; Lloyd Axworthy, *Navigating A New World: Canada's Global Future* (2003), at pp. 200-1).

76 The four authoritative sources of modern international law, including customary international law, are found in art. 38(1) of the *Statute of the International Court of Justice*, Can. T.S. 1945, No. 7, which came into force October 24, 1945:

. . . . .

> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> d. ... judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Professors Brunnée and Toope have described art. 38 as the "litmus test for the sources of international law" (Brunnée and Toope (2002), "A Hesitant Embrace", at p. 11).

77 There are two requirements for a norm of customary international law to be recognized as such: general but not necessarily universal practice, and *opinio juris*, namely the belief that such practice amounts to a legal obligation (United Nations, International Law Commission, *Report of the International Law Commission*, 73rd Sess., Supp. No. 10, U.N. Doc. A/73/10, 2018, at p. 124; *North Sea Continental Shelf*, Judgment, I.C.J. Report 1969, p. 3, at para. 71; *Kazemi (Estate) v. Islamic Republic of Iran*, [2014] 3 S.C.R. 176 (S.C.C.), at para. 38; Harold Hongju Koh, "Twenty-First Century International Lawmaking" (2013), 101 *Geo. L.J.* 725, at p. 738; Jean-Marie Henckaerts, "Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict" (2005), 87 *Int'l Rev. Red Cross* 175, at p. 178; Antonio Cassese, *International Law* (2nd ed. 2005), at p. 157).

78 To meet the first requirement, the practice must be sufficiently general, widespread, representative and consistent (International Law Commission, at p. 135). To meet the second requirement, *opinio juris*, the practice "must be undertaken with a sense of legal right or obligation", as "distinguished from mere usage or habit" (International Law Commission, at p. 138; *North Sea Continental Shelf*, at para. 77).

79 The judicial decisions of national courts are also evidence of general practice or *opinio juris* and thus play a crucial role in shaping norms of customary international law. As the Permanent Court of International Justice noted in *German interests in Polish Upper Silesia (The Merits), Re* (1925), [1926] P.C.I.J. Ser. A 7 (P.C.I.J.), legal decisions are "facts which express the will and constitute the activities of States" (p. 19; see also *Prosecutor v. Jelisi* (Dec 14, 1999), Doc. IT-95-10-T (Int. Criminal Trib.), at para. 61; *Prosecutor v. Krstic* (Aug 02, 2001), Doc. IT-98-33-T (Int. Criminal Trib.), at paras. 541, 575 and 579-89; *Prosecutor v. Erdemovic* (Oct 07, 1997), Doc. IT-96-22-A (Int. Criminal Trib.), Joint separate opinion of Judge McDonald and Judge Vohrah, 7 October 1997 (ICTY, Appeal Chamber), at paras. 47-55).

80 When an international practice develops from being intermittent and voluntary into being widely accepted and believed to be obligatory, it becomes a norm of customary international law. As Professor James L. Brierly wrote:

> Custom in its legal sense means something more than mere habit or usage; it is a usage felt by those who follow it to be an obligatory one. There must be present a feeling that, if the usage is departed from, some form of sanction will probably, or at any rate ought to, fall on the transgressor.
>
> (James L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (6th ed. 1963), at p. 59, cited in John H. Currie, et al., *International Law: Doctrine, Practice, and Theory* (2nd ed. 2014), at p. 116)

81 This process, whereby international practices become norms of customary international law, has been variously described as "accretion", "crystallization", "ripening" and "gel[ling]" (see, e.g., Bruno Simma and Philip Alston, "The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles" (1988), 12 *Aust. Y.B.I.L.* 82, at p. 104; *"Paquette Habana" (The), Re*, 175 U.S. 677 (U.S. Sup. Ct. 1900), at p. 686; Jutta Brunnée and Stephen J. Toope, "International Law and the Practice of Legality: Stability and Change" (2018), 49 *V.U.W.L.R.* 429, at p. 443).

82 Once a practice becomes a norm of customary international law, by its very nature it "must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour" (*North Sea Continental Shelf*, at para. 63).

83 Within customary international law, there is a subset of norms known as *jus cogens*, or peremptory norms, which have been "accepted and recognized by the international community of States as a whole ... from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character" (*Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37 (entered into force 27 January 1980), art. 53). This Court acknowledged that "a peremptory norm, or *jus cogens* norm is a fundamental tenet of international law that is non-derogable" (*Kazemi (Estate)*, at para. 47, citing John H. Currie, *Public International Law* (2nd ed. 2008), at p. 583; Claude Emanuelli, *Droit international public: Contribution à l'étude du droit international selon une perspective canadienne* (3rd ed. 2010), at pp. 168-69; *Vienna Convention on the Law of Treaties*, art. 53).

84 Peremptory norms have been accepted as fundamental to the international legal order (Ian Brownlie, *Principles of Public International Law* (7th ed. 2008), at pp. 510-12; see also Andrea Bianchi, "Human Rights and the Magic of *Jus Cogens*" (2008), 19 *E.J.I.L.* 491; Evan J. Criddle and Evan Fox-Decent, "A Fiduciary Theory of Jus Cogens" (2009), 34 *Yale J. Intl L.* 331).

85 How then does customary international law apply in Canada? As Professor Koh explains, "[l]aw-abiding states *internalize* international law by incorporating it into their domestic legal and political structures, through executive action, legislation, and judicial decisions which take account of and incorporate international norms" (Harold Hongju Koh, "Transnational Legal Process" (1996), 75 *Neb. L. Rev.* 181, at p. 204 (emphasis in original)). Some areas of international law, like treaties, require legislative action to become part of domestic law (Currie, et al., *International Law: Doctrine, Practice, and Theory*, at pp. 160-61 and 173-74; Currie, *Public International Law*, at pp. 225-26).

86 On the other hand, customary international law is automatically adopted into domestic law without any need for legislative action (Currie, *Public International Law*, at pp. 225-26; *Hape*, at paras. 36 and 39, citing *Trendtex Trading Corp. v. Central Bank of Nigeria*, [1977] 1 Q.B. 529 (Eng. C.A.), per Lord Denning; Hersch Lauterpacht, "Is International Law a Part of the Law of England?", in *Transactions of the Grotius Society*, vol. 25, *Problems of Peace and War: Papers Read Before the Society in the Year 1939* (1940), 51). In England this is known as the doctrine of incorporation and in Canada as the doctrine of adoption. As Professor Brownlie explains:

> The dominant principle ... is that customary rules are to be considered part of the law of the land and enforced as such, with the qualification that they are incorporated only so far as is not inconsistent with Acts of Parliament or prior judicial decisions of final authority. [p. 41]

87 The adoption of customary international law as part of domestic law by way of automatic judicial incorporation can be traced back to the 18th century (Gib van Ert, *Using International Law in Canadian Courts* (2nd ed. 2008), at pp. 184-208). Blackstone's 1769 *Commentaries on the Laws of England: Book the Fourth*, for example, noted that "the law of nations ... is here adopted in it[s] full extent by the common law, and is held to be a part of the law of the land", at p. 67; see also *Triquet v. Bath* (1764), 3 Burr. 1478 (Eng. K.B.)). Similarly, in the frequently cited case of *R. v. Chung Chi Cheung* (1938), [1939] A.C. 160 (Hong Kong P.C.), Lord Atkin wrote:

> The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals. [p. 168]

88 Direct incorporation is also far from a niche preserve among nations. In a study covering 101 countries over a period between 1815 and 2013, Professors Pierre-Hugues Verdier and Mila Versteeg found widespread acceptance of the direct application of customary international law:

> [P]erhaps the most striking pattern that emerges from our data is that in virtually all states, CIL [Customary International Law] rules are in principle directly applicable without legislative implementation. ... [M]ost countries that require treaty implementation do not apply the same rule to international custom, but rather apply it directly.
>
> (Pierre-Hugues Verdier and Mila Versteeg, "International Law in National Legal Systems: An Empirical Investigation" (2015), 109 *Am. J. Intl L.* 514, at p. 528)

89 In Canada, in *R. v. "North" (The)* (1906), 37 S.C.R. 385 (S.C.C.), Davies J., in concurring reasons, expressed the view that the Admiralty Court was "bound to take notice of the law of nations" (p. 394). Similarly, in *Exemption of United States Forces from Proceedings in Canadian Criminal Courts, Re*, [1943] S.C.R. 483 (S.C.C.), Taschereau J., drawing on *Chung Chi Cheung*, held that the body of rules accepted by nations are incorporated into domestic law absent statutes to the contrary (pp. 516-17).

90 As these cases show, Canada has long followed the conventional path of automatically incorporating customary international law into domestic law via the doctrine of adoption, making it part of the common law of Canada in the absence of conflicting legislation. This approach was more recently confirmed by this Court in *Hape*, where LeBel J. for the majority held:

> Despite the Court's silence in some recent cases, the doctrine of adoption has never been rejected in Canada. Indeed, there is a long line of cases in which the Court has either formally accepted it or at least applied it. In my view, following the common law tradition, it appears that the doctrine of adoption operates in Canada such that prohibitive rules of customary international law *should* be incorporated into domestic law in the absence of conflicting legislation. The *automatic* incorporation of such rules is justified on the basis that international custom, as the law of nations, is also the law of Canada unless, in a valid exercise of its sovereignty, Canada declares that its law is to the contrary. Parliamentary sovereignty dictates that a legislature may violate international law, but that it must do so expressly. Absent an express derogation, the courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law. [Emphasis added; para. 39.]

It is important to note that he concluded that rules of customary international law should be automatically incorporated into domestic law in the absence of conflicting legislation. His use of the word "may" later in the paragraph cannot be taken as overtaking his clear direction that, based on "a long line of cases", customary international law is automatically incorporated into Canadian law. Judicial decisions are not Talmudic texts whereby each word attracts its own exegetical interpretation. They must be read in a way that respects the author's overall intention, without permitting a stray word or phrase to undermine the overarching theory being advanced.

91 Justice LeBel himself, in an article he wrote several years after *Hape*, explained that the Court's use of the word "may" in *Hape* was in no way meant to diverge from the traditional approach of directly incorporating customary norms into Canadian common law:

> Following [*Hape*], there was some comment and concern to the effect that the [statement that "courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law" (para. 39)] left the law in a state of some doubt. These comments pointed out that this sentence could be read as holding that prohibitive norms are not actually part of the domestic common law, but may only serve to aid in its development. In my view, this was not the sense of this passage, for at least three reasons. First, the sentences immediately preceding this last sentence stated, without reservation, that prohibitive rules of customary international law are incorporated into domestic law in the absence of conflicting legislation.
>
> Second, the entire discussion of incorporation was for the purpose of showing how the norm of respect for the sovereignty of foreign states, forming, as it does, part of our common law, could shed light on the interpretation of s. 32(1) of the *Charter*.

> Third, the majority reasons also explicitly held that the customary principles of non-intervention and territorial sovereignty "may be adopted into the common law of Canada in the absence of conflicting legislation". The gist of the majority opinion in *Hape* was that accepting incorporation of customary international [law] was the right approach. *In conclusion, the law in Canada today appears to be settled on this point: prohibitive customary norms are directly incorporated into our common law and must be followed by courts absent legislation which clearly overrules them*. [Emphasis added.]
>
> (Louis LeBel, "A Common Law of the World? The Reception of Customary International Law in the Canadian Common Law" (2014), 65 *U.N.B.L.J.* 3, at p. 15)

92 As for LeBel J.'s novel use of the word "prohibitive", we should be wary of concluding that he intended to create a new category of customary international law unique to Canada. In the same article, LeBel J. clarified that "prohibitive" norms simply mean norms that are "mandatory", in the sense that they are obligatory or binding (LeBel, at p. 17). As Professor Currie observes, the word "prohibitive" is a "puzzling qualification [that] does not figure in any of the authorities cited by LeBel J. for the doctrine, nor is it a feature of the doctrine of adoption that operates in the United Kingdom" (John H. Currie, "Weaving a Tangled Web: *Hape* and the Obfuscation of Canadian Reception Law" (2007), 45 *Can. Y.B. Intl Law* 55, at p. 70; see also Armand de Mestral and Evan Fox-Decent, "Rethinking the Relationship Between International and Domestic Law" (2008), 53 *McGill L.J.* 573, at p. 587).

93 The use of the word "prohibitive", therefore, does not add a separate analytic factor, it merely emphasizes the mandatory nature of customary international law (see van Ert, *Using International Law in Canadian Courts*, at pp. 216-18). This aligns with LeBel J.'s statement in *Hape* that the "automatic incorporation" of norms of customary international law "is justified on the basis that *international custom, as the law of nations, is also the law of Canada*" (para. 39 (emphasis added)).

94 Therefore, as a result of the doctrine of adoption, norms of customary international law — those that satisfy the twin requirements of general practice and *opinio juris* — are fully integrated into, and form part of, Canadian domestic common law, absent conflicting law (Oonagh E. Fitzgerald, "Implementation of International Humanitarian and Related International Law in Canada", in Oonagh E. Fitzgerald, ed., *The Globalized Rule of Law: Relationships between International and Domestic Law* (2006), 625, at p. 630). Legislatures are of course free to change or override them, but like all common law, no legislative action is required to give them effect (Kindred, at p. 8). To suggest otherwise by requiring legislative endorsement, upends a 250 year old legal truism and would put Canada out of step with most countries (Verdier and Versteeg, at p. 528). As Professor Toope noted, "[t]he Canadian story of international law is not merely a story of 'persuasive' foreign law. International law also speaks directly to Canadian law and requires it to be shaped in certain directions. International law is more than 'comparative law', because international law is partly *our* law" (Stephen J. Toope, "Inside and Out: The Stories of International Law and Domestic Law" (2001), 50 *U.N.B.L.J.* 11, at p. 23 (emphasis in original)).

95 There is no doubt then, that customary international law is also the law of Canada. In the words of Professor Rosalyn Higgins, former President of the International Court of Justice: "In short, there is not 'international law' and the common law. International law is part of that which comprises the common law on any given subject" (Rosalyn Higgins, "The Relationship Between International and Regional Human Rights Norms and Domestic Law" (1992), 18 *Commonwealth L. Bull.* 1268, at p. 1273). The fact that customary international law is part of our common law means that it must be treated with the same respect as any other law.

96 In other words, "Canadian courts, like courts all over the world, are supposed to treat public international law as law, not fact" (Gib van Ert, "The Reception of International Law in Canada: Three Ways We Might Go Wrong", in Centre for International Governance Innovation, *Canada in International Law at 150 and Beyond, Paper No. 2* (2018), at p. 6; see also van Ert, *Using International Law in Canadian Courts*, at pp. 62-69).

97 Unlike foreign law in conflict of laws jurisprudence, therefore, which is a question of fact requiring proof, established norms of customary international law are law, to be judicially noticed (van Ert, "The Reception of International Law", at p. 6; van Ert, *Using International Law in Canadian Courts*, at pp. 62-69). Professor Higgins explains this as follows: "There is not a legal system in the world where international law is treated as 'foreign law'. It is everywhere part of the law of the land; as much

as contracts, labour law or administrative law" (p. 1268; see also James Crawford, *Brownlie's Principles of Public International Law* (9th ed. 2019), at p. 52; Robert Jennings and Arthur Watts, *Oppenheim's International Law* (9th ed. 2008), vol. 1, at p. 57; van Ert, *Using International Law in Canadian Courts*, at p. 64).

98 And just as the law of contracts, labour law and administrative law are accepted without the need of proof, so too is customary international law. Taking judicial notice — in the sense of not requiring formal proof by evidence — is appropriate and an inevitable implication both of the doctrine of adoption [3] and legal orthodoxy (Anne Warner La Forest, "Evidence and International and Comparative Law", in Oonagh E. Fitzgerald, ed., *The Globalized Rule of Law: Relationships between International and Domestic Law* (2006), 367, at pp. 381-82; van Ert, *Using International Law in Canadian Courts*, at pp. 42-56 and 62-66).

99 Some academics suggest that when recognising *new* norms of customary international law, allowing evidence of state practice may be appropriate. While these scholars acknowledge that permitting such proof departs from the conventional approach of judicially noticing customary international law, they maintain that this in no way derogates from the nature of international law as law (Anne Warner La Forest, at pp. 384 and 388; van Ert, *Using International Law in Canadian Courts*, at pp. 67-69). The questions of whether and what evidence may be used to demonstrate the existence of a new norm are not, however, live issues in this appeal. Here the inquiry is less complicated and taking judicial notice is appropriate since the workers claim breaches not simply of established norms of customary international law, but of norms accepted to be of such fundamental importance as to be characterized as *jus cogens*, or peremptory norms.

100 Crimes against humanity have been described as among the "least controversial examples" of violations of *jus cogens* (Louis LeBel and Gloria Chao, "The Rise of International Law in Canadian Constitutional Litigation: Fugue or Fusion? Recent Developments and Challenges in Internalizing International Law" (2002), 16 *S.C.L.R.* (2d) 23, at p. 33).

101 The prohibition against slavery too is seen as a peremptory norm. In 2002, the Office of the United Nations High Commissioner for Human Rights confirmed that "it is now a well-established principle of international law that the 'prohibition against slavery and slavery-related practices have achieved the level of customary international law and have attained "*jus cogens*" status'" (David Weissbrodt and Anti-Slavery International, *Abolishing Slavery and its Contemporary Forms*, U.N. Doc. HR/PUB/02/4 (2002), at p. 3).

102 Compelling authority also confirms that the prohibition against forced labour has attained the status of *jus cogens*. The International Labour Organization, in a report entitled "Forced labour in Myanmar (Burma)", *I.L.O Official Bulletin: Special Supplement*, vol. LXXXI, 1998, Series B, recognized that, "there exists now in international law a peremptory norm prohibiting any recourse to forced labour and that the right not to be compelled to perform forced or compulsory labour is one of the basic human rights" (para. 203). To the extent that debate may exist about whether forced labour is a peremptory norm, there can be no doubt that it is at least a norm of customary international law.

103 And the prohibition against cruel, inhuman and degrading treatment has been described as an "absolute right, where no social goal or emergency can limit [it]" (Currie, et al., *International Law: Doctrine, Practice, and Theory*, at p. 627). This is reflected in the ratification of several international covenants and treaties such as the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47 (entered into force March 23, 1976), art. 7; the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Can T.S. 1987 No. 36 (entered into force June 26, 1987), art. 16; the European *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221, art. 3; the *American Declaration of the Rights and Duties of Man*, April 30, 1948, art. 26; the *American Convention on Human Rights*, 1144 U.N.T.S. 123, art. 5; the *African Charter on Human and Peoples' Rights*, 1520 U.N.T.S. 217, art. 5; the *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, art. 37; the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, 1561 U.N.T.S. 363; and the *Inter-American Convention to Prevent and Punish Torture*, O.A.S.T.S. No. 67 (Currie et al., *International Law: Doctrine, Practice, and Theory*, at p. 627).

104 Nevsun argues, however, that even if customary international law norms such as those relied on by the Eritrean workers form part of the common law through the doctrine of adoption, it is immune from their application because it is a corporation.

105 Nevsun's position, with respect, misconceives modern international law. As Professor William S. Dodge has observed, "[i]nternational law ... does not contain general norms of liability or non-liability applicable to categories of actors" (William S. Dodge, "Corporate Liability Under Customary International Law" (2012), 43 *Geo. J. Int'l L.* 1045, at p. 1046). Though certain norms of customary international law, such as norms governing treaty making, are of a strictly interstate character and will have no application to corporations, others prohibit conduct regardless of whether the perpetrator is a state (see, e.g., Dodge; Harold Hongju Koh, "Separating Myth from Reality about Corporate Responsibility Litigation" (2004), 7 *J.I.E.L.* 263, at pp. 265-267; Andrew Clapham, *Human Rights Obligations of Non-State Actors* (2006), at p. 58).

106 While states were classically the main subjects of international law since the Peace of Westphalia in 1648 (Cassese, at pp. 22-25; Oona A. Hathaway and Scott J. Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (2017), at p. xix), international law has long-since evolved from this state-centric template. As Lord Denning wrote in *Trendtex Trading Corp.*: "I would use of international law the words which Galileo used of the earth: 'But it does move'" (p. 554).

107 In fact, international law has so fully expanded beyond its Grotian origins that there is no longer any tenable basis for restricting the application of customary international law to relations between states. The past 70 years have seen a proliferation of human rights law that transformed international law and made the individual an integral part of this legal domain, reflected in the creation of a complex network of conventions and normative instruments intended to protect human rights and ensure compliance with those rights.

108 Professor Payam Akhavan notes that "[t]he rapid emergence of human rights signified a revolutionary shift in international law, from a state-centric to a human-centric conception of global order" (Payam Akhavan, "Canada and international human rights law: is the romance over?" (2016), 22 *Canadian Foreign Policy Journal* 331, at p. 332). The result of these developments is that international law now works "not only to maintain peace between States, but to protect the lives of individuals, their liberty, their health, [and] their education" (Emmanuelle Jouannet, "What is the Use of International Law? International Law as a 21st Century Guardian of Welfare" (2007), 28 *Mich. J. Int'l L.* 815, at p. 821). As Professor Christopher Joyner adds: "The rights of peoples within a state now transcend national boundaries and have become essentially a common concern under international law" (Christopher C. Joyner, "'The Responsibility to Protect': Humanitarian Concern and the Lawfulness of Armed Intervention" (2007), 47 *Va J. Int'l L.* 693, at p. 717).

109 This represents the international law actualization of Professor Hersch Lauterpacht's statement in 1943 that "[t]he individual human being ... is the ultimate unit of all law" (Sands, at p. 63).

110 A central feature of the individual's position in modern international human rights law is that the rights do not exist simply as a contract with the state. While the rights are certainly enforceable against the state, they are not defined by that relationship (Patrick Macklem, *The Sovereignty of Human Rights* (2015), at p. 22). They are discrete legal entitlements, held by individuals, and are "to be respected by everyone" (Clapham, *Human Rights Obligations*, at p. 58).

111 Moreover, as Professor Beth Stephens has observed, these rights may be violated by private actors:

> The context in which international human rights norms must be interpreted and applied today is one in which such norms are routinely applied to private actors. Human rights law in the past several decades has moved decisively to prohibit violations by private actors in fields as diverse as discrimination, children's rights, crimes against peace and security, and privacy. ... It is clear that individuals today have both rights and responsibilities under international law. Although expressed in neutral language, many human rights provisions must be understood today as applying to individuals as well as to states.
>
> (Beth Stephens, "The Amorality of Profit: Transnational Corporations and Human Rights" (2002), 20 *B.J.I.L.* 45, at p. 73)

There is no reason, in principle, why "private actors" excludes corporations.

112 Canvassing the jurisprudence and academic commentaries, Professor Koh observes that non-state actors like corporations can be held responsible for violations of international criminal law and concludes that it would not "make sense to argue that

international law may impose criminal liability on corporations, but not civil liability" (Koh, "Separating Myth from Reality", at p. 266). He describes the idea that domestic courts cannot hold corporations civilly liable for violations of international law as a "myth" (Koh, "Separating Myth from Reality", at pp. 264-68; see also Simon Baughen, *Human Rights and Corporate Wrongs: Closing the Governance Gap* (2015), at pp. 130-32). Professor Koh also notes that

> [t]he commonsense fact remains that if states and individuals can be held liable under international law, then so too should corporations, for the simple reason that both states and individuals *act through* corporations. Given that reality, what legal sense would it make to let states and individuals immunize themselves from liability for gross violations through the mere artifice of corporate formation? [Emphasis in original.]
>
> (Koh, "Separating Myth from Reality", at p. 265)

113 As a result, in my respectful view, it is not "plain and obvious" that corporations today enjoy a blanket exclusion under customary international law from direct liability for violations of "obligatory, definable, and universal norms of international law", or indirect liability for their involvement in what Professor Clapham calls "complicity offenses" (Koh, "Separating Myth from Reality", at pp. 265 and 267; Andrew Clapham, "On Complicity", in Marc Henzelin and Robert Roth, eds., *Le Droit Pénal à l'Épreuve de l'Internationalisation* (2002), 241, at pp. 241-75). However, because some norms of customary international law are of a strictly interstate character, the trial judge will have to determine whether the specific norms relied on in this case are of such a character. If they are, the question for the court will be whether the common law should evolve so as to extend the scope of those norms to bind corporations.

114 Ultimately, for the purposes of this appeal, it is enough to conclude that the breaches of customary international law, or *jus cogens*, relied on by the Eritrean workers may well apply to Nevsun. The only remaining question is whether there are any Canadian laws which conflict with their adoption as part of our common law. I could not, with respect, find any.

115 On the contrary, the Canadian government has adopted policies to ensure that Canadian companies operating abroad *respect* these norms (see, e.g., Global Affairs Canada, *Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad*, last updated July 31, 2019 (online); Global Affairs Canada, *Minister Carr announces appointment of first Canadian Ombudsperson for Responsible Enterprise*, April 8, 2019 (online) (announcing the creation of an Ombudsperson for Responsible Enterprise, and a Multi-stakeholder Advisory Body on Responsible Business Conduct)). With respect to the Canadian Ombudsperson for Responsible Enterprise, mandated to review allegations of human rights abuses of Canadian corporations operating abroad, the Canadian government has explicitly noted that "[t]he creation of the Ombudsperson's office does not affect the right of any party to bring a legal action in a court in any jurisdiction in Canada regarding allegations of harms committed by a Canadian company abroad" (Global Affairs Canada, *Responsible business conduct abroad — Questions and answers*, last updated September 16, 2019 (online); Yousuf Aftab and Audrey Mocle, *Business and Human Rights as Law: Towards Justiciability of Rights, Involvement, and Remedy* (2019), at pp. 47-48).

116 In the absence of any contrary law, the customary international law norms raised by the Eritrean workers form part of the Canadian common law and potentially apply to Nevsun.

117 Is a civil remedy for a breach of this part of our common law available? Put another way, can our domestic common law develop appropriate remedies for breaches of adopted customary international law norms?

118 Development of the common law occurs where such developments are necessary to clarify a legal principle, to resolve an inconsistency, or to keep the law aligned with the evolution of society (*Friedmann Equity Developments Inc. v. Final Note Ltd.*, [2000] 1 S.C.R. 842 (S.C.C.), at para. 42; see also *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210 (S.C.C.), at para. 93; *Watkins v. Olafson*, [1989] 2 S.C.R. 750 (S.C.C.)). In my respectful view, recognizing the possibility of a remedy for the breach of norms already forming part of the common law is such a necessary development. As Lord Scarman noted:

> Unless statute has intervened to restrict the range of judge-made law, the common law enables the judges, when faced with a situation where a right recognised by law is not adequately protected, either to extend existing principles to cover the

> situation or to apply an existing remedy to redress the injustice. There is here no novelty: but merely the application of the principle *ubi jus ibi remedium* [for every wrong, the law provides a remedy].
>
> (*Sidaway v. Bethlem Royal Hospital Governors*, [1985] A.C. 871 (U.K. H.L.), at p. 884)

119 With respect specifically to the allegations raised by the workers, like all state parties to the *International Covenant on Civil and Political Rights*, Canada has international obligations to ensure an effective remedy to victims of violations of those rights (art. 2). Expounding on the nature of this obligation, the United Nations Human Rights Committee — which was established by states as a treaty monitoring body to ensure compliance with the *International Covenant on Civil and Political Rights* — provides additional guidance in its *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13, May 26, 2004. In this document, the Human Rights Committee specifies that state parties must protect against the violation of rights not just by states, but also by private persons and entities. The Committee further specifies that state parties must ensure the enjoyment of *Covenant* rights to all individuals, including "asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party" (para. 10). As to remedies, the Committee notes:

> [T]he enjoyment of the rights recognized under the Covenant can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law. [para. 15]

120 In the domestic context, the general principle that "where there is a right, there must be a remedy for its violation" has been recognized in numerous decisions of this Court (see, e.g., *Kazemi (Estate)*, at para. 159; *Henry v. British Columbia (Attorney General)*, [2015] 2 S.C.R. 214 (S.C.C.), at para. 65; *Doucet-Boudreau v. Nova Scotia (Department of Education)*, [2003] 3 S.C.R. 3 (S.C.C.), at para. 25; *Ontario v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575 (S.C.C.), at para. 20; *Brown v. Great Western Railway* (1879), 3 S.C.R. 159 (S.C.C.), at p. 179).

121 The right to a remedy in the context of allegations of human rights violations was discussed by this Court in *Kazemi (Estate)*, where a Canadian woman's estate sought damages against the Islamic Republic of Iran for torture. The majority did not depart from the position in *Hape* that customary international law, including peremptory norms, are part of Canadian common law, absent express legislation to the contrary. However, it concluded that the *State Immunity Act* was the kind of express legislation that prevented a remedy against the State of Iran for the breach of the *jus cogens* prohibition against torture, which it agreed was part of domestic Canadian law. LeBel J. for the majority noted that "[w]hile rights would be illusory if there was never a way to remedy their violation, the reality is that certain rights do exist even though remedies for their violation may be limited by procedural bars" (para. 159). In effect, the majority in *Kazemi (Estate)* held that the general right to a remedy was overridden by Parliament's enactment of the *State Immunity Act*. However, the *State Immunity Act* protects "foreign states" from claims, not individuals or corporations.

122 Unlike *Kazemi (Estate)*, there is no law or other procedural bar precluding the Eritrean workers' claims. Nor is there anything in *Kazemi (Estate)* that precludes the possibility of a claim against a Canadian corporation for breaches in a foreign jurisdiction of customary international law, let alone *jus cogens*. As a result, it is not "plain and obvious" that Canadian courts cannot develop a civil remedy in domestic law for corporate violations of the customary international law norms adopted in Canadian law.

123 Nevsun additionally argues that the harms caused by the alleged breaches of customary international law can be adequately addressed by the recognized torts of conversion, battery, "unlawful confinement", conspiracy and negligence, all of which the Eritrean workers have also pleaded. In my view, it is at least arguable that the Eritrean workers' allegations encompass conduct not captured by these existing domestic torts.

124 Customary international law norms, like those the Eritrean workers allege were violated, are inherently different from existing domestic torts. Their character is of a more public nature than existing domestic private torts since the violation of

these norms "shock[s] the conscience of humanity" (M. Cherif Bassiouni, "International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*" (1996), 59 *Law & Contemp. Probs*. 63, at p. 69).

125 Refusing to acknowledge the differences between existing domestic torts and forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity, may undermine the court's ability to adequately address the heinous nature of the harm caused by this conduct. As Professor Virgo notes, in the context of allegations of human rights violations, the symbolism reflected by the characterization or labelling of the allegations is crucial:

> From the perspective of the victim ... the fact that torture is characterized as a tort, such as battery, will matter — simply because characterising torture in this way does not necessarily reflect the seriousness of the conduct involved. In the context of human rights ... symbolism is crucial.
>
> . . . . .
>
> [In this context, accurately labelling the wrong is important] because the main reason why the victim wishes to commence civil proceedings will presumably be to ensure public awareness of the violation of fundamental human rights. The remedial consequence of successfully bringing a case is often, or even usually, only a secondary concern.
>
> (Graham Virgo, "Characterisation, Choice of Law, and Human Rights", in Craig Scott, ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001), 325, at p. 335)

126 While courts can, of course, address the extent and seriousness of harm arising from civil wrongs with tools like an award of punitive damages, these responses may be inadequate when it comes to the violation of the norms prohibiting forced labour; slavery; cruel, inhuman or degrading treatment; or crimes against humanity. The profound harm resulting from their violation is sufficiently distinct in nature from those of existing torts that, as the workers say, "[i]n the same way that torture is something more than battery, slavery is more than an amalgam of unlawful confinement, assault and unjust enrichment". Accepting this premise, which seems to be difficult to refute conceptually, reliance on existing domestic torts may not "do justice to the specific principles that already are, or should be, in place with respect to the human rights norm" (Craig Scott, "Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms", in Craig Scott, ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001), 45, at p. 62, fn 4; see also Sandra Raponi, "Grounding a Cause of Action for Torture in Transnational Law", in Craig Scott, ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001), 373; Virgo).

127 The workers' customary international law pleadings are broadly worded and offer several ways in which the violation of adopted norms of customary international law may potentially be compensable in domestic law. The mechanism for how these claims should proceed is a novel question that must be left to the trial judge. The claims may well be allowed to proceed based on the recognition of new nominate torts, but this is not necessarily the only possible route to resolving the Eritrean workers' claims. A compelling argument can also be made, based on their pleadings, for a direct approach recognizing that since customary international law is part of Canadian common law, a breach by a Canadian company can theoretically be directly remedied based on a breach of customary international law.

128 The doctrine of adoption in Canada entails that norms of customary international law are directly and automatically incorporated into Canadian law absent legislation to the contrary (Gib van Ert, "What Is Reception Law?", in Oonagh E. Fitzgerald, ed., *The Globalized Rule of Law: Relationships between International and Domestic Law* (2006), 85, at p. 89). That may mean that the Eritrean workers' customary international law claims need not be converted into newly recognized categories of torts to succeed. Since these claims are based on norms that already form part of our common law, it is not "plain and obvious" to me that our domestic common law cannot recognize a direct remedy for their breach. Requiring the development of new torts to found a remedy for breaches of customary international law norms automatically incorporated into the common law may not only dilute the doctrine of adoption, it could negate its application.

129 Effectively and justly remedying breaches of customary international law may demand an approach of a different character than a typical "private law action in the nature of a tort claim" (*Ward v. Vancouver (City)*, [2010] 2 S.C.R. 28 (S.C.C.), at para. 22, citing *Dunlea v. Attorney General*, [2000] NZCA 84 (New Zealand C.A.)). The objectives associated with preventing violations

of *jus cogens* and norms of customary international law are unique. A good argument can be made that appropriately remedying these violations requires different and stronger responses than typical tort claims, given the public nature and importance of the violated rights involved, the gravity of their breach, the impact on the domestic and global rights objectives, and the need to deter subsequent breaches.

130 As Professor Koh wrote about civil remedies for terrorism:

> Whenever a victim of a terrorist attack obtains a civil judgment in a United States court, that judgment promotes two distinct sets of objectives: The objectives of traditional tort law and the objectives of public international law. A judgment awarding compensatory and punitive damages to a victim of terrorism serves the twin objectives of traditional tort law, compensation and deterrence. At the same time, the judgment promotes the objectives of public international law by furthering the development of an international rule of law condemning terrorism. By issuing an opinion and judgment finding liability, the United States federal court adds its voice to others in the international community collectively condemning terrorism as an illegitimate means of promoting individual and sovereign ends.
>
> (Harold Hongju Koh, "Civil Remedies for Uncivil Wrongs: Combatting Terrorism through Transnational Public Law Litigation" (2016), 50 *Tex. Intl L.J.* 661, at p. 675)

131 This proceeding is still at a preliminary stage and it will ultimately be for the trial judge to consider whether the facts of this case justify findings of breaches of customary international law and, if so, what remedies are appropriate. These are complex questions but, as Wilson J. noted in *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.):

> The fact that a pleading reveals "an arguable, difficult or important point of law" cannot justify striking out part of the statement of claim. Indeed, I would go so far as to suggest that where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed. Only in this way can we be sure that the common law ... will continue to evolve to meet the legal challenges that arise in our modern industrial society. [pp. 990-91]

132 Customary international law is part of Canadian law. Nevsun is a company bound by Canadian law. It is not "plain and obvious" to me that the Eritrean workers' claims against Nevsun based on breaches of customary international law cannot succeed. Those claims should therefore be allowed to proceed.

133 I would dismiss the appeal with costs.

Brown, Rowe JJ. **(dissenting in part):**

I. Introduction

134 At the British Columbia Supreme Court, Nevsun Resources Ltd. applied to strike 67 paragraphs of the Eritrean workers' notice of civil claim ("NOCC"). The chambers judge dismissed Nevsun's application, holding that the claim was not bound to fail (2016 BCSC 1856, 408 D.L.R. (4th) 383 (B.C. S.C.)). His decision was upheld on appeal (2017 BCCA 401, 4 B.C.L.R. (6th) 91 (B.C. C.A.)). The majority would also uphold the dismissal of Nevsun's application to strike the pleadings of the workers.

135 We would allow Nevsun's appeal in part. We agree with the majority that the dismissal of Nevsun's application should be upheld as it regards the foreign act of state doctrine, and we concur in the majority reasons from paras. 27 to 59. We would, however, allow Nevsun's appeal on the matter of the use of customary international law in creating tort liability. As we will explain, we part ways from the majority on this issue in several respects: the characterization of the content of international law; the procedure for identifying international law; the meaning of "adoption" of international law in Canadian law; and the availability of a tort remedy.

136 Our reasons are structured as follows. We begin by explaining the theories of the case which are advanced to defend the pleadings from the motion to strike. We then set out our view of the proper approach to customary international law: it is to determine what practices states in fact engage in out of the belief that these practices are mandated by customary international law. We then explain how the rules of customary international law (frequently termed "norms") are given effect in Canada.

When the norms are prohibitive, this question is simple; when the norms are mandatory, the matter is more complicated. We then do our best to explain why, on its theory of the case, the majority finds it not plain and obvious the claim is doomed to fail. We identify three domains of disagreement: the content of international law in fact; how the doctrine of adoption operates; and the differences between the effect of international law on domestic criminal law and tort law. In the final section, we turn to the theory of the case upon which the chambers judge relied in dismissing the motion to strike: the workers seek recognition of new common law torts. After stating the test for determining whether a new tort should be recognized, we explain why the causes of action advanced in the pleadings do not meet it.

II. Two Theories of the Case

137 The majority explains that the pleadings are broadly worded and identifies two separate theories upon which they could be upheld (Majority Reasons, at para. 127). One of these is the focus of the majority's reasons with regard to customary international law; the other is the focus of the chambers judge's reasons. We would summarize these two theories as follows:

a) *The majority's theory*: The workers seek to have Canadian courts recognize a cause of action for "breach of customary international law" and to prosecute a claim thereunder (para. 127). (While the majority never describes the workers' pleadings as raising a "tort" claim, we observe that its theory of the case describes a cause of action that can only be understood in Canadian common law as a "tort". A tort is simply a wrong against a third party, actionable in law, typically for money damages (*Moran v. Pyle National (Canada) Ltd.* (1973), [1975] 1 S.C.R. 393 (S.C.C.), at pp. 404-5). That is the very substance of the allegation here, and we will treat it as such. If the cause of action the majority is proposing is not a "tort", then it must be a species of action not known to Canadian common law, and so should fail simply on that basis).

b) *The chambers judge's theory*: The workers seek to have Canadian courts recognize four new nominate torts *inspired by* customary international law: use of forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity. [4] The workers then seek to prosecute claims under those torts.

In our respectful view, the latter theory is more consistent with the pleadings before us, but both must be defeated in order for Nevsun to succeed on its motion to strike.

138 The following paragraphs of the workers' amended NOCC describe the proposed cause of action:

53. The plaintiffs seek damages under customary international law, as incorporated into the law [of] Canada, from Nevsun for the use of forced labour, slavery, cruel, inhuman or degrading treatment, and crimes against humanity.

. . . . .

57. Forced labour, slavery, cruel, inhuman or degrading treatment, and crimes against humanity are prohibited under international law. This prohibition is incorporated into and forms a part of the law of Canada.

. . . . .

60. The use of forced labour is a breach of customary international law and jus cogens and is actionable at common law.

(A.R., vol. III, at pp. 170 and 172-73)

139 Paragraphs 63, 66, and 70 are to the same effect as para. 60, except "use of forced labour" is replaced by "slavery", "cruel, inhuman, or degrading treatment" and "crimes against humanity", respectively (A.R., vol. III, at pp. 173-75).

140 In our view, paras. 60, 63, 66 and 70 suggest that the workers sought to have four nominate torts recognized.

141 The chambers judge's theory accords with how the workers framed their claims before this Court, as the following excerpts from their factum demonstrate:

98. The development of the common law will be aided by the recognition of torts which fully capture the prohibited injurious conduct, rather than treating these kinds of claims as a variant or hybrid of traditional torts ....

. . . . .

> 102. ... In assessing whether to recognize new nominate torts, *Charter* values inform the assessment of the societal importance of the rights at issue ....
>
> . . . . .
>
> 117. To be clear, the [workers] do not contend that the adoption of *jus cogens* norms into Canadian law leads automatically to a civil remedy for the violation of those norms. Rather, the *jus cogens* norms serve as a source for development of the common law, and the test for recognition of new common law torts must still be satisfied.
>
> 118. ... the recognition of these new torts is desirable given the factors outlined at paragraphs 97 to 110 above.
>
> . . . . .
>
> 149. Here, recognizing new nominate torts for slavery or crimes against humanity under the common law complements and advances Parliament's broader intent in enacting legislation such as the *Crimes Against Humanity and War Crimes Act* that there be accountability for serious human rights abuses. [Emphasis added.]

142 We also observe that, at para. 117 of their factum, the workers specifically disavow the majority's theory of the case.

143 The second theory should be preferred also because, in deciding whether a pleading is bound to fail, it ought to be read generously. For example, the pleading ought to be considered as it might reasonably be amended (*British Columbia/Yukon Assn. of Drug War Survivors v. Abbotsford (City)*, 2015 BCCA 142, 75 B.C.L.R. (5th) 69 (B.C. C.A.), at para. 15; *Kripps v. Touche Ross & Co.* (1992), 69 B.C.L.R. (2d) 62 (B.C. C.A.)). In our view, the second theory is the *more* plausible claim. That said, the workers could reasonably amend their pleadings to clearly engage the first theory, so both must be considered.

144 As the majority has explained, we ask whether it is plain and obvious a pleading is "certain to fail" or "bound to fail" because this is the test that courts apply on a motion to strike (*Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.), at p. 980). This question is to be determined "in the context of the law and the litigation process", assuming the facts pleaded by the non-moving party are true (*Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 (S.C.C.), at paras. 23 and 25 (emphasis omitted)).

145 Any confusion over whether a novel question of law can be answered on a motion to strike should be put to bed: it can. If a court would not recognize a novel claim when the facts as pleaded are taken to be true — that is, in the most favourable factual context possible in the litigation process — the claim is plainly doomed to fail (S.G.A. Pitel and M.B. Lerner, "Resolving Questions of Law: A Modern Approach to Rule 21" (2014), 43 *Adv. Q.* 344, at p. 351). As Justice Karakatsanis explained for this Court in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 (S.C.C.), judges can and should resolve legal disputes promptly to facilitate rather than frustrate access to justice (paras. 24-25 and 32). Answering novel questions of law on a motion to strike is one way they can do so (Pitel and Lerner, at p. 358). But there also are some questions that the court *could* answer on a motion to strike, but ought not to. They include, for example, questions related to the interpretation of the *Canadian Charter of Rights and Freedoms*, or questions where the facts are unlikely, if not implausible. Deciding a question of law without proof of the facts in such circumstances risks distorting the law for an ultimately fruitless purpose.

146 The majority would find that it is not plain and obvious that the workers' cause of action is doomed to fail. So far as we can discern, the majority's reasons concern entirely extricated questions of law. In refraining to decide a question of law, there appears to be no pressing concern for judicial economy or for the integrity of the common law. The uncertainty in the majority's reasons relates to *which* theory the workers should rely on, not *whether* the workers' claim can succeed on either theory. We can only understand the inevitable effect of its reasons to be that, if the facts pleaded by the workers are proven, the workers' claim should succeed. In other words, in its view, the phoenix will fly. And concomitantly, it means that if the workers continue these proceedings relying on the majority's theory of the case, a court should recognize a new cause of action for tortious breach of customary international law.

147 That observation aside, however, our disagreement with the majority in this matter about the better theory of the case does not affect either our, or its, proposed disposition of the appeal. As previously mentioned, the question to be decided on a motion to strike is whether the pleadings are bound to fail on all reasonable theories of the case. In its view, the workers' claims are not bound to fail on either theory. In our view, they are, for four reasons.

148 First, the claims run contrary to how norms of international law become binding in Canada. According to the doctrine of adoption, the courts of this country recognize legal prohibitions that mirror the prohibitive rules of customary international law. Courts do not convert prohibitive rules into liability rules. Changing the doctrine of adoption to do so runs into the second problem, which is that doing so would be inconsistent with the doctrine of incrementalism and the principle of legislative supremacy. Nor does developing a theory of the case that does not rely on the doctrine of adoption rescue the pleadings: the third problem is that some of the claims are addressed by extant torts. And, finally, the viability of other claims requires changing the common law in a manner that would infringe the separation of powers and place courts in the unconstitutional position of conducting foreign relations, which is the executive's domain. We therefore find the workers' claims for damages based on breach of customary international law disclose no reasonable cause of action and are bound to fail.

III. On the First Theory, the Claim Is Bound to Fail

149 The majority maintains that, because international law is incorporated into Canadian law, it is not plain and obvious that a claim to remedy such a breach brought in a Canadian court is doomed to fail. But to give effect to this claim would displace international law from its proper role within the Canadian legal system. In the following section, we will explain why this is so. We will also explain why changing the role of international law within Canadian law exceeds the limits of the judicial role.

A. The Operation of International Law in Canada

150 One essential point of disagreement we have with the majority concerns which law is supreme in Canadian courts: Canadian law, or international law. The majority (at para. 94) adopts the opinion of Professor Stephen J. Toope, who has opined that "[i]nternational law ... speaks directly to Canadian law and requires it to be shaped in certain directions" ("Inside and Out: The Stories of International Law and Domestic Law" (2001), 50 *U.N.B.L.J.* 11, at p. 23). We disagree.

151 The conventional — and, in our view, correct — approach to the supremacy of legal systems is that each court treats its own constituting document as supreme (J. Crawford, *Brownlie's Principles of Public International Law* (9th ed. 2019), at p. 101). An international tribunal or international court will apply the law of its constituting treaty. Canadian law cannot require international law to be shaped in certain directions, except insofar as international law grants that power to Canadian law.

152 It follows that Canadian courts will apply the law of Canada, including the supreme law of our Constitution. And it is that law — Canadian law — which defines the limits of the role international law plays within the Canadian legal system. To hold otherwise would be to ignore s. 52(1) of the *Constitution Act, 1982*, and s. 96 of the *Constitution Act, 1867*. To be clear, then: international law cannot require Canadian law to take a certain direction, except inasmuch as Canadian law allows it.

153 On the majority's theory, the workers' pleadings — which seek the remedy of money damages — are viable only if international law is given a role that exceeds the limits placed upon it by Canadian law. These limits are set out in *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292 (S.C.C.), at para. 39, where this Court stated that "prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation". These prohibitive rules of customary international law, by their nature, *could not* give rise to a remedy. On its terms then, for these pleadings to succeed, Canadian law must change. And, in our view, such a change would require an act of a competent legislature. It does not fall within the competence of this Court, or any other. And yet, without that change, the pleadings are doomed to fail.

154 Below, we set out the existing limits of the role that public international law can play according to Canadian law. Public international law has two main sources: custom and convention, which have different effects on and in Canadian law. While the focus of this appeal is customary international law, its role and function can best be understood in relation to its counterpart, conventional international law. Below, we describe these two main sources of international law in more detail.

(1) Conventional International Law: the Role of Treaties

155 Although customary international law was historically the primary source of international law (J.H. Currie, *Public International Law* (2nd ed. 2008), at p. 124), convention, most often in the form of treaties, has become the source of much

substantive international law today (J. Brunnée and S. J. Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2002), 40 *Can. Y. B. Intl Law* 3, at p. 13). This trend originated in the late 19th and early 20th centuries, with the growth of international bodies and the elaboration of broader-based treaty regimes, mostly concerned with the conduct of war and humanitarian law (Currie, at p. 124).

156 A treaty is much like a contract, in the sense that it records the terms to which its signatories consent to be bound (J. Harrington, "Redressing the Democratic Deficit in Treaty Law Making: (Re-)Establishing a Role for Parliament" (2005), 50 *McGill L.J.* 465, at p. 470): "The essential idea [of treaties] is that states are bound by what they expressly consent to" (Brunnée and Toope, at p. 14). It sets out the parties' mutual legal rights and obligations, and are governed by international law (Currie, at p. 123). Article 38(1)(a) of the *Statute of the International Court of Justice*, Can. T.S. 1945 No. 7, contains an implicit definition of treaty when it specifies that the International Court of Justice shall apply "international conventions, whether general or particular, establishing rules expressly recognized by the contesting states" (see also Brunnée and Toope, at p. 14). A treaty may be bilateral (recording reciprocal undertakings among two or more states) or multilateral (recording a generalized agreement between several states) (Currie, at p. 123). In either form, it permits states to enter into agreements with other states on specific issues or projects, or to establish widely applicable norms intended to govern legal relationships with as many states as will expressly agree to their terms (p. 123).

157 Because a treaty is concerned with express agreement between states, certain formalities govern the process of entering a binding treaty (Brunnée and Toope, at p. 14), which we discuss below.

158 In Canada, each order of government plays a different role in the process of entering a treaty. Significantly, it is *the executive* which controls the negotiation, signature and ratification of treaties, in exercise of the royal prerogative power to conduct foreign relations. Its signature manifests initial consent to the treaty framework, but does not indicate consent to be bound by specific treaty obligations; that latter consent is given by ratification. It is only when a treaty enters into force that the specific treaty obligations become binding. For multilateral treaties, entry into force usually depends on the deposit of a specific number of state ratifications. If a treaty is in force and ratified by Canada, the treaty binds Canada as a matter of international law (Brunnée and Toope, at pp. 14-15).

159 Many treaties do not require a change in domestic law to bind the state to a course of action. Where it does, however, and even when internationally binding, a treaty has no formal legal effect domestically until it is transformed or implemented through a domestic-law making process, usually by legislation (Harrington, at pp. 482-85; Currie, at p. 235). Giving an unimplemented treaty binding effect in Canada would result in the executive creating domestic law — which, absent legislative delegation, it cannot do without infringing on legislative supremacy and thereby undermining the separation of powers. Any domestic legal effect therefore depends on Parliament or a provincial legislature adopting the treaty rule into a domestic law that can be invoked before Canadian courts (Currie, at p. 237). For example, the environmental commitments in the *North American Free Trade Agreement*, Can. T.S. 1994 No. 2 (entered into force January 1, 1994) ("*NAFTA*") were implemented by provincial governments through a Canadian Interprovincial Agreement (Harrington, at pp. 483-84). The formalities associated with treaties respect the role that each order of the state is competent to play, in accordance with the separation of powers and the principle of legislative supremacy.

(2) Customary International Law

160 As with conventional international law, the content of customary international law is established by the actions of states on the international plane. The relevance of customary international law to domestic law has both a substantive and a procedural aspect. Substantively, customary international law norms can have a direct effect on public common law, without legislative enactment. But for that substantive effect to be afforded a customary international law norm, the existence of the norm must be proven as a matter of fact according to the normal court process.

(a) Sources of Customary International Law

161 As the majority describes (at para. 77), customary international law is a general practice accepted as law that is concerned with the principles of custom at the international level. A rule of customary international law exists when state practice evidences a "custom" and the practicing states accept that custom as law (Currie, at p. 188).

162 A custom exists where a state practice is applied both generally and uniformly. To be general, it must be a sufficiently widespread practice. To be uniform, the states that apply that practice must have done so consistently. A state practice need not, however, be perfectly widespread or consistent at all times. And for good reason: if that were true, the moment one state departs from either requirement, the custom would cease to exist (Currie, pp. 188-93).

163 The requirement that states, which follow the practice, do so on the basis that they subjectively believe the practice to be legally mandated is known as *opinio juris* (Currie, at p. 188; J. L. Slama, "*Opinio Juris* in Customary International Law" (1990), 15 *Okla. City U.L. Rev.* 603, at p. 656). The practicing state must perform the practice out of the belief that this practice is necessary in order to fulfil its obligations under customary international law, rather than simply due to political, security or other concerns. [5]

164 The high bar established by the twin requirements of state practice and *opinio juris* reflects the extraordinary nature of customary international law: it leads courts to adopt a role otherwise left to legislatures; and, unless a state persistently objects, its recognition binds states to rules to which they have not affirmatively consented (Currie, at p. 187). And, if a rule becomes recognized as peremptory (i.e., as *jus cogens*) then even persistent objection will not relieve a state of the rule's constraints (J. A. Green, *The Persistent Objector Rule in International Law* (2016), at pp. 194-95).

(b) The Adoption of Customary International Law in Canada

165 Once a norm of customary international law has been established, it can become a source of Canadian domestic law unless it is inconsistent with extant statutory law. This doctrine is called "adoption" in Canada and "incorporation" in its English antecedents. *Hape* explains the doctrine as follows:

> The English tradition follows an adoptionist approach to the reception of customary international law. Prohibitive rules of international custom may be incorporated directly into domestic law through the common law, without the need for legislative action. According to the doctrine of adoption, the courts may adopt rules of customary international law as common law rules in order to base their decisions upon them, provided there is no valid legislation that clearly conflicts with the customary rule: I. Brownlie, *Principles of Public International Law* (6th ed. 2003), at p. 41. Although it has long been recognized in English common law, the doctrine received its strongest endorsement in the landmark case of *Trendtex Trading Corp. v. Central Bank of Nigeria*, [1977] 1 Q.B. 529 (C.A.). Lord Denning considered both the doctrine of adoption and the doctrine of transformation, according to which international law rules must be implemented by Parliament before they can be applied by domestic courts. In his opinion, the doctrine of adoption represents the correct approach in English law. Rules of international law are incorporated automatically, as they evolve, unless they conflict with legislation ....
>
> . . . . .
>
> Despite the Court's silence in some recent cases, the doctrine of adoption has never been rejected in Canada. Indeed, there is a long line of cases in which the Court has either formally accepted it or at least applied it. In my view, following the common law tradition, it appears that the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation. The automatic incorporation of such rules is justified on the basis that international custom, as the law of nations, is also the law of Canada unless, in a valid exercise of its sovereignty, Canada declares that its law is to the contrary. Parliamentary sovereignty dictates that a legislature may violate international law, but that it must do so expressly. Absent an express derogation, the courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law. [Emphasis added; paras. 36 and 39.]

166 In our view, two features of this passage are noteworthy: (1) that prohibitive rules of customary international law can be incorporated into domestic law "in the *absence of conflicting legislation*"; and (2) that adoption only operates with respect

to "*prohibitive* rules of international custom". Taken together, these elements respect legislative supremacy in the incorporation of customary international law into domestic law.

167 The primacy given to contrary legislation preserves the legislature's ability to control the effect of international laws in the domestic legal system. As Currie writes, the adoption of customary international law preserves "the domestic legal system's ultimate ability, primarily through its legislative branch, to control the content of domestic law through express override of a customary rule" (p. 234).

168 The majority (at paras. 91-93) suggests that there is no difference between "mandatory" norms of international law and "prohibitive" norms, citing the extrajudicial writing of Justice LeBel (L. LeBel, "A Common Law of the World? The Reception of Customary International Law in the Canadian Common Law" (2014), 65 *U.N.B.L.J.* 3). We agree that this is not a distinction that is generally drawn in international law jurisprudence. It is, however, a helpful distinction for explaining the capacity of a common law court to remedy a breach of an international law norm. As James Crawford (a judge of the International Court of Justice) has explained, the first question when considering a rule of customary international law is to ask whether it is susceptible to domestic application (p. 65). Although a common law court adopts both prohibitive and mandatory norms, the domestic legal effect of the adoption of a prohibitive norm is different from the domestic legal effect of the adoption of a mandatory norm. This distinction becomes clear when comparing the roles of the various branches of the state.

169 To illustrate the difference between prohibitive and mandatory norms, it may be helpful to analogize to *certiorari* and *mandamus* or to acts and omissions. When a norm is prohibitive, in the sense that it prohibits a state from acting in a certain way, the doctrine of adoption means that actions by the executive branch contravening the norm can be set aside through judicial review, as is the case with *certiorari*. When a norm is mandatory, in the sense that it mandates a state to act in a certain way, the doctrine of adoption means that omissions in contravention of the norm can be remedied through judicial review, as is the case with *mandamus*.[6] *Mandamus* is a limited remedy — it allows courts to enforce a clear public duty, but not to devise a regulatory scheme out of whole cloth.

170 When the legislative branch contravenes an adopted norm, there is no difference between prohibitive norms and mandatory norms. If the legislature passes a law contravening a prohibitive norm of international law, that law is not subject to review by the courts. Similarly, if the legislature does not pass a law in contravention of a mandatory norm of international law, the courts cannot construct that law for them, unless doing so is otherwise within the courts' power. Courts may presume the intent of the legislature is to comply with customary international law norms (see, for example, *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (S.C.C.), at para. 182), but that presumption is rebuttable: customary international law has interpretive force, but it does not formally constrain the legislature. The interpretive force comes from the presumption that the legislature would not mean to inadvertently violate customary international law (J. M. Keyes and R. Sullivan, "A Legislative Perspective on the Interaction of International and Domestic Law", in O. E. Fitzgerald, ed., *The Globalized Rule of Law: Relationships between International and Domestic Law* (2006), 277, at p. 297).

171 The final question is what happens when private common law contravenes a norm.[7] We are aware of no case where private common law has violated a prohibitive norm. Nor are we aware of any case where private common law has violated a mandatory norm. In the case that has come closest, *Kazemi (Estate) v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176 (S.C.C.), this Court found that Canada was not under an obligation to provide a private law civil remedy for violations of a norm:

> While the prohibition of torture is certainly a *jus cogens* norm from which Canada cannot derogate (and is also very likely a principle of fundamental justice), the question in this case is whether this norm extends in such a way as to require each state to provide a civil remedy for torture committed abroad by a foreign state.
>
> Several national courts and international tribunals have considered this question, and they have consistently confirmed that the answer is no: customary international law does not extend the prohibition of torture so far as to require a civil remedy for torture committed in a foreign state. [paras. 152-53]

172 In short, even if a plaintiff can prove that, (1) a prohibition lies on nation states at international law; and (2) that prohibition is *jus cogens*, these two considerations are nonetheless insufficient to support the proposition that international law requires every state to provide a civil remedy for conduct in breach of the prohibition.

173 There are good reasons for distinguishing between executive action and legislative action. Canada — and the provinces — have the ability, should they choose to exercise it, to violate norms of customary international law. But that is a choice that only Parliament or the provincial legislatures can make; the federal and provincial governments cannot do so without the authorization of those legislative bodies.

174 But how does this inform the development of private common law? If there were a private common law rule that contravened a prohibitive norm — we confess that such a combination of norm and private law rule is beyond our imagination, but perhaps it could exist — we would agree that judges must alter that law. When the private common law contravenes a mandatory norm, the court is faced with determining whether any existing statutes prevent the court from amending the common law as necessary for it to comply with that norm.

175 How, then, to determine whether a statute prevents so amending the common law? We would suggest that courts should follow a three-step process. First, precisely identify the norm. Second, determine how the norm would best be given effect. Third, determine whether any legislation prevents the court from changing the common law to create that effect. If no legislation does so, courts should implement that change to the common law. If any legislation does so, the courts should respect that legislative choice, and refrain from changing the common law. In such circumstances, judicial restraint respects both legislative supremacy and the superior institutional capacity of the legislatures to design regulatory schemes to comply with Canada's international obligations. These are foundational considerations, going to the proper roles of courts, legislatures and the executive. The incorporation of a rule of customary international law must yield to such constitutional principles (*R. v. Jones*, [2006] UKHL 16, [2007] 1 A.C. 136 (U.K. H.L.), at para. 23, per Lord Bingham; Crawford, at pp. 65-66).

176 One final point on the doctrine of adoption. *Hape* is ambivalent as to whether incorporation means that rules of customary international law are incorporated (at para. 36), should be incorporated (at para. 39) or simply may aid in the interpretation of the common law (at para. 39). The traditional English view is the first. But the modern English jurisprudence puts that view in doubt, and rightly so (see *Jones*, at para. 11, per Lord Bingham). As we discussed above, a rule of customary international law may need to be adapted to fit the differing circumstances of common law instead of public international law.

(c) The Procedure for Recognizing Customary International Law

177 Much of Canadian civil procedure depends on the distinction between law and facts. Facts are pled, but law is not; facts are determined through evidence, but law is not; facts cannot be settled on a motion to strike or summary judgment, but law can; factual findings by a trier of fact are deferred to by appellate courts; legal conclusions are not. Perhaps most importantly, judges cannot determine matters of fact without evidence led by the parties (except where judicial notice applies), but can decide questions of law. Judges doing their own research on law is not only accepted, but expected. Judges doing their own research on facts is impermissible.

178 The majority suggests that the content of customary international law should be treated as law by Canadian courts, not fact, but, incongruously, also recognizes that the authorities on which it relies for this proposition nonetheless maintain that *evidence* of state practice is necessary to prove a new norm of customary international law (para. 96, citing G. van Ert, "The Reception of International Law in Canada: Three Ways We Might Go Wrong", in Centre for International Governance Innovation, *Canada in International Law at 150 and Beyond, Paper No. 2* (2018), at p. 6; G. van Ert, *Using International Law in Canadian Courts* (2nd ed. 2008), at pp. 62-69). With respect, we see the approach of treating norms of international law as law and new norms of international law as fact as creating an unwieldy hybridization of law and fact. As we have discussed above, procedure in Canadian law is largely built upon the distinction between law and fact, and such a hybrid therefore promises to cause confusion. The absence of clear methodology will foster conclusionary reasoning, in other words decision making by intuition. And, what standard of review would be applied to such decisions? Confusion in means gives rise to uncertainty in ends.

179 The process is perhaps most conveniently understood as comprising three steps. The first requires the court to find the facts of state practice and *opinio juris*. In easy cases, the first step can be dispensed with without a trial due to the power of judicial notice. When there is or can be no dispute about the existence of a norm of customary international law it is appropriate for the courts to take judicial notice (*R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863 (S.C.C.), at para. 48; *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458 (S.C.C.), at para. 61). In this case, we agree with the majority that the existence of some of the norms of international law that have been pled — for example, that crimes against humanity are prohibited — meets the threshold for taking judicial notice (Majority Reasons, at para. 99). Where, however, the existence of a norm of customary international law is contested — as it is on the question of whether corporations can be held liable at international law — judges should rely on the pleadings (on an application to strike or for summary judgment) or the evidence that is adduced before them.

180 It is in these contested, hard cases where this step is particularly important. Courts will be called on to evaluate both whether there exists a custom generally among states that is applied uniformly, and whether the practicing states respect the custom out of the belief that doing so is necessary in order to fulfil their obligations under customary international law. These are, fundamentally, empirical exercises: they do not ask what state practice should be or whether states should comply with the norm out of a sense of customary international legal obligation, but whether states in fact do so. As van Ert has acknowledged, "[s]tate practice ... is a matter of fact" (*Using International Law in Canadian Courts*, at p. 67) and that when a claimant asserts "a new rule of customary international law", proof in evidence may be required ("The Reception of International Law in Canada", at p. 6, fn. 60).

181 As the majority has correctly described (at para. 79), the judicial decisions of national courts can be "evidence" of general practice or *opinio juris*. These national courts include Canadian courts, the courts of other common law systems, and the courts of every other national legal system. To determine whether a rule of customary international law exists, Canadian courts must be prepared to understand and evaluate judicial decisions from the world over. As this Court explained, "[t]o establish custom, an extensive survey of the practices of nations is required" (*R. v. Finta*, [1994] 1 S.C.R. 701 (S.C.C.), at p. 773). Canadian judges need to be able to understand decisions rendered in a foreign legal system, in which they are not trained, and in languages which they do not know. Making expert evidence available for judges to understand foreign language texts is simply sensible (van Ert, *Using International Law in Canadian Courts*, at p. 57). Put another way, the foundations of customary international law rest, in part, on foreign law. In Canada, foreign law is treated as fact, not law (J. Walker, *Castel & Walker: Canadian Conflict of Laws* (6th ed. (loose-leaf)), vol. 1, at p. 7-1). When a Canadian court applies Canadian conflict of laws rules and determines that the law of a foreign state is to be applied in a Canadian court proceeding, the Canadian judge does not then embark on their own analysis of the foreign law. Rather, the Canadian judge relies on the parties to adduce evidence of the content of the foreign law.

182 It is only once the facts of state practice and *opinio juris* are found that the court can proceed to a second step, which is to identify which, if any, norms of customary international law must be recognized to best explain these facts. This question arises since state practice and *opinio juris* may be consistent with more than one possible norm. This is a question of law.

183 The final step is to apply the norms, as recognized, to the facts of the case at bar. This is a question of mixed fact and law.

184 We should note that, although we disagree with the majority on this procedural point, and although this point is important, it is ultimately not the nub of our disagreement. The more the questions in dispute are questions of fact, the more difficult it is for a court to properly strike the pleadings. It is therefore more difficult for us to strike these claims on *our* understanding of the jurisprudential character of international law, than it is on *the majority's* understanding. Nonetheless, as we will explain, we would do just that.

B. The Claim, on the Majority's Theory, Contravenes These Limits Placed Upon International Law Within Canadian Law

185 In the following section, we explain why the majority's theory of the case cannot succeed. We begin here by summarizing its approach, as we understand it:

a) There are prohibitions at international law against crimes against humanity, slavery, the use of forced labour, and cruel, inhuman, and degrading treatment (paras. 100-3).

b) These prohibitions have the status of *jus cogens*, except possibly for that against the use of forced labour (paras. 100-3).

c) Individuals and states both must obey some customary international law prohibitions, and it is a question for the trial judge whether they must obey these specific prohibitions (paras. 105, 110-11 and 113).

d) Corporations must also obey certain such prohibitions (paras. 112-113).

e) Individuals are beneficiaries of these prohibitions (paras. 106-11).

f) It would not "make sense to argue that international law may impose criminal liability on corporations, but not civil liability" (para. 112, citing H. H. Koh, "Separating Myth from Reality about Corporate Responsibility Litigation" (2004), 7 *J.I.E.L.* 263, at p. 266).

g) The doctrine of adoption makes any action prohibited at international law also prohibited at domestic law, unless there is legislative action to the contrary (paras. 94, 114 and 116).

h) In domestic law, where there is a right there must be a remedy (paras. 120-21).

i) There is no adequate remedy in domestic law, including in existing tort (paras. 122-26).

186 We have no quarrel with steps (a), (b), (c), (e), and (h) of the majority's analysis.

187 In our respectful view, however, the majority's analysis goes astray at steps (d), (f), (g), and (i). The conclusion it draws at step (d) relies upon it being possible for a norm of customary international law to exist when state practice is not general and not uniform. The conclusions it draws at steps (f) and (g) are not supported by the premises on which it relies. And the conclusions the majority draws at step (i) are possible only if one ignores the express *Criminal Code*, R.S.C. 1985, c. C-46, prohibition against courts creating common law offences. We will address these in turn.

(1) As a Matter of Law, Corporations Cannot Be Liable at Customary International Law

188 The majority states that "it is not plain and obvious that corporations today enjoy a blanket exclusion under customary international law from direct liability for violations of 'obligatory, definable, and universal norms of international law'" (para. 113, citing Koh, at p. 267). The authority the majority cites in support of this proposition is a single law review essay by Professor Harold Koh. It cites no cases where a corporation has been held civilly liable for breaches of customary international law anywhere in the world, and we do not know of any. While it does cite a book by Simon Baughen and an article by Andrew Clapham, those authorities do not support its view of the matter (S. Baughen, *Human Rights and Corporate Wrongs: Closing the Governance Gap* (2015), at pp. 130-32; A. Clapham, "On Complicity", in M. Henzelin and R. Roth, eds., *Le Droit Pénal à l'Épreuve de l'Internationalisation* (2002), 241, at pp. 241-75). Baughen's discussion of norms of international criminal law imposing civil liability on aiders and abetters is specific to the provision in the United States Code now commonly known as the *Alien Tort Statute*, 28 U.S.C. § 1350 (2018), and Clapham's article concerns the recognition of the complicity of corporations in international criminal law and human rights violations, not the recognition of civil liability rules.

189 In our view, that corporations are excluded from direct liability is plain and obvious. Although normally such a contested issue would be left to trial, in the context of a disputed norm of customary international law the existence of an opposing view can itself be dispositive. As this Court said in *Kazemi (Estate)*, "customary international law is, by its very nature, unequivocal. It is not binding law if it is equivocal" (para. 102).

190 In this regard, and against Professor Koh's lone essay, we would pit the United Nations General Assembly's *Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises*, U.N. Doc. A/HRC/4/035, February 9, 2007, which states that "preliminary research has not identified the emergence of uniform and consistent state practice establishing corporate responsibilities under customary international

law" (para. 34). This is confirmed by the evaluation of Judge Crawford, in the book that the majority cites at para. 97 of its reasons (*Brownlie's Principles of Public International Law*):

> At present, no international processes exist that require private persons or businesses to protect human rights. Decisions of international tribunals focus on states' responsibility for preventing human rights abuses by those within their jurisdiction. Nor is corporate liability for human rights violations yet recognized under customary international law. [Emphasis added; footnotes omitted.]
>
> (Crawford, at p. 630)

191 The authorities thus favour the proposition that corporate liability for human rights violations has *not* been recognized under customary international law; the most that one could credibly say is that the proposition that such liability has been recognized is equivocal. To repeat *Kazemi (Estate)*, "customary international law is, by its very nature, unequivocal. It is not binding law if it is equivocal" (para. 102). Absent such a binding norm, the workers' cause of action is clearly doomed to fail.

(2) The Doctrine of Adoption Does Not Transform a Prohibitive Rule Into a Liability Rule

192 With respect, we find the majority's analysis in respect of steps (f) and (g) difficult to follow.

193 At paragraph 101, the majority writes that "[t]he prohibition against slavery too is seen as a peremptory norm". We are uncertain how it deduces the potential existence of a liability rule from this uncontroversial statement of a prohibition. Perhaps it sees a liability rule as inherent in a "prohibition", or perhaps it sees the doctrine of adoption as producing a liability rule in response to a prohibition, or perhaps both. [8] We do not know.

194 Faced with such uncertainty, we will consider all the plausible reasoning paths that could take the majority from the existence of a prohibition to the existence of a liability rule. We see three such paths that correspond to distinct interpretations of its reasons:

> (1) Prohibitions of customary international law *require* the Canadian state to provide domestic liability rules between individuals and corporations. With regard to slavery, the prohibition would require Canada to provide a legal rule pursuant to which enslaved persons could hold a corporation responsible for their enslavement liable. The doctrine of adoption requires our courts to create such rules if they do not already exist. Paragraph 119 of the majority's reasons supports this interpretation.
>
> (2) A prohibition in customary international law itself contains a liability rule between individuals and corporations. With regard to slavery, the prohibition upon slavery would include a subordinate rule that 'a corporation who is responsible for enslavement is liable to enslaved persons'. The doctrine of adoption requires domestic courts to enforce these rules. Paragraphs 127 and 128 of the majority reasons support this interpretation.
>
> (3) General (that is, non-criminal) customary international law requires states to enact laws prohibiting certain actions. International criminal law also prohibits corporations from taking these actions. With regard to slavery, the prohibition upon slavery would mean that, respectively, 'Canada must prohibit and prevent slavery by third parties' and 'it is an international crime for a corporation to enslave someone'. The doctrine of adoption transforms these requirements and prohibitions into tort liability rules. Paragraphs 117 and 122 of the majority reasons support this interpretation.

195 If either of the first two interpretations correctly represents the majority's reasons, then we would respectfully suggest that its reasons depend on customary international law norms that do not exist. If the third interpretation correctly represents the majority's reasons, we would respectfully suggest that its reasons depend on affording to the doctrine of adoption a role it cannot have.

196 If, as in the first interpretation above, the majority's reasons depend on customary international law *requiring* states to provide a civil remedy for breaches of prohibitions, then we say — first of all — that this theory is not what the workers have

pleaded. The workers did not plead the necessary facts of state practice and *opinio juris*: they did not plead that there exists a general practice among states of providing a civil remedy for breaches of prohibitions, and that states perform that practice out of compliance with customary international law. Nor can the court take judicial notice of such practices, because they are not sufficiently well-established.

197 Further, and more fundamentally, states are typically free to meet their international obligations according to their own domestic institutional arrangements and preferences. Customary international law may well require all states to prohibit slavery, but it does not typically govern the form of that prohibition. A civil liability rule is but one possibility. A prohibition could also be effected through, for example, the criminal law or through administrative penalties. How legislatures accomplish such a goal is typically a matter for them to consider and decide. As the Second Circuit Court of Appeals observed in *Khulumani v. Barclay National Bank Ltd.*, 504 F.3d 254 (U.S. C.A. 2nd Cir. 2007), the "law of nations generally does not create private causes of action to remedy its violations, but leaves to each nation the task of defining the remedies that are available for international law violations" (at p. 269, citing *Kadic v. Karadzic*, 70 F.3d 232 (U.S. C.A. 2nd Cir. 1995), at p. 246). While it is conceivable that international law could develop to give such a result, it has not done so (*Kazemi (Estate)*, at para. 153). Asserting that it has done so or that it should do so does not make it so.

198 If, as in the second interpretation above, the majority's reasons depend on an existing a rule of customary international law that renders a corporation directly civilly liable to an individual, then we observe, once again, that this theory is not pleaded.

199 The support for this conclusion in the majority's reasons (at para. 112) consists of the aforementioned academic essay by Professor Koh. Professor Koh's essay states it would not "make sense to argue that international law may impose criminal liability on corporations, but not civil liability". If the majority is relying on this essay as evidence of the existence of such a rule, then we would say simply that a single essay does not constitute state practice or *opinio juris*.

200 Even taken on its own terms as authority for any proposition, the Koh essay does not indicate that customary international law *has* so evolved; rather, it simply speculates that it *could* so evolve. The mere possibility that customary international law *could* change is not sufficient, on a motion to strike, to save a claim from being doomed to fail. Otherwise, all kinds of suppositious claims would succeed on the basis that the legislature *could* create a new statutory cause of action to support them. Of course, on a motion to strike, it is impossible to strike a novel common law claim for novelty alone. The relevant distinction here is that courts have some discretion to change the common law. Courts do not have that discretion in respect of statutory law or customary international law. Courts can recognize a change to customary international law, but they cannot change it directly themselves.

201 We observe also that Professor Koh, in his other work, is clear that his academic project is normative in nature: he does not seek merely to *describe* the existing state of international law, but *to change* international law through his scholarship (see H. H. Koh, *International Law vs. Donald Trump: A Reply*, March 5, 2018 (online)). State practice is not a normative concept, but a descriptive one. It therefore cannot be established based on how a single U.S. academic thinks international law should work, but rather must be based on how states in fact behave. State practice is the difference between civil liability and criminal liability at customary international law. That criminal liability arises from customary international law has been accepted by the states of the international community since Nuremberg. It is precisely this acceptance that creates customary international law.

202 Outside the sphere of criminal law, there is no corresponding acceptance-of-liability rules regarding individuals. This widely accepted view is neatly summarized by Professor Roger O'Keefe, who writes, "[t]he phenomenon of individual criminal responsibility under international law sets this subset of international crimes apart from the general body of public international law, the breach of whose rules gives rise only to the delictual responsibility of any state in breach" (*International Criminal Law* (2015), at pp. 47-48 (footnote omitted)). Indeed, as the majority of this Court observed in *Kazemi (Estate)* (at para. 104), criminal proceedings and civil proceedings are "seen as fundamentally different by a majority of actors in the international community".

203 Authority from this country also supports the view that customary international law prohibitions do not create civil liability rules. In *Bouzari v. Iran (Islamic Republic)* (2004), 71 O.R. (3d) 675 (Ont. C.A.), the Court of Appeal for Ontario considered and rejected the argument that the customary international law prohibition against torture "constitutes a right to be

free from torture and where there is a right there must be a remedy", and therefore a civil remedy must exist (para. 92). As *Bouzari* correctly held, "[a]s a matter of principle, providing a civil remedy for breach of the prohibition of torture is not the only way to give effect to that prohibition" (at para. 93) and "as a matter of practice, states do not accord a civil remedy for torture committed abroad by foreign states" (para. 94). The issue may be simply stated: a domestic court cannot effect a change to the law by "seeing a widespread state practice that does not exist today" (para. 95).

204 It may be that neither of our first two interpretations of its reasons is correct, and that the majority shares our view that there is no rule of customary international law that requires states to create civil liability rules or that purports to impose civil liability directly. If that is so, then, as in the third interpretation above, the doctrine of adoption must play in the majority's reasons the role of converting a general prohibition upon states and criminal prohibitions upon individuals into a civil liability rule. In our view, this would afford the doctrine of adoption a role it cannot play.

205 It is not enough to simply say that the doctrine of adoption incorporates prohibitive and mandatory rules into the common law. Outside the realm of criminal law, customary international law imposes prohibitions and mandates on states, not private actors. As Judge Crawford puts it, "human rights ... arise against the state, which so far has a virtual monopoly of responsibility" (p. 111). States are the only duty-holders under general customary international law.

206 Nor is it enough to say that the doctrine of adoption must respond to a state's duties under customary international law. We do not dispute that a state's duties may include one to prohibit and another to prevent violations of those aforementioned rights. Nor do we dispute that such a mandatory norm can trigger the doctrine of adoption. Our dispute is limited to *how* the doctrine of adoption leads Canadian law to change in response to recognition of a norm of customary international law. In our view, the three-step process we defined above for determining whether to amend private common law rules in response to the recognition of a mandatory norm of customary international law ought to govern.

207 At the first step, we would identify the mandatory norm at issue here as "Canada must prohibit and prevent slavery by third parties", *mutatis mutandis* for each of the activities alleged to be in violation of international law. We agree that the pleadings may allege that this norm may exist, and further, it is not plain and obvious to us that it does not. We would not therefore strike out the claim on that basis. This brings us to considering the second and third steps of the process for adopting a mandatory norm: determining how the norm would be best given effect, and determining whether any legislation prevents the court from changing the common law to give the norm that effect.

208 At the second step, we say that such a mandatory rule is appropriately given effect through, and only through, the criminal law. Indeed, the majority's reasons appear animated by concerns that are the subject of the criminal law. We will discuss this aspect of its reasons in greater detail in the next section and will not repeat the point here.

209 At the third step, we note that Parliament has, in s. 9 of the *Criminal Code*, clearly prohibited courts from creating criminal laws via the common law. In *R. v. W. (D.L.)*, 2016 SCC 22, [2016] 1 S.C.R. 402 (S.C.C.), at para. 3, this Court explicitly rejected the idea that it could "turn back the clock and re-enter ... a period when the courts rather than Parliament could change the elements of criminal offences". At this step, we conclude that, on this interpretation of the majority's theory of the case, the pleadings are doomed to fail on two bases: first, that violations of the mandatory norms at issue here are properly remedied through the criminal law, for which there is not a private law cause of action; and secondly, that Parliament has prohibited the courts from creating new crimes.

210 The majority's approach is no more tenable if we take a step back and consider it more conceptually. Essentially, on this interpretation, the majority's approach amounts to saying that the doctrine of adoption has what jurists in Europe would call "horizontal effect". Articles of the treaties that constitute the European Union give individuals rights both against the state ("vertical effect") and against other private parties ("horizontal effect") (P. Craig, "Britain in the European Union", in J. Jowell, D. Oliver and C. O'Cinneide, eds., *The Changing Constitution* (8th ed. 2015), 104, at p. 127). In Canada, this Court rejected the idea that the *Charter* has horizontal effect (see *Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580*, [1986] 2 S.C.R. 573 (S.C.C.), at p. 597; see also G. Phillipson, "The Human Rights Act, 'Horizontal Effect' and the Common Law: a Bang or a Whimper?" (1999), 62 *Mod. L. Rev*. 824, at p. 824). It would be astonishing were customary international law to have horizontal effect where the

Charter does not. One wonders if the majority's view of the adoption of customary international law would amount to a new Bill of Horizontal Rights; conceptually, these are very deep waters.

211 The majority's approach also amounts to recognizing a private law cause of action for simple breach of customary international public law. This would be similarly astonishing, since there is no private law cause of action for simple breach of statutory Canadian public law (see *R. v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205 (S.C.C.); *Holland v. Saskatchewan (Minister of Agriculture, Food & Rural Revitalization)*, 2008 SCC 42, [2008] 2 S.C.R. 551 (S.C.C.), at para. 9). As Judge Crawford has explained, a rule of customary international law will not be adopted if it is itself "contradicted by some antecedent principle of the common law" (p. 66, citing *West Rand Central Gold Mining Co. v. R.*, [1905] 2 K.B. 391 (Eng. K.B.), at p. 408, per Lord Alverstone C.J.; *R. v. Chung Chi Cheung* (1938), [1939] A.C. 160 (Hong Kong P.C.), at p. 168, per Lord Atkin).

212 Further yet, the mere existence of international criminal liability rules does not make necessary the creation of domestic torts. As we have already noted, in support of its view that domestic courts can hold corporations civilly liable for breaches of international law, the majority (at para. 112) relies upon an essay by Professor Koh. But this essay concerns the domestic courts of the United States, not Canada. And the law being applied by U.S. courts differs in a highly significant respect. As Professor Koh writes, "Congress passed two statutes — the Alien Tort Statute and the Torture Victim Protection Act (TVPA) — precisely to provide civil remedies for international law violations" ("Separating Myth from Reality about Corporate Responsibility Litigation", at pp. 266-67 (emphasis added)). The former, the hoary and historically unique *Alien Tort Statute*, requires American courts to treat international law as creating civil liabilities (*Khulumani*, at p. 270, fn. 5). The *Alien Tort Statute* has no analogue outside the United States (A. Ramasastry and R. C. Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law — A Survey of Sixteen Countries* (2006), at p. 24; J. Zerk, *Corporate liability for gross human rights abuses: Towards a fairer and more effective system of domestic law remedies — A report prepared for the Office of the UN High Commissioner for Human Rights*, February 2014 (online), at p. 45). The existence of these statutes has influenced the peculiar American equivalent to the doctrine of adoption. Essentially, the majority's approach would amount to Americanizing the Canadian doctrine of adoption without accounting for the unique statutory context from which the American doctrine arose. It goes without saying that Canadian courts cannot adopt a U.S. statute when Parliament and the legislatures have not.

213 In short, in order to reach the conclusion it does about the necessity of a tort liability rule, the majority must significantly change the doctrine of adoption. As we will explain below (see section III, subheading C), this is not a change that this Court is empowered to make.

(3) A Tort Remedy Is Not Necessary

214 At what we identified as step (h) of its reasons, the majority suggests that where there is a right, there must be a remedy. We agree. It adds, in what we termed step (i) of its reasons, that this truism signifies there is no bar to Canadian courts granting a civil remedy for violations of customary international law norms. Here is another point of disagreement. In our view, it is possible, even at this early stage of proceedings, to exclude a remedy *for money damages* for violations of customary international law norms. The right to a remedy does not necessarily mean a right to a *particular form, or kind of* remedy. Parliament could prefer another remedy, such as judicial review, or a criminal sanction. As this Court said in*Kazemi (Estate)*, "[r]emedies are by no means automatic or unlimited; there is no societal consensus that an effective remedy is always guaranteed to compensate for every rights violation" (para. 159).

215 The majority rejects the possibility that existing domestic torts could suffice. In its view, "it is at least arguable that the Eritrean workers' allegations encompass conduct not captured by these existing domestic torts" (para. 123). It tells us it is difficult to refute the concept that "torture is something more than battery" and that "slavery is more than an amalgam of unlawful confinement, assault and unjust enrichment" (para. 126, citing R.F., at para. 4). There is, it says (at para. 125), important "symbolism", in the labelling of an action as "torture" or "battery". It adopts the view that the "remedial consequence of successfully bringing a case is often, or even usually, only a secondary concern" (para. 125, citing G. Virgo, "Characterisation, Choice of Law, and Human Rights", in C. Scott, ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001), 325, at para. 335). The majority also explains that these proposed causes of

action are "inherently different from" and have "a more public nature than" traditional torts, since these tortious actions "shoc[k] the conscience" (para. 124, citing M. C. Bassiouni, "International Crimes: *Jus Cogens and Obligatio Erga Omnes*" (1996), 59 *Law & Contemp. Probs*. 63, at p. 69). It concludes by explaining that an appropriate remedy must emphasize "the public nature and importance of the violated rights involved, the gravity of their breach, the impact on the domestic and global rights objectives, and the need to deter subsequent breaches" (para. 129).

216 With respect, these considerations are not relevant to deciding the scope of tort law. A difference merely of damages or the extent of harm will not suffice to ground a new tort. For example, in *Non-Marine Underwriters, Lloyd's London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551 (S.C.C.), this Court explained that a separate tort of sexual battery was unnecessary because the harms addressed by sexual battery were fully encompassed by battery. The sexual aspect of the claim went to the amount of damages, which did not require the recognition of a separate tort (para. 27). Similarly, the Court of Appeal for Ontario recently held that "an increased societal recognition" of the wrongfulness of conduct did not necessitate the creation of a new tort (*Merrifield v. Canada (Attorney General)*, 2019 ONCA 205, 145 O.R. (3d) 494 (Ont. C.A.), at paras. 50-53, leave to appeal refused [2019 CarswellOnt 14956 (S.C.C.)], S.C.C. Bull., September 20, 2019, at p. 7). The point is this: since all torture is battery (or intentional infliction of emotional distress), albeit a particularly severe form thereof, it does not need to be recognized as a new tort. Our law, as is, furnishes an appropriate cause of action.

217 The majority provides plausible reasons for recognizing four new common law *crimes*, were that something courts could do. However, in our respectful view, they are inapposite for determining whether a new common law *tort* should be recognized.

218 The suitability of criminal law, relative to tort law, in addressing this conduct, is readily apparent. Parliament reached precisely this conclusion when it chose to criminalize crimes against humanity (see *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24). Parliament chose not to provide for a liability rule in tort. As we have already mentioned, to find a new tort based on mere degree of harm would contradict *Scalera*. A more profound degree of harm, may, however, be an appropriate reason for crafting a different criminal remedy. "[S]ymbolism", too, is an issue well-addressed by criminal remedies and poorly addressed by tort. The labelling of a crime matters (*R. c. Vaillancourt*, [1987] 2 S.C.R. 636 (S.C.C.)); the labelling of a tort, not so much. Tort is not an area of law in which the primary value of bringing a case is often, or even usually, symbolic. Finally, the tort system has its own, built-in way to adapt to breaches of rights that are more grave or that need to be deterred: by awarding increased damages.

219 The majority also suggests recognizing new nominate torts so that this Court can "ad[d] its voice to others in the international community collectively condemning [these crimes]" and so "furthe[r] the development of an international rule of law" (para. 130, citing H. H. Koh, "Civil Remedies for Uncivil Wrongs: Combatting Terrorism through Transnational Public Law Litigation" (2016), 50 *Tex. Intl L.J.* 661, at p. 675).

220 In making this suggestion, the majority undervalues the tools Canadian courts already have that can be used to condemn crimes against humanity and degrading treatment. First, even were this action formally for the tort of battery, a court can express its condemnation of the conduct through its reasons. Nothing would prevent the trial judge in this case from writing in his or her reasons that Nevsun committed, or was complicit in, forced labour, slavery and other human rights abuses, even if his or her ultimate legal conclusion is that Nevsun committed assault, battery, or other wrongs. Causes of action sometimes go by different names. For example, what this Court referred to as the "unlawful means" tort in *Bram Enterprises Ltd. v. A.I. Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177 (S.C.C.), is commonly referred to as "'unlawful interference with economic relations', 'interference with a trade or business by unlawful means', 'intentional interference with economic relations', or simply 'causing loss by unlawful means'" (para. 2). Similarly, what this Court referred to as the "tort of civil fraud" in *Bruno Appliance and Furniture Inc. v. Hryniak*, 2014 SCC 8, [2014] 1 S.C.R. 126 (S.C.C.), at para. 21, and *Mauldin*, at para. 87, is also commonly referred to as the "tort of deceit" (see *Dhillon v. Dhillon*, 2006 BCCA 524, 232 B.C.A.C. 249 (B.C. C.A.), at para. 77).

221 A trial court could also express its condemnation through its damage award. Punitive damages, for example, have been recognized by this Court as "straddl[ing] the frontier between civil law (compensation) and criminal law (punishment)", have as a goal the *denunciation* of misconduct (*Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595 (S.C.C.), at paras. 36 and 44). The majority tells us that an award of punitive damages "may be inadequate" to remedy the violation

of these international norms (para. 126). It says that a "different and stronger" response may be required (para. 129). But the "different and stronger" response that the majority concludes must be given appears to be a tort with a new name but the same remedy. Again, the better conclusion is that a remedy in criminal law is appropriate, while a remedy in tort law (established by the courts, rather than the legislature) is not.

222 We note also that the majority's approach in this regard would put Canada out of step with other states. As Dr. Zerk explains, although "most jurisdictions provide for the possibility of private claims for compensation for wrongful behaviour", "these kinds of claims are not in most cases aimed at gross human rights abuses specifically" (p. 43). Instead, torts such as "assault", "battery", "false imprisonment", and "negligence" are used (pp. 43-44). Indeed, corporate liability for violations of customary international law generally depends on "ordinary common law torts or civil law delicts" (Ramasastry and Thompson, at p. 22). Such ordinary private law actions provide mechanisms to address the "harm arising out of a grave breach" of international criminal law (p. 24). This is a critical point here, where the workers advance such ordinary private law claims in addition to their claim founded on customary international law. Even were this part of Nevsun's motion to strike to be granted, the workers could pursue in Canada the same relief they could obtain in most other states.

223 And, as we will discuss below in section IV, subheading D, our existing private international law jurisprudence also provides a vehicle by which courts can declare that the law of another state is so morally repugnant that the courts of this country will decline to apply it.

C. Changing the Limits of International Law Is Not the Job of Courts

224 Above, we have described how the majority's reasons either depend on customary international law norms that do not exist or depend on affording to the doctrine of adoption a role it does not have. This requires us to consider whether this Court can change the doctrine of adoption so that it provides a civil liability rule for breaches of prohibitions at customary international law. In our view, it cannot, regardless of whether it is framed as recognizing a cause of action for breach of customary international law or as giving horizontal effect to that law.

225 It is of course open to Parliament and the legislatures to make such a change. Absent statutory intervention, however, the ability of courts to shape the law is, as a matter of common-law methodology, constrained. Courts develop the law *incrementally*. This is a manifestation of the unwritten constitutional principle of legislative supremacy, which goes to the core of just governance and to the respective roles of the legislature, the executive and the judiciary (*Watkins v. Olafson*, [1989] 2 S.C.R. 750 (S.C.C.), at pp. 760-61; *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299 (S.C.C.), at pp. 436-38; *R. v. Salituro*, [1991] 3 S.C.R. 654 (S.C.C.), at pp. 666-67; *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108 (S.C.C.), at para. 43; B. McLachlin, "Unwritten Constitutional Principles: What is Going On?" (2006), 4 *N.Z.J.P.I.L.* 147). It also reflects the comparative want of expertise of the courts, relative to the legislature. The legislature has the institutional competence and the democratic legitimacy to enact major legal reform. By contrast, the courts are confined by the record to considering the circumstances of the particular parties before them, and so cannot anticipate all the consequences of a change.

226 The importance, both practical and normative, of confining courts to making only incremental changes to the common law was stated by this Court in *Watkins*, at pp. 760-61:

> This branch of the case, viewed thus, raises starkly the question of the limits on the power of the judiciary to change the law. Generally speaking, the judiciary is bound to apply the rules of law found in the legislation and in the precedents. Over time, the law in any given area may change; but the process of change is a slow and incremental one, based largely on the mechanism of extending an existing principle to new circumstances. While it may be that some judges are more activist than others, the courts have generally declined to introduce major and far-reaching changes in the rules hitherto accepted as governing the situation before them.
>
> There are sound reasons supporting this judicial reluctance to dramatically recast established rules of law. The court may not be in the best position to assess the deficiencies of the existing law, much less problems which may be associated

> with the changes it might make. The court has before it a single case; major changes in the law should be predicated on a wider view of how the rule will operate in the broad generality of cases. Moreover, the court may not be in a position to appreciate fully the economic and policy issues underlying the choice it is asked to make. Major changes to the law often involve devising subsidiary rules and procedures relevant to their implementation, a task which is better accomplished through consultation between courts and practitioners than by judicial decree. Finally, and perhaps most importantly, there is the long-established principle that in a constitutional democracy it is the legislature, as the elected branch of government, which should assume the major responsibility for law reform.
>
> Considerations such as these suggest that major revisions of the law are best left to the legislature. Where the matter is one of a small extension of existing rules to meet the exigencies of a new case and the consequences of the change are readily assessable, judges can and should vary existing principles. But where the revision is major and its ramifications complex, the courts must proceed with great caution. [Emphasis added.]

227 In the same vein, Justice Robert J. Sharpe, writing extra-judicially, has reflected on the limits of the judicial role when faced with polycentric issues:

> The first question is whether the proposed change is of a nature that falls within the capacity of the courts to decide. Judges, as I have argued, should be conscious of the inherent limits of adjudication and the fact that their view of a legal issue will necessarily be limited by the dynamics of the adversarial litigation process. That process is well-suited to deal with the issues posed by bipolar disputes and considerably less capable of dealing with polycentric issues that raise questions and pose problems that transcend the interests of the parties. Judges should hesitate to move the law in new directions when the implications of doing so are not readily captured or understood by looking at the issue through the lens of the facts of the case they are deciding. The legislative process is better suited to consider and weigh competing policy choices that are external to legal rights and duties. Elected representatives have the capacity to reflect the views of the population at large. Government departments have the resources to study and evaluate policy options. The legislative process allows all interested parties to make their views known and encourages consideration and accommodation of competing viewpoints.
>
> The second question relates to the magnitude of the change. Common law judges constantly refer to incremental or interstitial change and characterize the development of the common law as a gradual process of evolution. Former Senior Law Lord Tom Bingham put it this way: it is very much in the common law tradition "to move the law a little further along a line on which it is already moving, or to adapt it to accord with modern views and practices." If the proposed change fits that description, there is a strong tradition to support judicial law-making. It is quite another thing, however, "to seek to recast the law in a radically innovative or adventurous way," as that makes the law "uncertain and unpredictable" and is unfair to the losing party who relied on the law as it existed before the change. Developments of the latter magnitude may best be left to the legislature. [Footnote omitted.]
>
> (*Good Judgment: Making Judicial Decisions* (2018), at p. 93)

Accordingly, for a change to be incremental, it cannot have complex and uncertain ramifications. This Court has repeatedly declined to change the common law in those very circumstances (*Watkins*, at p. 761; *London Drugs Ltd.*, at pp. 436-38; *Salituro*, at pp. 677-78; *Fraser River Pile & Dredge Ltd.* at para. 44).

228 There is much accumulated wisdom in this jurisprudence. To alter the courts' treatment of customary international law would "se[t] the law on an unknown course whose ramifications cannot be accurately gauged" (*Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210 (S.C.C.), at para. 93). As this Court explained in *Kazemi (Estate)*, at para. 108:

> The common law should not be used by the courts to determine complex policy issues in the absence of a strong legal foundation or obvious and applicable precedents that demonstrate that a new consensus is emerging. To do otherwise would be to abandon all certainty that the common law might hold. Particularly in cases of international law, it is appropriate

> for Canadian courts only to follow the "bulk of the authority" and not change the law drastically based on an emerging idea that is in its conceptual infancy.

The majority views such a change as "necessary" (at para. 118), but provides no reason to believe the change will have anything other than complex and uncertain ramifications. Such a fundamental reform to the common law must be left to the legislature, even though doing so by judge-made law might seem intuitively desirable (*Salituro*, at p. 670).

229 If Parliament wishes to create an action for a breach of customary international law, that is a decision for Parliament itself to take. It is not one for this Court to take on Parliament's behalf. As stated by Professor O'Keefe:

> ... the recognition by the courts of a cause of action in tort for the violation of a rule of customary international law would be no less than the judicial creation of a new tort, something which has not truly happened since the coining of the unified tort of negligence in *Donoghue v Stephenson* in 1932.[9] The reason for this is essentially constitutional: given its wide-reaching implications, economic and sometimes political, the creation of a novel head of tort is now generally recognised as better left to Parliament, on account of the latter's democratic legitimacy and superior capacity to engage beforehand in the necessary research and consultation. [Footnote omitted.]
>
> (R. O'Keefe, "The Doctrine of Incorporation Revisited", in J. Crawford and V. Lowe, eds., *The British Year Book of International Law 2008* (2009), 7, at p. 76.)

230 When the English courts determined to give horizontal effect to an international instrument (the European *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221), they did so pursuant to the direction of *a statute* that made it unlawful for a public authority — which by the terms of the statute included the courts — to act "in a way which is incompatible with a Convention right" (*Human Rights Act 1998* (U.K.), 1998, c. 42, s. 6(1) and (3)). Similarly, the horizontal effect of the Treaties of the European Union in the United Kingdom depends on a statutory instruction in the *European Communities Act 1972* (U.K.), 1972, c. 68 (*Miller v. Secretary of State for Exiting the European Union*, [2017] UKSC 5, [2018] A.C. 61 (U.K. S.C.), at paras. 62-68). While we agree with the majority's reasoning (at para. 94) that legislative endorsement is not required for there to be *vertical* effect in the common law (that is, an effect against the executive) of a mandatory or prohibitive norm of customary international law, there is no such tradition of *horizontal* effect in the common law (that is, an effect on the relations between private parties) without legislative action. Further, and to the extent such an effect is even possible, it should be governed by the considerations we set out at paras. 174-75 concerning the effect of mandatory and prohibitive norms in private common law.

231 It is thus for Parliament to decide whether to change the doctrine of adoption to provide courts the power to convert prohibitive rules of international law into free-standing torts. Parliament has not done so. While it has created a statutory cause of action for victims of terrorism, it has not chosen to do so for every violation of customary international law (see s. 4 of the *Justice for Victims of Terrorism Act*, S.C. 2012, c. 1, s. 2).

IV. On the Second Theory, the Claims Are Also Bound to Fail

232 We have thus far confined our comments to the theory of the case given by the majority. As part of reading the pleadings generously, however, we must also consider the theory given by the chambers judge and the Court of Appeal. Under this theory, the amended pleadings sought to have the court recognize four new nominate torts *inspired* by international law: use of forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity.

233 On this theory of the case, international law plays a limited role. It will be of merely persuasive authority in recognizing the tort to begin with. It will also play less ongoing significance. Although proving the content of customary international law may be valuable for showing the urgency of recognizing a new tort, once a new tort is recognized, the new tort will have a comfortable home within the common law. If slavery is recognized as a tort, a future litigant will have no need to prove that an edge-case of slavery is a violation of customary international law; they can instead simply invoke the domestic tort. It is far easier for Canadian judges to know the contours of a domestic tort than it is for them to know the contours of customary international

law. The transmutation of customary international law into individual domestic torts has another advantage, too. On an edge-case, where it is unclear whether states are obliged to prohibit the conduct under customary international law, Canadian judges will not be faced with a partly empirical question (as they would on the majority's theory of the case), but a normative question.

234 The question that remains is: when should Canadian common law courts recognize these new nominate torts?

235 We explain below, first, the test that Canadian courts have developed for recognizing — or more precisely, for refusing to recognize — a new nominate tort. We then apply that test to the four torts the workers allege.

A. The Test for Recognizing a New Nominate Tort

236 In *Frame v. Smith*, [1987] 2 S.C.R. 99 (S.C.C.), at p. 120, Wilson J. (dissenting, but not on this point) described the history of disputed theories for recognizing new torts:

> It has been described in Solomon, Feldthusen and Mills, *Cases and Materials on the Law of Torts* (2nd ed. 1986), as follows (at p. 6):
>
> > Initially, the search for a theoretical basis for tort law centred on the issue of whether there was a general principle of tortious liability. Sir John Salmond argued that tort law was merely a patchwork of distinct causes of action, each protecting different interests and each based on separate principles of liability [see Salmond, *The Law of Torts* (6th ed., 1924) at pp. 9-10]. Essentially the law of torts was a finite set of independent rules, and the courts were not free to recognize new heads of liability. In contrast, writers such as Pollock contended that the law of torts was based upon the single unifying principle that all harms were tortious unless they could be justified [see Pollock, *The Law of Torts* (13th ed., 1929) at p. 21]. The courts were thus free to recognize new torts. Glanville Williams suggested a compromise between the two viewpoints. He argued that tort law historically exhibited no comprehensive theory, but that the existing categories of liability were sufficiently flexible to enable tort law to grow and adapt. [Emphasis added.]

Justice Wilson agreed with, and adopted, Glanville Williams's pragmatic approach (p. 120, citing G. L. Williams, "The Foundation of Tortious Liability" (1939), 7 *Cambridge L.J.* 1).

237 Three clear rules for when the courts will not recognize a new nominate tort have emerged: (1) The courts will not recognize a new tort where there are adequate alternative remedies (see, for example, *Scalera*); (2) the courts will not recognize a new tort that does not reflect and address a wrong visited by one person upon another (*Saskatchewan Wheat Pool*, at pp. 224-25); and (3) the courts will not recognize a new tort where the change wrought upon the legal system would be indeterminate or substantial (*Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 (S.C.C.), at paras. 76-77). Put another way, for a proposed nominate tort to be recognized by the courts, at a minimum it must reflect a wrong, be necessary to address that wrong, and be an appropriate subject of judicial consideration.

238 The first rule, that of necessity, acknowledges at least three alternative remedies: another tort, an independent statutory scheme, and judicial review. If any of these alternatives address the wrong targeted by the proposed nominate tort, then the court will decline to recognize it.

239 As we described above, a difference merely of damages or the extent of harm will not suffice to ground a new tort (*Scalera*). The proposed torts of "harassment" and "obstruction" also failed at the necessity stage. As the Saskatchewan Court of Appeal recently observed in *McLean v. McLean*, 2019 SKCA 15 (Sask. C.A.), at paras. 103-5 (CanLII), the proposed tort of harassment was entirely encompassed by the tort of intentional infliction of mental suffering and so need not be recognized as a distinct tort (see also *Merrifield*, at para. 42). Similarly, the proposed tort of obstruction — the plaintiffs had alleged the defendants had obstructed them from clearing trees — was encompassed by the existing torts of nuisance and trespass (*6165347 Manitoba Inc. et al v. Jenna Vandal et al*, 2019 MBQB 69 (Man. Q.B.), at paras. 91 and 100 (CanLII)).

240 A statutory remedy can also suffice to show that a new nominate tort is unnecessary. For example, in *Bhadauria v. Seneca College of Applied Arts & Technology*, [1981] 2 S.C.R. 181 (S.C.C.), at p. 195, this Court held that the *Ontario Human Rights*

Code, R.S.O. 1970, c. 318 ("*Code*") foreclosed the development of a common law tort based on the same policies embodied in the *Code*. Similarly, in *Frame*, at p. 111, the Court declined to create a common law tort concerning alienation of affection in the family context because the legislature had occupied the field through the *Children's Law Reform Act*, R.S.O. 1980, c. 68.

241 The second rule, that the tort must reflect a wrong visited by one person upon another, is also well-established and is reflected in the courts' resistance to creating strict or absolute liability regimes (see, for example, *Saskatchewan Wheat Pool*, at p. 224). It is also the converse of the idea so memorably expressed by Sharpe J.A. in *Jones v. Tsige*, 2012 ONCA 32, 108 O.R. (3d) 241 (Ont. C.A.), at para. 69: there, the "facts ... cr[ied] out for a remedy". When the facts do not make such a cry, the courts will not recognize a tort.

242 Finally, the change wrought to the legal system must not be indeterminate or substantial. This rule reflects the courts' respect for legislative supremacy and the courts' mandate to ensure that the law remains stable, predictable and accessible (T. Bingham, *The Rule of Law* (2010), at p. 37). Hence, the Ontario Superior Court's rejection of a proposed tort of "derivative abuse of process" that would provide compensation for someone allegedly injured by another person's litigation. Such a tort, the court noted, would create indeterminate liability (*Harris v. GlaxoSmithKline Inc.*, 2010 ONSC 2326, 101 O.R. (3d) 665 (Ont. S.C.J.), aff'd on other grounds, 2010 ONCA 872, 106 O.R. (3d) 661 (Ont. C.A.), leave to appeal refused, [2011] 2 S.C.R. vii (note) (S.C.C.)). Similarly, in *Wallace*, this Court rejected the proposed tort of "bad faith discharge" (at para. 78) because it would create a "radical shift in the law" (at para. 77) and contradict "established principles of employment law" (para. 76). A shift will be less radical when it is presaged by some combination of *obiter*, academic commentary, and persuasive foreign judicial activity, none of which are present here.

243 *Jones v. Tsige* provides a rare and instructive example of where a proposed new nominate tort was found by a court to have passed this test. The breach of privacy was indeed seen by the court as a wrong caused by one person to another, and as a wrong for which there existed no other remedy in tort law or in statute. The Court of Appeal for Ontario found support to recognize a cause of action for intrusion upon seclusion in the common law and *Charter* jurisprudence (at para. 66), and looked to other jurisdictions which had recognized a similar cause of action arising from a right to privacy, either by statute or by the common law (paras. 55-64). The court defined the elements of the cause of action (at paras. 70-72) and identified factors to guide an assessment of damages (paras. 87-90). Having undertaken this careful analysis, the court concluded that it had the competence as an institution to make this incremental change to the common law — it being "within the capacity of the common law to evolve to respond to the problem" (para. 68).

B. Two of the Proposed Nominate Torts Fail This Test

244 In our view, the proposed torts of cruel, inhuman or degrading treatment, and "crimes against humanity" both fail this test.

245 The proposed tort of cruel, inhuman or degrading treatment fails the necessity test, since any conduct captured by this tort would also be captured by the extant torts of battery or intentional infliction of emotional distress. To the extent that this tort describes a greater degree of harm than that typically litigated in the conventional torts, this goes only to damages. As this Court found in *Scalera*, no distinct tort is necessary.

246 The proposed tort of "crimes against humanity" also fails, but for a different reason: it is too multifarious a category to be the proper subject of a nominate tort. Many crimes against humanity would be already addressed under extant torts. If there are individual crimes against humanity that would not already be recognized as tortious conduct in Canada, the workers should specify them, rather than rely on a catch-all phrase that includes wrongs already covered. Adopting such a tort wholesale would not be the kind of incremental change to the common law that a Canadian court ought to make.

C. Two of the Proposed Nominate Torts May Pass This Test

247 In our view, it is possible the proposed torts of slavery and use of forced labour would pass the test for recognizing a new nominate tort. Recognizing each of these torts — subject to further development throughout the proceedings — may prove to be necessary, in that each may capture conduct not independently captured in torts such as battery, intentional infliction of emotional distress, negligence, or forcible confinement. For example, it is possible that the facts, if fully developed in the course

of trial, might show that one person kept another person enslaved without need for any force or violence, simply by convincing that other person that they are rightfully property. Use of forced labour also, by its terms, may include liability that pierces the corporate veil or extends through agency relationships. And, to the extent there are non-tort alternative remedies under the criminal law, they would not restore the victim as tort law would.

248 It is also uncontroversial that each of these torts — again, subject to further development — reflects wrongs being done by one person to another.

249 Finally, the admission of these torts would not cause unforeseeable or unknowable harm to Canadian law. Both slavery and use of forced labour are widely understood in this country to be illegal and, indeed, morally reprehensible, and liability for such conduct would herald no great shift in expectations.

250 Nonetheless, for the reasons that follow, we would hold that the attempt to create such nominate torts is doomed to fail.

D. Slavery and Use of Forced Labour Should Not Be Recognized for the First Time in the Circumstances of This Case

251 In our view, proposed torts should not be recognized for the first time in a proceeding based on conduct that occurred in a foreign territory, where the workers in this case had no connection to British Columbia at the time of the alleged torts, and where the British Columbian defendant has only an attenuated connection to the tort.

252 In general, tortious conduct abroad will not be governed by Canadian law, even where the wrong is litigated before Canadian courts. It is the law of the place of the tort that will, normally, govern (*Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 (S.C.C.), at p. 1050). The only exception is when such law is so repugnant to the fundamental morality of the Canadian legal system as to lead the court not to apply it (p. 1054).

253 One of two possibilities may arise when the proceedings in this case continue. It may be that the court finds Eritrean law not so offensive, and proceeds to apply it. In that case, judicial restraint would prevent the courts from recognizing a novel tort in Canadian law, because its application would be moot. Alternatively, if Eritrean law is found to be repugnant, the British Columbia courts would be in the unfortunate position of setting out a position for the first time on these proposed new torts based on conduct that occurred in a foreign state.

254 There are problems, both practical and institutional, with developing Canadian law based on conduct that occurred in a foreign state.

255 The practical problem is that the law that is appropriate for regulating a foreign state may not also be law that is appropriate for regulating Canada. It is trite to say that hard cases make bad law. When a case comes through the public policy exception to conflicts of law, it will, almost by definition, be a hard case.

256 The institutional problem is well expressed by La Forest J. in *Tolofson*, at p. 1052:

> It seems to me self evident, for example, that State A has no business in defining the legal rights and liabilities of citizens of State B in respect of acts in their own country, or for that matter the actions in State B of citizens of State C, and it would lead to unfair and unjust results if it did.

If that is true of legislatures, it is ever the more true for courts. Courts simply must recognize the limits of their institutional competence and the distinct roles of the judiciary vis-à-vis Parliament and the executive (*Khadr v. Canada (Prime Minister)*, 2010 SCC 3, [2010] 1 S.C.R. 44 (S.C.C.), at paras. 46-47). The judiciary is confined to making incremental changes to the common law, and can only respond to the evidence and argument before it. In contrast, the executive has the resources to study complex matters of state, conduct research, and consult with affected groups and the public. Parliament can do so, too, as well as hearing expert testimony through its committees. While the remedy that a court may order is limited to the question before the court, the executive can craft broad legal and institutional responses to these issues. The executive can create delegated regulatory authority, and implement policy and procedures. Further, whereas courts do not have the jurisdiction or resources to monitor the impact of its decisions, the executive can develop specialized units with a mandate to monitor,

make recommendations, implement and, where necessary, adjust a course of action. The domain of foreign relations is, in our view, perhaps the most obvious example of where the executive is competent to act, but where courts lack the institutional competence to do so.

257 Lester B. Pearson, in a speech before the Empire Club of Canada and the Canadian Club of Toronto in 1951, spoke about developing foreign policy in Canada ("Canadian Foreign Policy in a Two Power World", *The Empire Club of Canada: Addresses 1950-1951* (1951), 346). Mr. Pearson emphasized the delicacy of foreign relations, which calls for balancing political, economic and geographical considerations and consultation with other nations — a role that courts are not institutionally suited to undertake:

> The formulation of foreign policy has special difficulties for a country like Canada, which has enough responsibility and power in the world to prevent its isolation from the consequences of international decisions, but not enough to ensure that its voice will be effective in making those decisions.
>
> Today, furthermore, foreign policy must be made in a world in arms, and in conflict ....
>
> . . . . .
>
> We all agree, however, that we must play our proper part, no less and no more, in the collective security action of the free world, without which we cannot hope to get through the dangerous days ahead. But how do we decide what that proper part is, having regard to our own political, economic and geographical situation? It is certainly not one which can be determined by fixing a mathematical proportion of what some other country is doing. As long as we live in a world of sovereign states, Canada's part has to be determined by ourselves, but this should be done only after consultation with and, if possible, in agreement with our friends and allies. We must be the judge of our international obligations and we must decide how they can best be carried out for Canada .... [pp. 349 and 352]

258 Mr. Pearson's speech was given in the Cold War context, and considered Canada's foreign relations policy vis-à-vis two major world powers. Clearly, the landscape of international relations and Canada's role on the world stage have changed dramatically since 1951. Today, as the political and economic relationships between nations become increasingly complex, Mr. Pearson's message is even more compelling: foreign relations is a delicate matter, which the executive — and not the courts — is equipped to undertake.

259 Setting out a novel tort in the exceptional circumstance of a foreign state's law being held by the court to be so repugnant to Canadian morality would be an intrusion into the executive's dominion over foreign relations. The courts' role within this country is, primarily, to adjudicate on disputes within Canada, and between Canadian residents. This is the purpose for which the courts have been vested their powers by s. 96 of the *Constitution Act, 1867*. Our courts' legitimacy depends on our place within the constitutional architecture of this country; Canadian courts have no legitimacy to write laws to govern matters in Eritrea, or to govern people in Eritrea. Developing Canadian law in order to respond to events in Eritrea is not the proper role of the court: that is a task that ought to be left to the executive, through the conduct of foreign relations, and to the legislatures and Parliament.

260 In making these observations, we do not question the public policy exception to applying the law indicated by a choice of law exercise. The proper use of that exception, however, is to apply existing Canadian law, which is either the product of legislative enactment or the common law, to situations where applying the foreign law would be repugnant to the consciences of Canadians. That exception should not be used as a back door for the courts to create new law governing the behaviour of the citizens of other states in their home state.

V. Conclusion

261 This appeal engages fundamental questions of procedure and substance. The majority's approach to the procedural question at the heart of a motion to strike will encourage parties to draft pleadings in a vague and unders pecified manner. It offers this lesson: the more nebulous the pleadings and legal theory used to protect them, the more likely they are to survive a motion to strike. This approach will suck much of the utility from the motion to strike. Doomed actions will occupy the superior

courtrooms of this country, persisting until the argument collapses at summary judgment or trial. In a moment where courts are struggling to handle the existing caseload, increasing the load is likely not to facilitate access to justice, but to frustrate it.

262 In substance, this appeal is about, as much as anything else, maintaining respect for the appropriate role of each order of the Canadian state. The creation of a cause of action for breach of customary international law would require the courts to encroach on the roles of both the legislature (by creating a drastic change in the law and ignoring the doctrine of incrementalism), and the executive (by wading into the realm of foreign affairs).

263 It is not up to the Court to ignore the foundations of customary international law, which prohibits certain state conduct, in order to create a cause of action against private parties. Rather, it would be up to Parliament to create a statutory cause of action. And, where an issue has consequences for foreign relations, the executive, not courts, is institutionally competent to decide questions of policy. Fundamentally, it is this understanding and respect for the institutional competence of each order of the state that underlies the proper functioning of the domestic and international order.

264 A final word. The implications of the majority's reasons should be comprehended. On the majority's approach to determining what norms of customary international law may exist, generalist judges will be called upon to determine the practices of foreign states and the bases for those practices without hearing evidence from either party. They are to make these determinations aided only by lawyers, who themselves will rarely be experts in this field. The judiciary is institutionally ill-suited to make such determinations.

265 The result, we fear, will be instability. In international law, on the majority's approach, Canadian courts will, perhaps on the word of a single law professor, be empowered to declare what the states of the world have through their practices agreed upon. And this uncertainty will redound upon the law of this country. The line of reasoning set out in this judgment departs from foundational principles of judicial law-making in tort law, and there is no reason to believe that Canadian courts will in the future be any more restrained with their use of international law. So fundamental a remaking of the laws of this country is not for the courts. This, ultimately, is where we part ways with the majority.

266 For these reasons, we would allow the appeal in part and strike the paragraphs of the workers' claims related to causes of action arising from customary international law norms, with costs to Nevsun in this Court and in the courts below.

***Côté J.* (dissenting) (Moldaver J. concurring):**

I. Introduction

267 My main point of departure from the analysis of my colleague, Abella J., concerns the existence and applicability of the act of state doctrine, or some other rule of non-justiciability barring the respondents' claims. As for the reasons of Brown and Rowe JJ. concerning the respondents' claims inspired by customary international law, while I agree with their analysis and conclusion, I wish to briefly stress a few points on that issue before addressing the act of the state doctrine.

II. Claims Inspired by Customary International Law

268 On this first issue, I must emphasize that the extension of customary international law to corporations represents a significant departure in this area of the law.

269 The question posed to this Court is not whether corporations are "immune" from liability under customary international law (Abella J.'s reasons, at para. 104), but whether customary international law extends the scope of liability for violation of the norms at issue to corporations: *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (U.S. C.A. 2nd Cir. 2010), at p. 120, aff'd on other grounds, 569 U.S. 108 (U.S. Sup. Ct. 2013). While my colleague recites the rigorous requirements for establishing a norm of customary international law (at paras. 77-78), when it comes to actually analyzing whether international human rights law applies to corporations, she does not engage in the descriptive inquiry into whether there is a sufficiently widespread, representative and consistent state practice. Instead, she relies on normative arguments about why customary international law

ought to apply to corporations: see paras. 104-13. A court cannot abandon the test for international custom in order to recast international law into a form more compatible with its own preferences:

> As Professor Dworkin demonstrated in *Law's Empire* (1986), the ordering of competing principles according to the importance of the values which they embody is a basic technique of adjudication. But the same approach cannot be adopted in international law, which is based upon the common consent of nations. It is not for a national court to "develop" international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states.
>
> (*Jones v. Kingdom of Saudi Arabia*, [2006] UKHL 26, [2007] 1 A.C. 270 (U.K. H.L.), at p. 298, per Lord Hoffman)

My colleague is indeed correct that international law "does move" (at para. 106), but it moves only so far as state practice will allow. The widespread, representative and consistent state practice and *opinio juris* required to establish a customary rule do not presently exist to support the proposition that international human rights norms have horizontal application between individuals and corporations: J. Crawford, *Brownlie's Principles of Public International Law* (9th ed. 2019), at pp. 102 and 607.

III. Act of State Doctrine

270 Turning to the issue of the act of state doctrine, this is not a conflict of laws case. This Court is not being asked to determine whether the courts of British Columbia have jurisdiction over the parties, whether a court of another jurisdiction is a more appropriate forum to hear the dispute, whether the law of another jurisdiction should be applied or what the content of that foreign law happens to be.

271 Rather, we must decide whether the respondents' claims are amenable to adjudication by courts within Canada's domestic legal order or whether they are allocated to the plane of international affairs for resolution in accordance with the principles of public international law and diplomacy. In my view, the respondents' claims, as pleaded, fall within this latter category. Accordingly, I would allow the appeal and dismiss the respondents' claims in their entirety, as they are not justiciable.

272 In the reasons that follow, I begin by outlining two distinct branches within the act of state doctrine. I conclude that our choice of law jurisprudence does indeed play a similar role to that of certain aspects of the act of state doctrine. However, I also conclude that the act of state doctrine includes a second branch distinct from choice of law which renders some claims non-justiciable. This branch of the doctrine bars the adjudication of civil actions which have their foundation in allegations that a foreign state has violated public international law.

273 Next, I discuss how the doctrine of justiciability and the constitutional separation of powers explain why a Canadian court may not entertain a civil claim between private parties where the outcome depends on a finding that a foreign state violated international law. Finally, I apply the doctrine of justiciability to the respondents' claims, ultimately finding that they are not justiciable, because they require a determination that Eritrea has committed an internationally wrongful act.

A. Substantive Foundations of the Act of State Doctrine

274 Whether a national court is competent to adjudicate upon the lawfulness of sovereign acts of a foreign state is a question that has many dimensions. As the United Kingdom Supreme Court explained in *Belhaj v. Straw*, [2017] UKSC 3, [2017] A.C. 964 (U.K. S.C.), the act of state doctrine can be disaggregated into an array of categories: para. 35, per Lord Mance; paras. 121-22, per Lord Neuberger; paras. 225-38, per Lord Sumption.

275 My colleague holds that the act of state doctrine, and all of its animating principles, have been completely subsumed by the Canadian choice of law and judicial restraint jurisprudence. With respect, I am unable to agree with her approach. There is another distinct, though complementary, dimension of the act of state doctrine in addition to the choice of law dimension. Claims founded upon a foreign state's alleged breach of international law raise a unique issue of justiciability which is not addressed in my colleague's reasons.

276 Whether this dimension is referred to as a branch of the act of state doctrine or as a specific application of the more general doctrine of justiciability, the Canadian jurisprudence leads to the conclusion that some claims are not justiciable, because adjudicating them would impermissibly interfere with the conduct by the executive of Canada's international relations.

277 I pause to note that the distinction between the non-justiciability and choice of law branches does not exhaust the "array of categories" within the act of state doctrine. Rather, I prefer to consider the doctrine along two axes: (1) unlawfulness under the foreign state's domestic law, as opposed to unlawfulness under international law; and (2) the choice of law branch, as opposed to the non-justiciability branch, of the doctrine. These two axes are interrelated. As I explain below, there are choice of law rules that apply to a court's review of alleged unlawfulness under the foreign state's domestic law and under international law. There are also rules of non-justiciability which address unlawfulness under the foreign state's domestic law and unlawfulness under international law. The discussion that follows is not intended to be comprehensive, as my aim is simply to demonstrate that the issue before this Court is whether a domestic court is competent to adjudicate claims based on a foreign state's violations of international law under the non-justiciability branch of the doctrine.

278 I turn now to the underlying rationale for drawing a distinction between the respective branches of the act of state doctrine.

(1) Choice of Law Branch of the Act of State Doctrine

279 The choice of law branch of the act of state doctrine establishes a general rule that a foreign state's domestic law — or "municipal law" — will be recognized and normally accepted as valid and effective: *Belhaj*, at paras. 35 and 121-22. In England, the effect of this principle is that English courts will not adjudicate on the lawfulness or validity of sovereign acts performed by a state under its own laws: *Johnstone v. Pedlar*, [1921] 2 A.C. 262 (Ireland H.L.), at p. 290. This branch is focused on whether an English court should give effect to a foreign state's municipal law.

280 There are exceptions to this general rule. The act of state doctrine gives way to the "well-established exception in private international law of public policy": C. McLachlan, *Foreign Relations Law* (2014), at para. 12.157. For example, in *Oppenheimer v. Cattermole* (1975), [1976] A.C. 249 (U.K. H.L.), the House of Lords refused to apply a Nazi-era law depriving Jews of their citizenship and property: pp. 277-78. Lord Cross reasoned that "it is part of the public policy of this country that our courts should give effect to clearly established rules of international law", and that the Nazi decree was "so grave an infringement of human rights that the courts of this country ought to refuse to recognize it as a law at all": p. 278. The House of Lords reiterated this principle in *Kuwait Airways Corp. v. Iraqi Airways Co. (No. 6)*, [2002] UKHL 19, [2002] 2 A.C. 883 (U.K. H.L.), holding that the domestic law of a foreign state could be disregarded if it constitutes a serious violation of international law. Iraq had issued a decree expropriating aircrafts of the Kuwait Airways Corporation which were then in Iraq. The House of Lords held that the Iraqi decree was a clear violation of international law and that the English courts were therefore at liberty to refuse to recognize it on grounds of public policy. This shows how international law informs the public policy exception of the choice of law branch.

281 In Canada, similar principles are reflected in this Court's choice of law jurisprudence. In *Estonian State Cargo & Passenger Steamship Line v. "Elise" (The)*, [1949] S.C.R. 530 (S.C.C.), this Court declined to give effect to a 1940 decree of the Estonian Soviet Socialist Republic that purported to nationalize all Estonian merchant vessels and also purported to have extraterritorial effect. The appeal was decided on the principle that a domestic court will not give effect to foreign public laws that purport to have extraterritorial effect: see p. 538, per Rinfret C.J.; p. 542, per Kerwin J.; p. 547, per Rand J.; pp. 547-51, per Kellock J. However, Rand J. would also have held that, irrespective of the decree's extraterritorial scope, there is a "general principle that no state will apply a law of another which offends against some fundamental morality or public policy": p. 545. I note that no act of state issue actually arose on the facts of that case, as the domestic law branch of the act of state doctrine applies only to acts carried out in the foreign state's territory: see, e.g., *Belhaj*, at paras. 229 and 234, per Lord Sumption. Therefore, it is unsurprising that "[n]o act of state concerns about Estonia's sovereignty or non-interference in its affairs were even raised by the Court": Abella J.'s reasons, at para. 46.

282 In another English case, *Buck v. Attorney General*, [1965] 1 All E.R. 882 (Eng. C.A.), the plaintiffs sought a declaration that the constitution of Sierra Leone was invalid. Lord Harman held that an English court could not make a declaration that impugned the validity of the constitution of a foreign state: p. 885. Lord Diplock reasoned that the claim had to be dismissed because the issue of the validity of the foreign law did not arise incidentally:

> The only subject-matter of this appeal is an issue as to the validity of a law of a foreign independent sovereign state, in fact, the basic law prescribing its constitution. The validity of this law does not come in question incidentally in proceedings in which the High Court has undoubted jurisdiction as, for instance, the validity of a foreign law might come in question incidentally in an action on a contract to be performed abroad. The validity of the foreign law is what this appeal is about; it is nothing else. This is a subject-matter over which the English courts, in my view, have no jurisdiction. [pp. 886-87]

283 While the facts of *Buck* fall within the non-justiciability branch, the effect of Lord Diplock's reasoning is that the act of state doctrine does not prevent a court from examining the validity of a foreign law if the court is obliged to determine the content of the foreign law as a choice of law issue. As Professor McLachlan points out, any other approach could lead to perverse results, because a court applying foreign law must apply the law as it would have been applied in the foreign jurisdiction: McLachlan, at para. 12.139.

284 In this regard, too, this Court reached a similar result in *Hunt v. T & N plc*, [1993] 4 S.C.R. 289 (S.C.C.). The issue in it was whether British Columbia's superior court could rule on the constitutionality of a Quebec statute which prohibited the removal from Quebec of business documents required for judicial processes outside Quebec. This Court approached the question as one of conflict of laws, observing that there was no reason why a court should never be able to rule on the constitutionality of another province's legislation. Ultimately, this Court held that a provincial superior court has jurisdiction to make findings respecting the constitutionality of a statute enacted by the legislature of another province if this issue arises incidentally in litigation before it. The constitutionality of the Quebec statute was not foundational to the claim advanced in the British Columbia courts. Rather, it arose in the discovery process in the context of the parties' obligation to disclose relevant documents, some of which were in Quebec. Therefore, the constitutionality of the statute could properly be considered in the choice of law analysis. Of course, because the facts of that case gave rise to an issue involving the British Columbia courts and Quebec legislation, it is, again, unsurprising that this Court "made no reference to act of state": Abella J.'s reasons, at para. 48.

285 Nonetheless, based on this comparative review of the case law, it appears that this Court's choice of law jurisprudence leads to the same result as the choice of law branch of the English Act of State doctrine: see McLachlan, at paras. 12.24 and 12.126-12.167. To this extent, I agree with Abella J. that that jurisprudence plays a similar role to that of the choice of law branch of the act of state doctrine in the context of alleged unlawfulness under foreign domestic and international law: paras. 44-57. However, this is not true as regards the non-justiciability branch as applied to alleged violations of international law.

(2) Non-justiciability Branch of the Act of State Doctrine

286 The non-justiciability branch of the doctrine is concerned with judicial abstention from adjudicating upon the lawfulness of actions of foreign states: see *Buttes Gas & Oil v. Hammer* (1981), [1982] A.C. 888 (Eng. H.L.), at p. 931; McLachlan, at paras. 12.168 and 12.177-12.178. As I explain below, a court should not entertain a claim, even one between private parties, if a central issue is whether a foreign state has violated its obligations under international law.

287 *Blad v. Bamfield* (1674), 3 Swans. 604, 36 E.R. 992 (Eng. Ch.), may be the earliest case regarding this branch of the act of state doctrine. A Danish man, Blad, had seized property of English subjects (including Bamfield) in Iceland on the authority of letters patent granted by the King of Denmark. Blad was sued in England for this allegedly unlawful act. He sought an injunction to restrain the proceeding. In the High Court of Chancery, Lord Nottingham entered a stay of the proceeding against Blad because the English subjects' defence against the injunction was premised on a finding that the Danish letters patent were inconsistent with articles of peace between England and Denmark. Lord Nottingham reasoned that a misinterpretation of the articles of peace "may be the unhappy occasion of a war" (p. 606), and that it would be "monstrous and absurd" (p. 607) to

have a domestic court decide the question of the legality of the Danish letters patent, the meaning of the articles of peace or the question of whether the English had a right to trade in Iceland.

288 Another early case on the act of state doctrine is *Duke of Brunswick v. King of Hanover* (1848), 2 H.L. Cas. 1, 9 E.R. 993 (U.K. H.L.). Revolutionaries in the German duchy of Brunswick overthrew the reigning Duke, Charles, in 1830. The King of Hanover deposed Charles in favour of Charles' brother, William, and placed Charles' assets under the guardianship of the Duke of Cambridge. Charles brought an action in which he sought an accounting for the property of which he had been deprived. In the House of Lords, Lord Chancellor Cottenham reasoned that the action was not concerned with determining private rights as between individuals but, rather, concerned an allegation that the King of Hanover had acted contrary to the "laws and duties and rights and powers of a Sovereign exercising sovereign authority": p. 1000. This led the Lord Chancellor to conclude that the English courts cannot "entertain questions to bring Sovereigns to account for their acts done in their sovereign capacities abroad": p. 1000.

289 The leading case on the non-justiciability branch is *Buttes Gas & Oil*. The Occidental Petroleum Corporation and Buttes Gas and Oil Co. held competing concessions to exploit disputed oil reserves near an island in the Arabian Gulf. Occidental claimed its right to exploit the reserves under a concession granted by the emirate of Umm al Qaiwain. Buttes Gas claimed its right pursuant to one granted by the emirate of Sharjah. Both emirates, as well as Iran, claimed to be entitled to the island and to its oil reserves. After the United Kingdom intervened, the dispute was settled by agreement. Occidental's concession was subsequently terminated. Occidental alleged that Buttes Gas and Sharjah had fraudulently conspired to cheat and defraud Occidental, or to cause the United Kingdom and Iran to act unlawfully to the injury of Occidental: p. 920. Buttes Gas argued that an English court should not entertain such claims, as they concerned acts of foreign states.

290 In the House of Lords, Lord Wilberforce held that Occidental's claim was not justiciable. He identified a branch of the act of state doctrine which he said was concerned with the applicability of foreign domestic legislation: p. 931. He suggested that this branch was essentially a choice of law rule concerned with the choice of the proper law to apply to a dispute: p. 931. However, he drew one important distinction:

> It is one thing to assert that effect will not be given to a foreign municipal law or executive act if it is contrary to public policy, or to international law (cf. *In re Helbert Wagg & Co. Ltd's Claim*, [1956] Ch. 323) and quite another to claim that the courts may examine the validity, under international law or some doctrine of public policy, of an act or acts operating in the area of transactions between states. [p. 931]

291 Lord Wilberforce went on to hold, following *Blad*, *Duke of Brunswick* and other authorities, that private law claims which turn on a finding that a foreign state has acted in a manner contrary to public international law are not justiciable by an English court:

> It would not be difficult to elaborate on these considerations, or to perceive other important inter-state issues and/or or issues of international law which would face the court. They have only to be stated to compel the conclusion that these are not issues upon which a municipal court can pass. Leaving aside all possibility of embarrassment in our foreign relations (which it can be said not to have been drawn to the attention of the court by the executive) there are ... no judicial or manageable standards by which to judge these issues, or to adopt another phrase (from a passage not quoted), the court would be in a judicial no-man's land: the court would be asked to review transactions in which four sovereign states were involved, which they had brought to a precarious settlement, after diplomacy and the use of force, and to say that at least part of these were "unlawful" under international law. [p. 938]

292 In the two passages reproduced above, Lord Wilberforce touched on an important point: a distinction must be drawn between the types of problems addressed in justiciability cases and the types of problems addressed in choice of law cases. Private international law is a response to the problem of how to distribute legal authority among competing municipal jurisdictions: R. Banu, "Assuming Regulatory Authority for Transnational Torts: An Interstate Affair? A Historical Perspective on the Canadian Private International Law Tort Rules" (2013), 31 *Windsor Y.B. Access Just.* 197, at p. 199. However, the problem posed by claims based on violations of public international law is that the international plane constitutes an additional legal

system with its own claim to jurisdiction over certain legal questions: McLachlan, at para. 12.22. Thus, conflict of laws rules alone are not capable of addressing the concerns raised by Lord Wilberforce in *Buttes Gas & Oil*, because they do not mediate between domestic legal systems and the international legal system. In order to address the problems raised by Lord Wilberforce regarding the legitimacy of a domestic court's consideration of questions of international law, this Court must inquire into whether such questions are justiciable under Canada's domestic constitutional arrangements.

293 Before doing so, I want to express my agreement with Newbury J.A. that the early English cases which underpin the act of state doctrine were received into the law of British Columbia in 1858 by what is now s. 2 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253: 2017 BCCA 401, 4 B.C.L.R. (6th) 91 (B.C. C.A.), at para. 123. However, for conceptual clarity, the principles animating early cases such as *Blad* and *Duke of Brunswick* should be reflected through the lens of the modern doctrine of justiciability recognized by this Court in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, [2018] 1 S.C.R. 750 (S.C.C.). It is to that doctrine which I now turn.

B. Justiciability of International Law Questions in Canada

294 Justiciability is rooted in a commitment to the constitutional separation of powers: L. M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (2nd ed. 2012), at p. 289. The separation of powers under the Constitution prescribes different roles for the executive, legislative and judicial orders: *Fraser v. Canada (Treasury Board, Department of National Revenue)*, [1985] 2 S.C.R. 455 (S.C.C.), at pp. 469-70. In exercising its jurisdiction, a court must conform to the separation of powers by showing deference for the roles of the executive and the legislature in their respective spheres so as to refrain from unduly interfering with the legitimate institutional roles of those orders: *R. v. Imona-Russell*, 2013 SCC 43, [2013] 3 S.C.R. 3 (S.C.C.), at paras. 29-30. It is "fundamental" that each order not "overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other": *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319 (S.C.C.), at p. 389, per McLachlin J. The doctrine of justiciability reflects these institutional limitations.

295 This Court recognized the existence of a general doctrine of non-justiciability in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee)*, stating that the main question to be asked in applying the doctrine of justiciability is whether the issue is one that is appropriate for a court to decide: para. 32. The answer to that question depends on whether the court asking the question has the institutional capacity to adjudicate the matter and whether its doing so is legitimate: para. 34.

296 A court has the institutional capacity to consider international law questions, and its doing so is legitimate, if they also implicate questions with respect to constitutional rights (*Khadr v. Canada (Minister of Justice)*, 2008 SCC 28, [2008] 2 S.C.R. 125 (S.C.C.)), the legality of an administrative decision (*Suresh v. Canada (Minister of Citizenship & Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3 (S.C.C.)) or the interface between international law and Canadian public institutions (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (S.C.C.), at para. 23). If, however, a court allows a private claim which impugns the lawfulness of a foreign state's conduct under international law, it will be overstepping the limits of its proper institutional role. In my view, although the court has the institutional capacity to consider such a claim, its doing so would not be legitimate.

297 The executive is responsible for conducting international relations: *Khadr v. Canada (Prime Minister)*, 2010 SCC 3, [2010] 1 S.C.R. 44 (S.C.C.), at para. 39. In *Kazemi (Estate) v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176 (S.C.C.), this Court observed that creating a universal civil jurisdiction allowing torture claims against foreign officials to be pursued in Canada "would have a potentially considerable impact on Canada's international relations", and that such decisions are not to be made by the courts: para. 107. Similar concerns arise in the case of litigation between private parties founded upon allegations that a foreign state has violated public international law. Such disputes "are not the proper subject matter of judicial resolution" (Sossin, at p. 251), because questions of international law relating to internationally wrongful acts of foreign states are not juridical claims amenable to adjudication on "judicial or manageable standards" (*Buttes Gas & Oil*, at p. 938, per Lord Wilberforce). Such questions are allocated to the plane of international affairs for resolution in accordance with the principles of public international law and diplomacy.

298 In *Khadr* (2010), this Court justified its interference with the exercise by the executive of an aspect of its power over international relations on the basis that the judiciary possesses "a narrow power to review and intervene on matters of foreign

affairs to ensure the constitutionality of executive action": para. 38. However, the same cannot be said of a private claim for compensation which is dependent upon a determination that a foreign state has breached its international obligations. This is not a case in which a court would be abdicating its constitutional judicial review function if it were to decline to adjudicate the claim.

299 *Presbyterian Church of Sudan v. Talisman Energy Inc.* [, Doc. No. 01 Civ.9882(DLC), Cote J. (U.S. Dist. Ct. S.D. N.Y. Aug 30 2005)], 2005 WL 2082846, is an example of how private litigation can interfere with the responsibility of the executive for the conduct of international relations. In *Presbyterian Church of Sudan*, a foreign state had sent a diplomatic note to the United States Department of State in response to litigation initiated in the U.S. by Sudanese residents against a company incorporated and domiciled in the foreign state that had operations in Sudan. The allegations were based on violations of international law by Sudan. Although the company's motion to dismiss the claim was not successful, the incident was significant enough to spur the foreign state to send the diplomatic note in which it insisted that its foreign policy was being undermined by the litigation. I would point out in particular that the motion failed because the action as pleaded did "not require a judgment that [the foreign state's foreign policy] was or caused a violation of the law of nations", which suggests that if the reverse were true, the claim would have been barred: para. 5. Thus, even in the case of disputes between private parties, when courts "engage in piecemeal adjudication of the legality of the sovereign acts of states, they risk disruption of our country's international diplomacy": *International Association of Machinists and Aerospace Workers v. Organization of Petroleum Exporting Countries*, 649 F.2d 1354 (U.S. C.A. 9th Cir. 1981), at pp. 1358-60.

300 As a practical matter, Canadian courts have good reason to refrain from passing judgment on alleged internationally wrongful acts of foreign states. If Canadian courts claimed the power to pass judgment on violations of public international law by states, that could well have unforeseeable and grave impacts on the conduct of Canada's international relations, expose Canadian companies to litigation abroad, endanger Canadian nationals abroad and undermine Canada's reputation as an attractive place for international trade and investment. Sensitive diplomatic matters which do not raise domestic public law questions should be kept out of the hands of the courts.

301 Further, as this doctrine consists in a rule of non-justiciability, it is not amenable to the application of a public policy exception. It arises from the constitutional separation of powers and the limits of the legitimacy of acts of the judiciary. The public importance and fundamental nature of the values at stake cannot render justiciable that which is otherwise not within the judiciary's bailiwick.

302 Abella J. relies on the *Secession Reference* as authority for the proposition that the adjudication of questions of international law is permitted for the purpose of determining the private law rights or obligations of individuals within our legal system: para. 49. With respect, this is an overstatement of the scope of the reasoning in the *Secession Reference*, in which this Court held that it could consider the question whether international law gives the National Assembly, the legislature or the Government of Quebec the right to effect the secession of Quebec from Canada unilaterally: paras. 21-23. In the Court's view, the question was not a "pure" question of international law, because its purpose was to determine the legal rights of a public institution which exists as part of the domestic Canadian legal order: para. 23. This Court's holding was confined to delineating the scope of Canada's obligation to respect the right to self-determination of the people of Quebec. No issue regarding private law claims or internationally wrongful acts of a foreign state arose in the *Secession Reference*.

303 In its public law decisions, this Court has had recourse to international law to determine issues relating to other public authorities, such as whether municipalities can levy rates on foreign legations (*Powers of Ottawa & Rockcliffe Park to Levy Rates on Foreign Legations & High Commissioners' Residences, Re*, [1943] S.C.R. 208 (S.C.C.)) and whether the federal or provincial governments possess proprietary rights in Canada's territorial sea and continental shelf (*Reference re Offshore Mineral Rights (British Columbia)*, [1967] S.C.R. 792 (S.C.C.); *Reference re Seabed & Subsoil of Continental Shelf Offshore Newfoundland*, [1984] 1 S.C.R. 86 (S.C.C.)). It has never held that a Canadian court is free, in adjudicating a private law claim, to decide whether a foreign state — which does not exist as a part of the domestic Canadian legal order — has violated public international law.

304 Abella J. also relies on decisions in the extradition and deportation contexts, in which courts consider the human rights records of foreign states as part of their decision-making process: paras. 50-55. However, when Canadian courts examine the

human rights records of foreign states in extradition and deportation cases, they do so to ensure that Canada complies with its own international, statutory and constitutional obligations: see *Suresh*. The same cannot be said of a civil claim for compensation. To equate the respondents' civil claim for a private law remedy to claims in the public law extradition and deportation contexts is to disregard the judiciary's statutory and constitutional mandates to consider human rights issues in foreign states in extradition and deportation cases. No such mandate exists in the context of private law claims.

305 In conclusion, although a court has the institutional capacity to consider international law questions, it is not legitimate for it to adjudicate claims between private parties which are founded upon an allegation that a foreign state violated international law. The adjudication of such claims impermissibly interferes with the conduct by the executive of Canada's international relations. That interference is not justified without a mandate from the legislature or a constitutional imperative to review the legality of executive or legislative action in Canada. In the absence of such a mandate or imperative, claims based on a foreign state's internationally wrongful acts are allocated to the plane of international affairs for resolution in accordance with the principles of public international law and diplomacy.

IV. The Respondents' Claims Require a Determination That Eritrea Violated Public International Law

306 In this context, justiciability turns on whether the outcome of the claims is dependent upon the allegation that the foreign state acted unlawfully. If this issue is central to the litigation, the claims are not justiciable: e.g., *Buck*, at pp. 886-87; *Buttes Gas & Oil*, at pp. 935-38. By contrast, a court may consider the legality of acts of a foreign state under municipal or international law if the issue arises incidentally: e.g., *Hunt*; *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., International*, 493 U.S. 400 (U.S. C.A. 3rd Cir. 1990), at p. 406.

307 In *Buck*, the issue of the validity of the foreign state's constitution was central to the plaintiffs' claim, because the plaintiffs were seeking a declaration that the constitution of Sierra Leone was invalid: p. 886. Lord Diplock stated:

> I do not think that this rule [that a state does not purport to exercise jurisdiction over the internal affairs of another state], which deprives the court of jurisdiction over the subject-matter of this appeal because it involves assertion of jurisdiction over the internal affairs of a foreign sovereign state, can be eluded by the device of making the Attorney-General of England a party instead of the government of Sierra Leone. [p. 887]

308 A case to the opposite effect is *Kirkpatrick*, in which the respondent alleged that the petitioner had obtained a construction contract from the Nigerian Government by bribing Nigerian officials, which was prohibited under Nigerian law. Scalia J. found that the factual predicate for application of the act of state doctrine did not exist in that case, as nothing in the claim required the court to declare an official act of a foreign state to be invalid: p. 405. Scalia J. reasoned that:

> [a]ct of state issues only arise when a court *must decide* — that is, when the outcome of the case turns upon — the effect of official action by a foreign sovereign. When that question is not in the case, neither is the act of state doctrine. That is the situation here. Regardless of what the court's factual findings may suggest as to the legality of the Nigerian contract, its legality is simply not a question to be decided in the present suit, and there is thus no occasion to apply the rule of decision that the act of state doctrine requires. [Emphasis in original; p. 406.]

309 Similarly, in *Hunt*, La Forest J. concluded that the issue of the constitutionality of the "foreign" statute arose incidentally, because it arose in a proceeding in which the plaintiff sought the disclosure of relevant documents, which was barred by the impugned Quebec statute. In *Buttes Gas & Oil*, on the other hand, Occidental pleaded the tort of conspiracy against Buttes Gas, but to succeed, the claim required a determination that Sharjah, Umm al Qaiwain, Iran and the United Kingdom had violated international law. This was not incidental to the claim, and the House of Lords held that it was not justiciable: p. 938.

310 In the case at bar, the issue of the legality of Eritrea's acts under international law is central to the respondents' claims. To paraphrase Lord Diplock in *Buck*, at p. 887, the respondents are simply using the appellant, Nevsun Resources Ltd., as a device to avoid the application of Eritrea's sovereign immunity from civil proceedings in Canada. The respondents' central allegation is that Eritrea's National Service Program is an illegal system of forced labour (A.R., vol. III, at pp. 162-64) that constitutes a crime against humanity (p. 175). The respondents allege that "Nevsun expressly or implicitly condoned the use of forced labour

and the system of enforcement through threats and abuse, by the Eritrean military", and that it is directly liable for injuries suffered by the respondents as a result of its "failure to stop the use of forced labour and the enforcement practices at its mine site when it was obvious ... that the plaintiffs were forced to work there against their will": A.R., vol. III, at p. 178.

311 In other words, the respondents allege that Nevsun is liable because it was complicit in the Eritrean authorities' alleged internationally wrongful acts. As was the case in *Buttes Gas & Oil*, Nevsun can be liable only if the acts of the actual alleged perpetrators — Eritrea and its agents — were unlawful as a matter of public international law. The case at bar is therefore materially different from *Hunt* and *Kirkpatrick*, in which the legality of the acts of a foreign sovereign state, or of an authority in another jurisdiction, had arisen incidentally to the claim.

312 To obtain relief, the respondents would have to establish that the National Service Program is a system of forced labour that constitutes a crime against humanity. This means that determinations that the Eritrean state acted unlawfully would not be incidental to the allegations of liability on Nevsun's part. In my view and with respect, Newbury J.A. erred in finding that the respondents were not asking the court to "inquire into the legality, validity or 'effectiveness' of the acts of laws or conduct of a foreign state": C.A reasons, at para. 172. As she had noted earlier in her reasons — and I agree with her on this point — given how the complaint was being pleaded, Nevsun could only be found liable if "Eritrea, its officials or agents were found to have violated fundamental international norms and Nevsun were shown to have been complicit in such conduct": para. 92. The respondents' claims, as pleaded, require a determination that Eritrea has violated international law and must therefore fail.

V. Conclusion

313 It is plain and obvious that the respondents' claims are bound to fail, because private law claims which are founded upon a foreign state's internationally wrongful acts are not justiciable, and the respondents' claims are dependent upon a determination that Eritrea has violated its international obligations. Additionally, for the reasons given by Brown and Rowe JJ., I find that it is plain and obvious that the respondents' causes of action which are inspired by customary international law are bound to fail. Accordingly, I would allow the appeal and dismiss the respondents' claims.

Appeal dismissed.

Pourvoi rejeté.

Footnotes

1 Eritrean workers' amended notice of civil claim, at paras. 7, 53, 56(a), 60, 63, 66, 70 and 71 (A.R., vol. III, at p. 159).

2 Nevsun's notice of application: application to strike workers' customary international law claims as disclosing no reasonable claim (A.R., vol. III, at p. 58).

3 As Anne Warner La Forest writes: "[I]f custom is indeed the law of the land, then the argument in favour of judicial notice, as traditionally understood, is a strong one. It is a near perfect syllogism. If custom is the law of the land, and the law of the land is to be judicially noticed, then custom should be judicially noticed" (p. 381).

4 See chambers judgment, at paras. 427, 444, 455 and 465-66.

5 That this creates a paradox of sorts is a well-known problem in the theory of customary international law (see, for example, J. Kammerhofer, "Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems" (2004), 15 *Eur. J. Int'l L.* 523). It is not a paradox we have cause to address in this case.

6 To be clear, we do not mean to suggest that relief in the nature of *certiorari* and *mandamus* are the only remedies available in such a situation: for example, equitable remedies such as injunctive or declaratory relief may also be available.

7 We say "private" common law in contradistinction to "public" common law. Public common law is the law that governs the activities of the Crown, and is of course the law related to the executive branch, discussed previously. "Private" common law is law that governs relations between non-state entities.

8 There is, of course, a further possibility, but it is not one that the majority advances. It may be neither the prohibition at customary international law nor the doctrine of adoption that creates the liability rule. Rather, it would be a prosaic change to the common law that creates the liability rule, inspired by the recognition that an action prohibited at customary international law is wrongful. This was the theory of the case by which the chambers judge upheld the pleadings. We consider and reject this theory in Part IV of our reasons.

9 This statement was written prior to *Jones v. Tsige*, 2012 ONCA 32, 108 O.R. (3d) 241 (Ont. C.A.).

13.

R v. Hape 2007 SCC 26 Carswell ONT 3563

Most Negative Treatment: Distinguished
Most Recent Distinguished: R. v. Souvannarath | 2017 NSSC 107, 2017 CarswellNS 283, 383 C.R.R. (2d) 354, 138 W.C.B. (2d) 580 | (N.S. S.C., Apr 21, 2017)

2007 SCC 26
Supreme Court of Canada

R. v. Hape

2007 CarswellOnt 3563, 2007 CarswellOnt 3564, 2007 SCC 26, [2007] 2 S.C.R. 292, [2007] S.C.J. No. 26, 160 C.R.R. (2d) 1, 220 C.C.C. (3d) 161, 227 O.A.C. 191, 280 D.L.R. (4th) 385, 363 N.R. 1, 47 C.R. (6th) 96, 73 W.C.B. (2d) 528, J.E. 2007-1140

Lawrence Richard Hape (Appellant) and Her Majesty The Queen (Respondent) and Attorney General of Ontario (Intervener)

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

Heard: October 12, 2006
Judgment: June 7, 2007
Docket: 31125

Proceedings: affirming *R. v. Hape* (2005), [2005] O.J. No. 3188, 201 O.A.C. 126, 2005 CarswellOnt 3298 (Ont. C.A.)**Proceedings: affirming *R. v. Hape* (2002), 2002 CarswellOnt 4295, [2002] O.J. No. 4873 (Ont. S.C.J.)Proceedings: and affirming *R. v. Hape* (2002), 2002 CarswellOnt 6188 (Ont. S.C.J.)Proceedings: and affirming *R. v. Hape* (2002), [2002] O.J. No. 5044, 2002 CarswellOnt 6189 (Ont. S.C.J.)**

Counsel: Alan D. Gold, Vanessa Arsenault for Appellant
John North, Robert W. Hubbard for Respondent
Michal Fairburn for for Intervener

Subject: Criminal; Constitutional; International; Evidence; Human Rights
Related Abridgment Classifications
Criminal law
IV Charter of Rights and Freedoms
IV.12 Life, liberty and security of person [s. 7]
IV.12.c Principles of fundamental justice
IV.12.c.iv Fair and impartial hearing
Criminal law
IV Charter of Rights and Freedoms
IV.32 Applicability [s. 32]
International law
III Extraterritorial application of domestic law
III.2 Of Canadian law outside Canada
III.2.a General principles
Headnote
Criminal law --- Charter of Rights and Freedoms — Applicability
RCMP commenced investigation of accused for suspected money laundering through accused's investment company located in Turks and Caicos Islands — Turks and Caicos officer agreed to allow RCMP to continue investigation on Turks and Caicos territory under his authority — RCMP searched offices of investment company in Turks and Caicos and seized information and

documents — Accused was charged with money laundering — At trial, no warrants for searches were entered into evidence — Accused unsuccessfully brought application to exclude documentary evidence obtained from offices in Turks and Caicos on basis of violation of s. 8 of Canadian Charter of Rights and Freedoms — Application judge held that Charter did not apply to searches and seizures — Accused was convicted of two counts of money laundering — Court of Appeal dismissed accused's appeal from convictions — Accused appealed — Appeal dismissed — Charter did not apply to searches and seizures conducted by RCMP officers outside Canada — Although Canadian state actors were involved, searches and seizures took place in Turks and Caicos and so were not matters within authority of Parliament — Turks and Caicos did not consent to Canadian extraterritorial enforcement jurisdiction in this case.

International law --- Extraterritorial application of domestic law — Of Canadian law outside Canada — General principles

RCMP commenced investigation of accused for suspected money laundering through accused's investment company located in Turks and Caicos Islands — Turks and Caicos officer agreed to allow RCMP to continue investigation on Turks and Caicos territory under his authority — RCMP searched offices of investment company in Turks and Caicos and seized information and documents — Accused was charged with money laundering — At trial, no warrants for searches were entered into evidence — Accused unsuccessfully brought application to exclude documentary evidence obtained from offices in Turks and Caicos on basis of violation of s. 8 of Canadian Charter of Rights and Freedoms — Application judge held that Charter did not apply to searches and seizures — Accused was convicted of two counts of money laundering — Court of Appeal dismissed accused's appeal from convictions — Accused appealed — Appeal dismissed — Charter did not apply to searches and seizures conducted by RCMP officers outside Canada — Although Canadian state actors were involved, searches and seizures took place in Turks and Caicos and so were not matters within authority of Parliament — Turks and Caicos did not consent to Canadian extraterritorial enforcement jurisdiction in this case — Admission of documents obtained through searches did not render trial unfair.

Criminal law --- Charter of Rights and Freedoms — Life, liberty and security of person — Principles of fundamental justice — Fair trial

RCMP commenced investigation of accused for suspected money laundering through accused's investment company located in Turks and Caicos Islands — Turks and Caicos officer agreed to allow RCMP to continue investigation on Turks and Caicos territory under his authority — RCMP searched offices of investment company in Turks and Caicos and seized information and documents — Accused was convicted of two counts of money laundering — At trial, no warrants for searches were entered into evidence — Trial judge refused to grant order excluding documents obtained during searches because admission of evidence would not render trial unfair — Accused's appeal from conviction was dismissed on other grounds — Accused appealed — Appeal dismissed — Admission of evidence did not violate accused's right to fair trial — Documents were not conscriptive evidence — Actions of officers were not unreasonable, unfair or improper, and officers acted in good faith — Way in which evidence was obtained in no way undermined its reliability — Accused's reasonable expectation should have been that Turks and Caicos law would apply to investigation since he chose to conduct business there — There was no evidence that searches were conducted in manner inconsistent with requirements of Turks and Caicos law — There was no basis for concluding that procedural requirements for lawful search and seizure under Turks and Caicos law failed to meet basic standards commonly accepted by free and democratic societies.

Droit criminel --- Charte des droits et libertés — Applicabilité

Soupçonnant l'accusé de blanchir de l'argent au moyen d'une société d'investissement établie dans les îles Turks et Caicos, la GRC a entrepris une enquête à son sujet — Commissaire local a autorisé la GRC à poursuivre l'enquête, sous son autorité, sur le territoire des îles Turks — GRC a perquisitionné les bureaux de la société d'investissement dans les îles Turks et Caicos et a saisi des documents — Accusé a été mis en accusation pour blanchiment d'argent — Aucun mandat n'a été mis en preuve au procès — Accusé a déposé, sans succès, une requête visant à faire exclure la preuve documentaire saisie dans ses bureaux des îles Turks et Caicos au motif qu'elle avait été obtenue en violation de l'art. 8 de la Charte canadienne des droits et libertés — Juge de la requête a conclu que la Charte ne s'appliquait pas aux perquisitions et saisies — Accusé a été reconnu coupable de deux chefs d'accusation de blanchiment d'argent — Cour d'appel a rejeté l'appel interjeté par l'accusé à l'encontre des déclarations de culpabilité — Accusé a formé un pourvoi — Pourvoi rejeté — Charte ne s'appliquait pas aux perquisitions et saisies faites par les officiers de la GRC à l'extérieur du Canada — Même si des acteurs étatiques canadiens étaient en cause, les fouilles, les perquisitions et les saisies ont eu lieu aux îles Turks et Caicos et n'appartenaient donc pas à un domaine relevant du Parlement — Îles Turks et Caicos n'ont pas consenti en l'espèce à l'exercice extraterritorial de la compétence d'exécution du Canada.

Droit international --- Application extraterritoriale du droit interne — D'une loi canadienne à l'extérieur du Canada — Principes généraux

Soupçonnant l'accusé de blanchir de l'argent au moyen d'une société d'investissement établie dans les îles Turks et Caicos, la GRC a entrepris une enquête à son sujet — Commissaire local a autorisé la GRC à poursuivre l'enquête, sous son autorité, sur le territoire des îles Turks — GRC a perquisitionné les bureaux de la société d'investissement dans les îles Turks et Caicos et a saisi des documents — Accusé a été mis en accusation pour blanchiment d'argent — Aucun mandat n'a été mis en preuve au procès — Accusé a déposé, sans succès, une requête visant à faire exclure la preuve documentaire saisie dans ses bureaux des îles Turks et Caicos au motif qu'elle avait été obtenue en violation de l'art. 8 de la Charte canadienne des droits et libertés — Juge de la requête a conclu que la Charte ne s'appliquait pas aux perquisitions et saisies — Accusé a été reconnu coupable de deux chefs d'accusation de blanchiment d'argent — Cour d'appel a rejeté l'appel interjeté par l'accusé à l'encontre des déclarations de culpabilité — Accusé a formé un pourvoi — Pourvoi rejeté — Charte ne s'appliquait pas aux perquisitions et saisies faites par les officiers de la GRC à l'extérieur du Canada — Même si des acteurs étatiques canadiens étaient en cause, les fouilles, les perquisitions et les saisies ont eu lieu aux îles Turks et Caicos et n'appartenaient donc pas à un domaine relevant du Parlement — Îles Turks et Caicos n'ont pas consenti en l'espèce à l'exercice extraterritorial de la compétence d'exécution du Canada — Admission de documents obtenus à la suite des perquisitions n'a pas eu pour effet de rendre le procès inéquitable.

Droit criminel --- Charte des droits et libertés — Vie, liberté et sécurité de la personne — Principes de justice fondamentale — Procès équitable

Soupçonnant l'accusé de blanchir de l'argent au moyen d'une société d'investissement établie dans les îles Turks et Caicos, la GRC a entrepris une enquête à son sujet — Commissaire local a autorisé la GRC à poursuivre l'enquête, sous son autorité, sur le territoire des îles Turks — GRC a perquisitionné les bureaux de la société d'investissement dans les îles Turks et Caicos et a saisi des documents — Accusé a été reconnu coupable de deux chefs d'accusation de blanchiment d'argent — Aucun mandat n'a été mis en preuve au procès — Juge du procès a refusé de rendre une ordonnance qui aurait eu pour effet d'exclure les documents obtenus grâce aux perquisitions parce que l'admission de cette preuve n'aurait pas rendu le procès inéquitable — Appel de l'accusé à l'encontre de sa déclaration de culpabilité a été rejeté pour d'autres motifs — Accusé a formé un pourvoi — Pourvoi rejeté — Admission de la preuve n'a pas violé le droit de l'accusé à un procès équitable — Il ne s'agissait pas d'une preuve obtenue en mobilisant l'accusé contre lui-même — Conduite des policiers n'était pas déraisonnable, inéquitable ou inappropriée et les officiers ont agi de bonne foi — Façon dont la preuve a été obtenue n'a pas affaibli sa fiabilité — En choisissant d'exercer ses activités aux îles Turks et Caicos, l'accusé aurait dû raisonnablement s'attendre à ce que le droit de l'archipel s'applique à l'enquête — Rien ne démontrait que les perquisitions et les saisies avaient été effectuées sans que les exigences du droit local soient respectées — Rien ne permettait de conclure que les exigences procédurales applicables aux fouilles, aux perquisitions et aux saisies dans l'archipel n'étaient pas équivalentes à celles qui s'appliquent généralement à ces mesures dans les sociétés libres et démocratiques.

The RCMP commenced an investigation of the accused for suspected money laundering through the accused's investment company located in the Turks and Caicos Islands. The officer in charge of criminal investigations on the Islands agreed to allow the RCMP to continue the investigation on Turks and Caicos territory, but warned that he would be in charge and that the RCMP would be working under his authority. The RCMP searched the offices of the investment company and seized information and documents.

The accused was charged with money laundering. At trial, no warrants for the searches were entered into evidence. The accused unsuccessfully applied to exclude the documentary evidence obtained through the searches on the basis of a violation of s. 8 of the Canadian Charter of Rights and Freedoms. The application judge found that the propriety and legality of the entries into the offices were governed by Turks and Caicos criminal law and procedure and the supervisory authority of the Turks and Caicos courts. As a result of the potential conflict between the concurrent exercise of jurisdiction by Canada and Turks and Caicos, the application judge held that the Charter did not apply to the searches and seizures.

The accused also applied under s. 7 and 24(1) of the Charter to exclude from evidence the seized documents. The application judge dismissed the application because the admission of the evidence would not render the trial unfair.

The accused was convicted of two counts of money laundering. The Court of Appeal dismissed the accused's appeal from these convictions. The accused appealed.

Held: The appeal was dismissed.

Per LeBel J. (McLachlin C.J.C. and Deschamps, Fish and Charron JJ. concurring): The issue of applying the Charter to activities that take place abroad implicates the extraterritorial enforcement of Canadian law. Certain fundamental rules of customary international law govern what actions a state may legitimately take outside its territory, such as territorial sovereign equality and non-intervention, the comity of nations, and the limits of international law to the extent that they are not incompatible with domestic law. Those rules are important interpretive aids for determining the jurisdictional scope of s. 32(1) of the Charter.

The Charter is subject to the same jurisdictional limits as the country's other laws or rules. Canadian law, whether statutory or constitutional, cannot be enforced in another state's territory without the other state's consent. This conclusion, which is consistent with the principles of international law, is also dictated by the words of the Charter itself. The Charter's territorial limitations are provided for in s. 32, which states that the Charter applies only to matters that are within the authority of Parliament or the provincial legislatures. In the absence of consent, Canada cannot exercise its enforcement jurisdiction over a matter situated outside Canadian territory. Since effect cannot be given to Canadian law in the circumstances, the matter falls outside the authority of Parliament and the provincial legislatures.

Canadian officers can participate in investigations abroad, but must do so under the laws of the foreign state. This rule derives from the principles of comity, sovereign equality and non-intervention. But the principle of comity may give way where the participation of Canadian officers in investigative activities sanctioned by foreign law would place Canada in violation of its international obligations in respect of human rights.

If evidence is gathered in a way that fails to meet certain minimum standards, its admission at trial in Canada may amount to a violation of s. 7 or s. 11(d) of the Charter, regardless of where it was gathered. Judges have the discretion to exclude evidence that would result in an unfair trial. However, it does not automatically follow that a trial will be unfair or that the principles of fundamental justice will be infringed if evidence obtained in circumstances that do not meet Charter standards is admitted. The circumstances in which the evidence is gathered must be considered in their entirety. Where commonly accepted laws are complied with, no unfairness results from variances in particular procedural requirements or from the fact that another country chooses to do things in a somewhat different way from Canada.

The methodology for determining whether the Charter applies to a foreign investigation can be summarized as follows. The first stage is to determine whether the activity in question falls under s. 32(1) such that the Charter applies to it. At this stage, two questions must be asked. First, is the conduct at issue that of a Canadian state actor? Second, if the answer is yes, is there an exception to the principle of sovereignty that would justify the application of the Charter to the extraterritorial activities of the state actor? In most cases, there will be no such exception and the Charter will not apply. At the second stage, it must be determined whether evidence obtained through the foreign investigation ought to be excluded at trial because its admission would render the trial unfair.

In this case, the RCMP officers involved in the searches and seizures were state actors for the purposes of s. 32(1) of the Charter. However, since the search was carried out in Turks and Caicos, it was not a matter within the authority of Parliament. It was not reasonable to suggest that Turks and Caicos consented to Canadian extraterritorial enforcement jurisdiction. That was enough to conclude that the Charter did not apply.

This was not a case where admission of the evidence violated the accused's right to a fair trial. The evidence was not conscriptive evidence. The actions of the RCMP officers were not unreasonable, unfair or improper. The RCMP officers acted in good faith at all times. The way in which the evidence was obtained did not undermine its reliability. Since he had chosen to conduct business there, the accused's reasonable expectation should have been that Turks and Caicos law would apply to the investigation. There was no evidence that the searches and seizures were conducted in a manner that was inconsistent with the requirements of Turks and Caicos law. There was no basis for concluding that the procedural requirements for a lawful search and seizure under Turks and Caicos law failed to meet basic standards commonly accepted by free and democratic societies.

Per Bastarache J. (Abella and Rothstein JJ. concurring): The Charter applies extraterritorially, but the obligations it creates in the circumstances will depend on the nature of the right at risk, the nature of the action of the police, the involvement of foreign authorities and the application of foreign laws.

Section 32(1) of the Charter includes all actions of Canadian police officers because it does not distinguish between actions taken on Canadian soil and actions taken abroad. It would also be unprincipled to draw a distinction the moment a Canadian police officer's foot touches foreign soil. The fact that Canadian law is not enforced in a foreign country does not mean that it cannot apply to a Canadian government official. In the instant case, the matter was a Canadian criminal investigation involving Canadian police acting abroad, which clearly made it a matter within the authority of Parliament or the provincial legislatures.

In any challenge to the conduct of Canadian officials investigating abroad, the onus will be on the claimant to demonstrate that the difference between fundamental human rights protection given by the local law and that afforded under the Charter is inconsistent with basic Canadian values; the onus will then shift to the government to justify its involvement in the activity. In many cases, differences between protections guaranteed by Charter principles and the protections offered by foreign procedures will simply be justified by the need for Canada to be involved in fighting transnational crime and the need to respect the sovereign authority of foreign states. On account of this, courts are permitted to apply a rebuttable presumption of Charter compliance where the Canadian officials were acting pursuant to a valid foreign law and procedures. Unless it is shown that those laws or procedures are substantially inconsistent with the fundamental principles emanating from the Charter, they will not give rise to the breach of a Charter right.

In this case, the Charter applied to the search and seizures conducted by the RCMP in the Turks and Caicos Islands. However, the accused did not establish a breach of s. 8 of the Charter. The Canadian authorities were operating under the authority of the Turks and Caicos Island police, the local laws applied to the investigation and there was no evidence that the local laws had been breached or did not meet fundamental human rights standards. No evidence was led to suggest there were any differences between the fundamental human rights protections available under Turks and Caicos search and seizure laws and what the protections the Charter guarantees under Canadian law that would raise serious concerns. The seizure of documents was thus reasonable in the context.

Per Binnie J.: The appeal failed because the accused could not bring his case within the requirements that the impugned act fell within s. 32(1) of the Charter, and the application of the Charter to the actions of the Canadian police in the Turks and Caicos Islands did not interfere with the sovereign authority of the foreign state and thereby generate an *objectionable* extraterritorial effect. This case did not afford a proper springboard for the sweeping conclusion that any extraterritorial effect is objectionable. Issues of more far-reaching importance would soon confront Canadian courts, especially in the context of the "war on terror" and its progeny. Premature pronouncements that restricted the application of the Charter to Canadian officials operating abroad in relation to Canadian citizens should be avoided. The "objectionable extraterritorial effect" principle should be retained while leaving the door open to future developments in assessing the extraterritorial application of the Charter.

Soupçonnant l'accusé de blanchir de l'argent au moyen d'une société d'investissement établie dans les îles Turks et Caicos, la GRC a entrepris une enquête à son sujet. Le commissaire local a autorisé la GRC à poursuivre l'enquête sur le territoire de l'archipel mais il a précisé aux agents qu'il en conserverait la responsabilité et que la GRC serait soumise à son autorité. GRC a perquisitionné les bureaux de la société d'investissement et a saisi des documents.

L'accusé a été mis en accusation pour blanchiment d'argent. Aucun mandat n'a été mis en preuve au procès. L'accusé a déposé, sans succès, une requête visant à faire exclure la preuve documentaire saisie au motif qu'elle avait été obtenue en contravention de l'art. 8 de la Charte canadienne des droits et libertés. Le juge de la requête a conclu que la régularité et la légalité des entrées dans les bureaux relevaient du droit criminel et de la procédure pénale des îles Turks et Caicos et se trouvaient soumises au contrôle des tribunaux de ce pays. Puisque l'exercice de la compétence canadienne fondée sur la nationalité concurremment avec celle des îles Turks et Caicos fondée sur la territorialité risquait de faire naître un conflit, le juge de la requête a conclu que la Charte ne s'appliquait pas aux perquisitions et saisies.

L'accusé a aussi demandé que les documents saisis soient exclus de la preuve en vertu de l'art. 7 et du par. 24(1) de la Charte. Le juge de la requête a rejeté la demande parce que l'admission de cette preuve ne rendrait pas le procès inéquitable.

L'accusé a été reconnu coupable de deux chefs d'accusation de blanchiment d'argent. La Cour d'appel a rejeté l'appel interjeté par l'accusé à l'encontre des déclarations de culpabilité. L'accusé a formé un pourvoi.

LeBel, J. (McLachlin, J.C.C., Deschamps, Fish, Charron, JJ., souscrivant à son opinion): L'assujettissement à la Charte de mesures prises à l'étranger suppose l'application extraterritoriale du droit canadien. Certaines règles de fond du droit international coutumier déterminent les actes qu'un État peut accomplir légitimement à l'étranger, tels que l'égalité souveraine et la non-intervention, la courtoisie entre les nations et les règles du droit international qui sont compatibles avec le droit interne. Ces règles sont d'une grande utilité pour circonscrire l'application territoriale du par. 32(1) de la Charte.

La Charte est sujette aux mêmes limites d'application que les autres textes législatifs ou réglementaires du pays. Qu'il soit de nature législative ou constitutionnelle, le droit canadien ne peut pas être appliqué à l'étranger sans le consentement de l'État en cause. Cette conclusion découle non seulement des principes du droit international, mais aussi du texte même de la Charte. Les limites territoriales de l'application de la Charte sont énoncées à l'art. 32, lequel précise qu'elle ne s'applique qu'aux domaines relevant du Parlement ou des législatures provinciales. S'il n'obtient pas le consentement de l'autre État, le Canada ne peut

exercer sa compétence d'exécution lorsque l'objet de cette dernière se trouve sur le territoire de cet autre État. Comme il ne peut alors être donné effet au droit canadien, le domaine échappe à la compétence du Parlement et des législatures provinciales.

Un policier canadien peut prendre part à une enquête à l'étranger, mais il doit alors se soumettre aux lois de l'État d'accueil. Cette règle découle des principes de courtoisie, d'égalité souveraine et de non-intervention. Or, le principe de courtoisie peut cesser de justifier la participation d'un policier canadien à une activité d'enquête permise par le droit étranger lorsque cette participation emporterait le manquement du Canada à ses obligations internationales en matière de droits de la personne.

Lorsqu'un élément de preuve est obtenu d'une manière qui ne respecte pas certaines conditions de base, son admission en preuve au Canada peut emporter la violation de l'art. 7 ou de l'al. 11d) de la Charte, peu importe l'endroit où il a été obtenu. Le tribunal détient le pouvoir discrétionnaire d'écarter un élément de preuve susceptible de rendre le procès inéquitable. Cependant, l'admission en preuve d'un élément obtenu dans des circonstances non conformes aux exigences de la Charte ne rendra pas automatiquement le procès inéquitable ni ne constituera d'emblée une atteinte aux principes de justice fondamentale. Il faut examiner toutes les circonstances de l'obtention d'un élément de preuve. Lorsque les règles généralement reconnues sont respectées, une différence au chapitre des exigences procédurales ou le choix du pays étranger de faire les choses différemment n'entraîne pas d'iniquité.

On peut résumer la méthode grâce à laquelle on peut déterminer si la Charte s'applique à une enquête à l'étranger de la façon suivante. La première étape consiste à se demander si l'acte considéré tombe sous le coup du par. 32(1) et est soumis à la Charte. Deux sous-questions se posent alors. Premièrement, l'acte a-t-il été accompli par un acteur étatique canadien? Deuxièmement, dans l'affirmative, il peut se révéler nécessaire de déterminer si une exception au principe de souveraineté justifie l'application de la Charte aux activités extraterritoriales de l'acteur étatique. Dans la plupart des cas, aucune ne vaudra, et la Charte n'aura pas d'effet. À la seconde étape, il s'agira de déterminer si la preuve obtenue à l'issue de l'enquête à l'étranger doit être écartée au motif qu'elle est de nature à compromettre l'équité du procès

En l'espèce, les policiers de la GRC impliqués dans les perquisitions et les saisies se qualifiaient à titre d'acteurs étatiques au sens du par. 32(1) de la Charte. Toutefois, comme les perquisitions s'étaient déroulées dans les îles Turks et Caicos, elles échappaient à la compétence du Parlement. Il n'était pas raisonnable de prétendre que les îles Turks et Caicos avaient consenti à ce que le Canada exerce sa compétence d'exécution extraterritoriale. Cela suffisait pour conclure que la Charte ne s'appliquait pas.

Il ne s'agissait pas d'un cas où l'admission d'une preuve avait enfreint le droit de l'accusé à un procès équitable. Il ne s'agissait pas d'une preuve obtenue en mobilisant l'accusé contre lui-même. La conduite des policiers n'était pas déraisonnable, inéquitable ou inappropriée. Les officiers de la GRC ont agi de bonne foi en tout temps. La façon dont la preuve a été obtenue n'a pas affaibli sa fiabilité. En choisissant d'exercer ses activités aux îles Turks et Caicos, l'accusé aurait dû raisonnablement s'attendre à ce que le droit de l'archipel s'applique à l'enquête. Rien ne démontrait que les perquisitions et les saisies avaient été effectuées sans que les exigences du droit local ne soient respectées. Rien ne permettait de conclure que les exigences procédurales applicables aux fouilles, aux perquisitions et aux saisies dans l'archipel n'étaient pas équivalentes à celles qui s'appliquent généralement à ces mesures dans les sociétés libres et démocratiques.

Bastarache, J. (Abella, Rothstein, JJ., souscrivant à son opinion): La Charte s'applique à l'extérieur du territoire canadien, mais les obligations qu'elle crée dépendent de la nature du droit en jeu et de la mesure policière, de la participation des autorités étrangères et de l'application des lois étrangères.

La compétence que confère le par. 32(1) vise tous les actes des policiers canadiens précisément parce que l'art. 32 ne distingue pas entre les mesures prises au Canada et celles prises à l'étranger. Il ne serait pas fondé non plus de faire une distinction dès le moment où le policier canadien foule le sol étranger. Ce n'est pas parce qu'on ne peut lui donner d'effet dans un pays étranger que le droit canadien ne peut s'appliquer à un fonctionnaire canadien. En l'espèce, il s'agissait d'une enquête criminelle impliquant un corps policier canadien agissant à l'étranger, ce qui en faisait clairement une affaire soumise à la compétence du Parlement ou des législatures provinciales.

La personne qui conteste l'acte d'un fonctionnaire canadien enquêtant à l'étranger devra démontrer que l'écart entre la protection des droits fondamentaux de la personne par le droit étranger et celle prévue par la Charte est incompatible avec les valeurs fondamentales canadiennes. Il incombera alors au gouvernement de justifier sa participation à l'acte en cause. Dans bien des cas, l'écart entre la protection assurée par les principes qui sous-tendent la Charte et celle offerte par la procédure étrangère sera simplement justifié par la nécessité que le Canada participe à la lutte contre la criminalité transnationale et respecte l'autorité souveraine des États étrangers. C'est pourquoi le tribunal peut appliquer la présomption réfutable du respect de la Charte lorsqu'un fonctionnaire canadien a agi conformément aux règles de droit et de procédure étrangères. Il n'y aura atteinte à un droit

garanti par la Charte que si une incompatibilité importante entre les règles de droit et de procédure étrangères et les principes fondamentaux de la Charte est établie.

En l'espèce, la Charte s'appliquait aux fouilles, aux perquisitions et aux saisies de la GRC aux îles Turks et Caicos. Toutefois, l'accusé n'a pas prouvé la violation de l'art. 8 de la Charte. Les autorités canadiennes ont agi sous l'autorité du corps de police des îles Turks et Caicos, l'enquête était assujettie aux lois locales et il n'y avait aucune preuve que ces dernières avaient été enfreintes ou qu'elles ne respectaient pas les normes en matière de droits fondamentaux de la personne. Il n'y avait aucune preuve suggérant qu'il avait des différences préoccupantes entre la protection des droits fondamentaux de la personne et les dispositions régissant les fouilles, les perquisitions et les saisies aux îles Turks et Caicos et les garanties prévues par la Charte. La saisie des documents n'était donc pas abusive dans le contexte.

Binnie, J.: Le pourvoi doit être rejeté parce que l'accusé n'a pu prouver, selon les exigences établies, que l'acte reproché tombe sous le coup du par. 32(1) de la Charte et que l'application de la Charte aux actes des policiers canadiens aux îles Turks et Caicos ne constituait pas une atteinte à l'autorité souveraine de l'État étranger et ne produisait donc pas d'effet extraterritorial inacceptable. La présente affaire n'offrait pas l'assise voulue pour exercer un revirement tel qu'il serait possible de conclure que tout effet extraterritorial est inacceptable. Les tribunaux canadiens seront bientôt saisis de questions d'une portée beaucoup plus grande, en particulier dans le contexte de la « guerre au terrorisme » et des mesures qui en découlent. Il faut éviter de formuler prématurément des énoncés qui limitent l'application de la Charte à l'égard des fonctionnaires canadiens exerçant leurs activités à l'étranger relativement à des citoyens canadiens. Le principe de l'« effet extraterritorial inacceptable » devrait être retenu tout en gardant la porte ouverte à de futurs développements dans l'appréciation de l'application extraterritoriale de la Charte.

Annotation

In *Hape*, the majority does a salutary job at articulating the international law principles of jurisdiction, and its review of how international law and Canadian domestic law interact puts paid to some rather haphazard approaches in the past. However, given the three-way split among the members of the Court, it is probably not the last word on the vexing problem of if and how to apply the *Charter* extraterritorially.

The majority's reasons indicate that the *Charter* will not be applied to the actions of police officers who are operating on the territory of other states, except in the exceptional circumstance of the foreign state's officials actually granting permission for Canadian law to be applied on its territory. The latter situation is not unheard of (see *R. v. Dorsay* (2006), 42 C.R. (6th) 155 (B.C. C.A.)), but will not often be a feature of transnational police investigations. While the Court's official report of the case indicates its view that *R. v. Cook*, [1998] 2 S.C.R. 597, 19 C.R. (5th) 1 is being distinguished, the *Hape* approach cannot be reconciled with the facts in *Cook*. The Canadian police in that case had been given permission to question the suspect but not to apply Canadian law. Accordingly, it seems that *Cook* has been overruled.

What the majority appears to have done is simply extended the reasoning in *R. v. Terry*, 48 C.R. (4th) 137 and *R. v. Harrer*, [1995] 3 S.C.R. 562, 42 C.R. (4th) 269, which dealt with foreign police officers operating in their own states, to Canadian police operating in foreign states. Absent the permission of the foreign state, the *Charter* does not apply and the target of the Canadian investigation enjoys no procedural rights vis-à-vis the investigation — either at the time of the investigation or at trial. The ultimate recourse is to sections 7 and 11(d), to exclude the impugned evidence where it would render the trial unfair.

The Court had a very difficult analytical task in this case, and the majority makes a solid effort at attaining both doctrinal clarity and practical utility. The judgment is very much an exercise in statutory interpretation, recognizing the unique characteristics both of interpreting constitutional law, and of applying the presumption of conformity with international law in so doing. While the majority presents itself as being driven towards certain conclusions, however, the obstacles they see as preventing extraterritorial application of the *Charter* are actually the products of deliberate choices that they make.

For example, the majority ultimately grounds its finding that the *Charter* cannot be applied extraterritorially on its interpretation of section 32 (and drawing on a similar interpretation by L'Heureux-Dubé J. in dissent in *Cook*). However, it uses a rather dubious reading of the phrase "matters within the authority of Parliament", which has always been understood to refer to subject matter and the section 91/92 divide in the Constitution. Policing is one of the quintessential matters within the authority of the federal Crown, and the *Charter* was obviously intended by the framers to cover this activity. Unlike a regular statute, determining whether the *Charter* has any extraterritorial effect requires reading it together with the law to which it is being applied. Taking

a dynamic, contextual approach to interpreting the *Charter* it is just as valid to reason that, since Canadian law has evolved to allow police to operate outside Canada, the *Charter* must be capable of such evolution and thus amenable to extraterritorial application in appropriate situations. Indeed, this has been the position of the Court since *Harrer*.

Nonetheless, the majority is convinced that applying the *Charter* to the Canadian police is untenable, since it would result in an exercise of Canadian enforcement/investigative jurisdiction in the foreign state. This, too, is a deliberate choice, and it may be confusing the question of jurisdiction with the question of what law applies to the investigation. Normally, of course, Canadian police cannot exercise any investigational powers in the foreign state. However, as Bastarache J. points out, as soon as the local police or authorities let them onto foreign soil to act as police (whether it is a "cooperative" investigation or otherwise), then they are being permitted to exercise enforcement jurisdiction. Of course the Canadian police cannot exercise their powers in such a way as to force the Turks and Caicos authorities to set up a different statutory scheme to accommodate them, but that is not the point — they are still exercising enforcement powers. These may be in an attenuated form, because local law applies and the Canadian police can act only within its bounds, but it is still enforcement jurisdiction. This reasoning circumvents the apparition of interference with the sovereignty of the foreign state which so troubles the majority, but there is a deliberate steering away from it.

The result they reach, that the *Charter* basically can never be applied extraterritorially, has the advantage of being tidy and easy to apply. The Canadian police are assimilated to the local police and can exercise only the latter's powers — except, of course, where Canada's international human rights obligations are engaged, where they must refuse to undertake any activities that would violate them. But how is it that acting in accordance with *Charter* guarantees results in objectionable enforcement jurisdiction, while acting in accordance with international human rights obligations (which may not bind the host state) does not? In both cases, the Canadian police would likely have to refuse to do certain things, which is the kind of interference with the local investigatory standards that the majority sees as the problem to begin with.

Moreover, the *Charter* is the primary means by which Canada's international human rights obligations (or at least the relevant ones) are implemented into Canadian law. In suggesting these obligations as the yardstick for shaping the way Canadian officers act in the foreign state, the Court seems to miss that *failing* to apply the *Charter* to the actions of its agents may have the effect of contravening Canada's international human rights obligations.

The Court is *ad idem* that, as a policy goal, we want Canadian police to be participating in transnational investigations. What we don't want is for the abilities of Canadian police to operate in foreign states to be hampered beyond effectiveness by a clash between *Charter* standards and local laws. On the other hand, we also don't want a situation where, simply by putting themselves under the authority of a local official, the Canadian police are immunized completely from *Charter* compliance — which is where the majority position leaves us. We do want the police to have some guidance as to what they can and cannot do in foreign states. As Justice Bastarache points out, the majority's suggestion that Canadian police would have to abstain where the foreign investigational standards would require them to violate Canada's international human rights obligations is essentially no guidance at all.

Justice Binnie notes that the matter was not fully argued before the Court, and this probably was not the best set of facts for such a broad and conclusive judgment. Moreover, having entered the waters of international law, the Court should have dived in. The extraterritorial application of human rights standards to state authorities operating abroad is a very current issue in the international sphere. Had the Court considered the jurisprudence of the European Court of Human Rights, the United Nations Human Rights Committee and the Inter-American Commission on Human Rights on analogous questions, it might have been drawn towards a different result. Given the number of contentious cases on this very question which are proceeding through the lower courts, it seems likely that the Court will be compelled to revisit this badly-divided opinion.

Robert J. Currie [1]

Table of Authorities

Cases considered by *LeBel J.*:

Abbasi v. Secretary of State for Foreign & Commonwealth Affairs (November 6, 2002), Carnwath L.J., Phillips L.J., Waller L.J. (Eng. C.A.) — considered

Bouzari v. Iran (Islamic Republic) (2004), 2004 CarswellOnt 2681, 243 D.L.R. (4th) 406, (sub nom. *Bouzari v. Islamic Republic of Iran)* 71 O.R. (3d) 675, 122 C.R.R. (2d) 26 (Ont. C.A.) — considered

Bouzari v. Iran (Islamic Republic) (2005), 2005 CarswellOnt 292, 2005 CarswellOnt 293, 122 C.R.R. (2d) 376 (note), (sub nom. *Bouzari v. Canada (Attorney General))* 204 O.A.C. 399 (note), (sub nom. *Bouzari v. Canada (Attorney General))* 337 N.R. 190 (note), [2005] 1 S.C.R. vi (S.C.C.) — referred to

Canadian Foundation for Children, Youth & the Law v. Canada (Attorney General) (2004), 2004 SCC 4, 2004 CarswellOnt 252, 2004 CarswellOnt 253, 315 N.R. 201, 183 O.A.C. 1, 70 O.R. (3d) 94 (note), (sub nom. *Canadian Foundation for Children v. Canada)* [2004] 1 S.C.R. 76, 115 C.R.R. (2d) 88, 16 C.R. (6th) 203, 46 R.F.L. (5th) 1, 234 D.L.R. (4th) 257, 180 C.C.C. (3d) 353 (S.C.C.) — referred to

Cotroni c. Centre de Prévention de Montréal (1989), (sub nom. *El Zein c. Centre de Prévention de Montréal)* [1989] 1 S.C.R. 1469, (sub nom. *United States v. El Zein)* 96 N.R. 321, (sub nom. *El Zein c. Centre de Prévention de Montréal)* 23 Q.A.C. 182, (sub nom. *United States v. Cotroni)* 48 C.C.C. (3d) 193, 96 N.S.R. 321, (sub nom. *El Zein c. Centre de Prévention de Montréal)* 42 C.R.R. 101, 1988 CarswellQue 149, 1989 CarswellQue 129 (S.C.C.) — considered

Customs Régime between Germany and Austria, Re (1931), [1931] P.C.I.J. Ser. A/B 41 (P.C.I.J.) — considered

Daniels v. White (1968), 4 C.R.N.S. 176, 64 W.W.R. 385, [1969] 1 C.C.C. 299, 2 D.L.R. (3d) 1, [1968] S.C.R. 517, 1968 CarswellMan 23 (S.C.C.) — considered

Exemption of United States Forces from Proceedings in Canadian Criminal Courts, Re (1943), 80 C.C.C. 161, [1943] 4 D.L.R. 11, 1943 CarswellNat 35, [1943] S.C.R. 483 (S.C.C.) — considered

Kindler v. Canada (Minister of Justice) (1991), 8 C.R. (4th) 1, [1991] 2 S.C.R. 779, 67 C.C.C. (3d) 1, 84 D.L.R. (4th) 438, 129 N.R. 81, 6 C.R.R. (2d) 193, 1991 CarswellNat 3, 45 F.T.R. 160 (note), 1991 CarswellNat 831 (S.C.C.) — considered

"Lotus" (The), Re (1927), [1927] P.C.I.J. Ser. A 10 (P.C.I.J.) — considered

Mack v. Canada (Attorney General) (2002), 217 D.L.R. (4th) 583, 2002 CarswellOnt 2927, 96 C.R.R. (2d) 254, 165 O.A.C. 17, 24 Imm. L.R. (3d) 1, 60 O.R. (3d) 737, 60 O.R. (3d) 756 (Ont. C.A.) — referred to

Mack v. Canada (Attorney General) (2003), 2003 CarswellOnt 1455, 2003 CarswellOnt 1456, 101 C.R.R. (2d) 375 (note), 319 N.R. 196 (note), 191 O.A.C. 200 (note), [2003] 1 S.C.R. xiii (S.C.C.) — referred to

Morguard Investments Ltd. v. De Savoye (1990), 46 C.P.C. (2d) 1, 15 R.P.R. (2d) 1, 76 D.L.R. (4th) 256, 122 N.R. 81, [1991] 2 W.W.R. 217, 52 B.C.L.R. (2d) 160, [1990] 3 S.C.R. 1077, 1990 CarswellBC 283, 1990 CarswellBC 767 (S.C.C.) — considered

Ordon Estate v. Grail (1998), (sub nom. *Ordon v. Grail)* 232 N.R. 201, 40 O.R. (3d) 639 (headnote only), [1998] 3 S.C.R. 437, 1998 CarswellOnt 4391, 1999 A.M.C. 994, 1998 CarswellOnt 4390, (sub nom. *Ordon v. Grail)* 115 O.A.C. 1, 166 D.L.R. (4th) 193 (S.C.C.) — referred to

"Parlement Belge" (The) (1880), 5 P.D. 197 — considered

Powers of Ottawa & Rockcliffe Park to Levy Rates on Foreign Legations & High Commissioners' Residences, Re (1943), [1943] S.C.R. 208, 1943 CarswellNat 31, [1943] 2 D.L.R. 481 (S.C.C.) — referred to

R. v. Cook (1998), 1998 CarswellBC 2001, [1999] 5 W.W.R. 582, [1998] 2 S.C.R. 597, 57 B.C.L.R. (3d) 215, 1998 CarswellBC 2002, 230 N.R. 83, 128 C.C.C. (3d) 1, 164 D.L.R. (4th) 1, 5 B.H.R.C. 163, 19 C.R. (5th) 1, 112 B.C.A.C. 1, 182 W.A.C. 1, 55 C.R.R. (2d) 189 (S.C.C.) — distinguished

R. v. Hape (2002), 2002 CarswellOnt 6175 (Ont. S.C.J.) — referred to

R. v. Harrer (1995), 1995 CarswellBC 651, 1995 CarswellBC 1144, 42 C.R. (4th) 269, 101 C.C.C. (3d) 193, 128 D.L.R. (4th) 98, 186 N.R. 329, 64 B.C.A.C. 161, 105 W.A.C. 161, 32 C.R.R. (2d) 273, [1995] 3 S.C.R. 562 (S.C.C.) — considered

R. v. Libman (1985), 62 N.R. 161, 21 C.C.C. (3d) 206, 12 O.A.C. 33, (sub nom. *Libman v. R.)* 21 D.L.R. (4th) 174, [1985] 2 S.C.R. 178, 1985 CarswellOnt 951, 1985 CarswellOnt 951F (S.C.C.) — referred to

R. v. "North" (The) (1906), 1906 CarswellNat 47, 37 S.C.R. 385, 26 C.L.T. 380 (S.C.C.) — considered

R. v. Seaboyer (1991), 7 C.R. (4th) 117, 128 N.R. 81, 6 C.R.R. (2d) 35, [1991] 2 S.C.R. 577, 66 C.C.C. (3d) 321, 83 D.L.R. (4th) 193, 1991 CarswellOnt 109, 4 O.R. (3d) 383 (headnote only), 48 O.A.C. 81, 1991 CarswellOnt 1022 (S.C.C.) — considered

R. v. Terry (1996), 197 N.R. 105, 106 C.C.C. (3d) 508, 48 C.R. (4th) 137, 135 D.L.R. (4th) 214, 76 B.C.A.C. 25, 125 W.A.C. 25, 36 C.R.R. (2d) 21, [1996] 2 S.C.R. 207, 1996 CarswellBC 2299, 1996 CarswellBC 2300 (S.C.C.) — considered

R. v. Zingre (1981), 23 C.P.C. 259, 10 Man. R. (2d) 62, 38 N.R. 272, 61 C.C.C. (2d) 465, 127 D.L.R. (3d) 223, 1981 CarswellMan 47, [1981] 2 S.C.R. 392, 1981 CarswellMan 142 (S.C.C.) — considered

Reference re Public Service Employee Relations Act (Alberta) (1987), (sub nom. *A.U.P.E. v. Alberta (Attorney General)*) 28 C.R.R. 305, [1987] D.L.Q. 225, 1987 CarswellAlta 580, 1987 CarswellAlta 705, 87 C.L.L.C. 14,021, [1987] 1 S.C.R. 313, 38 D.L.R. (4th) 161, (sub nom. *Reference re Compulsory Arbitration)* 74 N.R. 99, [1987] 3 W.W.R. 577, 51 Alta. L.R. (2d) 97, 78 A.R. 1 (S.C.C.) — considered

Reference re s. 94(2) of the Motor Vehicle Act (British Columbia) (1985), 1985 CarswellBC 398, [1986] D.L.Q. 90, 1985 CarswellBC 816, [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536, 63 N.R. 266, 69 B.C.L.R. 145, 23 C.C.C. (3d) 289, 18 C.R.R. 30, 36 M.V.R. 240, [1986] 1 W.W.R. 481, 48 C.R. (3d) 289 (S.C.C.) — referred to

Reference re Seabed & Subsoil of Continental Shelf Offshore Newfoundland (1984), 1984 CarswellNat 698F, [1984] 1 S.C.R. 86, 5 D.L.R. (4th) 385, 51 N.R. 362, 1984 CarswellNat 698 (S.C.C.) — referred to

Reference re Secession of Quebec (1998), 228 N.R. 203, 1998 CarswellNat 1300, 161 D.L.R. (4th) 385, 1998 CarswellNat 1299, 55 C.R.R. (2d) 1, [1998] 2 S.C.R. 217 (S.C.C.) — referred to

Saint John (City) v. Fraser-Brace Overseas Corp. (1958), 13 D.L.R. (2d) 177, 1958 CarswellNB 49, [1958] S.C.R. 263 (S.C.C.) — considered

Schreiber v. Canada (Attorney General) (1998), 225 N.R. 297, 124 C.C.C. (3d) 129, 158 D.L.R. (4th) 577, 1998 CarswellNat 752, 1998 CarswellNat 753, 51 C.R.R. (2d) 253, 16 C.R. (5th) 1, [1998] 1 S.C.R. 841, 147 F.T.R. 309 (note), 5 B.H.R.C. 145 (S.C.C.) — considered

Schreiber v. Canada (Attorney General) (2002), (sub nom. *Schreiber v. Federal Republic of Germany)* 216 D.L.R. (4th) 513, 22 C.P.C. (5th) 207, 167 C.C.C. (3d) 51, 164 O.A.C. 354, 2002 SCC 62, 2002 CarswellOnt 2921, 2002 CarswellOnt 2922, 61 O.R. (3d) 160 (note), [2002] 3 S.C.R. 269, 292 N.R. 250 (S.C.C.) — referred to

Singh v. Canada (Minister of Employment & Immigration) (1985), 1985 CarswellNat 663, [1985] 1 S.C.R. 177, 17 D.L.R. (4th) 422, 58 N.R. 1, 12 Admin. L.R. 137, 14 C.R.R. 13, 1985 CarswellNat 152 (S.C.C.) — referred to

Slaight Communications Inc. v. Davidson (1989), 26 C.C.E.L. 85, 1989 CarswellNat 193, [1989] 1 S.C.R. 1038, 59 D.L.R. (4th) 416, (sub nom. *Davidson v. Slaight Communications Inc.)* 93 N.R. 183, 89 C.L.L.C. 14,031, 40 C.R.R. 100, 1989 CarswellNat 695 (S.C.C.) — considered

Suresh v. Canada (Minister of Citizenship & Immigration) (2002), 2002 SCC 1, 37 Admin. L.R. (3d) 159, [2002] 1 S.C.R. 3, 2002 CarswellNat 7, 2002 CarswellNat 8, 18 Imm. L.R. (3d) 1, 208 D.L.R. (4th) 1, 281 N.R. 1, 90 C.R.R. (2d) 1 (S.C.C.) — referred to

Trendtex Trading Corp. v. Central Bank of Nigeria (1977), [1977] 1 Q.B. 529, [1977] 1 All E.R. 881, [1977] 1 Lloyd's Rep. 581 (Eng. C.A.) — considered

United States v. Burns (2001), 39 C.R. (5th) 205, 265 N.R. 212, [2001] 3 W.W.R. 193, [2001] 1 S.C.R. 283, 85 B.C.L.R. (3d) 1, 2001 SCC 7, 2001 CarswellBC 272, 2001 CarswellBC 273, 151 C.C.C. (3d) 97, 195 D.L.R. (4th) 1, 81 C.R.R. (2d) 1, 148 B.C.A.C. 1, 243 W.A.C. 1 (S.C.C.) — referred to

United States v. Dynar (1997), (sub nom. *United States of America v. Dynar)* 44 C.R.R. (2d) 189, (sub nom. *United States of America v. Dynar)* 33 O.R. (3d) 478 (headnote only), (sub nom. *United States of America v. Dynar)* [1997] 2 S.C.R. 462, 8 C.R. (5th) 79, (sub nom. *United States of America v. Dynar)* 213 N.R. 321, (sub nom. *United States of America v. Dynar)* 115 C.C.C. (3d) 481, (sub nom. *United States of America v. Dynar)* 147 D.L.R. (4th) 399, 1997 CarswellOnt 1981, 1997 CarswellOnt 1982, (sub nom. *United States of America v. Dynar)* 101 O.A.C. 321 (S.C.C.) — considered

Venne v. Congo (Republic) (1971), [1971] S.C.R. 997, 22 D.L.R. (3d) 669, 1971 CarswellQue 41F, 1971 CarswellQue 41 (S.C.C.) — referred to

Cases considered by *Bastarache J.*:

Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc. (1984), (sub nom. *Hunter v. Southam Inc.)* 11 D.L.R. (4th) 641, 33 Alta. L.R. (2d) 193, (sub nom. *Hunter v. Southam Inc.)* 55 A.R. 291, 27 B.L.R. 297, 41 C.R. (3d) 97, 84 D.T.C. 6467, (sub nom. *Hunter v. Southam Inc.)* 14 C.C.C. (3d) 97, (sub nom. *Director of Investigations & Research Combines Investigation Branch v. Southam Inc.)* [1984] 6 W.W.R. 577, 1984 CarswellAlta 121, 1984 CarswellAlta 415, (sub nom. *Hunter v. Southam Inc.)* [1984] 2 S.C.R. 145, (sub nom. *Hunter v. Southam Inc.)* 55 N.R. 241, (sub nom. *Hunter v. Southam Inc.)* 2 C.P.R. (3d) 1, (sub nom. *Hunter v. Southam Inc.)* 9 C.R.R. 355 (S.C.C.) — considered

R. v. Caslake (1998), 48 C.R.R. (2d) 189, [1998] 1 S.C.R. 51, 123 Man. R. (2d) 208, 159 W.A.C. 208, [1999] 4 W.W.R. 303, 121 C.C.C. (3d) 97, 1998 CarswellMan 1, 1998 CarswellMan 2, 155 D.L.R. (4th) 19, 221 N.R. 281, 13 C.R. (5th) 1 (S.C.C.) — considered

R. v. Cook (1998), 1998 CarswellBC 2001, [1999] 5 W.W.R. 582, [1998] 2 S.C.R. 597, 57 B.C.L.R. (3d) 215, 1998 CarswellBC 2002, 230 N.R. 83, 128 C.C.C. (3d) 1, 164 D.L.R. (4th) 1, 5 B.H.R.C. 163, 19 C.R. (5th) 1, 112 B.C.A.C. 1, 182 W.A.C. 1, 55 C.R.R. (2d) 189 (S.C.C.) — considered

R. v. Dedman (1985), *(*sub nom. *Dedman v. R.)* [1985] 2 S.C.R. 2, 34 M.V.R. 1, *(*sub nom. *Dedman v. R.)* 46 C.R. (3d) 193, 11 O.A.C. 241, 20 D.L.R. (4th) 321, 60 N.R. 34, *(*sub nom. *Dedman v. R.)* 20 C.C.C. (3d) 97, 1985 CarswellOnt 103, 1985 CarswellOnt 942 (S.C.C.) — referred to

R. v. Evans (1996), 45 C.R. (4th) 210, 191 N.R. 327, 104 C.C.C. (3d) 23, 131 D.L.R. (4th) 654, 33 C.R.R. (2d) 248, 69 B.C.A.C. 81, 113 W.A.C. 81, [1996] 1 S.C.R. 8, 1996 CarswellBC 996, 1996 CarswellBC 996F (S.C.C.) — considered

R. v. Godoy (1998), 235 N.R. 134, 117 O.A.C. 127, 21 C.R. (5th) 205, 131 C.C.C. (3d) 129, 168 D.L.R. (4th) 257, 1998 CarswellOnt 5224, [1999] 1 S.C.R. 311, 1998 CarswellOnt 5223 (S.C.C.) — referred to

R. v. Hape (2002), 2002 CarswellOnt 6175 (Ont. S.C.J.) — referred to

R. v. Harrer (1995), 1995 CarswellBC 651, 1995 CarswellBC 1144, 42 C.R. (4th) 269, 101 C.C.C. (3d) 193, 128 D.L.R. (4th) 98, 186 N.R. 329, 64 B.C.A.C. 161, 105 W.A.C. 161, 32 C.R.R. (2d) 273, [1995] 3 S.C.R. 562 (S.C.C.) — considered

R. v. Kokesch (1990), [1990] 3 S.C.R. 3, [1991] 1 W.W.R. 193, 121 N.R. 161, 51 B.C.L.R. (2d) 157, 61 C.C.C. (3d) 207, 1 C.R. (4th) 62, 50 C.R.R. 285, 1990 CarswellBC 255, 1990 CarswellBC 763 (S.C.C.) — considered

R. v. Libman (1985), 62 N.R. 161, 21 C.C.C. (3d) 206, 12 O.A.C. 33, *(*sub nom. *Libman v. R.)* 21 D.L.R. (4th) 174, [1985] 2 S.C.R. 178, 1985 CarswellOnt 951, 1985 CarswellOnt 951F (S.C.C.) — referred to

R. v. Mann (2004), 21 C.R. (6th) 1, 241 D.L.R. (4th) 214, 185 C.C.C. (3d) 308, 122 C.R.R. (2d) 189, 324 N.R. 215, [2004] 3 S.C.R. 59, 2004 SCC 52, 2004 CarswellMan 303, 2004 CarswellMan 304, [2004] 11 W.W.R. 601, 187 Man. R. (2d) 1, 330 W.A.C. 1 (S.C.C.) — referred to

R. v. Terry (1996), 197 N.R. 105, 106 C.C.C. (3d) 508, 48 C.R. (4th) 137, 135 D.L.R. (4th) 214, 76 B.C.A.C. 25, 125 W.A.C. 25, 36 C.R.R. (2d) 21, [1996] 2 S.C.R. 207, 1996 CarswellBC 2299, 1996 CarswellBC 2300 (S.C.C.) — considered

Schreiber v. Canada (Attorney General) (1998), 225 N.R. 297, 124 C.C.C. (3d) 129, 158 D.L.R. (4th) 577, 1998 CarswellNat 752, 1998 CarswellNat 753, 51 C.R.R. (2d) 253, 16 C.R. (5th) 1, [1998] 1 S.C.R. 841, 147 F.T.R. 309 (note), 5 B.H.R.C. 145 (S.C.C.) — considered

United States v. Burns (2001), 39 C.R. (5th) 205, 265 N.R. 212, [2001] 3 W.W.R. 193, [2001] 1 S.C.R. 283, 85 B.C.L.R. (3d) 1, 2001 SCC 7, 2001 CarswellBC 272, 2001 CarswellBC 273, 151 C.C.C. (3d) 97, 195 D.L.R. (4th) 1, 81 C.R.R. (2d) 1, 148 B.C.A.C. 1, 243 W.A.C. 1 (S.C.C.) — referred to

United States v. Dynar (1997), *(*sub nom. *United States of America v. Dynar)* 44 C.R.R. (2d) 189, *(*sub nom. *United States of America v. Dynar)* 33 O.R. (3d) 478 (headnote only), *(*sub nom. *United States of America v. Dynar)* [1997] 2 S.C.R. 462, 8 C.R. (5th) 79, *(*sub nom. *United States of America v. Dynar)* 213 N.R. 321, *(*sub nom. *United States of America v. Dynar)* 115 C.C.C. (3d) 481, *(*sub nom. *United States of America v. Dynar)* 147 D.L.R. (4th) 399, 1997 CarswellOnt 1981, 1997 CarswellOnt 1982, *(*sub nom. *United States of America v. Dynar)* 101 O.A.C. 321 (S.C.C.) — referred to

Cases considered by *Binnie J.*:

R. v. Cook (1998), 1998 CarswellBC 2001, [1999] 5 W.W.R. 582, [1998] 2 S.C.R. 597, 57 B.C.L.R. (3d) 215, 1998 CarswellBC 2002, 230 N.R. 83, 128 C.C.C. (3d) 1, 164 D.L.R. (4th) 1, 5 B.H.R.C. 163, 19 C.R. (5th) 1, 112 B.C.A.C. 1, 182 W.A.C. 1, 55 C.R.R. (2d) 189 (S.C.C.) — followed

R. v. Harrer (1995), 1995 CarswellBC 651, 1995 CarswellBC 1144, 42 C.R. (4th) 269, 101 C.C.C. (3d) 193, 128 D.L.R. (4th) 98, 186 N.R. 329, 64 B.C.A.C. 161, 105 W.A.C. 161, 32 C.R.R. (2d) 273, [1995] 3 S.C.R. 562 (S.C.C.) — considered

R. v. Terry (1996), 197 N.R. 105, 106 C.C.C. (3d) 508, 48 C.R. (4th) 137, 135 D.L.R. (4th) 214, 76 B.C.A.C. 25, 125 W.A.C. 25, 36 C.R.R. (2d) 21, [1996] 2 S.C.R. 207, 1996 CarswellBC 2299, 1996 CarswellBC 2300 (S.C.C.) — considered

Schreiber v. Canada (Attorney General) (1998), 225 N.R. 297, 124 C.C.C. (3d) 129, 158 D.L.R. (4th) 577, 1998 CarswellNat 752, 1998 CarswellNat 753, 51 C.R.R. (2d) 253, 16 C.R. (5th) 1, [1998] 1 S.C.R. 841, 147 F.T.R. 309 (note), 5 B.H.R.C. 145 (S.C.C.) — considered

Statutes considered by *LeBel 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
Generally — considered

s. 1 — referred to

s. 7 — considered

s. 8 — considered

s. 10(a) — referred to

s. 10(b) — referred to

s. 11(d) — considered

s. 24(1) — referred to

s. 24(2) — referred to

s. 32 — referred to

s. 32(1) — considered
Controlled Drugs and Substances Act, S.C. 1996, c. 19
s. 9 — referred to
Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24
Generally — referred to

s. 6(1) — considered

s. 8 — considered
Criminal Code, R.S.C. 1985, c. C-46
Generally — referred to

s. 6(2) — considered

s. 7 — considered
Mutual Legal Assistance in Criminal Matters Act, R.S.C. 1985, c. 30 (4th Supp.)
Generally — referred to
Statute of Westminster, 1931 (22 & 23 Geo. 5), c. 4
s. 3 — referred to
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
Generally — considered

s. 1 — referred to

s. 7 — considered

ss. 7-14 — referred to

s. 8 — considered

s. 9 — referred to

s. 10(b) — considered

s. 11(d) — considered

s. 24(1) — referred to

s. 24(2) — referred to

s. 32 — referred to

s. 32(1) — considered

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

Generally — referred to

s. 7(3.7)-7(3.75) — referred to

s. 7(4.1) [en. 1997, c. 16, s. 1] — referred to

s. 117.02(1) [en. 1995, c. 39, s. 139] — referred to

s. 117.02(2) [en. 1995, c. 39, s. 139] — referred to

s. 199(2) — referred to

s. 254(2)-254(4) — referred to

s. 269.1(1) [en. R.S.C. 1985, c. 10 (3rd Supp.), s. 2] — referred to

s. 462 — referred to

ss. 487-489 — referred to

s. 495(1) — referred to

s. 495(2) — referred to

Narcotic Control Act, R.S.C. 1985, c. N-1

s. 10(1)(a) — referred to

Statutes considered by *Binnie 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

Generally — considered

s. 24(2) — referred to

s. 32(1) — referred to

Treaties considered by *LeBel J.*:

Charter of the United Nations, 1945, C.T.S. 1945/7; 59 Stat. 1031; T.S. No. 993

Generally — referred to

Article 2 ¶ 1 — considered

Declaration on the Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, 1970, G.A. Res. 2625(XXV)

Generally — referred to

Words and phrases considered

sovereignty

"Sovereignty" refers to the various powers, rights and duties that accompany statehood under international law. Jurisdiction — the power to exercise authority over persons, conduct and events — is one aspect of state sovereignty. Although the two are not coterminous, jurisdiction may be seen as the quintessential feature of sovereignty. Other powers and rights that fall under the umbrella of sovereignty include the power to use and dispose of the state's territory, the right to state immunity from the jurisdiction of foreign courts and the right to diplomatic immunity. In his individual opinion in *Customs Régime between Germany and Austria, Re*, [1931] P.C.I.J. Ser. A/B 41 (P.C.I.J.), at p. 57, Judge Anzilotti defined sovereignty as follows: "Independence ... is really no more than the normal condition of States according to international law; it may also be described as *sovereignty* (*suprema potestas*), or *external sovereignty*, by which is meant that the State has over it no other authority than that of international law."

comity

Comity refers to informal acts performed and rules observed by states in their mutual relations out of, politeness, convenience and goodwill, rather than strict legal obligation: *Oppenheim's International Law*, at pp. 50-51. When cited by the courts, comity is more a principle of interpretation than a rule of law, because it does not arise from formal obligations. Speaking in the private international law context in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 (S.C.C.), at p. 1095, La Forest J. defined comity as "the deference and respect due by other states to the actions of a state legitimately taken within its territory". In *Re Foreign Legations*, both Duff C.J. and Hudson J. referred in their reasons to *"Parlement Belge" (The)* (1880), 5 P.D. 197, in which Brett L.J. commented, at pp. 214-15, that the principle of international comity "induces every sovereign state to respect the independence and dignity of every other sovereign state".

APPEAL by accused from judgment reported at *R. v. Hape* (2005), [2005] O.J. No. 3188, 201 O.A.C. 126, 2005 CarswellOnt 3298 (Ont. C.A.), affirming accused's convictions for money laundering.

POURVOI de l'accusé à l'encontre d'une décision publiée à*R. v. Hape* (2005), [2005] O.J. No. 3188, 201 O.A.C. 126, 2005 CarswellOnt 3298 (Ont. C.A.), ayant confirmé les déclarations de culpabilité de l'accusé pour blanchiment d'argent.

***LeBel J.*:**

I. Introduction

A. Overview

1 At issue in this appeal is whether the *Canadian Charter of Rights and Freedoms* applies to extraterritorial searches and seizures by Canadian police officers. The appellant, Lawrence Richard Hape, is a Canadian businessman. He was convicted of two counts of money laundering contrary to s. 9 of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. At his trial, the Crown adduced documentary evidence that the police had gathered from the records of the appellant's investment company while searching its premises in the Turks and Caicos Islands. The appellant sought to have that evidence excluded, pursuant to s. 24(2) of the *Charter*, on the basis that the *Charter* applies to the actions of the Canadian police officers who conducted the searches and seizures and that the evidence was obtained in violation of his right under s. 8 of the *Charter* to be secure against unreasonable search and seizure. For the reasons that follow, I would affirm the convictions and dismiss the appeal.

B. Background

2 In the spring of 1996, the RCMP commenced an investigation of the appellant for suspected money laundering activities. Sergeant Nicholson, an undercover operative, contacted the appellant in October 1996 posing as someone interested in laundering proceeds of narcotics trafficking. On February 2, 1998, Sergeant Nicholson provided C$252,000 of "sting money" to the appellant on the understanding that the funds would be laundered through the appellant's investment company, the British

West Indies Trust Company ("BWIT"), located in the Turks and Caicos Islands, and transferred to an account in the Netherlands. Unbeknownst to the appellant, the RCMP had set up the account. Sergeant Nicholson gave the appellant a further US$80,000 on November 11, 1998, instructing him to send the funds to the same account in the Netherlands. The RCMP hoped to obtain documentation confirming the transfers and determine whether the BWIT was involved in other money laundering activities.

3 RCMP officers sought permission to conduct parts of their investigation in Turks and Caicos. Detective Superintendent Lessemun of the Turks and Caicos Police Force was in charge of criminal investigations on the Islands. In November 1997, he met with the two Canadian officers in charge of the RCMP's investigation, Detective Sergeant Boyle and Corporal Flynn. He agreed to allow the RCMP to continue the investigation on Turks and Caicos territory, but warned the officers that he would be in charge and that the RCMP would be working under his authority. Because the appellant was well known on the Islands and Detective Superintendent Lessemun was concerned that he could not trust all Turks and Caicos police officers, the Canadian officers dealt exclusively with him while planning and preparing their operations.

4 The investigators planned a covert entry into the BWIT's office for March 1998. RCMP technical experts assisted with the planning, which began in Canada using technical information provided by Detective Superintendent Lessemun. The experts traveled to the Turks and Caicos Islands in February 1998 to obtain information about the office's door locks and burglar alarm systems.

5 Late in the nights of February 7 and 8, 1998, the RCMP officers and Detective Superintendent Lessemun surreptitiously entered the BWIT's premises. The technical experts examined the office's locks and alarm systems from outside the building. They recorded what they observed, using a video camera. Throughout this perimeter search, Detective Superintendent Lessemun was with the RCMP investigators as a lookout.

6 During the day on February 9, 1998, two RCMP technical experts entered the reception area of the BWIT's office to observe what they could of the interior locks and alarm system. They entered the office under a ruse and spent a few minutes speaking with the receptionist.

7 There were no warrants authorizing the RCMP to enter the BWIT's premises in February 1998. The RCMP investigators were aware of this, but they testified that they had relied on Detective Superintendent Lessemun's expertise and advice regarding the legalities of investigations conducted on the Islands.

8 After the RCMP technical experts returned to Canada, they received further technical information from Detective Superintendent Lessemun to assist with the planning of the March 1998 covert entry. A briefing was held in the Bahamas on March 11, 1998, in preparation for the covert search. Present at the meeting were seven RCMP officers involved in the investigation and three American police officers. No Turks and Caicos officers were in attendance.

9 The investigators covertly entered the BWIT's office twice on March 14, 1998, once in the early hours of the morning and once shortly before midnight. The RCMP technical experts opened the locked doors of the office to enable the investigators to enter it. Detective Superintendent Lessemun entered the office with what the RCMP officers understood to be a warrant. He then took up a position outside the building to provide security around the perimeter and stop any Turks and Caicos police officers who might come by from jeopardizing the operation. Inside the office, the RCMP investigators downloaded information contained in the company's computer systems onto portable hard drives and electronically scanned documents from numerous client files, as well as company records and banking documents.

10 The RCMP officers testified at trial that they had understood separate warrants to be in place for each of the two covert entries of March 14, 1998. Officer Boyle said he saw a warrant for the first entry. Sergeant McDonagh, one of the technical experts, stated that after the first entry, but before the second, Detective Superintendent Lessemun had shown him a document that Sergeant McDonagh understood to be the warrant for the first entry. Sergeant McDonagh noted down the document's terms. Both Officer Boyle and Sergeant McDonagh understood from Detective Superintendent Lessemun that a warrant had been obtained for the second entry, but neither had any notes on this point or remembered having seen it. No warrants were introduced into evidence at trial. The Crown sought to introduce copies of two Turks and Caicos warrants, one dated March 13 and the

other March 14, 1998. The purported warrants, issued to Robert Conway Lessemun, authorized entry into the BWIT's office to search for computer and office records linking Richard Hape to the laundering of proceeds of drug trafficking. The copies of the warrants had not been authenticated, and counsel for the appellant objected to their admission at trial.

11 RCMP officers returned to the Turks and Caicos Islands in February 1999. Beginning on February 16 and continuing over the next three days, six RCMP officers, along with Detective Superintendent Lessemun and three other Turks and Caicos police officers, entered the BWIT's office and seized over one hundred banker's boxes of records. Officer Boyle testified that he had read a document he understood to be a warrant authorizing the entry and seizure, and had passed it to the other officers to read. Again, no warrant was entered into evidence at trial.

12 When the search was complete, the RCMP officers began loading the seized records onto their airplane with the intention of bringing them back to Canada. Detective Superintendent Lessemun informed the officers that they could not remove the records from the Islands. The boxes were unloaded. At trial, there was some suggestion that a Turks and Caicos court order had prevented the officers from removing the evidence from the jurisdiction, but no such order was admitted as evidence.

13 The RCMP returned to the Turks and Caicos Islands in March and October 1999. In the presence of Turks and Caicos police officers, the RCMP officers scanned thousands of the seized documents in order to bring electronic copies of them back to Canada. Ultimately, a number of the documents seized during the search became exhibits at the appellant's trial.

14 Money laundering charges were laid for the two transactions involving the funds Sergeant Nicholson had provided to the appellant. The appellant was also charged, along with a co-accused, Ross Beatty, with conspiring to launder funds. A lengthy and complex trial took place before Juriansz J. (as he then was) of the Ontario Superior Court of Justice, sitting without a jury. Before the trial started, the appellant brought a *Charter* application to exclude the documentary evidence obtained from the BWIT's office on the basis of a violation of the s. 8 guarantee against unreasonable search and seizure. The application was denied and the documents were admitted into evidence.

C. Judicial History

(1) Ontario Superior Court of Justice

15 The appellant called evidence on the s. 8 application. The Crown, taking the position that the *Charter* does not apply to searches and seizures conducted outside Canada and that the appellant had not established that he had standing to bring the application, sought a ruling on these two issues in advance of its decision on introducing evidence. Juriansz J. ruled on this application on January 17, 2002 ([2002] O.J. No. 3714 (Ont. S.C.J.)).

16 The application judge considered three decisions of this Court on the extraterritorial application of the Charter: *R. v. Harrer*, [1995] 3 S.C.R. 562 (S.C.C.), *R. v. Terry*, [1996] 2 S.C.R. 207 (S.C.C.), and *R. v. Cook*, [1998] 2 S.C.R. 597 (S.C.C.). He noted that all those cases concerned the application of the s. 10(*b*) right to counsel and that the question of the potential extraterritorial application of s. 8 might raise different issues. Relying on the majority decision in *Cook*, the application judge held that his task was to determine whether applying the *Charter* to the activities of the RCMP officers in Turks and Caicos would "interfere with the sovereign authority of the foreign state and thereby generate an objectionable extra-territorial effect" (para. 20).

17 In his argument before the application judge, the appellant resisted the characterization of the RCMP's actions in the instant case as part of a "co-operative investigation", within the meaning of *Terry*, with Turks and Caicos authorities, because the searches and seizures were carried out by the RCMP officers with little or no involvement of the Turks and Caicos police. The application judge rejected the argument that a "co-operative investigation" must involve relatively equal contributions from the participants (para. 24).

18 The application judge made several key findings of fact that were relevant to his *Charter* ruling. He noted that Detective Superintendent Lessemun, who was with the Canadian police at all times, had played a role in the investigation by acting as a lookout, providing information, and obtaining warrants. The Turks and Caicos contributed police authority. The RCMP was required to seek and receive permission from Turks and Caicos authorities to conduct the investigation in that jurisdiction. The

RCMP officers were operating under the authority of Detective Superintendent Lessemun. The fact that they were not permitted to remove the seized physical records from Turks and Caicos was a significant factor in the application judge's conclusion that they were subject to Turks and Caicos authority. The application judge found that all the RCMP's actions on the Turks and Caicos Islands were part of a "co-operative investigation" (para. 26).

19 As the next step in his analysis, the application judge considered whether the application of the *Charter* to the "co-operative investigation" would result in an objectionable extraterritorial effect. The application judge found that the propriety and legality of the entries into the BWIT's office were governed by Turks and Caicos criminal law and procedure and the supervisory authority of the Turks and Caicos courts. In light of that fact, he concluded that there was a potential conflict between the concurrent exercise of jurisdiction by Canada on the basis of nationality and by Turks and Caicos on the basis of territoriality. Juriansz J. held, as a result, that the *Charter* did not apply. He therefore dismissed the application without discussing whether the appellant had standing to bring the *Charter* application or whether the searches and seizures were conducted in accordance with the requirements of s. 8.

20 The appellant had also applied under ss. 7 and 24(1) of the *Charter* for a stay of proceedings on the basis that the police conduct had contravened fundamental notions of justice and that the ensuing trial would undermine the integrity of the justice system. In the alternative, the appellant requested an order excluding from evidence 26 documents seized from the BWIT. In his ruling on this application dated January 18, 2002, Juriansz J. relied on the findings of fact he had made on the s. 8 application. He noted that the RCMP officers had believed there were warrants for the entries that took place in March 1998 and February 1999 and had believed their actions to be lawful under Turks and Caicos law. No evidence to the contrary had been called. The burden of proving that the operations of the Canadian officers had violated Turks and Caicos law rested on the appellant. In refusing to grant the stay, Juriansz J. gave the following explanation:

> Considering that the applicant in this case has not established that the police conduct infringed a *Charter* right or was otherwise unlawful, and considering the police conduct as a whole, I have concluded that this is not one of those clearest of cases in which a stay ought to be granted.

Relying on *Harrer* and *Terry*, Juriansz J. stated that the overriding consideration was whether the admission of the evidence would result in an unfair trial. He reasoned that since the documents constituted real, non-conscriptive evidence, their reliability as evidence was not affected by the manner in which they were obtained. As the admission of the evidence would not therefore render the trial unfair, he refused to grant the exclusionary order.

21 On June 10, 2002, Juriansz J. found the appellant guilty beyond a reasonable doubt on both counts of money laundering ([2002] O.J. No. 5044 (Ont. S.C.J.)). The appellant was acquitted of the charge of conspiracy to launder funds.

(2) Ontario Court of Appeal (2005), 201 O.A.C. 126 (Ont. C.A.)

22 The appellant appealed his conviction to the Court of Appeal for Ontario on numerous grounds, one of which was that Juriansz J. had erred in his rulings on ss. 7 and 8 of the *Charter*. The appeal from the ruling on s. 7 was not pursued at the oral hearing before the Court of Appeal, and the issue of trial fairness is not before this Court. The appellant also contested his sentence of 30 months' imprisonment. The Crown cross-appealed on the trial judge's refusal to make a forfeiture order.

23 The Court of Appeal dismissed the appeal. It held that the trial judge had made a finding of fact that the investigation was under the control of the Turks and Caicos authorities and that his finding was supported by the evidence. Referring to the decisions in *Terry* and *Cook*, the court concluded that the trial judge had correctly applied the law to his findings of fact. The Crown's cross-appeal was also dismissed. The appellant obtained leave to appeal from that judgment.

II. Analysis

A. Issues

24 The sole issue in this appeal is whether s. 8 of the *Charter* applies to searches and seizures conducted by RCMP officers outside Canada. This issue requires the Court to consider the question of the extraterritorial application of the *Charter*. This in turn requires the Court to consider the more general question of the relationship between Canadian criminal and constitutional law, on the one hand, and public international law, on the other. In addition, although the issue is not before this Court, I feel that it will be helpful to comment on the use of ss. 7 and 11(*d*) of the *Charter* to exclude evidence gathered outside Canada.

B. Positions of the Parties

(1) The Appellant

25 The appellant argues that the *Charter* applies to the actions of the RCMP officers in the course of their searches and seizures at the BWIT's office, notwithstanding that those actions took place outside Canada. He submits that Canadian authorities are subject to the *Charter* even when operating outside the territorial boundaries of Canada and that it can be seen from the evidence in the case at bar that the searches and seizures were the product of and were integral to an investigation that was completely planned by the RCMP. In the appellant's submission, Detective Superintendent Lessemun merely served as a host for the Canadian officials. He made no decisions, even if he provided ultimate control and legal authority. The actual searches and seizures were conducted by the RCMP, and they are the actions that are subject to *Charter* scrutiny. Given the almost non-existent role of the Turks and Caicos authorities, the application of the *Charter* does not in any way interfere with that state's sovereign authority. The appellant argues that the courts below erred in concluding, on the basis of a finding that the RCMP's actions constituted a "co-operative investigation", that the *Charter* did not apply.

26 At the hearing, counsel for the appellant argued that, in *Cook*, this Court had specified two situations in which the application of the *Charter* would have an objectionable extraterritorial effect. The first would be if the *Charter* were applied to foreign officers, and the second would be if it were applied to foreign criminal proceedings. Aside from those two circumstances, extraterritorial application of the *Charter* would not, in the appellant's opinion, interfere with the sovereign authority of a foreign state. If it were physically impracticable to comply with the *Charter*, then Canadian officials acting abroad could either request that foreign officials undertake the activities that are inconsistent with the *Charter* or carry out the activities themselves and try to establish that the evidence obtained should not be excluded under s. 24(2) of the *Charter*.

(2) The Crown

27 The Crown responds that the *Charter* does not applybecause the searches and seizures in this case were conducted under the authority of the Turks and Caicos police. To impose Canada's *Charter* standards on the actions of the RCMP officers while they were operating in Turks and Caicos would produce an objectionable extraterritorial effect. The trial judge made a factual finding that the investigation in Turks and Caicos was under the control of the Turks and Caicos police force. The appellant has not demonstrated that this finding resulted from a palpable and overriding error; he is asking this Court to reweigh the evidence and substitute its view for that of the trial judge.

28 In the Crown's view, the fact that Canadian police officers participated in an international investigation does not, on its own, mean that the *Charter* is engaged. The *Charter* does not apply to conduct outside Canada unless the impugned action falls within the exception established in *Cook*, namely, where no conflict arises from the concurrent exercise of jurisdiction by Canada on the basis of nationality and by a foreign state on the basis of territoriality. The authority for all the RCMP's actions in Turks and Caicos was derived from Turks and Caicos law. It is clear from the evidence that the RCMP exercised no control over the Turks and Caicos police. Further, the appellant has not established that the RCMP's conduct violated Turks and Caicos law.

29 The Crown adds that it would be untenable to require that searches carried out in Turks and Caicos in accordance with the laws of that jurisdiction be consistent with the *Charter* or to subsequently scrutinize such searches for consistency with the *Charter*. In *Cook*, the *Charter* was applied on facts very different from those in the case at bar. In that case, it would have been easy for the Canadian police officers, in interviewing the accused, to comply with *Charter* standards in a way that did not interfere with the host state's procedures. Here, to apply the *Charter* to the investigation in Turks and Caicos would of necessity compel compliance by the foreign authorities, thus impinging on their sovereign authority.

30 According to the Crown, to hold that s. 8 of the *Charter* does not apply to foreign searches is not to suggest that there are no controls over the actions of Canadian law enforcement officers involved in investigations in other countries. Where the admission of evidence would lead to an unfair trial, a court has the discretion to exclude evidence under s. 7 of the *Charter*.

(3) The Intervener

31 The Attorney General of Ontario intervened in this appeal. His submissions focused on the complexities and difficulties of applying s. 8 of the *Charter* to searches and seizures outside Canada. The intervener emphasized the need to consider the nature and scope of s. 8 rights in the host jurisdiction. He also drew the Court's attention to the need for international cooperation in criminal investigations as a practical matter, and to the importance of not hampering such investigations unduly by imposing Canadian standards on foreign jurisdictions.

C. Scope of the Charter

32 This case centres around the proper scope of application of the *Charter*, and in particular its territorial reach and limits. The analysis must begin with the wording of s. 32(1) *Charter*, which reads as follows:

> 32. (1) This Charter applies
>
> (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Pursuant to s. 32(1), the *Charter* serves to limit the legislative and executive powers of Canada and each of the provinces. The problem involved in establishing the *Charter*'s scope has two aspects. First, s. 32(1) determines who is bound by the *Charter*: Parliament and the federal government, and the provincial legislatures and governments, bear the burden of complying with the requirements of the *Charter*. Second, s. 32(1) specifies what powers, functions or activities of those bodies and their agents are subject to the *Charter*: constitutional limitations are imposed "in respect of all matters within the authority of" Parliament or the provincial legislatures. Any action by the relevant body or its agents in relation to any matter within its legislative authority must be consistent with the *Charter*.

33 Section 32 does not expressly impose any territorial limits on the application of the *Charter*. By virtue of state sovereignty, it was open to the framers to establish the jurisdictional scope of the *Charter*. Had they done so, the courts of this country would have had to give effect to a clear expression of that scope. However, the framers chose to make no such statement. Consequently, as with the substantive provisions of the *Charter*, it falls upon the courts to interpret the jurisdictional reach and limits of the *Charter*. Where the question of application involves issues of extraterritoriality, and thereby necessarily implicates interstate relations, the tools that assist in the interpretation exercise include Canada's obligations under international law and the principle of the comity of nations. As I will explain, the issue of applying the *Charter* to activities that take place abroad implicates the extraterritorial enforcement of Canadian law. The principles of state jurisdiction are carefully spelled out under international law and must guide the inquiry in this appeal.

D. Relationship Between Domestic Law and International Law

34 In order to understand how international law assists in the interpretation of s. 32(1), it is necessary to consider the relationship between Canadian domestic law and international law, as well as the principles of international law pertaining to territorial sovereignty, non-intervention and extraterritorial assertions of jurisdiction.

(1) Relationship Between Customary International Law and the Common Law

35 As I will explain, certain fundamental rules of customary international law govern what actions a state may legitimately take outside its territory. Those rules are important interpretive aids for determining the jurisdictional scope of s. 32(1) of the *Charter*. The use of customary international law to assist in the interpretation of the *Charter* requires an examination of the Canadian approach to the domestic reception of international law.

36 The English tradition follows an adoptionist approach to the reception of customary international law. Prohibitive rules of international custom may be incorporated directly into domestic law through the common law, without the need for legislative action. According to the doctrine of adoption, the courts may adopt rules of customary international law as common law rules in order to base their decisions upon them, provided there is no valid legislation that clearly conflicts with the customary rule: I. Brownlie, *Principles of Public International Law* (6th ed. 2003), at p. 41. Although it has long been recognized in English common law, the doctrine received its strongest endorsement in the landmark case of *Trendtex Trading Corp. v. Central Bank of Nigeria*, [1977] 1 Q.B. 529 (Eng. C.A.). Lord Denning considered both the doctrine of adoption and the doctrine of transformation, according to which international law rules must be implemented by Parliament before they can be applied by domestic courts. In his opinion, the doctrine of adoption represents the correct approach in English law. Rules of international law are incorporated automatically, as they evolve, unless they conflict with legislation. He wrote, at p. 554:

> It is certain that international law does change. I would use of international law the words which Galileo used of the earth: "But it does move." International law does change and the courts have applied the changes without the aid of any Act of Parliament... .
>
> ... Seeing that the rules of international law have changed — and do change — and that the courts have given effect to the changes without any Act of Parliament, it follows to my mind inexorably that the rules of international law, as existing from time to time, do form part of our English law. It follows, too, that a decision of this court — as to what was the ruling of international law 50 or 60 years ago — is not binding on this court today. International law knows no rule of stare decisis. If this court today is satisfied that the rule of international law on a subject has changed from what it was 50 or 60 years ago, it can give effect to that change — and apply the change in our English law — without waiting for the House of Lords to do it.

37 In Canada, this Court has implicitly or explicitly applied the doctrine of adoption in several cases. In *R. v. "North" (The)* (1906), 37 S.C.R. 385 (S.C.C.), at p. 394, Davies J. wrote: "[T]he Admiralty Court when exercising its jurisdiction is bound to take notice of the law of nations ... The right of hot pursuit ... being part of the law of nations was properly judicially taken notice of and acted upon by the learned judge in this prosecution." In *Exemption of United States Forces from Proceedings in Canadian Criminal Courts, Re*, [1943] S.C.R. 483 (S.C.C.), at p. 502, Kerwin J. stated that the exemptions from territorial jurisdiction based on sovereign immunity "are grounded on reason and are recognized by civilized countries as being rules of international law which will be followed in the absence of any domestic law to the contrary". See also *Powers of Ottawa & Rockcliffe Park to Levy Rates on Foreign Legations & High Commissioners' Residences, Re*, [1943] S.C.R. 208 (S.C.C.) (*Re Foreign Legations*). In *Saint John (City) v. Fraser-Brace Overseas Corp.*, [1958] S.C.R. 263 (S.C.C.), Rand J. accepted the doctrine of adoption, applying international law principles to exempt foreign sovereigns and their property from municipal taxation in Canada. He wrote, at pp. 268-69:

> If in 1767 Lord Mansfield, as in *Heathfield v. Chilton* [(1767), 4 Burr. 2015, 98 E.R. 50], could say, "The law of nations will be carried as far in England, as any where", in this country, in the 20th century, in the presence of the United Nations and the multiplicity of impacts with which technical developments have entwined the entire globe, we cannot say any thing less.

The Court of Appeal for Ontario recently cited the doctrine of adoption in *Bouzari v. Iran (Islamic Republic)* (2004), 71 O.R. (3d) 675 (Ont. C.A.), stating at para. 65 that "customary rules of international law are directly incorporated into Canadian domestic law unless explicitly ousted by contrary legislation" (leave to appeal refused, [2005] 1 S.C.R. vi (S.C.C.)). See also *Mack v. Canada (Attorney General)* (2002), 60 O.R. (3d) 737 (Ont. C.A.), at para. 32 (leave to appeal refused, [2003] 1 S.C.R. xiii (S.C.C.)).

38 In other decisions, however, the Court has not applied or discussed the doctrine of adoption of customary international law when it had the opportunity to do so: see, for example, *Venne v. Congo (Republic)*, [1971] S.C.R. 997 (S.C.C.); *Reference re Seabed & Subsoil of Continental Shelf Offshore Newfoundland*, [1984] 1 S.C.R. 86 (S.C.C.); *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (S.C.C.); *Suresh v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1 (S.C.C.).

39 Despite the Court's silence in some recent cases, the doctrine of adoption has never been rejected in Canada. Indeed, there is a long line of cases in which the Court has either formally accepted it or at least applied it. In my view, following the common law tradition, it appears that the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation. The automatic incorporation of such rules is justified on the basis that international custom, as the law of nations, is also the law of Canada unless, in a valid exercise of its sovereignty, Canada declares that its law is to the contrary. Parliamentary sovereignty dictates that a legislature may violate international law, but that it must do so expressly. Absent an express derogation, the courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law.

(2) Principle of Respect for Sovereignty of Foreign States as a Part of Customary International Law and of Canadian Common Law

40 One of the key customary principles of international law, and one that is central to the legitimacy of claims to extraterritorial jurisdiction, is respect for the sovereignty of foreign states. That respect is dictated by the maxim, lying at the heart of the international legal structure, that all states are sovereign and equal. Article 2(1) of the *Charter of the United Nations*, Can. T.S. 1945 No. 7, recognizes as one of that organization's principles the "sovereign equality of all its Members". The importance and centrality of the principle of sovereign equality was reaffirmed by the General Assembly in the 1970 *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, GA Res. 2625 (XXV), 24 October 1970, which expanded the scope of application of the principle to include non-U.N. member states. A renowned international law jurist, Antonio Cassese, writes that of the various principles recognized in the U.N. Charter and the 1970 Declaration:

> [T]his is unquestionably the only one on which there is unqualified agreement and which has the support of all groups of States, regardless of ideologies, political leanings, and circumstances. It is safe to conclude that sovereign equality constitutes the linchpin of the whole body of international legal standards, the fundamental premise on which all international relations rest.

See A. Cassese, *International Law* (2nd ed. 2005), at p. 48.

41 The principle of sovereign equality comprises two distinct but complementary concepts: sovereignty and equality. "Sovereignty" refers to the various powers, rights and duties that accompany statehood under international law. Jurisdiction — the power to exercise authority over persons, conduct and events — is one aspect of state sovereignty. Although the two are not coterminous, jurisdiction may be seen as the quintessential feature of sovereignty. Other powers and rights that fall under the umbrella of sovereignty include the power to use and dispose of the state's territory, the right to state immunity from the jurisdiction of foreign courts and the right to diplomatic immunity. In his individual opinion in *Customs Régime between Germany and Austria, Re*, [1931] P.C.I.J. Ser. A/B 41 (P.C.I.J.), at p. 57, Judge Anzilotti defined sovereignty as follows: "Independence ... is really no more than the normal condition of States according to international law; it may also be described as *sovereignty* (*suprema potestas*), or *external sovereignty*, by which is meant that the State has over it no other authority than that of international law." (Emphasis in original)

42 Sovereignty also has an internal dimension, which can be defined as "the power of each state freely and autonomously to determine its tasks, to organize itself and to exercise within its territory a 'monopoly of legitimate physical coercion'": L. Wildhaber, "Sovereignty and International Law", in R. St.J. Macdonald and D. M. Johnston, eds., *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (1983), 425, at p. 436.

43 While sovereignty is not absolute, the only limits on state sovereignty are those to which the state consents or that flow from customary or conventional international law. Some such limits have arisen from recent developments in international humanitarian law, international human rights law and international criminal law relating, in particular, to crimes against humanity (R. Jennings and A. Watts, eds., *Oppenheim's International Law* (9th ed. 1996), vol. 1, at p. 125; K. Kittichaisaree, *International Criminal Law* (2001), at pp. 6 and 56; H. M. Kindred and P. M. Saunders, *International Law, Chiefly as Interpreted and Applied in Canada* (7th ed. 2006), at p. 836; Cassese, at p. 59). Nevertheless, despite the rise of competing values in international law, the sovereignty principle remains one of the organizing principles of the relationships between independent states.

44 Equality is a legal doctrine according to which all states are, in principle, equal members of the international community: Cassese, at p. 52. It is both a necessary consequence and a counterpart of the principle of sovereignty. If all states were not regarded as equal, economically and politically weaker states might be impeded from exercising their rights of sovereignty. One commentator suggests the following rationales for the affirmation of the equality of states in their mutual relations: "to forestall factual inequities from leading to injustice, to ensure that one state should not be disadvantaged in relation to another state, and to preclude the possibility of powerful states dictating their will to weaker nations" (V. Pechota, "Equality: Political Justice in an Unequal World", in Macdonald and Johnston, 453, at p. 454). Although all states are not in fact equal in all respects, equality is, as a matter of principle, an axiom of the modern international legal system.

45 In order to preserve sovereignty and equality, the rights and powers of all states carry correlative duties, at the apex of which sits the principle of non-intervention. Each state's exercise of sovereignty within its territory is dependent on the right to be free from intrusion by other states in its affairs and the duty of every other state to refrain from interference. This principle of non-intervention is inseparable from the concept of sovereign equality and from the right of each state to operate in its territory with no restrictions other than those existing under international law. (For a discussion of these principles, see the comments of Arbitrator Huber in the *Island of Palmas Case* (*Netherlands v. United States*) (1928), 2 R.I.A.A. 829, at pp. 838-39.)

46 Sovereign equality remains a cornerstone of the international legal system. Its foundational principles — including non-intervention and respect for the territorial sovereignty of foreign states — cannot be regarded as anything less than firmly established rules of customary international law, as the International Court of Justice held when it recognized non-intervention as a customary principle in the *Case concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, [1986] I.C.J. Rep. 14, at pp. 106. As the International Court of Justice noted on that occasion, the status of these principles as international customs is supported by both state practice and *opinio juris*, the two necessary elements of customary international law. Every principle of customary international law is binding on all states unless superseded by another custom or by a rule set out in an international treaty. As a result, the principles of non-intervention and territorial sovereignty may be adopted into the common law of Canada in the absence of conflicting legislation. These principles must also be drawn upon in determining the scope of extraterritorial application of the *Charter*.

(3) Comity as an Interpretive Principle

47 Related to the principle of sovereign equality is the concept of comity of nations. Comity refers to informal acts performed and rules observed by states in their mutual relations out of, politeness, convenience and goodwill, rather than strict legal obligation: *Oppenheim's International Law*, at pp. 50-51. When cited by the courts, comity is more a principle of interpretation than a rule of law, because it does not arise from formal obligations. Speaking in the private international law context in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 (S.C.C.), at p. 1095, La Forest J. defined comity as "the deference and respect due by other states to the actions of a state legitimately taken within its territory". In *Re Foreign Legations*, both Duff C.J. and Hudson J. referred in their reasons to *"Parlement Belge" (The)* (1880), 5 P.D. 197, in which Brett L.J. commented, at pp. 214-15, that the principle of international comity "induces every sovereign state to respect the independence and dignity of every other sovereign state".

48 Where our laws — statutory and constitutional — could have an impact on the sovereignty of other states, the principle of comity will bear on their interpretation. One example is in the area of extradition. As this Court noted in *Kindler v. Canada*

(Minister of Justice), [1991] 2 S.C.R. 779 (S.C.C.), at p. 844: "Extradition procedure, unlike the criminal procedure, is founded on the concepts of reciprocity, comity and respect for differences in other jurisdictions." In *United States v. Dynar*, [1997] 2 S.C.R. 462 (S.C.C.), another extradition case, Cory and Iacobucci JJ., writing for the majority, stated, at para. 123:

> There is no doubt that the *Charter* applies to extradition proceedings. Yet s. 32 of the *Charter* provides that it is applicable only to Canadian state actors. Pursuant to principles of international comity as well, the *Charter* generally cannot apply extraterritorially.

In stating that the *Charter* cannot apply extraterritorially, Cory and Iacobucci JJ. were speaking specifically of applying it to foreign authorities.

49 In other contexts as well, this Court has noted the importance of comity as a tool in the interpretation of Canadian law in situations where it affects other sovereign states. In *R. v. Zingre*, [1981] 2 S.C.R. 392 (S.C.C.), Dickson J. (as he then was), writing for the Court, stated, at pp. 400-401:

> As that great jurist, U.S. Chief Justice Marshall, observed in *The Schooner Exchange v. M'Faddon & Others* [(1812), 7 Cranch's Reports 116], at pp. 136-37, the jurisdiction of a nation within its own territory is necessarily exclusive and absolute, susceptible of no limitation not imposed by itself, but common interest impels sovereigns to mutual intercourse and an interchange of good offices with each other.
>
> It is upon this comity of nations that international legal assistance rests.

Further, McLachlin J. (as she then was) noted in *Terry*, at para. 16, that this Court "has repeatedly affirmed the territorial limitations imposed on Canadian law by the principles of state sovereignty and international comity". See also *Singh v. Canada (Minister of Employment & Immigration)*, [1985] 1 S.C.R. 177 (S.C.C.); *R. v. Libman*, [1985] 2 S.C.R. 178 (S.C.C.), at p. 183.

50 The nature and limitations of comity need to be clearly understood. International law is a positive legal order, whereas comity, which is of the nature of a principle of interpretation, is based on a desire for states to act courteously towards one another. Nonetheless, many rules of international law promote mutual respect and, conversely, courtesy among states requires that certain legal rules be followed. In this way, "courtesy and international law lend reciprocal support to one another": M. Akehurst, "Jurisdiction in International Law" (1972-1973), 46 *Brit. Y.B. Int'l L.* 145, at p. 215. The principle of comity reinforces sovereign equality and contributes to the functioning of the international legal system. Acts of comity are justified on the basis that they facilitate interstate relations and global cooperation; however, comity ceases to be appropriate where it would undermine peaceable interstate relations and the international order.

51 The principle of comity does not offer a rationale for condoning another state's breach of international law. Indeed, the need to uphold international law may trump the principle of comity (see for example the English Court of Appeal's decision in *Abbasi v. Secretary of State for Foreign & Commonwealth Affairs*, [2002] E.W.J. No. 4947, [2002] EWCA Civ 1598 (Eng. C.A.), in respect of a British national captured by U.S. forces in Afghanistan who was transferred to Guantanamo Bay and detained for several months without access to a lawyer or a court).

52 In an era characterized by transnational criminal activity and by the ease and speed with which people and goods now cross borders, the principle of comity encourages states to cooperate with one another in the investigation of transborder crimes even where no treaty legally compels them to do so. At the same time, states seeking assistance must approach such requests with comity and respect for sovereignty. Mutuality of legal assistance stands on these two pillars. Comity means that when one state looks to another for help in criminal matters, it must respect the way in which the other state chooses to provide the assistance within its borders. That deference ends where clear violations of international law and fundamental human rights begin. If no such violations are in issue, courts in Canada should interpret Canadian law, and approach assertions of foreign law, in a manner respectful of the spirit of international cooperation and the comity of nations.

(4) Conformity with International Law as an Interpretive Principle of Domestic Law

53 One final general principle bears on the resolution of the legal issues in this appeal. It is a well-established principle of statutory interpretation that legislation will be presumed to conform to international law. The presumption of conformity is based on the rule of judicial policy that, as a matter of law, courts will strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations, unless the wording of the statute clearly compels that result. R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 422, explains that the presumption has two aspects. First, the legislature is presumed to act in compliance with Canada's obligations as a signatory of international treaties and as a member of the international community. In deciding between possible interpretations, courts will avoid a construction that would place Canada in breach of those obligations. The second aspect is that the legislature is presumed to comply with the values and principles of customary and conventional international law. Those values and principles form part of the context in which statutes are enacted, and courts will therefore prefer a construction that reflects them. The presumption is rebuttable, however. Parliamentary sovereignty requires courts to give effect to a statute that demonstrates an unequivocal legislative intent to default on an international obligation. See also P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at pp. 367-68.

54 The presumption of conformity has been accepted and applied by this Court on numerous occasions. In *Daniels v. White*, [1968] S.C.R. 517 (S.C.C.), at p. 541, Pigeon J. stated:

> [T]his is a case for the application of the rule of construction that Parliament is not presumed to legislate in breach of a treaty or in any manner inconsistent with the comity of nations and the established rules of international law. ... [I]f a statute is unambiguous, its provisions must be followed even if they are contrary to international law. [Emphasis added.]

See also *Zingre*, at pp. 409-10; *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437 (S.C.C.), at para. 137; *Schreiber v. Canada (Attorney General)*, [2002] 3 S.C.R. 269, 2002 SCC 62 (S.C.C.), at para. 50. The presumption applies equally to customary international law and treaty obligations.

55 This Court has also looked to international law to assist it in interpreting the *Charter*. Whenever possible, it has sought to ensure consistency between its interpretation of the *Charter*, on the one hand, and Canada's international obligations and the relevant principles of international law, on the other. For example, in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 (S.C.C.), at p. 1056, Dickson C.J., writing for the majority, quoted the following passage from his dissenting reasons in *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 (S.C.C.), at p. 349:

> The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of the "full benefit of the *Charter*'s protection". I believe that the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.

Dickson C.J. then stated that Canada's international obligations should also inform the interpretation of pressing and substantial objectives under s. 1 of the *Charter*. (See also *Reference re s. 94(2) of the Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486 (S.C.C.), at p. 503; *Suresh*; *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7 (S.C.C.); *Canadian Foundation for Children, Youth & the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, 2004 SCC 4 (S.C.C.)).

56 In interpreting the scope of application of the *Charter*, the courts should seek to ensure compliance with Canada's binding obligations under international law where the express words are capable of supporting such a construction. In light of the foregoing principles — the direct application of international custom, territorial sovereignty and non-intervention as customary rules, and comity and the presumption of conformity as tools of construction — I will now turn to the point that is directly in issue in this appeal: the interpretation of s. 32 of the *Charter* and the application of the *Charter* to searches and seizures outside Canada.

E. Constitutional Authority of Parliament to Make Laws with Extraterritorial Effects

(1) International Law Principles of Jurisdiction

57 In order to resolve the question of extraterritorial application of the *Charter*, the international law principles of jurisdiction and Parliament's authority to make laws with extraterritorial effects must be examined. As has already been mentioned, jurisdiction is distinct from, but integral to, the principle of state sovereignty. The principles relating to jurisdiction arise from sovereign equality and the corollary duty of non-intervention. Broadly speaking, jurisdiction refers to a state's power to exercise authority over individuals, conduct and events, and to discharge public functions that affect them: Cassese, at p. 49.

58 Jurisdiction takes various forms, and the distinctions between them are germane to the issue raised in this appeal. Prescriptive jurisdiction (also called legislative or substantive jurisdiction) is the power to make rules, issue commands or grant authorizations that are binding upon persons and entities. The legislature exercises prescriptive jurisdiction in enacting legislation. Enforcement jurisdiction is the power to use coercive means to ensure that rules are followed, commands are executed or entitlements are upheld. As stated by S. Coughlan et al. in "Global Reach, Local Grasp: Constructing Extraterritorial Jurisdiction in the Age of Globalization" (2007), 6 *C.J.L.T.* 29, at p. 32, "enforcement or executive jurisdiction refers to the state's ability to act in such a manner as to give effect to its laws (including the ability of police or other government actors to investigate a matter, which might be referred to as *investigative jurisdiction*)" (emphasis in original). Adjudicative jurisdiction is the power of a state's courts to resolve disputes or interpret the law through decisions that carry binding force. See Cassese, at p. 49; Brownlie, at p. 297.

59 International law — and in particular the overarching customary principle of sovereign equality — sets the limits of state jurisdiction, while domestic law determines how and to what extent a state will assert its jurisdiction within those limits. Under international law, states may assert jurisdiction in its various forms on several recognized grounds. The primary basis for jurisdiction is territoriality: *Libman*, at p. 183. It is as a result of its territorial sovereignty that a state has plenary authority to exercise prescriptive, enforcement and adjudicative jurisdiction over matters arising and people residing within its borders, and this authority is limited only by the dictates of customary and conventional international law. The principle of territoriality extends to two related bases for jurisdiction, the objective territorial principle and the subjective territorial principle. According to the objective territorial principle, a state may claim jurisdiction over a criminal act that commences or occurs outside the state if it is completed, or if a constituent element takes place, within the state, thus connecting the event to the territory of the state through a sufficiently strong link: Brownlie, at p. 299. See also *Libman*, at pp. 212-13. Subjective territoriality refers to the exercise of jurisdiction over an act that occurs or has begun within a state's territory even though it has consequences in another state.

60 Territoriality is not the only legitimate basis for jurisdiction, however. In *"Lotus" (The), Re*, [1927] P.C.I.J. Ser. A 10 (P.C.I.J.) (*Lotus*), at p. 20, the Permanent Court of International Justice noted:

> Though it is true that in all systems of law the principle of the territorial character of criminal law is fundamental, it is equally true that all or nearly all these systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State. The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty.

Where a dispute is wholly contained within the territory of one state, jurisdiction is not an issue. However, disputes and events commonly have implications for more than one state, and competing claims for jurisdiction can arise on grounds other than territoriality, which are, of course, extraterritorial in nature. Of those bases for jurisdiction, the most common is the nationality principle. States may assert jurisdiction over acts occurring within the territory of a foreign state on the basis that their nationals are involved. For example, a state may seek to try and punish one of its nationals for a crime committed in another state. The nationality principle is not necessarily problematic as a justification for asserting prescriptive or adjudicative jurisdiction in order to attach domestic consequences to events that occurred abroad, but it does give rise to difficulties in respect of the extraterritorial exercise of enforcement jurisdiction. Under international law, a state may regulate and adjudicate regarding actions committed by its nationals in other countries, provided enforcement of the rules takes place when those nationals are within the state's own borders. When a state's nationals are physically located in the territory of another state, its authority over them is strictly limited. I will discuss this below.

61 There are other bases of extraterritorial jurisdiction that, although less widely recognized, are nonetheless cited from time to time as justifications for a state's assertion of jurisdiction. One example is the principle of universal jurisdiction, pursuant to which jurisdiction may be asserted over acts committed, in other countries, by foreigners against other foreigners. Assertions of universal jurisdiction are not based on any link of territoriality or nationality between the crime or the perpetrator and the state: L. Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (2003), at p. 5. For that reason, universal jurisdiction is confined to the most serious crimes and includes crimes under international law. Any state that obtains custody of accused persons may try and punish those who have committed crimes under international law: Brownlie, at p. 303.

62 The interplay between the various forms and bases of jurisdiction is central to the issue of whether an extraterritorial exercise of jurisdiction is permissible. At the outset, it must be borne in mind, first, that the exercise of jurisdiction by one state cannot infringe on the sovereignty of other states and, second, that states may have valid concurrent claims to jurisdiction. Even if a state can legally exercise extraterritorial jurisdiction, whether the exercise of such jurisdiction is proper and desirable is another question: Coughlan et al., at p. 31. Where two or more states have a legal claim to jurisdiction, comity dictates that a state ought to assume jurisdiction only if it has a real and substantial link to the event. As La Forest J. noted in *Libman*, at p. 213, what constitutes a "real and substantial link" justifying jurisdiction may be "coterminous with the requirements of international comity".

63 In the classic example, Parliament might pass legislation making it a criminal offence for Canadian nationals to smoke in the streets of Paris, thereby exercising extraterritorial prescriptive jurisdiction on the basis of nationality. If France chooses to contest this, it may have a legitimate claim of interference with its territorial sovereignty, since Canada's link to smoking on the Champs-Élysées is less real and substantial than that of France. France's territorial jurisdiction collides with Canada's concurrent claim of nationality jurisdiction. The mere presence of the prohibition in the *Criminal Code* of Canada might be relatively benign from France's perspective. However, France's outrage might be greater if Canadian courts tried a Canadian national in Canada for violating the prohibition while on vacation in Paris. It would be greater still if Canadian police officers marched into Paris and began arresting Canadian smokers or if Canadian judges established a court in Paris to try offenders.

64 This example demonstrates the nuances of extraterritorial jurisdiction. It is not uncommon for states to pass legislation with extraterritorial effects or, in other words, to exercise extraterritorial prescriptive jurisdiction. This is usually done only where a real and substantial link with the state is evident. Similarly, comity is not necessarily offended where a state's courts assume jurisdiction over a dispute that occurred abroad (extraterritorial adjudicative jurisdiction), provided that the enforcement measures are carried out within the state's own territory. The most contentious claims for jurisdiction are those involving extraterritorial *enforcement* of a state's laws, even where they are being enforced only against the state's own nationals, but in another country. The fact that a state has exercised extraterritorial prescriptive jurisdiction by enacting legislation in respect of a foreign event is necessary, but not in itself sufficient, to justify the state's exercise of enforcement jurisdiction outside its borders: F.A. Mann, "The Doctrine of International Jurisdiction Revisited After Twenty Years", in W. M. Reisman, ed., *Jurisdiction in International Law* (1999), 139, at p. 154.

65 The Permanent Court of International Justice stated in the *Lotus* case, at pp. 18-19, that jurisdiction "cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention". See also *Cook*, at para. 131. According to the decision in the *Lotus* case, extraterritorial jurisdiction is governed by international law rather than being at the absolute discretion of individual states. While extraterritorial jurisdiction — prescriptive, enforcement or adjudicative — exists under international law, it is subject to strict limits under international law that are based on sovereign equality, non-intervention and the territoriality principle. According to the principle of non-intervention, states must refrain from exercising extraterritorial enforcement jurisdiction over matters in respect of which another state has, by virtue of territorial sovereignty, the authority to decide freely and autonomously (see the opinion of the International Court of Justice in the *Military and Paramilitary Activities* case, at p. 108). Consequently, it is a well-established principle that a state cannot act to enforce its laws within the territory of another state absent either the consent of the other state or, in exceptional cases, some other basis under international law. See Brownlie, at p. 306; *Oppenheim's International Law*, at p. 463. This principle of consent is central to assertions of extraterritorial enforcement jurisdiction.

(2) Extraterritoriality in Canadian Law

66 This Court recognized the foregoing principles in *Terry*. At para. 15, McLachlin J. wrote the following on behalf of the Court:

> The principle that a state's law applies only within its boundaries is not absolute: *The Case of the S.S. "Lotus"* (1927), P.C.I.J. Ser. A, No. 10, at p. 20. States may invoke a jurisdiction to prescribe offences committed elsewhere to deal with special problems, such as those provisions of the *Criminal Code*, R.S.C. 1985, c. C-46, pertaining to offences on aircraft (s. 7(1), (2)) and war crimes and other crimes against humanity (s. 7(3.71)). A state may likewise formally consent to permit Canada and other states to enforce their laws within its territory for limited purposes.

The *Statute of Westminster, 1931* (U.K.), 22 Geo. 5, c. 4, s. 3, conferred on Canada the authority to make laws having extraterritorial operation and Canada has enacted legislation with extraterritorial effects on several occasions. Some examples can be found in criminal legislation, including the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24, which addresses crimes of universal jurisdiction. Section 6(1) of that statute provides that every person who commits genocide, a crime against humanity or a war crime outside Canada is guilty of an indictable offence. Pursuant to s. 8, such a person may be prosecuted in Canada: (a) if at the time of the offence the person was a Canadian citizen or a citizen of a state engaged in armed conflict against Canada, or the victim was a Canadian citizen or a citizen of a state allied with Canada in an armed conflict; or (b) if, after the time of the offence was committed, the person is present in Canada. These provisions exemplify valid extraterritorial prescriptive jurisdiction, and any trial for such offences would constitute a legitimate exercise of extraterritorial adjudicative jurisdiction. But, importantly, they do not authorize Canada to enforce the prohibitions in a foreign state's territory by arresting the offenders there. Section 7 of the *Criminal Code*, R.S.C. 1985, c. C-46, contains a number of provisions that deem certain acts — including attacks on internationally protected persons or U.N. personnel, torture or hostage taking — to have been committed in Canada even though they took place in other countries. Although committed outside Canada, such an act will be deemed to have been committed in Canada if, *inter alia*, the person who committed it is a Canadian citizen or normally resides in Canada, it was committed on an aircraft registered in Canada or it was committed against a Canadian citizen.

67 On the other hand, it is recognized that there are limits to the extraterritorial application of Canadian law. Section 6(2) of the *Criminal Code* provides: "Subject to this Act or any other Act of Parliament, no person shall be convicted or discharged under section 730 of an offence committed outside Canada". As a general rule, then, Canadian criminal legislation is territorial unless specifically declared to be otherwise. Further, as noted by McLachlin J. in *Terry*, at para.18, bilateral treaties negotiated pursuant to the *Mutual Legal Assistance in Criminal Matters Act*, R.S.C. 1985, c. 30 (4th Supp.), provide that the actions requested of the assisting state are governed by that state's own laws, not by the laws of the requesting state.

68 Parliament has clear constitutional authority to pass legislation governing conduct by non-Canadians outside Canada. Its ability to pass extraterritorial legislation is informed by the binding customary principles of territorial sovereign equality and non-intervention, by the comity of nations, and by the limits of international law to the extent that they are not incompatible with domestic law. By virtue of parliamentary sovereignty, it is open to Parliament to enact legislation that is inconsistent with those principles, but in so doing it would violate international law and offend the comity of nations. However, in light of the foregoing discussion of the jurisdictional principles of customary international law, the prohibition on interference with the sovereignty and domestic affairs of other states, and this Court's jurisprudence, Canadian law can be *enforced* in another country only with the consent of the host state.

69 As the supreme law of Canada, the *Charter* is subject to the same jurisdictional limits as the country's other laws or rules. Simply put, Canadian law, whether statutory or constitutional, cannot be enforced in another state's territory without the other state's consent. This conclusion, which is consistent with the principles of international law, is also dictated by the words of the *Charter* itself. The *Charter*'s territorial limitations are provided for in s. 32, which states that the *Charter* applies only to matters that are within the authority of Parliament or the provincial legislatures. In the absence of consent, Canada cannot exercise its enforcement jurisdiction over a matter situated outside Canadian territory. Since effect cannot be given to Canadian law in the circumstances, the matter falls outside the authority of Parliament and the provincial legislatures.

F. External Reach of the Charter

70 In light of the context and interpretive assistance set out in the foregoing discussion, I will now turn to the specific issue raised in this appeal — the application of the *Charter* to investigations conducted by Canadian officers outside Canada.

(1) Review of the Supreme Court of Canada Jurisprudence: Harrer, Terry, Cook and Schreiber

71 This Court has already considered the question of extraterritorial application of the *Charter* to evidence gathering abroad in a series of cases, beginning with *Harrer*. The accused in *Harrer* was questioned by United States marshals about possible criminal involvement in her boyfriend's escape from custody in Canada. The accused was tried in Canada on the basis of statements she had made to the marshals. During the interrogation, she had not been given a second right-to-counsel warning, which would have been required by the *Charter* but not by U.S. law. At trial, the Crown sought to introduce statements that the accused had made to the marshals. The trial judge excluded the statement made after the second warning ought to have been given and this Court held that she erred in doing so. La Forest J. noted that pursuant to s. 32(1), the application of the *Charter* is confined to the governments of Canada, the provinces and the territories. The U.S. marshals were not acting on behalf of those bodies, and the *Charter* consequently had no direct application to the interrogation. He wrote, at para. 15:

> [I]t is obvious that Canada cannot impose its procedural requirements in proceedings undertaken by other states in their own territories. And I see no reason why evidence obtained in other countries in a manner that does not conform to our procedures should be rejected if, in the particular context, its admission would not make the trial unfair. For us to insist that foreign authorities have followed our internal procedures in obtaining evidence as a condition of its admission in evidence in Canada would frustrate the necessary cooperation between the police and prosecutorial authorities among the various states of the world.

McLachlin J., in concurring reasons, agreed that pursuant to s. 32, the *Charter* does not apply to foreign authorities. Both La Forest J. and McLachlin J. mentioned that evidence obtained abroad can be excluded from a trial in Canada if its admission would jeopardize trial fairness. I will return to this point.

72 The next case in the series was *Terry*, which also involved interrogation by U.S. authorities of an accused who was later tried in Canada. The accused was arrested in the U.S. on an extradition warrant. Canadian police asked the U.S. authorities to advise him of his American rights. Although the U.S. police gave the "*Miranda* warning" required under American law, the accused was not advised forthwith upon his detention of his right to counsel as required by the *Charter*. He made a statement to the U.S. police, and it was admitted at trial in Canada. The accused was convicted of second degree murder. McLachlin J., writing for the Court, found that the statement was admissible and upheld the conviction. She noted that despite the cooperation between Canadian and U.S. police, the latter could not be governed by the requirements of Canadian law. *Charter* standards cannot be imposed on U.S. authorities operating in their jurisdiction as that would undermine the principles of state sovereignty and international comity. In a passage that is particularly relevant to the facts of the case at bar, McLachlin J. wrote, at para. 19:

> Still less can the *Charter* govern the conduct of foreign police cooperating with Canadian police on an informal basis. The personal decision of a foreign officer or agency to assist the Canadian police cannot dilute the exclusivity of the foreign state's sovereignty within its territory, where its law alone governs the process of enforcement. The gathering of evidence by these foreign officers or agency is subject to the rules of that country and none other. Consequently, any cooperative investigation involving law enforcement agencies of Canada and the United States will be governed by the laws of the jurisdiction in which the activity is undertaken.

McLachlin J. reaffirmed the position taken in *Harrer* that evidence gathered abroad may be excluded from a Canadian trial if it was gathered in a way that would undermine trial fairness as guaranteed by s. 11(*d*) of the *Charter* or that violates the principles of fundamental justice.

73 The issue of extraterritorial application of the *Charter* arose once more in *Schreiber v. Canada (Attorney General)*, [1998] 1 S.C.R. 841 (S.C.C.). Mr. Schreiber, a Canadian citizen, had an interest in Swiss bank accounts. The federal Department

of Justice sent a request to Swiss authorities seeking assistance in a Canadian criminal investigation. Switzerland accepted the request and ordered the seizure of documents and records relating to Mr. Schreiber's accounts. Prior to the request, no search warrant or other judicial authorization had been issued in Canada. The question before this Court was whether Canadian standards for the issuance of a search warrant had to be complied with before the request was made. The majority answered the question in the negative.

74 L'Heureux-Dubé J. wrote the majority decision. She concluded that the sending of a letter of request to a foreign state does not attract scrutiny under s. 8 of the *Charter*. Section 32 limits the application of the *Charter* to actions taken by Parliament, the government of Canada, a provincial legislature or a provincial government. As the sending of the letter of request was the only action authorized and undertaken by the government, it was the only one that could be assessed for *Charter* compliance. The sending of the letter did not engage s. 8 of the *Charter*, and "[a]ll of those actions which rely on state compulsion in order to interfere with the respondent's privacy interests were undertaken in Switzerland by Swiss authorities. Neither the actions of the Swiss authorities, nor the laws which authorized their actions, are subject to *Charter* scrutiny" (para. 31).

75 Lamer C.J., in separate concurring reasons, found that the *Charter* applied to the actions of the Canadian officials who had prepared and sent the letter of request. He considered whether the searches and seizures carried out in Switzerland were consistent with s. 8 of the *Charter* but found that there had been no violation, because Mr. Schreiber had not had a reasonable expectation of privacy. He reasoned as follows, at paras. 22-23:

> Of critical importance to this case is the fact that the records were located in Switzerland, and obtained in a manner consistent with Swiss law.
>
> ...[A] Canadian residing in a foreign country should expect his or her privacy to be governed by the laws of that country and, as such, a reasonable expectation of privacy will generally correspond to the degree of protection those laws provide. This, if anything, is more true for the person who decides to conduct financial affairs and keep records in a foreign state. It may be fairly assumed that such a person has made an informed choice about where to conduct business, and thereby to create corresponding records, particularly banking records.

76 Iacobucci J., in dissent, found that Mr. Schreiber had had a reasonable expectation of privacy regarding the accounts and stated, in respect of the actions of the Canadian authorities in requesting the search and seizure, that "s. 8 consequently applies in full force with all of its attendant guarantees and preventative measures" (para. 48).

77 This Court's most recent decision on the issue of extraterritorial *Charter* application was *Cook*. The accused in that case was an American arrested in the U.S. by U.S. authorities on a warrant issued in connection with a Canadian extradition request. While he was detained in the U.S., Vancouver police officers interrogated the accused. He was not properly advised of his right to counsel as required by s. 10(*b*) of the *Charter*. At his trial in Canada, a statement he had made to the Canadian officers was admitted for the limited purpose of impeaching his credibility on cross-examination. A majority of this Court held that the *Charter* applied to the actions of the Canadian detectives and that there had been a violation of s. 10(*b*). The evidence should have been excluded under s. 24(2). A new trial was ordered.

78 Cory and Iacobucci JJ. wrote the majority decision. They noted that the circumstances in which the *Charter* may apply to actions taken outside Canada will be rare. At para. 25, they suggested the following two factors to assist in identifying those circumstances: "(1) the impugned act falls within s. 32(1) of the *Charter*; and (2) the application of the *Charter* to the actions of the Canadian detectives in the United States does not ... interfere with the sovereign authority of the foreign state and thereby generate an objectionable extraterritorial effect". On the facts of the case, they found no interference with the sovereign authority of the U.S.

79 The majority considered jurisdiction under international law. Cory and Iacobucci JJ. noted, at para. 26, that sovereign equality "generally prohibits extraterritorial application of domestic law since, in most instances, the exercise of jurisdiction beyond a state's territorial limits would constitute an interference under international law with the exclusive territorial jurisdiction of another state". However, the nationality of the person subject to the domestic law may also be invoked as a

valid basis for jurisdiction, and nationality jurisdiction may operate concurrently with the territorial jurisdiction of the foreign state. The majority affirmed that the *Charter* cannot apply to the actions of foreign authorities but distinguished the facts of the case before them from those in *Harrer* and *Terry* on the basis that the interrogation had been conducted by Canadian officers rather than by foreign authorities. Since the officers who questioned the accused were Canadian nationals, s. 32(1) extended the application of the *Charter* to their actions abroad pursuant to the nationality principle, provided there was no interference with the sovereign authority of the U.S. The majority concluded as follows, at para. 48: "[T]he *Charter* applies on foreign territory in circumstances where the impugned act falls within the scope of s. 32(1) of the *Charter* on the jurisdictional basis of the nationality of the state law enforcement authorities engaged in governmental action, and where the application of *Charter* standards will not conflict with the concurrent territorial jurisdiction of the foreign state." The majority took care to confine its holding to the facts before it, expressly acknowledging at para. 54 that the case might be different where "Canadian authorities participate, on foreign territory, in an investigative action undertaken by foreign authorities in accordance with foreign procedures".

80 Bastarache J. wrote concurring reasons in which he reached the same result by means of a different analysis. To begin, he found that the wording of s. 32(1) applies to the actions of Canadian police officers, since the police are constituted as part of the government and act under statutory authority. That statutory authority to exercise coercion will come into conflict with the jurisdiction of a foreign state when Canadian officers travel into the territory of that state; however, s. 32(1) continues to apply to the Canadian officers regardless of whether they exercise governmental powers of coercion. At para. 126, Bastarache J. stated that where an investigation abroad involves cooperation between Canadian officials and foreign officials, "the key issue ... is determining who was in control of the specific feature of the investigation which is alleged to constitute the *Charter* breach". If the foreign authority was in control of the circumstances leading to the *Charter* breach in obtaining the evidence, the activities in question are not subject to the *Charter*. If the Canadian authorities were primarily responsible for the breach, the *Charter* will apply to them and to the evidence. Bastarache J. considered principles of jurisdiction under international law, including territoriality, the objective territorial principle and the importance of a real and substantial link where competing claims of jurisdiction are made. He determined that, in the circumstances of that case, there was a real and substantial connection between the criminal prosecution in Canada and the investigation outside Canada in which Canadian officers had taken part. He then discussed whether the application of the *Charter* would interfere with the jurisdictional integrity of the foreign state. At para. 143, he reasoned as follows:

> [T]he nature of the rights contained in the relevant sections of the *Charter* are not mandatory, but rather conditional upon the occurrence of specified investigatory activities. Thus, if there is a rule of investigation in the foreign jurisdiction that directly contradicts a *Charter* provision, there is still no conflict. The reason for this is that the *Charter* does not impose any obligation to investigate; it simply requires that if an investigation is made by the officer, it must be conducted in accordance with certain conditions. It follows from this, moreover, that the application of the *Charter* to the Canadian official has no impact on the foreign legal system. At worst, the Canadian official may be obliged to cease taking a directing or primary role in the investigation in order to comply with the *Charter*.

81 L'Heureux-Dubé J. dissented in *Cook*, and McLachlin J. concurred in her reasons. According to L'Heureux-Dubé J.'s approach, before considering whether a case involves state action that may have infringed a *Charter* right, it must be asked whether the person claiming the *Charter* right in fact holds that right. If the claimant does hold a *Charter* right, the inquiry then moves to the question of state action. After reviewing the decisions in *Harrer*, *Terry* and *Schreiber*, L'Heureux-Dubé J. identified two fundamental principles relating to the extraterritorial application of the *Charter*. First, the action allegedly in breach of the *Charter* must have been carried out by one of the state actors identified in s. 32(1). Second, even an action by one of those state actors will fall outside the scope of the *Charter* if it is performed in cooperation with foreign officials on foreign soil. The key question to ask in order to determine whether the investigation is cooperative is whether Canadian officials have legal authority in the place where the actions occurred. Where the conduct of state actors falls under the authority of a foreign government, s. 32 does not apply, since it is confined to matters "within the authority" of Parliament or a provincial legislature. At paras. 93-94, L'Heureux-Dubé J. wrote the following:

> In my opinion, the *Charter* does not apply to any investigation where Canadian officials no longer have the legal attributes of "government"; this occurs whenever an investigation takes place under the sovereignty of another government.
>
> When Canadian officials work under the sovereignty of a foreign legal system, the investigation is necessarily cooperative. Foreign officials who permit Canadians to work with them, or to work on soil that is under their government's legal authority, are bound to follow that country's laws, and work within the procedural requirements of that system. So are the Canadian officials who work with them.

82 The dissent concluded that the *Charter* did not apply to the interrogation, and, consequently, that the statement was properly admitted at trial.

(2) Concerns in Respect of the Jurisprudence

83 The jurisprudence on the issue of extraterritorial application of the *Charter* as it stands after *Cook* is subject to a number of difficulties and criticisms, both practical and theoretical. The essence of the majority's holding in *Cook* is that the *Charter* will apply to acts of Canadian law enforcement authorities engaged in governmental action where the application of *Charter* standards will not conflict with the concurrent territorial jurisdiction of the foreign state. When that holding is applied to facts such as those in the present case, problems arise. For one, the majority in *Cook* failed to distinguish prescriptive from enforcement jurisdiction. Second, practical and theoretical difficulties arise when its approach is applied to different facts (such as a search and seizure). Third, it failed to give due consideration to the wording of s. 32(1).

84 Beginning with the first of these criticisms, the majority in *Cook* disregarded the important distinction between the powers of prescription and enforcement. It also failed to discuss the principle that Canadian law cannot be enforced in another state's territory without the other state's consent, regardless of the extent or degree of difference between the laws of Canada and the foreign state, or of whether there is any conflict at all. Criminal investigations in foreign countries by definition implicate foreign law and procedures. The choice of legal system inherently lies within the authority of each state as an exercise of its territorial sovereignty. Were *Charter* standards to be applied in another state's territory without its consent, there would by that very fact *always* be interference with the other state's sovereignty. *Cook* is also inconsistent with this Court's approval of the principle of consent in *Terry*.

85 The *Cook* approach therefore puts the focus in the wrong place, as it involves looking for a conflict between concurrent jurisdictional claims, whereas the question should instead be viewed as one of extraterritorial enforcement of Canadian law. The issue in these cases is the applicability of the *Charter* to the activities of Canadian officers conducting investigations abroad. The powers of prescription and enforcement are both necessary to application of the *Charter*. The *Charter* is prescriptive in that it sets out what the state and its agents may and may not do in exercising the state's powers. Prescription is not in issue in the case at bar, but even so, the *Charter* cannot be applied if compliance with its legal requirements cannot be enforced. Enforcement of compliance with the *Charter* means that when state agents act, they must do so in accordance with the requirements of the *Charter* so as to give effect to Canadian law as it applies to the exercise of the state power at issue. However, as has already been discussed, Canadian law cannot be enforced in another state's territory without that state's consent. Since extraterritorial enforcement is not possible, and enforcement is necessary for the *Charter* to apply, extraterritorial application of the *Charter* is impossible.

86 As for the second criticism, the circumstances of the instant case exemplify the theoretical and practical difficulties arising out of an attempt to apply *Charter* standards outside Canada in fact situations other than the one in *Cook*. In Turks and Caicos, judicial authorization does not appear to be necessary for a perimeter search of private premises, such as the one that took place on the nights of February 7 and 8, 1998. Under Canadian law, in most circumstances a warrant would be required to conduct such a search. To comply with the *Charter*, the RCMP officers would have had to obtain a warrant that is unavailable under Turks and Caicos law. It would constitute blatant interference with Turks and Caicos sovereignty to require that country's legal system to develop a procedure for issuing a warrant in the circumstances simply to comply with the dictates of the *Charter*.

87 The theoretical and practical impediments to extraterritorial application of the *Charter* can thus be seen more clearly where the s. 8 guarantee against unreasonable search and seizure is in issue than where the issue relates, as in the cases discussed above, to the right to counsel. Searches and seizures, because of their coerciveness and intrusiveness, are by nature vastly different from police interrogations. The power to invade the private sphere of persons and property, and seize personal items and information, is paradigmatic of state sovereignty. These actions can be authorized only by the territorial state. From a theoretical standpoint, the *Charter* cannot be applied, because its application would necessarily entail an exercise of the enforcement jurisdiction that lies at the heart of territoriality. As a result of the principles of sovereign equality, non-intervention and comity, Canadian law and standards cannot apply to searches and seizures conducted in another state's territory.

88 It is also evident from a practical standpoint that the *Charter* cannot apply to searches and seizures in other countries. How exactly would *Charter* standards operate in such circumstances? Lamer C.J. suggested in *Schreiber* that it would be sufficient for *Charter* purposes for those conducting a search and seizure to comply with the domestic law of the foreign state, since an individual's reasonable expectation of privacy would be commensurate to the degree of protection provided by the law of the country in which she or he is located. If the only requirement were that the Canadian officers and their foreign counterparts comply with the foreign law, it is unclear what purpose would be served by applying the *Charter*, as it would carry no added protection in respect of a search and seizure. Moreover, in some cases, compliance with the foreign law would be directly contrary to the express wording of the *Charter* provisions guaranteeing the rights in question.

89 Conversely, it is in practice impossible to apply the full force of the *Charter* to searches and seizures in foreign territory. One example of this, as I mentioned earlier, is where the *Charter* would require a warrant but the foreign law provides no procedure for obtaining or issuing such a warrant. The judicial authorities of a foreign state cannot be required under Canadian law to invent *ad hoc* procedures for the purposes of a cooperative investigation. Should that be a reason for prohibiting a search and seizure from taking place even though it is authorized by the law of the jurisdiction where it would occur? Further, it would be unrealistic, in a cooperative investigation, to require the various officers involved to follow different procedural and legal requirements. Searches and seizures require careful and detailed planning; where the investigation is a joint effort, it is bound to be unsuccessful if the participants are following two different sets of rules. This would be the result if the *Charter* applied to the Canadian officers only, and it clearly cannot apply to the foreign authorities: *Harrer* and *Terry*.

90 It is no more helpful to suggest that some third option other than the law of the host state or the full application of *Charter* standards might govern foreign investigations. Where would the standards to be applied come from? How would Canadian officials know what is required of them at the outset of an investigation? The only reasonable approach is to apply the law of the state in which the activities occur, subject to the *Charter*'s fair trial safeguards and to the limits on comity that may prevent Canadian officers from participating in activities that, though authorized by the laws of another state, would cause Canada to be in violation of its international obligations in respect of human rights.

91 One possible response to the problem of enforcement outside Canada is that *ex post facto* scrutiny of the investigation by a Canadian court in a Canadian trial that might result in the exclusion of evidence gathered in breach of the *Charter* would not interfere with the sovereignty of the foreign state, since this would merely constitute an exercise of extraterritorial adjudicative jurisdiction. However, while it is true that foreign sovereignty is not engaged by a criminal process in Canada that excludes evidence by scrutinizing the manner in which it was obtained for compliance with the *Charter*, the purpose of the *Charter* is not simply to serve as a basis for an *ex post facto* review of government action. The *Charter*'s primary role is to limit the exercise of government and legislative authority in advance, so that breaches are stopped before they occur. Canadian officers need to know what they are required to do as the investigation unfolds, so as to ensure that the evidence gathered will be admitted at trial. When a trial judge is considering a possible breach of the *Charter* by state actors, the ability of the state actors to comply with their *Charter* obligations must be relevant. The fact that the *Charter* could not be complied with during the investigation because the relevant state action was being carried out in a foreign jurisdiction strongly intimates that the *Charter* does not apply in the circumstances. In any event, if the concern is really about the *ex post facto* review of investigations, that function is performed by ss. 7 and 11(*d*) of the *Charter*, pursuant to which evidence may be excluded to preserve trial fairness. The inquiry under those provisions relates to the court's responsibility to control its own process and is fundamentally different from asking at trial whether the Canadian officer's conduct amounted to the violation of a particular *Charter* right.

92 The importance of considering the possibility of compliance with the *Charter* in advance is highlighted by the legal problems attendant upon the conduct of an interrogation abroad. Certain provisions setting out *Charter* rights require no more than that the accused be advised of something, such as the reasons for his or her arrest or detention (under s. 10(*a*)). Other *Charter* rights provisions in the investigation context require more. For example, s. 10(*b*) guarantees to everyone the right on arrest or detention *to be informed of* the right to retain and instruct counsel without delay; however, it also includes the right *to retain and instruct* counsel without delay. Consequently, while imposing an obligation on Canadian officers conducting an interrogation abroad to inform the accused of a right would not significantly interfere with the territorial sovereignty of the foreign state, interference would occur if the accused were to claim that right. At that point, Canadian officers would no longer be able to comply with their *Charter* obligations independently. As L'Heureux-Dubé J. wrote in *Cook*, at para. 94: "In an investigation that takes place under foreign sovereignty, it is the foreign government that has legal authority over the mechanics of the investigation." For *Charter* rights to be effective, it must be possible to assert them.

93 Finally, the third criticism of the current jurisprudence is that proper regard has not been given to the wording of s. 32(1) of the *Charter*. In setting out the two factors that were central to the conclusion that the *Charter* applied, the majority in *Cook* noted first that "the impugned act falls within s. 32(1) of the *Charter*" (para. 25). In doing so, it made the error of assuming precisely what had to be decided. The purpose of the inquiry into the application of the *Charter* to investigations in other countries is to determine whether the act in fact falls under s. 32(1). The words of s. 32(1) — interpreted with reference to binding principles of customary international law — must ultimately guide the inquiry. In my view, there is little logic in an approach that first determines that the activity falls under s. 32(1) and then questions at a second stage whether the *Charter* nonetheless ought not to apply because of some "objectionable extraterritorial effect". Rather, the extraterritorial implications of applying the *Charter* are, in my view, central to the question whether the activity in question falls under s. 32(1) in the first place. The inquiry begins and ends with s. 32(1) of the *Charter*.

94 Section 32(1) puts the burden of complying with the *Charter* on Parliament, the government of Canada, the provincial legislatures and the provincial governments. While my colleague is correct in stating, at para. 161, that s. 32(1) defines *to whom* the *Charter* applies and not *where* it applies, s. 32(1) does more than that. It also defines *in what circumstances* the *Charter* applies to those actors. The fact that a state actor is involved is not in itself sufficient, as Bastarache J. suggests. The activity in question must also fall within the "matters within the authority of" Parliament or the legislature of each province. A criminal investigation in the territory of another state cannot be a matter within the authority of Parliament or the provincial legislatures, because they have no jurisdiction to authorize enforcement abroad. Criminal investigations, like political structures or judicial systems, are intrinsically linked to the organs of the state, and to its territorial integrity and internal affairs. Such matters are clearly within the authority of Parliament and the provincial legislatures when they are in Canadian territory; it is just as clear that they lie outside the authority of those bodies when they are outside Canadian territory.

95 My colleague, Binnie J., recognizes that there are practical and theoretical difficulties with the application of the approach followed in *Cook*. Nonetheless, in his view that approach should be preserved because of possible issues that may eventually end up before this Court in respect of international law and of its relationship with Canadian law. He refers to matters such as the "war on terror", the deployment of Canadian police officers in states with troubled histories and the Maher Ararinquiry. With respect, I do not think such matters belong to the issue put before our Court in this appeal, nor form part of the record in this case. We cannot always know what new issues might arise before the courts in the future, but we can trust that the law will grow and evolve as necessary and when necessary in response. But until those new issues are presented in live cases we ought not to abdicate our duty to rethink and refine today the law when confronted by jurisprudence that has demonstrated practical and theoretical weaknesses.

(3) The Globalization of Criminal Activities and the Need for International Cooperation

96 The principles of international law and comity that I have discussed demonstrate why *Charter* standards cannot be applied to an investigation in another country involving Canadian officers so as to require that the investigation conform to Canadian law. At the same time, there is no impediment to extraterritorial adjudicative jurisdiction pursuant to which evidence gathered abroad may be excluded from a Canadian trial, as this jurisdiction simply attaches domestic consequences to foreign events.

The question flowing from those two propositions is whether the *Charter* can restrain Canadian officers from participating in a foreign investigation that does not meet *Charter* standards.

97 When it applies, the *Charter* imposes limits on the state's coercive power. It requires that state power be exercised only in accordance with certain restrictions. As a corollary, where those restrictions cannot be observed, the *Charter* prohibits the state from exercising its coercive power. Since the *Charter* does not authorize state action, but simply operates as a limit on such action, could it not be said that the *Charter* "applies" to extraterritorial investigations by prohibiting Canadian officers from participating in investigations abroad that do not conform to Canadian law? International law provides only part of the answer to this question. To prohibit Canadian officers from participating would indeed ensure conformity with both international law and the *Charter*; however, it would also mean that the investigation could not be conducted. This is a serious concern. The complete answer therefore lies both in international law and in the need to address the challenges of investigating and prosecuting transborder criminal activity.

98 Transnational crime is a growing problem in the modern world, as people, property and funds move fluidly across national borders. Some of the most costly, exploitative or dangerous crimes are committed on a worldwide scale, unconfined by state boundaries. The investigation and policing of such criminal activities requires cooperation between states. In a cooperative investigation, Canada cannot simply walk away when another country insists on following its own investigation and enforcement procedures rather than ours. That would fall short not only of Canada's commitment to other states and the international community to provide assistance in combatting transnational crime, but also of Canada's obligation to Canadians to ensure that crimes having a connection with Canada are investigated and prosecuted. As McLachlin J. wrote in *Harrer*, at para. 55:

> It is not reasonable to expect [police forces abroad] to comply with details of Canadian law. To insist on conformity to Canadian law would be to insist on external application of the *Charter* in preference to the local law. It would render prosecution of offences with international aspects difficult if not impossible. And it would undermine the ethic of reciprocity which underlies international efforts to control trans-border crime: *Argentina v. Mellino*, [1987] 1 S.C.R. 536, at p. 551, *per* La Forest J. We live in an era when people, goods and information pass from country to country with great rapidity. Law enforcement authorities, if they are to do their job, must apprehend people and intercept goods and communications wherever they may be found. Often they find themselves working with officers in foreign jurisdictions; often they are merely the recipients of information gathered independently elsewhere. ... We need to accommodate the reality that different countries apply different rules to evidence gathering, rules which must be respected in some measure if we are to retain the ability to prosecute those whose crime and travel take them beyond our borders.

99 When individuals choose to engage in criminal activities that cross Canada's territorial limits, they can have no guarantee that they carry *Charter* rights with them out of the country. As this Court has noted in the past, individuals should expect to be governed by the laws of the state in which they find themselves and in which they conduct financial affairs — it is the individual's decision to go to or operate in another country that triggers the application of the foreign law: *Terry*, at paras. 24 and 26; *Schreiber*, at para. 23. Cooperation between states is imperative if transnational crimes are not to be committed with impunity because they fall through jurisdictional cracks along national borders. In *Cotroni c. Centre de Prévention de Montréal*, [1989] 1 S.C.R. 1469 (S.C.C.), in the context of drug trafficking, La Forest J. stated the following, at p. 1485:

> The only respect paid by the international criminal community to national boundaries is when these can serve as a means to frustrate the efforts of law enforcement and judicial authorities. The trafficking in drugs, with which we are here concerned, is an international enterprise and requires effective tools of international cooperation for its investigation, prosecution and suppression.

In order to foster such cooperation, and in the spirit of comity, Canada cannot either insist that the *Charter* be applied in other countries or refuse to participate. When Canadian authorities are guests of another state whose assistance they seek in a criminal investigation, the rules of that state govern.

100 It is clear that a balance must be struck "to achieve a just accommodation between the interests of the individual and those of the state in providing a fair and workable system of justice": *Harrer*, at para. 14. Individual rights cannot be completely

disregarded in the interests of transborder cooperation. Sections 7 and 11(*d*) provide that everyone tried in Canada enjoys the same rights to a fair trial and not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice. Where the Crown seeks at trial to adduce evidence gathered abroad, the *Charter* provisions governing trial processes in Canada ensure that the appropriate balance is struck and that due consideration is shown for the rights of an accused being investigated abroad.

101 Moreover, there is an argument that comity cannot be invoked to allow Canadian authorities to participate in activities that violate Canada's international obligations. As a general rule, Canadian officers can participate in investigations abroad, but must do so under the laws of the foreign state. The permissive rule that allows Canadian officers to participate even when there is no obligation to do so derives from the principle of comity; the rule that foreign law governs derives from the principles of sovereign equality and non-intervention. But the principle of comity may give way where the participation of Canadian officers in investigative activities sanctioned by foreign law would place Canada in violation of its international obligations in respect of human rights. In such circumstances, the permissive rule might no longer apply and Canadian officers might be prohibited from participating. I would leave open the possibility that, in a future case, participation by Canadian officers in activities in another country that would violate Canada's international human rights obligations might justify a remedy under s. 24(1) of the *Charter* because of the impact of those activities on *Charter* rights in Canada.

(4) A Balancing Methodology

102 In light of the foregoing considerations, several issues arise with respect to the question of the application of the *Charter* to investigations. It will be necessary to consider each of them carefully in order to develop a principled approach to determining whether the *Charter* applies and avoid the uncertainties that now plague the question.

103 The court must first turn to s. 32 in order to determine whether the actors are agents of government and then determine whether the activities fall within the scope of the legislative authority of Parliament or the provincial legislatures. It must begin by considering the wording of s. 32(1) of the *Charter*, bearing in mind that provision's two distinct components. As a threshold question, it must be asked whether there is a state actor in the sense of a government agent or official possessing statutory authority or exercising a public function (see P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 2, at pp. 34-13 to 34-15 and 34-16 to 34-18). Police officers are clearly government actors to whom, *prima facie*, the *Charter* would apply: "By its terms, s. 32(1) dictates that the *Charter* applies to the Canadian police by virtue of their identity as part of the Canadian government" (*Cook*, at para. 124). However, the inquiry does not end there. It is clear that s. 32(1) applies to state actors "in respect of all matters" within the authority of Parliament or the provincial legislatures. The second part of the s. 32(1) inquiry is essential in such cases.

104 Although, on the basis of nationality, Canada has some jurisdiction over Canadian agents acting abroad, that jurisdiction is subject to the caveat that the matter must be within the authority of Parliament or the provincial legislatures. Consequently, Canada's jurisdiction is circumscribed by the territorial jurisdiction of the state in which its agents are operating. For example, Canadian consular officials operating abroad have some immunity from local laws on the basis of nationality jurisdiction, but that does not mean they have the power to abide by Canadian laws and only Canadian laws when in the host state. Bastarache J. correctly noted in *Cook* that a Canadian police officer is not stripped of his or her status as such on crossing the border into the U.S., but the officer's authority to exercise state powers is necessarily curtailed. Canada does not have authority over all matters respecting what the officer may or may not do in the foreign state. Where Canada's authority is limited, so too is the application of the *Charter*.

105 Neither Parliament nor the provincial legislatures have the power to authorize the enforcement of Canada's laws over matters in the exclusive territorial jurisdiction of another state. Canada can no more dictate what procedures are followed in a criminal investigation abroad than it can impose a taxation scheme in another state's territory. Criminal investigations implicate enforcement jurisdiction, which, pursuant to the principles of international law discussed above, cannot be exercised in another country absent the consent of the foreign state or the application of another rule of international law under which it can so be exercised. While concurrent jurisdiction over prosecutions of crimes linked with more than one country is recognized under international law, the same is not true of investigations, which are governed by and carried out pursuant to territorial

jurisdiction as a matter inherent in state sovereignty. Any attempt to dictate how those activities are to be performed in a foreign state's territory without that state's consent would infringe the principle of non-intervention. And, as mentioned above, without enforcement, the *Charter* cannot apply.

106 In some cases, the evidence may establish that the foreign state consented to the exercise of Canadian enforcement jurisdiction within its territory. The *Charter* can apply to the activities of Canadian officers in foreign investigations where the host state consents. In such a case, the investigation would be a matter within the authority of Parliament and would fall within the scope of s. 32(1). Consent clearly is neither demonstrated nor argued on the facts of the instant appeal, so it is unnecessary to consider when and how it might be established. Suffice it to say that cases in which consent to the application of Canadian law in a foreign investigation is demonstrated may be rare.

107 If the court is not satisfied that the foreign state consented to the enforcement of Canadian law in its territory, it must turn to the final stage of the inquiry and consider how to ensure the fairness of a trial held in Canada. What is in issue at this stage is no longer whether the actions of state agents outside Canada were consistent with the *Charter*, but whether they affect the fairness of a trial inside Canada.

108 Any individual tried in Canada for an offence under Canadian law has, pursuant to s. 11(*d*) and to centuries of common law, the right to a fair trial. In addition, everyone has the right to liberty and the right not to be deprived thereof except in accordance with the principles of fundamental justice (s. 7). This Court has in fact held that the right to a fair trial is a principle of fundamental justice: *R. v. Seaboyer*, [1991] 2 S.C.R. 577 (S.C.C.), at p. 603. If evidence is gathered in a way that fails to meet certain minimum standards, its admission at trial in Canada may — regardless of where it was gathered — amount to a violation of either or both of those sections of the *Charter*. Judges have the discretion to exclude evidence that would result in an unfair trial. That discretion, long established at common law, has attained constitutional status by being entrenched in s. 11(*d*) of the *Charter*. However, it does not automatically follow that a trial will be unfair or that the principles of fundamental justice will be infringed if evidence obtained in circumstances that do not meet *Charter* standards is admitted: *Harrer*, at para. 14.

109 The circumstances in which the evidence was gathered must be considered in their entirety to determine whether admission of the evidence would render a Canadian trial unfair. The way in which the evidence was obtained may make it unreliable, as would be true of conscriptive evidence, for example. The evidence may have been gathered through means, such as torture, that are contrary to fundamental *Charter* values. Such abusive conduct would taint the fairness of any trial in which the evidence was admitted: *Harrer*, at para. 46. La Forest J. offered the following additional guidance in *Harrer*, at paras. 16-18:

> The fact that the evidence was obtained in another country in accordance with the law of that country may be a factor in assessing fairness. Its legality at the place in question will necessarily affect all participants, including the police and the individual accused. More specifically, conformity with the law of a country with a legal system similar to our own has even more weight, for we know that a number of different balances between conflicting principles can be fair ....
>
> But the foreign law is not governing in trials in this country. For example, it may happen that the evidence was obtained in a manner that conformed with the law of the country where it was obtained, but which a court in this country would find in the circumstances of the case would result in unfairness if admitted at trial. On the other hand, the procedural requirements for obtaining evidence imposed in one country may be more onerous than ours. Or they may simply have rules that are different from ours but are not unfair. Or again we may not find in the particular circumstances that the manner in which the evidence was obtained was sufficiently objectionable as to require its rejection. In coming to a decision, the court is bound to consider the whole context.
>
> At the end of the day, a court is left with a principled but fact-driven decision.

110 La Forest J. and McLachlin J. both found that admission of the evidence would not render the trial unfair in the circumstances of that case. McLachlin J. noted in particular that the relevant circumstances included the expectations of the accused in the place where the evidence was taken, and that the police conduct was neither unfair nor abusive. She made the

following comment, at para. 49: "The unfairness arises in large part from the accused's expectation that the police in Canada will comply with Canadian law. Where the [evidence] is [gathered] abroad, the expectation is otherwise."

111 Individuals can reasonably expect that certain basic standards will be adhered to in all free and democratic societies; where those standards are deviated from in gathering evidence, a Canadian trial that relies on that evidence may be unfair. In such instances, "[i]t may be that ... notwithstanding the suspect's submission to the law of the foreign jurisdiction, to admit the evidence would be so grossly unfair as to repudiate the values underlying our trial system and condone procedures which are anathema to the Canadian conscience" (*Harrer*, at para. 51). Whether the evidence was obtained in compliance with or in violation of the law of the foreign state may also be relevant. However, where commonly accepted laws are complied with, no unfairness results from variances in particular procedural requirements or from the fact that another country chooses to do things in a somewhat different way than Canada. Further, the failure to comply with a particular rule in a given case does not necessarily amount to an injustice. As La Forest J. noted in *Harrer*, at para. 15, "we must be mindful that a constitutional rule may be adopted to ensure that our system of obtaining evidence is so devised as to ensure that a guaranteed right is respected as a matter of course". The rule is directed not at the individual case alone, but rather at systemic fairness — a concern that does not arise in foreign investigations under foreign systems. Instead, the concern is to preserve the fundamental values of the Canadian trial process.

112 Despite the fact that the right to a fair trial is available only at the domestic level, after the investigation, it does provide an incentive for Canadian police officers to encourage foreign police to maintain high standards in the course of a cooperative investigation so as to avoid having the evidence excluded or a stay entered: *Terry*, at para. 26. In a similar vein, L'Heureux-Dubé J. commented in *Cook*, at para. 103, that to the extent that it is possible to do so in the circumstances, Canadian police should strive to conduct investigations outside Canada in accordance with the letter and spirit of the *Charter*, even when its guarantees do not apply directly.

G. Summary of the Approach

113 The methodology for determining whether the *Charter* applies to a foreign investigation can be summarized as follows. The first stage is to determine whether the activity in question falls under s. 32(1) such that the *Charter* applies to it. At this stage, two questions reflecting the two components of s. 32(1) must be asked. First, is the conduct at issue that of a Canadian state actor? Second, if the answer is yes, it may be necessary, depending on the facts of the case, to determine whether there is an exception to the principle of sovereignty that would justify the application of the *Charter* to the extraterritorial activities of the state actor. In most cases, there will be no such exception and the *Charter* will not apply. The inquiry would then move to the second stage, at which the court must determine whether evidence obtained through the foreign investigation ought to be excluded at trial because its admission would render the trial unfair.

H. Application to the Facts

114 I will now apply the foregoing methodology to the facts of the instant case.

115 At the first stage, there is no question in the case at bar that the RCMP officers involved in the searches and seizures are state actors for the purposes of s. 32(1). However, since the search was carried out in Turks and Caicos, it is not a matter within the authority of Parliament. Without evidence of consent, that is enough to conclude that the *Charter* does not apply. It is not reasonable to suggest that Turks and Caicos consented to Canadian extraterritorial enforcement jurisdiction in the instant case. Nonetheless, I will say a few words on the factual circumstances of the investigation.

116 The trial judge made several significant findings of fact, and the appellant has not attempted to argue that they were based on a palpable and overriding error. Those findings are that:

- Detective Superintendent Lessemun "agreed to allow the RCMP to continue its investigation on the Islands, but was adamant he was going to be in charge, and that the RCMP would be working under his authority" (para. 4);

- "the RCMP officers were, and understood that they were, operating under the authority of Detective Superintendent Lessemun" (para. 25);

- the RCMP officers "were subject to Turks & Caicos authority" (para. 25);

- "the Canadian police, in this case, were operating under and subject to the authority of Detective Superintendent Lessemun" (para. 29); and

- "the propriety and legality of the entries into the private premises in the Turks & Caicos Islands ... are subject to Turks & Caicos criminal law and procedures and the superintending scrutiny of the Turks & Caicos courts" (para. 29).

As those findings demonstrate, Turks and Caicos clearly and consistently asserted its territorial jurisdiction in the conduct of the investigation within its borders. It controlled the investigation at all times, repeatedly making it known to the RCMP officers that, at each step, the activities were being carried out pursuant to Turks and Caicos authority alone. As found by the trial judge, the RCMP officers were well aware that, when operating in Turks and Caicos, they were working under the authority and direction of Detective Superintendent Lessemun. Although much of the planning took place in Canada, and Canada contributed much of the human and technological resources, Turks and Caicos law and procedure applied to all the searches: it applied to the perimeter searches in February 1998, to the covert entries in March 1998, and to the overt entries in February 1999. In his trial testimony, Office Boyle explained this as follows:

> I — I don't think there would have been any way, and certainly we would — I wasn't of the — I wasn't of the opinion that we would make [Detective Superintendent Lessemun] answerable to us in any way. We were — we were at his — it was at his discretion as to what we were allowed to do on that island. We were asking for his assistance as a Turks and Caicos police officer.
>
> . . . . .
>
> I had no authority. None of our officers, myself or the RCMP officers, had any authority to conduct any investigations or searches on the island.

Finally, warrants were sought in Turks and Caicos courts, and that country's authorities prevented the seized documents from being removed to Canada.

117 The appellant took issue in this appeal with the trial judge's finding that the RCMP and Turks and Caicos officers were engaged in a "co-operative investigation". There is no magic in the words "co-operative investigation", because the issue relates not to who participated in the investigation but to the fact that it occurred on foreign soil and that consent was not given for the exercise of extraterritorial jurisdiction by Canada. When investigations are carried out within another country's borders, that country's law will apply. A cooperative effort involving police from different countries "does not make the law of one country applicable in the other country": *Terry*, at para. 18.

118 In short, although Canadian state actors were involved, the searches and seizures took place in Turks and Caicos and so were not matters within the authority of Parliament. The *Charter* does not apply.

119 The final recourse available to the appellant would be to demonstrate that the trial judge erred in admitting the evidence because doing so rendered the trial unfair. The trial judge determined that to admit the evidence would not result in an unfair trial and that it need not therefore be excluded, and the appellant did not argue trial fairness in this appeal. Nonetheless, I will consider this issue briefly.

120 There was some discussion at trial about the existence of warrants authorizing the March 14, 1998 entries. No warrants were admitted into evidence, and I must proceed on the basis that the searches were warrantless. However, considering all the circumstances, I cannot conclude that the admission of the documents obtained through the searches rendered the trial unfair. The evidence at issue consists of documents obtained from the BWIT's office. As Juriansz J. found in his ruling on the application to exclude, it is not conscriptive evidence. The actions of the RCMP officers were not unreasonable or unfair, as they were acting

under Detective Superintendent Lessemun's direction and had a genuine and reasonable belief that they were complying with Turks and Caicos law. They thought that search warrants had been obtained and that the investigation was lawful under Turks and Caicos law. The RCMP officers acted in good faith at all times. Their actions were not improper. The way in which the evidence was obtained in no way undermines its reliability. Moreover, since he had chosen to conduct business in Turks and Caicos, the appellant's reasonable expectation should have been that Turks and Caicos law would apply to the investigation. Although no warrants were admitted at trial, I can find no evidence that the searches and seizures were conducted in a manner inconsistent with the requirements of Turks and Caicos law. Little evidence was presented on Turks and Caicos law. Foreign law must be proved. I see no basis for concluding that the procedural requirements for a lawful search and seizure under Turks and Caicos law fail to meet basic standards commonly accepted by free and democratic societies.

121 I do not think the circumstances demonstrate that this is a case where admission of the evidence would violate the appellant's right to a fair trial.

III. Disposition

122 For the foregoing reasons, I would dismiss the appeal and affirm the convictions.

***Bastarache J.*:**

123 This appeal is concerned with only one situation, investigatory actions undertaken by Canadian law enforcement officials in the Turks and Caicos Islands. It is argued that this Court's decision in *R. v. Cook*, [1998] 2 S.C.R. 597 (S.C.C.), left unclear whether the *Canadian Charter of Rights and Freedoms* will apply in such a case and that some clarification of the issue is required.

124 I have read the reasons of LeBel J. and believe we agree on many points. We agree that Canadian officers must respect fundamental human rights when investigating abroad. We also see the need for Canadian officers to participate effectively in the fight against transnational crime and recognize that this will often require Canadian officials to follow foreign laws and procedures. We both recognize that, on one hand, comity demands respect for a foreign state's choice of criminal procedure, while on the other hand, there is the possibility that some foreign procedures may violate fundamental human rights. In essence, we both see the need to strike a balance between effective participation by Canadian officers in fighting transnational crime and the protection of fundamental human rights.

125 Where we disagree is on the *Charter*'s role in this process. My colleague sees international law as the proper vehicle for achieving this balance. I prefer to continue to rely on the *Charter*, as this Court attempted to do in *Cook*, though I recognize there are problems with the position of the majority in that case that must be dealt with. Constitutions operate to define the sphere of legitimate governmental action; the *Charter* imposes restraints on all conduct of Canadian government officials with respect to fundamental human rights. It is a flexible document, amenable to contextual interpretation and permitting reasonable justifications of limitations to fundamental rights. I am of the view that it can apply to Canadian officers operating in another country without jeopardizing the need for comity.

126 I would resolve this case by ruling that the *Charter* did apply to the search and seizures conducted by the RCMP in the Turks and Caicos Islands. I would however dismiss the appeal by finding that Hape has not established a breach of s. 8 of the *Charter*.

I. Background

127 I generally agree with the summary of facts and judicial history of the case as set out by my colleague. However, I find it useful for the analysis that is to follow to set out the trial judge's ruling on the *Charter* and s. 8 in greater detail.

128 The trial judge resolved Hape's *Charter* motion by reference to *Cook*. He first noted that the majority found the *Charter* did apply to the actions of Canadian law enforcement in foreign territory and then cited an excerpt from my concurring reasons

as imposing a qualification based on the extent of control an officer exercises over the investigation ([2002] O.J. No. 3714 (Ont. S.C.J.)).

129 He then stated that both the majority and concurring reasons require more than just s. 32 compliance, citing the majority's statement that the *Charter* will not apply where it "interfere[s] with the sovereign authority of the foreign state and thereby generate[s] an objectionable extra-territorial effect" (para. 20).

130 The trial judge went on to discuss alternative language used by the majority to express this requirement, specifically that "Charter standards could 'not conflict with the concurrent territorial jurisdiction of the foreign state'" (para. 21). He then quoted all of para. 54 of *Cook* where he found that the majority again stressed this limitation.

131 The trial judge then pointed out the majority's emphasis on the words "co-operative investigation" in para. 54, quoting Justice McLachlin's (as she then was) observation in *R. v. Terry*, [1996] 2 S.C.R. 207 (S.C.C.), that "any co-operative investigation involving law enforcement agencies of Canada and the United States will be governed by the laws of the jurisdiction in which the activity is undertaken" (para. 22).

132 Following this, the trial judge rejected the defence's argument that a "co-operative investigation" is one where the participants make relatively equal contributions. He found that the term did not connote the extent of participation of the parties except that they "wor[k] together to the same end" (para. 24).

133 He then proceeded to find that the RCMP officers in question were involved in a "co-operative investigation":

> In any event, Detective Superintendent Lessemun was with the Canadian police at all times and did play a role in what they did by acting as a look-out, by providing information, and, the Canadian police believed, by obtaining warrants. While the Canadians may have made a larger contribution of officers, expertise and equipment, the Turks & Caicos contributed police authority in the jurisdiction. The RCMP sought and was granted permission from the Turks & Caicos authorities to conduct investigation on the Island. I accept Officer Boyle's testimony that the RCMP officers were, and understood that they were, operating under the authority of Detective Superintendent Lessemun. The fact that the RCMP could not remove the seized records from the Island, as they had planned, makes apparent that they were subject to Turks & Caicos authority.
>
> I find that all the actions of the RCMP on the Turks and Caicos Islands were part of a "co-operative investigation." [paras. 25-26]

134 Following this conclusion, the trial judge determined that it was for him to determine whether the application of the *Charter* to this "co-operative investigation" would result in an objectionable extraterritorial effect. He concluded that it would:

> Cory J. and Iacobucci J., in the majority judgement in Cook, indicated, at paragraphs 15 and 54, that there is an objectionable extra-territorial effect when Canadian criminal law standards are imposed on foreign officials and procedures. In Cook, the words which the Canadian police spoke to the accused were at their complete discretion. The conversation between the Canadian police and Cook, while it took place in a U.S. jail, was not subject to American law and procedure. In that conversation, the Canadian police could have instructed the accused about his right to counsel in accordance with Canadian standards without implicating American criminal law or procedures.
>
> This is a different case, because the Canadian police, in this case, were operating under and subject to the authority of Detective Superintendent Lessemun. Moreover, the propriety and legality of the entries into the private premises in the Turks and Caicos Islands, whether pursuant to warrants or not, are subject to Turks and Caicos criminal law and procedures and the superintending scrutiny of the Turks and Caicos courts. [paras. 28-29]

On this basis, the trial judge held that the *Charter* did not apply.

135 The Court of Appeal essentially endorsed the trial judge's ruling on s. 8, finding that he considered the binding authorities (*Terry* and *Cook*) and correctly concluded on the basis of these authorities that the *Charter* did not apply ((2005), 201 O.A.C. 126 (Ont. C.A.)).

II. Submissions of the Parties

136 The appellant's argument is that the conduct of the Canadian police falls within the factual confines of *Cook*. He further argues that the courts below erred in not applying the *Charter* on the basis that the RCMP officer's actions were part of a "co-operative investigation". He submits that the passage in *Terry* that employs this term only emphasizes that the *Charter* will not apply to foreign authorities, not that the *Charter* cannot apply to Canadian authorities. The appellant asks that the conviction be quashed as a result of a violation of s. 8 (though I note that he submits no argument on the alleged s. 8 breach or s. 24(2)).

137 The respondent takes the position that the trial judge correctly applied a "cooperation" test to determine the application of the *Charter*, and that the appellant is really only challenging his factual finding that the RCMP officers were cooperating with and under the control of Turks and Caicos officials. It argues that the decision of the trial judge is entitled to deference absent a palpable and overriding error and notes that no such error has been demonstrated. The respondent further argues that applying the *Charter* in this case would result in imposing the *Charter* to the laws and procedures of a foreign country, which *Cook* determined would constitute an interference with the sovereign authority of that country.

138 The intervener, Attorney General of Ontario, argues that cooperation *per se* precludes the application of the *Charter* in this case and supports the rulings of the courts below. The intervener does, however, make an alternative argument assuming *Charter* application. It argues that before determining whether *Charter* compliance will constitute an 'objectionable extraterritorial effect', it is first necessary to determine the nature and scope of the s. 8 *Charter* right in the location and jurisdiction searched. Essentially, the intervener cautions this Court against endorsing an approach that would permit wholesale application of s. 8 to the activities of Canadian officials investigating abroad. It argues that protection consistent with the law of the foreign country is merited here and that this can be realized by adopting the approach of Lamer C.J. in *Schreiber v. Canada (Attorney General)*, [1998] 1 S.C.R. 841 (S.C.C.), or by relying on comments made by this Court in previous judgments that provide that the scope of s. 8 is determined by a contextual approach. The intervener also emphasizes that a wholesale approach to applying s. 8 abroad would hamper international cooperation in fighting transnational crime.

III. Analysis

139 It is clear from this Court's jurisprudence (notably *Cook*, but also comments made by La Forest J. in *R. v. Harrer*, [1995] 3 S.C.R. 562 (S.C.C.), at paras. 11 and 12, and by Lamer C.J. in *Schreiber*, at para. 16) that the *Charter*'s reach does not end at the "water's edge". It is less clear, however, when and how the *Charter* applies abroad.

A. Solution(s) Presented by the Majority Judgment in Cook

140 At para. 25 of *Cook*, the majority set out two factors it identified as critical to its conclusion that the *Charter* applied to the activities of the Canadian police in that case on the basis of nationality: (1) The impugned act falls within s. 32(1) of the *Charter*; and (2) the application of the *Charter* does not interfere with the sovereign authority of the foreign state and thereby generate an objectionable extraterritorial effect. These two factors have since been seen by many as the test for the application of the *Charter* abroad.

141 Applying this test to the facts in *Cook*, the majority held that s. 10(*b*) of the *Charter* applied to the conduct of two Vancouver police officers in the United States. As to the first stage, the Court found that the officers involved were Canadians and thus the impugned act (failure to provide a proper counsel warning) fell within the scope of s. 32(1). I would similarly find that the first branch of the test in *Cook* applies to the RCMP officers' actions in this case.

142 What remains unclear about the majority's decision in *Cook* is when the second branch of its test has been met. In my view, the majority decision in *Cook* does not provide a definitive answer. Rather, several possible approaches to the question, "When is there an interference with the sovereign authority of foreign state?" appear possible on the basis of *Cook*. I review each of these below.

(1) "Co-operation"

143 The reference to Justice McLachlin's comments in *Terry* and the emphasis placed on "co-operation" at para. 54 of *Cook* suggest that co-operation is tantamount to interference with foreign jurisdiction if it involves the application of Canadian laws or procedures and that the determinative test for *Charter* application is therefore whether there is "co-operation" between Canadian and foreign officials or not. This also suggests that there was no co-operation in *Cook*. However, in my view, there clearly had to have been "co-operation", at least in the form of consent, between the U.S. and the Canadian law enforcement officers in order for the interrogation to take place. (See R. A. Harvie and H. Foster, "Let the Yanks Do It? The *Charter*, The Criminal Law and Evidence on a 'Silver Platter'" (2001), 59 *Advocate* 71, at pp. 75-76.)

144 The majority in *Cook* suggests, at para. 54, by citing the comments of McLachlin J. in *Terry*, that once there is any co-operation, the door to the application of the *Charter* closes entirely. In the present appeal, the trial judge did not dispose of the *Charter* issue by simply finding that there was co-operation between the RCMP and Turks and Caicos police. He went on to find that applying the *Charter* to this particular "co-operative investigation" would result in imposing Canadian standards on foreign authorities, and therefore constitute an interference with foreign jurisdiction. This Court must now decide whether *Cook* actually created a test based on "co-operation" to determine *Charter* application.

145 In my opinion, using "co-operative investigation" language to determine whether there is an objectionable extraterritorial effect of Canadian law is not helpful. The first problem with this approach relates to the fact that co-operation with foreign officials in the context of Canadian investigations abroad will be inevitable in most, if not all cases. All Canadian officers investigating in a foreign territory, in order to fulfill their mandate, will have to cooperate with foreign officials and comply with foreign law. This principle of international law is stated in I. Brownlie, *Principles of Public International Law* (6th ed. 2003), at p. 306:

> The governing principle is that a state cannot take measures on the territory of another state by way of enforcement of national laws without the consent of the latter. Persons may not be arrested, a summons may not be served, police or tax investigations may not be mounted, orders for production of documents may not be executed, on the territory of another state, except under the terms of a treaty or other consent given.

It is repeated in S. Coughlan et al., "Global Reach, Local Grasp: Constructing Extra-territorial Jurisdiction in the Age of Globalization" (2007), 6 *C.J.L.T.* 29, at p. 32: "[S]tate officials such as police cannot exercise their executive powers on the territory of another state without that state's permission".

146 As well, in a paper on the extraterritorial application of the Fourth Amendment outside the United States, E. Bentley, writes:

> [S]earches and seizures in foreign states are of necessity a cooperative endeavor, with United States agents routinely cast in the supporting role. In the "typical case," of which *Verdugo* provides an example, "the foreign officials are the ones who decide the scope and reasonableness of any proposed search," and United States agents "must comply with the demands of their hosts." The reasons for this are both legal and practical.
>
> It is a settled principle of international law that law enforcement operations are exclusively entrusted to each state within its own jurisdiction, and that when one state sends police to another state to conduct a search, it may conduct the search with only the permission, and conforming to the laws, of the host state. ...
>
> It is not only international law, but practical realities as well, that prevent the United States from conducting unilateral law enforcement operations in foreign states. United States law enforcement agents operating in a foreign state must try to accomplish their objectives while stripped of most of the powers of search and arrest that they wield in the United States. To accomplish anything, they generally must engage the cooperation of local authorities at one level or another. In attempting to do so, they face additional hurdles, in the form of alien legal and political systems, divergent law enforcement cultures, and diplomatic frictions.

> As a result, United States extraterritorial law enforcement now takes place within an elaborate framework of international cooperation, at all levels of formality.
>
> ("Toward an International Fourth Amendment: Rethinking Searches and Seizures Abroad After *Verdugo-Urquidez*" (1994), 27 *Vand. J. Transnat'l L.* 329, at pp. 365-68)

147 Adopting a "co-operation" approach as the limit to *Charter* application will result in very few situations where the *Charter* can apply. This can be seen in the American experience. Bentley describes, at pp. 400-402, how the U.S. "joint venture standard" used to determine constitutional protection abroad (which operates somewhat like a co-operation test in that it seeks to identify sufficient participation of U.S. officials in foreign investigation to activate Fourth Amendment protection) has failed to be applied in a coherent fashion by U.S. courts and has resulted in little constitutional protection:

> To date, as noted above, courts have found United States participation in foreign searches sufficient to trigger the Fourth Amendment in only a handful of cases. Among the activities which have been held not to rise to the requisite level of participation are: requesting, but not participating in, a foreign search, or otherwise "triggering the interest" of foreign authorities who subsequently conduct a search and pass the evidence on to United States authorities; passing on tips which prompt foreign police to initiate an investigation; passing on information requested by foreign governments; joining foreign police in a foreign-initiated search; participating in foreign wiretaps, as long as United States agents do not "initiate, supervise, control or direct" them; using information from an illegal foreign wiretap to support a United States search warrant; and even, in a few cases, triggering and then participating in a foreign search.
>
> If these decisions embody a coherent standard on joint participation, it is difficult to perceive. While most courts have followed the test set out in *Stonehill v. United States* — that "Federal agents so substantially participated in the raids so as to convert them into joint ventures" — or language essentially to that effect; they have failed to articulate what this test entails in any coherent fashion, instead applying the test in an ad hoc, apparently result-oriented manner to the facts of the case at hand. ... Whatever factors courts have focussed on, the result has been the same: courts have found insufficient United States participation in all but the most indisputable circumstances. If one had to judge by the few cases in which joint participation has been found, one would have to conclude that the Fourth Amendment does not apply abroad unless United States officials both initiate the search and then continue to participate actively as it unfolds.
>
> This near-elimination of Fourth Amendment liability cannot have been intended by the Supreme Court when it formulated the doctrine on which the joint venture standard was based.... [Emphasis deleted.]

148 A second problem with the "co-operation" approach, at least in my view, is the fact that co-operation as such which occurs between Canadian officials and foreign authorities tells us nothing about whether impermissible extraterritorial effects will occur. An objectionable territorial effect does not necessarily result from the mere fact of co-operation. On this basis, I think Justice McLachlin's comments in *Terry* are better characterized as a recognition of a state of affairs rather than a prescription of when there will be objectionable extraterritorial effects.

(2) The "Factors" Approach to Determining When There Is Interference With the Sovereign Authority of a Foreign State

149 At para. 50, the majority in *Cook* enumerates a number of factual elements that demonstrate why there is no interference with U.S. territorial jurisdiction on the facts in that case. These are: (1) the arrest and interrogation were initiated by a Canadian extradition request; (2) the offence was committed exclusively in Canada and was to be prosecuted in Canada; (3) the U.S. authorities did not become involved in the investigation; and (4) the interrogation was conducted solely by Canadian police officers. Harvie and Foster, at pp. 75-76, suggest that this is in fact *the* test advanced by the majority and criticize it as "a difficult and complex analysis", not straightforward enough, and difficult for lower courts to apply.

150 I have difficulty seeing how these factors establish a "test". Rather, this approach is based on a determination that seems as vague as "We will know what an interference is when we see one". Nevertheless, this is the type of "test" the appellant seems

to suggest *Cook* stands for by arguing that his situation falls within the factual confines of *Cook*. There is clearly a need to define a more principled articulation of the rule governing the application of the *Charter* abroad.

(3) Who Initiates the Investigation as Determinative of When There Is Interference With the Sovereign Authority of a Foreign State

151 It has been suggested that the principle that can be distilled from the factors raised by the majority in *Cook* is that the *Charter* will apply when the Canadian investigation abroad occurs absent an independent foreign investigation (see Harvie and Foster, at p. 76). R. J. Currie, in "*Charter* Without Borders? The Supreme Court of Canada, Transnational Crime and Constitutional Rights and Freedoms" (2004), 27 *Dal. L.J.* 235, at p. 242, states that the majority of the Court in *Cook* permitted *Charter* application to the interrogation in that case because "even though it occurred on U.S. territory, [it] did not interfere with American sovereignty since it was directed at the activities of Canadian officers acting within the context of a Canadian investigation, aimed at the ultimate result of a criminal trial in Canada". Coughlan et al., at p. 57, footnote 58, identifies the basis for applying the *Charter* in *Cook* as follows: "The application of the *Charter* in this kind of case appears to turn on whether the Canadian police are conducting their own investigative activities with the consent of the foreign authorities to do so, or whether they are engaged in policing activities under the direction of the foreign police authority."

152 The statement in *Cook*, at para. 54, that "It may well be a different case where, for example, Canadian authorities participate, on foreign territory, in an investigative action undertaken by foreign authorities in accordance with foreign procedures" supports this view (emphasis added). "Undertaken" can be seen to refer to an investigation *initiated* by foreign authorities. Therefore, as long as the investigation is initiated by Canadians and the evidence is sought to be used in Canada, compliance with the test in *Cook* will be achieved. The facts of this case do tend to support the view that this was indeed an investigation initiated by Canadians and that the role played by Turks and Caicos authorities was merely one of facilitating the RCMP's investigation.

153 I see no principled basis why the *Charter* would not apply to Canadian officials who are actively involved in an investigation just because they did not initiate the investigation.

(4) Foreign "Control" Over the Investigation as the Limit on the Extraterritorial Application of the Charter

154 The approach I suggested in my concurring reasons in *Cook* offered a solution to the indeterminacy presented by the majority's "factors" or "cooperation" approaches. It would appear that the trial judge in this case interpreted my reasons to call for such a "control" test and found this test to be easily reconcilable with the majority reasons in *Cook*. This view of the "control" test has been summarized as follows: "On the one hand, no *Charter* breach occurs if the evidence is obtained by the host officers or under their supervision. On the other hand, the *Charter* does apply if the Canadian authorities are primarily responsible for obtaining the evidence" (Harvie and Foster, at p. 74). A "control" test would thus be seen as a precision on the "cooperation" test discussed above, but this overlooks the fact that in most foreign investigations foreign officers will be in "control" since Canadian officials must operate in the foreign territory under their consent and guidance, usually relying on their procedures.

(5) Imposing Canadian Standards as Determinative of When There Is an Interference With the Sovereign Authority of a Foreign State

155 The majority reasons in *Cook* also suggest that the *Charter* will not apply where Canadian criminal law standards are imposed on foreign officials or where they would supplant foreign procedures (para. 54). I believe that this is what the trial judge in the case at bar concluded in his analysis. Above any other determination, in my view, his analysis emphasized the fact that the RCMP officers were subject to Turks and Caicos authority. This can be seen at para. 30, where, analysing the s. 8 arguments of the defence, he notes a tacit recognition by the defence of "the inescapable conclusion that foreign criminal law and procedures are engaged".

156 Adopting this approach will no doubt help resolve the issue where Canadian officers act independently; they will have to satisfy their normal *Charter* obligations. The test rests on two assumptions: (1) that whenever the *Charter* does apply, Canadian standards are applied *wholesale*; and (2) that some investigations occurring in a foreign state will be regulated by Canadian law.

When the Canadian officers can meet their *Charter* obligation *independently* (and not by consent, as argued by LeBel J.), as was the case in *Cook*, there will be no interference. But when the assistance or authorization of foreign authorities is required, fulfilling Canadian standards for some *Charter* rights will always result in an interference if they are, as said earlier, applied *wholesale*, as if the investigation was being held in Canada. For example, meeting Canadian s. 8 standards abroad will then mean imposing warrant requirements and standards on Turks and Caicos and requiring a certain conduct of Turks and Caicos officials. This generates objectionable extraterritorial effects.

157 But this approach produces inconsistent application of the *Charter*'s protection of legal rights because some rights, such as s. 10(*b*), could apply, as in *Cook*, but s. 8 and maybe s. 9 never will. This sort of "patchwork" approach to the *Charter* seems quite unprincipled. I recognize that the majority in *Cook* having said that the *Charter* would only apply in "rare circumstances" (see para. 25) supports the opposite inference; but I prefer the contrary view of Lamer C.J. in *Schreiber*, at para. 16, that "[Canadian] officials are clearly subject to Canadian law, including the *Charter*, within Canada, and in most cases, outside it" (cited in *Cook*, at para. 46).

B. An Alternative to the Majority Approach in Cook

158 It thus appears that the various approaches to determining when there is an interference with the sovereign authority of a foreign state presented by this Court's decision in *Cook* are problematic. One solution is to revert to the dissenting position of L'Heureux-Dubé J. in *Cook* and cut off the *Charter*'s reach at the "water's edge" on the basis that comity requires it. But there is an alternative to this displacement of the *Charter*.

159 Section 32(1) provides as follows:

> 32. (1) This Charter applies
>
> (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

These terms do not extend the application of the *Charter* to the actions of foreign officials. But they do not imply that the *Charter* cannot apply to Canadian police officials acting abroad. There can be no suggestion, therefore, that the *Charter* creates any legal consequences whatsoever for a foreign agent or for the application of foreign law.

160 I would disagree with LeBel J. that if one cannot enforce Canadian law outside Canada the matter falls outside the authority of Parliament and the provincial legislatures under s. 32(1) (para. 69). I think s. 32(1) includes all actions of Canadian police officers precisely because s. 32 does not distinguish between actions taken on Canadian soil and actions taken abroad. It would also be unprincipled, in my view, to draw a distinction the moment a Canadian police officer's foot touches foreign soil. As I noted in *Cook*, at para. 120: "the status of a police officer as an officer of the state is not altered by crossing a jurisdictional border, even if he or she is deprived of all the coercive powers conferred by the home state.... From the perspective of the home legal system, ... police officers are still representatives of their home government." The fact that Canadian law is not enforced in a foreign country does not mean that it cannot apply to a Canadian government official. I would note in particular that some Canadian laws apply on the basis of nationality wherever the crime is committed: See s. 7(4.1) of the *Criminal Code*, R.S.C. 1985, c. C-46, on sex crimes committed outside Canada and ss. 7(3.7) to 7(3.75) on crimes against humanity.

161 I do not think a restrictive interpretation of the words "matters that are within the authority of Parliament or the provincial legislatures", adopted at para. 69 of my colleague's reasons, is warranted in discussing the obligations of Canadian police officers operating in another country. I am uncomfortable with such a "reading down" of s. 32(1) of the *Charter*. Section 32(1) of the *Charter* defines *who* acts, not *where* they act. In the instant case, the matter is a Canadian criminal investigation involving Canadian police acting abroad, which clearly makes it a matter within the authority of Parliament or the provincial legislatures. It appears strange to me that my colleague could see an investigation as falling under s. 32(1) of the *Charter* in one

case (in Canada) and not the other (outside Canada). If the investigative activities of Canadian police officers abroad do not fall under "matters within the authority of Parliament or the provincial legislatures", then the officers would have no jurisdiction whatsoever to be conducting investigations abroad. Clearly, they do, as found in *R. v. Libman*, [1985] 2 S.C.R. 178 (S.C.C.).

162 The second thing that must be recognized is that the application of the *Charter* as such to the actions of Canadian officials does not automatically result in an interference with the sovereign authority of foreign states. In *Cook*, where I had adopted the "control" test, I found that there was no interference or "conflict" with sovereign authority when Canadian officials are subject to the *Charter* because the *Charter* does not mandate specific conduct, but rather imposes certain limits on the conduct of government officials:

> [T]he nature of the rights contained in the relevant sections of the *Charter* are not mandatory, but rather conditional upon the occurrence of specified investigatory activities. Thus, if there is a rule of investigation in the foreign jurisdiction that directly contradicts a *Charter* provision, there is still no conflict. The reason for this is that the *Charter* does not impose any obligation to investigate; it simply requires that if an investigation is made by the officer, it must be conducted in accordance with certain conditions. It follows from this, moreover, that the application of the *Charter* to the Canadian official has no impact on the foreign legal system.
>
> . . . . .
>
> As is clear from the discussion above, there is no question of a "conflict" between foreign procedures and Canadian procedures. If the compulsory foreign procedure adopted falls below the standard required by the *Charter*, then the Canadian officials may not take a directing or primary role in the part of the investigation involving those techniques. In essence, they may not exercise, even when invited to do so by the foreign authority, the powers purportedly conferred on them by the foreign investigatory procedures. This is no more complex than the obligation imposed by the *Charter* within Canada. [Emphasis added; paras. 143 and 150.]

By putting the onus squarely on Canadian authorities to not exercise control if the investigatory action is not *Charter* compliant, we never have to ask whether the application of the *Charter* results in an interference with sovereign authority of a foreign state. If the "control" test is not adopted, as prescribed by *Cook*, we must consider in what circumstances there will be interference in cases where Canadian officers simply co-operate with foreign authorities.

163 At para. 97 of his reasons, LeBel J. concedes that international law does not prohibit Canada from imposing restraints on its own conduct and that of its officials. He admits that it is the policy consideration of Canadian participation in the fight against transnational crime that ultimately informs his conclusion:

> Since the *Charter* does not authorize state action, but simply operates as a limit on such action, could it not be said that the *Charter* "applies" to extraterritorial investigations by prohibiting Canadian officers from participating in investigations abroad that do not conform to Canadian law? International law provides only part of the answer to this question. To prohibit Canadian officers from participating would indeed ensure conformity with both international law and the *Charter*, however, it would also mean that the investigation could not be conducted. This is a serious concern. The complete answer therefore lies both in international law and in the need to address the challenges of investigating and prosecuting transborder criminal activity.

I do not question the importance of this policy consideration and the need for Canada to participate in the fight against transnational crime. However, I fail to see how the *Charter* prevents us from taking into account this important societal need while holding Canadian officers to their obligation to respect fundamental Canadian values. Let me then examine more closely what *Charter* compliance demands of Canadian officials. For present purposes I will limit my examination to the Legal Rights set out in ss. 7-14 of the *Charter*.

164 The Legal Rights provisions of the *Charter* are very different from the provisions one can find in the *Criminal Code*, although there are provisions of the *Criminal Code* that prohibit specific conduct by Canadian officials based on the recognition of fundamental human rights. Take, for example, s. 269.1(1) which makes "[e]very official, or every person acting at the

instigation of or with the consent or acquiescence of an official, who inflicts torture on any other person" liable of an indictable offence.

165 The Legal Rights provisions of the *Charter* are also very different from the provisions in the *Criminal Code*, or other statutes, that stipulate specific criminal procedures that must be followed in a given case. For example, the *Criminal Code* specifies the circumstances in which search or arrest warrants are necessary (see for example ss. 487 to 489 and 495(2) of the *Criminal Code*), as well as those when they are not (see for example ss. 117.02(1), (2), 199(2), 254(2) to (4), 462 and 495(1)). Police also have powers to search and detain without a warrant in certain circumstances at common law under the *Waterfield* test (*R. v. Godoy* (1998), [1999] 1 S.C.R. 311 (S.C.C.), *R. v. Mann*, [2004] 3 S.C.R. 59, 2004 SCC 52 (S.C.C.), and *R. v. Dedman*, [1985] 2 S.C.R. 2 (S.C.C.)).

166 The Legal Rights provisions of the *Charter* neither mandate nor prohibit specific conduct by Canadian officials. Rather they lay down a number of fundamental principles — framed as general propositions regarding the treatment of individuals — that are used to scrutinize the legitimacy of the specific criminal procedures and conduct of Canadian officials. The principles embodied within these provisions are broadly worded and from these courts draw out further guiding principles. Consider s. 8 of the *Charter*, which puts forth the principle that "Everyone has the right to be secure against unreasonable search or seizure." This general principle has engendered a number of further principles determining what constitutes a "reasonable" search. This Court has stated in previous cases that: (1) The purpose behind s. 8 is to protect the privacy of individuals from unjustified state intrusion (*Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.*, [1984] 2 S.C.R. 145 (S.C.C.)). (2) This interest in privacy is, however, limited to a "reasonable expectation of privacy" (*R. v. Evans*, [1996] 1 S.C.R. 8 (S.C.C.)). (3) Wherever feasible, prior authorization must be obtained in order for a search and seizure to be reasonable (*Hunter*). (4) Prior authorization must be given by someone who is neutral and impartial and who is capable of acting judicially (*Hunter*). (5) The person granting the authorization must be satisfied by objective evidence on oath that there are reasonable and probable grounds for believing that an offence has been committed and that a search of the place for which the warrant is sought will find evidence related to that offence (*Hunter*). (6) A search is reasonable if it is authorized by law, if the law itself is reasonable and if the manner of the search is reasonable (*R. v. Caslake*, [1998] 1 S.C.R. 51 (S.C.C.)).

167 It is the role of courts to interpret the general principles set out in the provisions of the *Charter*, draw out further principles, and apply these to the facts of a given case. That exercise is an ongoing process which has produced, up to now, a body of rules applicable within the Canadian legal system. The specific application of these principles to factual circumstances and the rules they create, however, should not be confused with the more abstract principles for which the *Charter* stands.

168 For example s. 10(*b*), in the context of officers operating in Canada, has been interpreted to require that officers tell individuals upon detention, without delay, of their right to counsel and to provide reasonable access to counsel if the right is exercised. In the context of officers operating in a foreign country, unless it is a situation like that in *Cook* where the officers were acting independently, the officer will have to rely on the foreign authorities and their procedures. When the foreign officials are detaining and interrogating the individual, and where there is Canadian participation, the participating Canadian officer is not required to give a s. 10(*b*) warning; detention and interrogation are governed by the local laws. Nor is the Canadian officer required to provide "a crash course" to foreign officials on how to give the accused his s. 10(*b*) warning on the Canadian government's behalf. The *Charter* is not meant to be applied as if it were merely a code of criminal procedure.

169 In my view, adhering to fundamental principles that emanate from the *Charter* would simply require the Canadian officers to inform themselves of the rights and protections that exist under foreign law when dealing with the individual's legal rights on detention, and compare them to those guaranteed under the *Charter* in order to determine if they are consistent with fundamental human rights norms. It is not the case that the protections have to be identical. When the foreign procedure differs from the plain language of s. 10(*b*) (the right to retain and instruct counsel is not provided without delay upon arrest or detention for example), there will be a *prima facie* breach of this provision. However, differences resulting from different legal regimes and different approaches adopted in other democratic societies will usually be justified given the international context, the need to fight transnational crime and the need to respect the sovereign authority of other states, coupled with the fact that it is impossible for Canadian officials to follow their own procedures in those circumstances. Flexibility in this case is permitted by s. 1 of the

Charter. Trivial and technical differences will easily be discarded, more substantial differences between the protections that would be available in Canada and those available in the foreign state will require more in order to be justified.

170 Consider a further example that is closer to the facts at hand. In *R. v. Kokesch*, [1990] 3 S.C.R. 3 (S.C.C.), while investigating an illegal marijuana growing operation in British Columbia, police conducted a perimeter search of a dwelling, acting without reasonable grounds to justify a warrantless search under s. 10(1)(a) of the *Narcotic Control Act*., R.S.C. 1970, c. N-1. The search not being authorized by statute, the Court found that the police had no common law power to conduct the perimeter search because the common law rights of property holders to be free of police intrusion can be restricted only by clear statutory language. The search was therefore deemed illegal, and hence in violation of s. 8 of the *Charter*. But the case does not stand for the general rule that the *Charter* always prohibits warrantless perimeter searches. The case also does not mean that Canadian officers conducting such a search under the laws of a foreign state would have to obtain a warrant issued in Canada to be executed, for example, in the Turks and Caicos (this would be contrary to norms of international law, as earlier stated), or require Turks and Caicos officials to obtain an authorization that is not required under local law.

171 Under s. 8 *Charter* principles, a warrantless perimeter search may be *Charter* compliant if authorized by law. On the facts of this case, we know that a warrantless perimeter occurred and that such searches are permitted under Turks and Caicos law. *Charter* principles also require that a search permitted by law must be reasonable. The reasonableness test to be applied here is one that has regard to comity and the determination that the foreign law is not inconsistent with fundamental human rights. The ultimate question becomes, in reality: Was it reasonable for Canadian officers to participate in the search authorized by Turks and Caicos law?

172 I believe the *Charter* is flexible enough to permit a reasonable margin of appreciation for different procedures. Even between free and democratic societies, investigative procedures can vary and it is necessary, in order to foster continued cooperation between nations in the fight against transnational crime, to respect certain differences. As was noted by McLachlin J. in *Harrer*, at para. 55:

> We live in an era when people, goods and information pass from country to country with great rapidity. Law enforcement authorities, if they are to do their job, must apprehend people and intercept goods and communications wherever they may be found. Often they find themselves working with officers in foreign jurisdictions; often they are merely the recipients of information gathered independently elsewhere. The result is evidence gathered by rules which may differ from Canadian rules. We need to accommodate the reality that different countries apply different rules to evidence gathering, rules which must be respected in some measure if we are to retain the ability to prosecute those whose crime and travel take them beyond our borders. To insist on exact compliance with Canadian rules would be to insist universally on Canadian standards of procedures which, in the real world, may seldom be attained — an insistence which would make prosecution of many offences difficult, if not impossible.

173 The *Charter* permits the incorporation of legitimate justifications, sometimes within the right itself, as with s. 8, or pursuant to ss. 1 and 24(2). Both my colleague and I are prepared to accept that the need for Canadian officers to fight transnational crime, abide by foreign procedures and respect the sovereign authority of foreign states justifies Canada's participation in investigation procedures that are not identical to Canada's, *to a point*. For LeBel J., this point seems to be when Canadian authorities violate their international law obligations (para. 101). It may be that this proposition sounds appealing in theory, but I have difficulty in seeing how, in practice, Canadian officials will know when this point has been reached. Is the expectation that Canadian officers become knowledgeable in international customary law — an area of law whose content is uncertain and disputed? Practically speaking, I believe it is preferable to frame the fundamental rights obligations of Canadian officials working abroad in a context that officers are already expected to be familiar with — their obligations under the *Charter*. LeBel J.'s proposal of applying international law standards to the actions of Canadian officials working abroad introduces another new set of standards to the mix, which my colleague himself appears to recognize is difficult, at para. 90:

> It is no more helpful to suggest that some third option other than the law of the host state or the full application of *Charter* standards might govern foreign investigations. Where would the standards to be applied come from? How would Canadian officials know what is required of them at the outset of an investigation?

The approach I am advocating is in my view far more practical. It is also consistent with this Court's approach in extradition and deportation cases: see for instance *United States v. Dynar*, [1997] 2 S.C.R. 462 (S.C.C.), and *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7 (S.C.C.). What I advocate is that Canadian officers assess the fundamental human rights protection offered by the foreign procedures against the principles guaranteed by the *Charter*; they may consider *Charter* compliance for guidance. Minor differences in protection can be justified on the basis for the need for Canadian officials to participate in fighting transnational crime, and comity. Substantial differences require greater justifications, but there will still be a favourable presumption for laws and procedures of democratic countries.

174 To summarize, in any challenge to the conduct of Canadian officials investigating abroad, the onus will be on the claimant to demonstrate that the difference between fundamental human rights protection given by the local law and that afforded under the *Charter* is inconsistent with basic Canadian values; the onus will then shift to the government to justify its involvement in the activity. In many cases, differences between protections guaranteed by *Charter* principles and the protections offered by foreign procedures will simply be justified by the need for Canada to be involved in fighting transnational crime and the need to respect the sovereign authority of foreign states. On account of this, courts are permitted to apply a rebuttable presumption of *Charter* compliance where the Canadian officials were acting pursuant to a valid foreign law and procedures. Unless it is shown that those laws or procedures are substantially inconsistent with the fundamental principles emanating from the *Charter*, they will not give rise to the breach of a *Charter* right. In my view, this is the most principled and practical way to strike an appropriate balance between effective participation by Canadian officers in fighting transnational crime and respect for fundamental human rights.

175 It can be argued that applying the *Charter* abroad in this fashion, at the end of the day, essentially achieves the same result as applying the *Charter* "*ex post facto*"; under that approach, the *Charter* never applies abroad, but evidence at a Canadian trial could be excluded on the basis of ss. 7 and 11(*d*) of the *Charter*. The first problem I see with that approach is that it can only address situations where a s. 24(2) remedy may be sought (i.e., the exclusion of evidence), and not situations where s. 24(1) remedies may be sought. Though no such case has yet come before the Court, it is possible that at some future date an applicant may seek a declaration or some other remedy resulting from a *Charter* violation by Canadian officials acting abroad. It would be premature, in my view, to preclude this from occurring, without such a case being properly before the Court. The second problem with the ss. 7 and 11(*d*) approach is that it curtails the use of the fundamental principles set out under the other provisions of the *Charter*. From an analytical standpoint, it is preferable to use the principles emanating from s. 8 of the *Charter* to assess whether evidence gathered from a search and seizure ought to be excluded from a trial in Canada than to refer to principles developed under s. 7 to deal with the same issue.

C. Conclusion on the Proper Approach to Extraterritorial Charter Application

176 The main question here is to determine what are the *Charter* obligations of Canadian officers investigating in another country. In my view, *Cook* at least established that Canadian authorities must abide by standards set for actions taken in Canada when they act independently, i.e., where the foreign state takes absolutely no part in the action and does not subject the action to its laws. Where the host state takes part in the action by subjecting Canadian authorities to its laws, the *Charter* still applies to Canadian officers but there will be no *Charter* violation where the Canadian officers abide by the laws of the host state, subject to the exception discussed above. I believe this is the outcome contemplated in *Harrer* and *Terry*. This is also consistent with the approach taken by Lamer C.J. in *Schreiber*, who found a person's expectation of privacy to be commensurate with legal protections provided in the host country; his approach was based on a contextual application of the *Charter* and also showed some deference to the laws of the foreign country where the search took place.

177 I cannot agree with LeBel J. that the *Charter* is inapplicable or cannot be complied with outside Canadian territory. If s. 8 of the *Charter* was inapplicable to a s. 32(1) matter, as LeBel J. argues, I fail to see why he would apply s. 7 of the *Charter* as a control mechanism *ex post facto* (see para. 91) to the same matter, i.e. a Canadian investigation. There is, in my view, no meaningful distinction between *ex post facto* and *ex ante* application of the *Charter* to Canadian officials.

178 The *Charter* applies extraterritorially, but the obligations it creates in the circumstances will depend on the nature of the right at risk, the nature of the action of the police, the involvement of foreign authorities and the application of foreign

laws. In the context of actions taken outside Canada, the search had to be conducted in conformity with the local laws. There is obviously consent to the participation of Canadian officers in all cases where they operate in another country. Thus, in my view, consent is not a useful criterion to determine *Charter* application. The main question is rather whether the foreign law applies. *Cook* was a rare instance where it did not. But even where the foreign law applies, there are potential *Charter* protections. As LeBel J. recognizes himself at para. 108, flagrant breaches of fundamental human rights, such as torture, would not be accepted even if authorized by local laws.

179 On the facts of this case, it is clear that the Canadian authorities were operating under the authority of Detective Superintendent Lessemun, that the local laws applied to the investigation and that there was no evidence that the local laws had been breached or did not meet fundamental human rights standards. Hape led no evidence to suggest there were any differences between the fundamental human rights protections available under Turks and Caicos search and seizure laws and what the protections the *Charter* guarantees under Canadian law that would raise serious concerns. The seizure of documents was thus reasonable in the context and the evidence should not be excluded.

IV. Conclusion

180 I would dismiss the appeal and affirm the convictions.

***Binnie J.*:**

181 This appeal raises relatively straightforward issues arising out of a money laundering investigation. It should be dismissed. As my colleagues note, the searches and seizures of the appellant's bank records in the Turks and Caicos Islands were carried out under the authority of the local police in conformity with local powers of search and seizure. No prejudice to the appellant's right to a fair trial in Canada has been demonstrated. The appellant, having chosen to do his banking in the Turks and Caicos Islands, can be taken to have accepted the degree of privacy which the law of that jurisdiction affords. The record demonstrates that superimposing the Canadian law of search and seizure on top of that of the Turks and Caicos Islands would be unworkable. The appeal fails because the appellant cannot bring his case within the requirements adopted by the majority of this Court in *R. v. Cook*, [1998] 2 S.C.R. 597 (S.C.C.), at para. 25, namely that:

> ... (1) the impugned act falls within s. 32(1) of the *Charter*; and (2) the application of the *Charter* to the actions of the Canadian [police in the Turks and Caicos Islands do] not, in this particular case, interfere with the sovereign authority of the foreign state and thereby generate an objectionable extraterritorial effect. [Emphasis added.]

182 My colleague LeBel J. holds, in essence, that *any* extraterritorial effect is objectionable (para. 85). This effectively overrules *Cook* and would further limit the potential extraterritorial application of the *Canadian Charter of Rights and Freedoms*. With respect, I do not believe that this case, or the narrowly focussed argument of the very experienced counsel for the appellant (a 12-page factum of which three pages were devoted to legal argument citing only four authorities) affords a proper springboard for such sweeping conclusions.

183 While the application of *Cook* is not without practical and theoretical difficulties, as my colleagues Bastarache and LeBel JJ. show, there is sufficient flexibility in the notion of *objectionable* extraterritorial effect for such difficulties to be resolved over time in circumstances more challenging than those of the routine police investigations at issue here and in the four cases cited by the appellant, namely, *R. v. Harrer*, [1995] 3 S.C.R. 562 (S.C.C.), *R. v. Terry*, [1996] 2 S.C.R. 207 (S.C.C.), *Schreiber v. Canada (Attorney General)*, [1998] 1 S.C.R. 841 (S.C.C.), and *Cook* itself. Routine Canadian police investigations in the United States (*Harrer, Terry* and *Cook*), Switzerland (*Schreiber*) and in the Turks and Caicos Islands (this case) are of course significant, but issues of more far-reaching importance will soon confront Canadian courts, especially in the context of the "war on terror" and its progeny. We should, in my view, avoid premature pronouncements that restrict the application of the *Charter* to Canadian officials operating abroad in relation to Canadian citizens.

184 In the 12 years since *Harrer*, serious questions of the utmost importance have arisen respecting the extent to which, if at all, a constitutional bill of rights follows the flag when state security and police authorities operate outside their home territory. In the United States, the issues are being debated in the context of "special renditions" of suspects by non-military U.S.

authorities to and between foreign countries and the rights of individuals held in camps said to be operated under the control of non-military U.S. personnel outside the United States (quite apart from military installations such as Guantanamo Bay). It has been widely contended in that country that different standards apply to civilian as distinguished from military personnel and to citizens as distinguished from non-citizens. Canadian police and security officials have also been active recently in foreign "hot spots" as diverse as Haiti, Iraq and Afghanistan. In fact, since 1989, the RCMP has managed the deployment of over 2,000 Canadian police officers in at least 12 countries with troubled histories including Kosovo, East Timor, Guinea, Sierra Leone, Bosnia and Herzegovina, Ethiopia, Haiti, Jordan, Iraq, the Democratic Republic of the Congo, Côte d'Ivoire and Afghanistan (Royal Canadian Mounted Police, *RCMP International Peacekeeping Branch Review, 2004-2005* (2006)). In addition, RCMP "International Operations Branch" Officers work in 25 locations around the world (Royal Canadian Mounted Police, *RCMP Fact Sheets — International Operations Branch* (2005)), in circumstances that could give rise to *Charter* challenges. Recently, claims have been launched in Canadian courts by human rights activists (including Amnesty International Canada and British Columbia Civil Liberties Association) against the federal government asking the courts to extend *Charter* protections (as well as international human rights and humanitarian law) to individuals detained by the Canadian Forces operating in Afghanistan. It is not known to what extent Canadian citizens were among the detainees in question, although there is some evidence that there are Canadians among the Taliban. The allegation against the Minister of National Defence and the Attorney General of Canada (both civilian authorities) is that detainees were given into the custody of the security personnel of the government of Afghanistan without adequate safeguards (see Federal Court File Number T-324-07). We have no idea if there is any merit in any of these claims, but at some point we are likely to be called upon to address them. The *Maher Arar Inquiry* disclosed serious issues about Canadian police conduct in relation to the extraterritorial apprehension of a Canadian citizen in the United States which led to his incarceration and torture in Syria. The work of Canadian security personnel other than the RCMP may give rise to other issues, some of which may relate to the extraterritorial treatment of Canadian citizens. I mention these matters simply to illustrate the sort of issues that may eventually wind up before us and on which we can expect to hear extensive and scholarly argument in relation to the extraterritorial application of the *Charter*. Traditionally, common law courts have declined to make far-reaching pronouncements before being required by the facts before them to do so, heeding the cautionary words of the poet:

> There are more things in heaven and earth, Horatio,
>
> Than are dreamt of in your philosophy.
>
> (*Hamlet*, Act I, Scene v, 11. 166-67)

185 Justice LeBel places great emphasis on the remedial potential of s. 24(2) of the *Charter* under which evidence may, in certain circumstances, be excluded from a Canadian trial, but the allegations now coming before our courts may not result in a trial in Canada. Indeed even the *right* to an ordinary trial may become an issue here as it has in the United States. Such serious *Charter* issues should be resolved only after full argument and debate in this Court, which we did not receive (and had no reason to expect) in this case.

186 My colleague LeBel J. draws a number of very broad propositions from his analysis of certain aspects of international law and takes a more attenuated view of s. 32(1) of the *Charter* than was adopted by the majority in *Cook*. LeBel J. concludes that:

> Since extraterritorial enforcement [of Canadian law] is not possible, and enforcement is necessary for the *Charter* to apply, extraterritorial application of the *Charter* is impossible. [Emphasis added; para. 85.]

I accept, of course, that enforcement is a central issue, but at this stage I would not treat difficulties in that regard as conclusive. My colleague adds at para. 100 that "[i]ndividual rights cannot be *completely* disregarded in the interests of transborder cooperation" (emphasis added). In an effort to fill the gap created by his rejection of *Charter* applicability, LeBel J. would substitute Canada's "international human rights obligations", as a source of limitation on state power. The content of such obligations is weaker and their scope is more debatable than *Charter* guarantees. Specifically, LeBel J. writes, at para. 101, that relief may be available "where the participation of Canadian officers in investigative activities sanctioned by foreign law would place Canada in violation of its international obligations in respect of human rights". The proposal is that international

human rights obligations should become the applicable "extraterritorial" standard in substitution for *Charter* guarantees even as between the Canadian government and Canadian citizens.

187 This is not the case, in my respectful view, for the Court to determine whether Canadian citizens harmed by the extraterritorial conduct of Canadian authorities should be denied *Charter* relief (except if faced with a criminal trial in Canada) and be left to arguments about Canada's international law obligations. The Crown and the intervener, the Attorney General of Ontario, sought no such limitation. Neither the parties nor the intervener asked that *Cook* be revisited, much less overruled. Counsel were not at all dismissive of the relevance of the *Charter* in holding to account "extraterritorial" conduct of Canadian officials in relation to Canadian citizens, accepting (in my view correctly) that in *Charter* terms the denial of "*objectionable* extraterritorial effect" is a very different thing from the denial of *any* extraterritorial effect.

188 So too my colleague LeBel J. writes, at para. 101:

> I would leave open the possibility that, in a future case, participation by Canadian officers in activities in another country that would violate Canada's international human rights obligations might justify a remedy under s. 24(1) of the *Charter* because of the impact of those activities on *Charter* rights in Canada.

However, the scope of this possible exception is unclear, given the fact that the conduct at issue would necessarily be outside Canada and, according to my colleague, ought not to be judged by the *Charter* standards because "extraterritorial application of the *Charter* is impossible" (para. 85).

189 I would therefore resolve this appeal on the basis of *Harrer, Terry, Schreiber* and *Cook*. I would retain for the present *Cook*'s "objectionable extraterritorial effect" principle while leaving the door open to future developments in assessing the extraterritorial application of the *Charter*. Our grasp of the potential ramifications of different approaches would be sharpened by the challenging fact situations and fresh perspectives presented in cases now working their way through the system. Constitutional pronouncements of such far-reaching implications as are laid down by my colleague ("extraterritorial application of the *Charter* is impossible") were not even on the radar screen of the parties and intervener to this appeal, all of whom were represented by able and experienced counsel. The Court should decline to resolve such important questions before they are ripe for decision.

190 Since writing the above, my colleague LeBel J. has joined issue with this lone protest with the following comment:

> We cannot always know what new issues might arise before the courts in the future, but we can trust that the law will grow and evolve as necessary and when necessary in response.
>
> (LeBel J., at para. 95)

191 The law of the Constitution can only "grow and evolve" if the Court leaves it the flexibility to do so. It is precisely because of the uncertainty about future developments, some of which are now in the litigation pipeline, that I believe the Court should not in this case substitute rigidity for flexibility and, prematurely (and unnecessarily), foreclose *Charter* options that are now open to it under the flexible principles enunciated in *Cook*.

192 I would dismiss the appeal and affirm the convictions.

Appeal dismissed.

Pourvoi rejeté.

Footnotes

1 Dalhousie Law School.

End of Document

COURT FILE: CR-19-16; CR-19-020; CR-21-08; CR-19-1190; CR-20-1353; CR-20-8332; CR-21-1202; CR-21-1203; CR-22-12570MO

REGINA Applicant	and	David Brennan et al. Respondent

ONTARIO SUPERIOR
COURT OF JUSTICE
(Northeast Region)

BOOK OF AUTHORITIES

EWB PROFESSIONAL CORP.
P.O. Box 37041
Ottawa, Ontario
K1V 0W9
Michael Swinwood
LSO# 14587R
T. 613-852-8384
E. spiritualelders@hotmail.com

Jack Lloyd
Lloyd Law Professional Co.
750 Scarlett Road
Etobicoke, ON M9P2V1
Tel: 647-235-3972
jacklloydman@gmail.com
Counsel for Respondents