Manitoba Hydro 2017/18 & 2018/19 GRA

Consumers Coalition
List of Legal Sources

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Consumers Coalition List of Legal Sources

Case Law

1. *Consumers' Association of Canada (Manitoba) Inc v Manitoba Hydro Electric Board,* 2005 MBCA 55

2. *Dalhousie Legal Aid Service v. Nova Scotia Power Incorporated*, 2006 NSCA 74

3. *Boulter v Nova Scotia Power Incorporated*, 2009 NSCA 17

4. *Advocacy Centre for Toronto Ontario v Ontario Energy Board*, 2008 CanLII 23487, Ontario Superior Court of Justice

5. British Columbia Utilities Commission Decision and Order G-5-17

6. British Columbia Utilities Commission Decision and Order G-87-17

7. *British Columbia Old Age Pensioners' Organization v British Columbia Utilities Commission,* 2017 BCCA 400

8. *ATA v Alberta (Information & Privacy Commissioner)*, 2011 SCC 61

9. *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd,* 2016 SCC 47

10. *R v Conway,* 2010 SCC 22

11. *Doré v Barreau du Québec,* 2012 SCC 12 at para 24 [*Doré*].

12. *Loyola High School v Quebec (Attorney General),* 2015 SCC 12

13. *Duncan v Retail Wholesale Union Pension Plan,* 2017 BCSC 2375, at paras 105-106

14. *R v Oakes,* [1986] 1 SCR 103

15. *R v Kapp*, [2008] 2 SCR 483

16. *Law v Canada (Minister of Employment and Immigration),* [1999] 1 SCR 497

17. *Quebec v A,* 2013 SCC 5

18. *Withler v Canada (Attorney General)*, 2011 SCC 12

19. *Manitoba Keewatinowi Okimakanak Inc v Manitoba Hydro-Electric Board*, 1992 CanLII 8479 (MB CA)

20. *Tranchemontagne v Ontario (Directory, Disability Support Program),* 2006 SCC 14

21. *Baker v Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817

Legislation

22. *The Manitoba Hydro Act,* CCSM c H190

23. *The Public Utilities Board Act,* CCSM c P280

24. *The Crown Corporations Governance and Accountability Act,* CCSM c C336

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

26. *The Human Rights Code,* CCSM c H175, s 58

27. *International Covenant on Economic, Social and Cultural Rights*

28. *United Nations Declaration on the Rights of Indigenous Peoples*

29. *Convention on the Rights of Persons with Disabilities and Optional Protocol*

30. *Universal Declaration of Human Rights*

31. *The Efficiency Manitoba Act,* SM 2017, c 18

Legal Articles

32. Lorne Sossin & Mark Friedman, "*Charter* Values and Administrative Justice" (2014) Osgoode Legal Studies Research Paper Series, Vol 62, online: <http://digitalcommons.osgoode.yorku.ca/olsrps/62>

33. Lorne Sossin, "The 'Supremacy of God', Human Dignity and the Charter of Rights and Freedoms" (2003) 52 UNBLJ 227

TAB 1

Citation: Consumers' Association of Canada (Man.) Inc. et al. v. Manitoba Hydro, Electric Board, 2005 MBCA 55

Date: 20050505

IN THE COURT OF APPEAL OF MANITOBA

Docket: AI04-30-05963	)	
B E T W E E N:	)	
	)	
THE CONSUMERS' ASSOCIATION OF CANADA (MANITOBA) INC. AND THE MANITOBA SOCIETY OF SENIORS INC. (CAC/MSOS)	)	***J. B. Williams*** *for the Applicants CAC/MSOS*
	)	***T. D. McCaffrey*** *for the Applicant MIPUG*
(Intervenors) Applicants	)	
	)	***P. J. Ramage***
- and -	)	*for the Respondents*
	)	
THE MANITOBA HYDRO ELECTRIC BOARD (MANITOBA HYDRO)	)	***R. F. Peters*** *and* ***A. L. Southall***
	)	*for the Public Utilities Board*
(Applicant) Respondent	)	
	)	*Chambers motions heard:*
- and -	)	***February 23, 2005***
	)	
Docket: AI04-30-05969	)	*Decision pronounced:*
B E T W E E N:	)	***May 5, 2005***
	)	
MANITOBA INDUSTRIAL POWER USERS GROUP (MIPUG)	)	
	)	
(Intervenor) Applicant	)	
	)	
- and -	)	
	)	
MANITOBA HYDRO	)	
	)	
(Applicant) Respondent	)	

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MONNIN J.A.

1 In both of these actions, the applicants, The Consumers' Association of Canada (Manitoba) Inc. and The Manitoba Society of Seniors Inc.

> levels of organizational activity that is underway within MH would not be appropriate.
>
> The Board is satisfied that MH took reasonable steps to mitigate its loss during the drought, including its actions in the futures market to reduce its export delivery obligations. The Board notes that no Intervenor indicated concern with MH's actions related to export activities during the drought period. However, the Board is of the view that the events and actions of the recent drought created opportunities to learn and prepare for future droughts.
>
> The 2002-2004 drought related experience suggests that:
>
> (a) MH is at risk of sustaining significant losses related to energy pricing when its hydraulic generation falls materially below the long-term mean;
>
> (b) During periodic droughts, when MH is a net importer of electricity, the Corporation may be faced with highly unfavourable import prices;
>
> (c) MH requires somewhere in the order of $200 million per year in export revenue, net of associated water rental fees and fuel and power purchases, in order to break even; and
>
> (d) There are risks, as well as benefits, associated with MH's practice of seeking total energy sales above its hydraulic generation capabilities.
>
> Therefore, the Board directs MH to file a study by an independent expert on MH's response to the 2002-2004 drought, the study shall assess MH's actions and provide comments and recommendations with respect to future actions and circumstances. This report is to be filed by January 31, 2005.

61 When one sifts through all of the material and arguments put forth by the applicants in support of their positions, it becomes more and more clear that their argument that the PUB failed to reach a "just and reasonable" rate is not a matter of law but a dispute with the opinion at which the PUB arrived.

62 A review of the record demonstrates that the PUB did in fact review extensive financial information and then exercised its discretion. It may

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well be that the PUB could not, or would not, review the specific financial tools that the applicants argue it should have, but that is insufficient in my mind to justify a finding that, as a whole, the PUB did not fix rates that were just and reasonable.

63 The intent of the legislation is to approve fair rates, taking into account such considerations as cost and policy or otherwise as the PUB deems appropriate. Rate approval involves balancing the interests of multiple consumer groups with those of the utility. The PUB's decision to build retained earnings more rapidly than proposed in order to better protect the utility and consumers from the financial impact of future drought, clearly meets the intent of the legislation and is within the jurisdiction afforded the PUB in s. 26 of the *Accountability Act.*

64 The role of the PUB under the *Accountability Act* is not only to protect consumers from unreasonable charges, but also to ensure the fiscal health of Hydro. It is clear the PUB understood its role in this regard.

65 The PUB has two concerns when dealing with a rate application; the interests of the utility's ratepayers, and the financial health of the utility. Together, and in the broadest interpretation, these interests represent the general public interest. These issues were addressed in the PUB's decision.

66 All in all, the PUB addressed the right question, the reasonableness of approved rates. It did not rely on irrelevant evidence or fail to consider relevant evidence. The PUB was alive to the issues and alive to the implications of its decision. It did not apply inappropriate tests or apply appropriate tests or factors incorrectly. It did not make its decision in an arbitrary manner.

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67 The setting of rates, and the elements that are to be considered in doing so, require a specialized knowledge and understanding that ought not to be interfered with by courts unless there is clear error in that decision or the manner in which it was arrived at. This is not such a case.

68 When all of the arguments of the applicants are considered in light of the evidence the PUB heard and the decision it eventually made, I have not been convinced that what the applicants are complaining about is anything but the methodology the PUB utilized to arrive at that decision. The PUB then went on to justify that decision in the light of the interests of both the public and Hydro.

69 On whatever standard of review I might consider to be the applicable one, the applicants have not convinced me that leave to appeal should be granted. There are no questions of pure law to be decided. At best, from the applicants' perspective, their applications are grounded on questions of mixed fact and law and those issues are not such that they present a matter of importance that ought to engage the court.

70 I therefore deny the applications for law to appeal.

________________________________ J.A.

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TAB 2

Editors' note: Erratum released September 18, 2006. Original judgment has been corrected, with text of erratum appended.

NOVA SCOTIA COURT OF APPEAL

Citation: Dalhousie Legal Aid Service v. Nova Scotia Power Inc., 2006 NSCA 74

2006 NSCA 74 (CanLII)

Date: 20060620
Docket: CA 248695
Registry: Halifax

Between:

Dalhousie Legal Aid Service

Appellant

v.

Nova Scotia Power Inc.

Respondent

Judge(s): Saunders, Freeman and Fichaud, JJ.A.

Appeal Heard: May 29, 2006, in Halifax, Nova Scotia

Held: Appeal is dismissed without costs, per reasons for judgment of Fichaud, J.A.; Saunders and Freeman, JJ.A. concurring.

Counsel: Claire McNeil and Vincent Calderhead, for the appellant
Daniel Campbell, Q.C., for the respondent
Richard Melanson, for Nova Scotia Utility and Review Board
Stephen McGrath, for the Attorney General of Nova Scotia

Reasons for judgment:

[1] Nova Scotia Power applied to the Utility and Review Board for a rate increase. Dalhousie Legal Aid intervened and requested that the Board approve a program featuring power rate credits for low income customers. The Board declined. The Board was of the view that the legislation did not authorize the Board to reduce power rates based on the income level of the customer. Dalhousie Legal Aid appeals. The issue is whether the Board committed reviewable error by concluding that it had no statutory authority to adopt a rate assistance program for low income customers.

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Background

[2] Nova Scotia Power Incorporated ("NSP") produces and supplies electrical energy. As of December 31, 2003, NSP served approximately 460,000 customers throughout Nova Scotia. NSP is the successor to the Nova Scotia Power Corporation, a Crown corporation that was privatized in 1992. In January 1999, NSP became the principal subsidiary of what is now Emera Incorporated.

[3] NSP is a public utility regulated under the *Public Utilities Act* RSNS 1989, c. 380, as amended. Section 64(1) reads:

> 64 (1) No public utility shall charge, demand, collect or receive any compensation for any service performed by it until such public utility has first submitted for the approval of the Board a schedule of rates, tolls and charges and has obtained the approval of the Board thereof.

The "Board" is the Nova Scotia Utility and Review Board, created by the *Utility and Review Board Act* SNS 1992, c. 11, as amended ("*URB Act*").

[4] In May 2004 NSP filed with the Board an application for approval of increased rates, followed by a revised application in June 2004. The application would have resulted in an average overall increase of 12.4% for all classes of customer.

[5] The Board gave notice by advertisement as provided in s. 86 of the *Public Utilities Act*. Thirty-seven intervenors responded. One intervenor was the appellant Dalhouse Legal Aid Service ("DLA").

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[6] The Board conducted a public hearing over 16 days between November 16, 2004 and January 14, 2005. On March 31, 2005 the Board issued a decision (2005 NSUARB 27). The decision dealt with NSP's requested rate increase and related topics. Only one topic is relevant to this appeal. That is DLA's request that the Board approve a Rate Assistance Program for low income consumers of power.

[7] The Board's decision summarized DLA's submission:

> **9.1 Rate Assistance Program (RAP)**
>
> [246] While DLAS has opposed the approval of a FAM [Fuel Adjustment Mechanism] and the SA [Settlement Agreement], and has detailed concerns regarding aspects of customer service provided by NSPI, its main focus at the hearing was the implementation of a proposed Rate Assistance Program ("RAP") to help low-income customers meet their electricity costs.
>
> [247] DLAS filed evidence from several individuals, including Dr. Richard Shillington, a principal of Tristat Resources and Roger Colton, a principal of Fisher, Sheehan & Colton, with respect to this issue. Dr. Shillington, in his direct evidence (Exhibit N-126), outlined the challenging costs of shelter and electricity for low-income Canadians. Mr. Colton's evidence focused on low-income energy assistance programs and his efforts, in a number of US states, in designing rate affordability programs. Mr. Colton's position is that NSPI should "... be directed toward allowing low-income consumers to obtain quality utility service at affordable prices within a reasonable budget constraint." Mr. Colton also submits that the costs of such a program, to be shared by customers, are offset, although perhaps not fully, by savings realized by the Utility resulting from the adoption of a 'universal service program'.

Mr. Colton's report summarized his fixed credit proposal:

> Although a variety of percentage-of-income based approaches exists, I recommend the delivery of rate affordability assistance using a fixed credit approach. The fixed credit approach begins as an income-based approach. In order to be eligible for the rate, a household must meet *both* eligibility criteria: (1) that the household income is at or below the Low-Income Cutoff (LICO) for Nova Scotia; and (2) that the household electric burden exceeds the burden deemed to be affordable.
>
> The fixed credit approach differs from a straight percentage of income approach in the calculation of the bill to the household. The fixed credit calculates what bill

credit would need to be provided to the household in order to reduce the household's energy bill to a designated percent of income. To calculate the fixed credit involves three steps: (1) calculating a burden-based payment; (2) calculating an annual bill; and (3) calculating the fixed credit necessary to reduce the annual bill to the burden based payment. Each step is explained below.

1. The first step in the fixed credit model is to calculate a burden-based payment. Assume that the household has an annual income of $8,000 and is required to pay three percent (3%) for its home energy bill. The required household payment is thus $240. This is simply $8,000 x 3% = $240.

   Distinctions are also made between heating and non-heating customers. A heating customer should be asked to pay six percent (6%) of the household's income toward her home heating bill, while a non-heating customer would be asked to pay three percent (3%) toward his or her electric bill.

2. The next step is to calculate a projected annual household energy bill. This calculation is to be made using whatever method NSPI *currently* uses to estimate annual bills for other purposes. NSPI, in other words, has an established procedure for estimating an annual bill for purposes of placing residential customers (low-income or not) on a levelized Budget Billing Plan (where bills are paid in equal installments over 12 months). Let me assume for purposes of illustration that this existing process results in an estimated annual bill of $960.

3. The final step is to calculate the necessary fixed credit to bring the annual bill down to the burden-based payment. Given an annual bill projection of $960 and a burden-based payment of $240, the annual fixed credit would need to be $720 ($960 - $240 = $720). The household's *monthly* fixed credit would be $60 ($720 / 12 = $60).

[8] The Board, in response to DLA's request, cited s. 67(1) of the *Public Utilities Act*:

> 67 (1) All tolls, rates and charges shall always, under substantially similar circumstances and conditions in respect of service of the same description, be charged equally to all persons and at the same rate, and the Board may by regulation declare what shall constitute substantially similar circumstances and conditions.

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The Board accepted that "all customers, regardless of income, receive 'substantially similar' electrical service from NSP". The Board concluded that it had no power to consider DLA's proposed Rate Assistance Program:

> [256] After reviewing the submissions of DLAS, Board Counsel and the relevant provisions of the **Act**, the Board finds that it does not have the statutory authority to approve a RAP. The Board has the authority given to it by the Legislature to perform its duties in accordance with the provisions of the **Act**. The Board's role is to make decisions, based on fact and law, within the parameters of the statutory authority it has been given by the Legislature. The Board's duty is to follow public policy decisions made by the Legislature and expressed in statutes. The Board does not have jurisdiction to establish public policy. That is the role of elected officials who are accountable to the public for this function. It seems almost certain that the RAP, as described by Mr. Colton, would result in the electricity bills of certain customers, depending on their income, being subsidized by other customers. In the Board's view, this is a social and public policy question which falls within the purview of the Legislature rather than the Board. Should NSPI and DLAS wish to pursue this matter with Government, the Board would be pleased to offer assistance with respect to regulatory and ratemaking principles.

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[9] DLA appeals under s. 30(1) of the *URB Act*, permitting an appeal based on an error of law or jurisdiction.

Issue

[10] The issue is whether the Board committed an appealable error by declining to consider the merits of DLA's proposed Rate Assistance Program for low income electricity customers.

Standard of Review

[11] Under the pragmatic and functional approach, the court analyses the cumulative effect of four contextual factors: the presence, absence or wording of a privative clause or statutory appeal; the comparative expertise of the tribunal and the court on the appealed or reviewed issues; the purpose of the governing legislation; and the nature of the question, fact, law or mixed. The ultimate question is whether the legislature intended that the issue under review be left to the tribunal. From this analysis the court selects, for each issue, a standard of review of correctness, reasonableness or patent unreasonableness: *Pushpanathan*

v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982, at ¶ 26; *College of Physicians and Surgeons of British Columbia v. Dr. Q.*, [2003] 1 S.C.R. 226, at ¶ 26-35; *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, at ¶ 27; *Voice Construction Ltd. v. Construction and General Workers' Union, Local 92*, [2004] 1 S.C.R. 609 at ¶ 15-19; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at ¶ 55-62; *Granite Environmental Inc. v. Nova Scotia (Labour Relations Board)*, 2005 NSCA 141, at ¶ 21; *Nova Scotia Teachers Union v. Nova Scotia Community College*, 2006 NSCA 22, at ¶ 11; *The Nova Scotia Government and General Employees Union v. Capital District Health Authority*, 2006 NSCA 44, at ¶ 36.

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[12] In *Johnson (Re)*, 2005 NSCA 99, at ¶ 33-46, Justice Oland applied the four contextual factors to the expropriation powers of the Utility and Review Board, and concluded:

> [46] After considering the four contextual factors of the functional and pragmatic approach, in my view the standard of review to be applied to questions of law, such as any entitlement for compensation for owner's time and for pension loss, the standard of review is correctness. For questions of mixed law and fact, such as matters related to compensation for market value and injurious affection, the standard is patent unreasonableness. For findings of fact, the standard is patent unreasonableness.

Though there is correspondence among the Board's different functions, the pragmatic and functional analysis for expropriation is not necessarily commutable to rate-making. So I will consider the four contextual factors from the perspective of utility rating.

[13] Section 26 of the *URB Act* says that the Board's findings of fact are "binding and conclusive", while s. 30(1) prescribes an appeal to this court on questions of law or jurisdiction. The Legislature contemplated a serious judicial role in the review for legal error, particularly on threshold issues.

[14] Section 44 of the *Public Utilities Act* entitles the Board to fix rates "as it deems just". Section 67(1) quoted earlier directs equal charges for "similar circumstances and conditions" of service and authorizes the Board to enact regulations that define "substantially similar circumstances and conditions". The Board has a standing membership, repeatedly has examined NSP rate applications

and has developed a body of governing jurisprudence. Clearly, the Board has more expertise than the court in the architecture of rate-making.

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[15] In *Nova Scotia (Public Utilities Board) v. Nova Scotia Power Corp.* (1976), 18 N.S.R. (2d) 692 (A.D.), at ¶ 17, Chief Justice MacKeigan summarized the purposes of the *Public Utilities Act*:

> 17 The scheme of regulation established by the Act envisages and indeed compels control by the Board of all aspects of a utility's operation in providing a controlled service. Two great objects are enshrined - that all rates charged must be just, reasonable and sufficient and not discriminatory or preferential, and that the service must be adequately, efficiently and reasonably supplied to the public. Almost all provisions of the Act are directed toward securing these two objects - that a public utility give adequate service and charge only reasonable and just rates.

The legislation considered by Chief Justice MacKeigan included ss. 42 and 63(1), the equivalents to the current ss. 44 and 67(1) that are central to this appeal (see *NS (PUB)*at ¶ 15, 28).

[16] DLA says its argument is "jurisdictional" and therefore the standard of review must be correctness. It may be that, after the court reviews the four contextual factors, true jurisdictional issues usually will attract the correctness standard. But I disagree that every labelled "jurisdictional" argument is tethered to correctness, and I reiterate this court's comment in *NSGEU v. Capital District Health Authority*:

> [28] . . . The court no longer reviews for pigeonholed "jurisdictional errors." The phrase "goes to jurisdiction" describes a type of issue for which the proper standard of review is correctness, after the reviewing court has performed the pragmatic and functional analysis. But the "jurisdictional" inquiry is not a substitute for the pragmatic and functional approach. [Citing *Pushpanathan* at ¶ 28; *Dr.* Q. at ¶ 20 -25; *Voice* at ¶ 21; *Granite* at ¶ 41(b) and *ATCO Gas & Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4 at ¶ 21-32.]

[17] A similar issue arose in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4. A public utility applied to Alberta's Energy and Utilities Board for approval of a sale of assets and allocation of the sale proceeds. The Board allocated a portion of the proceeds of sale to the rate-paying customers. On appeal from the judicial review, the Supreme Court of Canada considered

whether the Board had statutory authority to allocate any sale proceeds to the ratepayers. Despite the "jurisdictional" aspect of the issue, Justice Bastarache for the majority said that the pragmatic and functional analysis was necessary:

> 23 In the case at bar, one should avoid a hasty characterizing of the issue as "jurisdictional" and subsequently be tempted to skip the pragmatic and functional analysis. A complete examination of the factors is required.

In *ATCO*, a threshold issue of statutory interpretation determined whether the Board could exercise its core functions. Justice Bastarache selected a correctness standard, having reasoned as follows:

> 30 While at first blush the purposes of the relevant statutes and of the Board can be conceived as a delicate balancing between different constituencies, i.e., the utility and the customer, and therefore entail determinations which are polycentric (*Pushpanathan*, at para. 36), the interpretation of the enabling statutes and the particular provisions under review (s. 26(2)(d) GUA and s. 15(3)(d) AEUBA) is not a polycentric question, contrary to the conclusion of the Court of Appeal. It is an inquiry into whether a proper construction of the enabling statutes gives the Board jurisdiction to allocate the profits realized from the sale of an asset. The Board was not created with the main purpose of interpreting the AEUBA, the GUA or the PUBA in the abstract, where no policy consideration is at issue, but rather to ensure that utility rates are always just and reasonable (see *Atco Ltd.*, at p. 576). In the case at bar, this protective role does not come into play. Hence, this factor points to a less deferential standard of review.
>
> 31 Fourth, the nature of the problem underlying each issue is different. The parties are in essence asking the Court to answer two questions (as I have set out above), the first of which is to determine whether the power to dispose of the proceeds of sale falls within the Board's statutory mandate. The Board, in its decision, determined that it had the power to allocate a portion of the proceeds of a sale of utility assets to the ratepayers; it based its decision on its statutory powers, the equitable principles rooted in the "regulatory compact" (see para. 63 of these reasons) and previous practice. This question is undoubtedly one of law and jurisdiction. The Board would arguably have no greater expertise with regard to this issue than the courts. A court is called upon to interpret provisions that have no technical aspect, in contrast with the provision disputed in *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476, 2003 SCC 28, at para. 86. The interpretation of general concepts such as "public interest" and "conditions" (as found in s. 15(3)(d) of the AEUBA) is not foreign to courts and is not derived from an area where the tribunal has been held to have greater expertise than the courts. ...

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> 32 In light of the four factors, I conclude that each question requires a distinct standard of review. To determine the Board's power to allocate proceeds from a sale of utility assets suggests a standard of review of correctness. As expressed by the Court of Appeal, the focus of this inquiry remains on the particular provisions being invoked and interpreted by the tribunal (s. 26(2)(d) of the GUA and s. 15(3)(d) of the AEUBA) and "goes to jurisdiction" *(Pushpanathan*, at para. 28). Moreover, keeping in mind all the factors discussed, the generality of the proposition will be an additional factor in favour of the imposition of a correctness standard, as I stated in *Pushpanathan*, at para. 38:
>
>> ... the broader the propositions asserted, and the further the implications of such decisions stray from the core expertise of the tribunal, the less likelihood that deference will be shown. Without an implied or express legislative intent to the contrary as manifested in the criteria above, legislatures should be assumed to have left highly generalized propositions of law to courts.

[18] The Board's rate-making power is a core function entitled to deference. But the issue here is whether the statute precludes the Board from exercising that power. After considering the four contextual factors, and given the statutory right of appeal and the comments in *ATCO*, in my view the Legislature intended no deference on that issue. The threshold legal question is governed by a correctness standard.

Did the Board err in law by declining to consider the Rate Assistance Program?

[19] This is a question of statutory interpretation. The words of a statute are read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the *Act*, the object of the *Act* and the intention of the Legislature: *Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees Union, Local 324*, 2003 SCC 42, at ¶ 41; *R. v. Sharpe*, [2001] 1 S.C.R. 45 at ¶ 33; *Nova Scotia (Minister of Health) v. R.G.*, 2005 NSCA 59, at ¶ 24; *Doctors Nova Scotia v. Nova Scotia (Department of Health)*, 2006 NSCA 59, at ¶ 25.

[20] DLA focusses on the grammatical and ordinary meaning of the Board's general rate-making power in s. 44 of the *Public Utilities Act*:

> 44 The Board may make from time to time such orders as it deems just in respect to the tolls, rates and charges to be paid to any public utility for services rendered or facilities provided, and amend or rescind such orders or make new orders in substitution therefor.

DLA submits that the Board is mandated to consider whether a rate assistance program for low income customers is "just".

[21] The court must also grapple with the basis of the Board's ruling, s. 67(1):

> 67 (1) All tolls, rates and charges shall always, under substantially similar circumstances and conditions in respect of service of the same description, be charged equally to all persons and at the same rate, and the Board may by regulation declare what shall constitute substantially similar circumstances and conditions.

DLA says that its Rate Assistance Program would provide a credit against the rate, but would not alter the rate itself. DLA says that s. 67(1) refers to pure "rates", not credits, and is irrelevant to DLA's Program.

[22] In my respectful view, DLA's rate/credit distinction is artificial and analytically flawed. A gross rate subject to an automatic credit is just a net rate charged to the customer by NSP. The "charge" under s. 67(1) is the net amount. The Board's "rate" making power is not a blind stab at gross revenue. The rating involves a projection of NSP's expenses, net income and rate of return. The Board must consider the effect of a credit against rates just as it must consider NSP's expenses to generate power. DLA cites s. 44 of the *Public Utilities Act* as authority for its Rate Assistance Program, including the credit. Yet, s. 44, quoted earlier, empowers the Board to approve "tolls, rates and charges", saying nothing of "credits". Rate credits are integrated with "rates and charges" in s. 67(1) no less than rate credits pertain to the Board's "rating" power in s. 44, upon which DLA relies.

[23] DLA's factum said that low income customers do not have "substantially similar circumstances" to higher income customers. So, different rates would not be barred by s. 67(1). At the appeal hearing DLA's counsel retreated somewhat from this submission.

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[24] With respect, the factum's submission misinterprets s. 67(1). The provision refers to "substantially similar circumstances and conditions ***in respect of service of the same description***." To justify a rate difference, the relevant dissimilarity is not in customers' incomes. It is in the service from NSP. The Board accepted, and there is no basis to question, that NSP provides substantially similar electrical service whatever the domestic customer's income.

[25] Section 67(1) is mandatory. The rates and charges "shall always . . . be charged equally" to persons of similar circumstances and conditions in respect of service. The statute does not endow the Board with discretion to consider the social justice of reduced rates for low income customers. It is not for the Board or this court to read into s. 67(1) the words:

> . . . similar circumstances and conditions in respect of ***the income level of customers and*** service of the same description,

It is for the Legislature to decide whether to expand the Board's purview with the italicized words.

[26] This point is illustrated by *Allstream Corp. v. Bell Canada*, 2005 FCA 247, cited by DLA. The Federal Court of Appeal upheld the decision of the CRTC to provide low rates to schools and municipalities for fibre optic service. DLA's factum says:

> This case stands for the proposition that the jurisdiction to regulate utilities ***includes*** non cost-based rates and by analogy would include programs similar to a rate assistance program for low income consumers. [emphasis in original]

[27] I disagree with DLA's measure of *Allstream*'s reach. The Federal Court of Appeal said:

> 34. ... It is apparent that the Commission was greatly concerned about the effect of a denial of services on the communities concerned and the dislocation of complex equipment and facility configurations at a significant cost and to the detriment of school boards and municipalities in the relevant areas and that such concerns outweighed, in its view, Bell's failure to seek prior approval of these rates. These are considerations that a specialized board can entertain and weigh relative to other considerations. It is true that these considerations are not purely economic in the sense referred to by the appellant such as costs, investment, allowance for necessary working capital, rate of return, etc. These considerations,

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> however, are ***part of the Commission's wide mandate under section 7***, a mandate it alone possesses and are quite distinct from the grant of a rate under paragraph 27(6)(b) of the Act, a power the Commission did not invoke. [emphasis added]

Section 47(a) of the Telecommunications Act, S.C. 1993, c. 38 directed the CRTC to implement the telecommunications policy objectives from s. 7. Those included enriching the "social and economic fabric", rendering "affordable" and "accessible" service, and responding to "the economic and social requirements of users." [legislation quoted in ¶ 10 of *Allstream*]. Nova Scotia's Utility and Review Board has no such statutory mandate.

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[28] The grammatical and ordinary interpretation of s. 67(1), outlined above, is consistent with the statutory context, scheme and object of the *Act*, and intention of the Legislature.

[29] The *Act* connects the Board's rate-making to NSP's "service". Section 2(f) of the *Public Utilities Act* defines "service" as including:

> (iii) the production, transmission, delivery or furnishing to or for the public by a public utility for compensation of electrical energy for purposes of heat, light and power,

Section 44 authorizes the Board to make rates "for services rendered or facilities provided". Section 52 requires the public utility to "furnish services and facilities that are adequate, just and reasonable". Section 64(1) prohibits the utility from charging compensation for any "service" until the Board has approved the rate for that service. Section 107, entitled "offence and penalty for unjust discrimination", prohibits the utility from charging "for any service" a rate that is higher or lower than charged to any other person "for a like and contemporaneous service".

[30] Section 73 of the *Public Utilities Act* allows preferential rates for

> (3) . . . a senior citizens club, service club, volunteer fire department, a Royal Canadian Legion, community hall or recreational facility owned by a community and used for general community purposes, a charitable or religious organization or institution . . .

and authorizes the Lieutenant Governor-in-Council to extend this list by order-in-council.

[31] The legislative context ties the Board's rate levels to the utility's services. The Legislature enacts, or assigns to order-in-council, non-compliant rates for specific classes of customer based on social criteria.

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[32] The Board sets rates for a utility that has a virtual monopoly on the supply of electric power. The Board's decision discusses this process: (2005 NSUARB 27)

> [17] . . . NSPI is not like an unregulated retailer. It is a virtual monopoly which operates its business on a cost-of-service basis. Providing electricity to all communities in the Province was not (and likely still is not) financially feasible for private, competitive companies. For that reason, the Province's electric service supplier is a cost-of-service monopoly. In return for undertaking and continuing the costs of electrification of the Province, the utility is permitted, under the *Act*, to recover the reasonable and prudent costs of providing the service. Because it is a monopoly, regulation operates as a surrogate for competition. One of the regulator's tasks is to balance the need for the Utility to recover its reasonable and prudent costs with the need to ensure that ratepayers are charged fair and reasonable rates.
>
> [18] It is in the interests of all Nova Scotians to ensure that NSPI continues to be a stable and financially sound company. This is a reality which the Board must consider when determining what, if any, rate increase is warranted.
>
> [19] In short, rates charged to customers are based on costs incurred by the Utility in providing service. If the Board finds certain costs to be imprudent or unreasonable, it can (and has) disallowed such expenditures and reduced proposed rate increases accordingly.

[33] I agree with this portrayal of the background to the Board's rate-making function. The Board's regulatory power is a proxy for competition, not an instrument of social policy.

[34] DLA points to the Board's approval of rates that prefer large industrial power customers. In *Re Nova Scotia Power Inc*., [2000] NSURBD No. 72, the Board approved NSP 's application for a load retention rate. This rate would be determined between the individual customer and NSP, then submitted to the Board for approval. Paragraph 5 of the Board's decision describes the features of NSP's proposed load retention rate:

> 5 NSPI states in its application that "the proposed rate is an appropriate approach to retaining existing customers who, in the absence of this rate, would reduce their purchases from the Company, to the detriment of all other customers". The rate would be available to customers "who are considering an alternate supply of at least 2000 KVA or 1800 KW". It would not be available for new load. The rate would only be available if the following conditions are satisfied:
>
> > 1. The customer's option to use a supply of power and energy (alternate supply) other than NSPI's is both technically and economically feasible.
> >
> > 2. Retaining the customer's load, at the price offered by this rate, is better for other electric customers than losing the customer load in question.
> >
> > 3. The price offered by this rate is not less than that necessary to make the customer in question indifferent with respect to alternate supply versus continuing to purchase the electric power and energy from NSPI.

DLA says that, if the Board can approve a load retention rate for large industrial customers, then it can approve a rate assistance program for low income customers.

[35] The Board's decision in [2000] NSURBD No. 72 is not under appeal. Neither are its decisions on similar issues such as the extra large industrial interruptible rate: *Re Nova Scotia Power Inc.*, [2003] NSUARB No. 6 and *Re Nova Scotia Power Inc.*, [2003] NSUARB No. 91. I make no comment on those rulings, except to say that they do not support DLA's submission here that the Board can implement social policy. The Board's approval of the load retention rate was premised on the finding that, otherwise, the large customer could leave NSP, obtain its energy from another source, and this would hike NSP's rates to its remaining customers. The Board's approach affirms the Board's role as a competition surrogate. The Board's load retention rate recognizes the microeconomic reality that NSP is not an absolute energy monopoly with a vertical customer demand curve, and is subject to elastic demand from high volume customers with other energy options. No such factors govern DLA's proposed Rate Assistance Program.

[36] DLA says that legislation should be interpreted in a manner that is consistent with the *Charter of Rights and Freedoms*. DLA's counsel makes a forceful submission that the impoverished are a protected category under s. 15 and,

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following *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, this court may direct the institution of a program to ameliorate their disadvantage. DLA's submission is interpretive and does not challenge the validity of the legislation.

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[37] I make no comment on s. 15. The statutory language does not accommodate the suggested construction.

[38] The constructive principle applies only when the statute is ambiguous. In *R. v. Rodgers*, 2006 SCC 15, at ¶ 18, Justice Charron for the majority said:

> It has long been accepted that courts should apply and develop common law rules in accordance with the values and principles enshrined in the *Charter*: *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at p. 603; *Cloutier v. Langlois*, [1990] 1 S.C.R. 158, at p. 184; *R. v. Salituro*, [1991] 3 S.C.R. 654, at p. 675; *R. v. Golden*, [2001] 3 S.C.R. 679, 2001 SCC 83, at para. 86; *R. v. Mann*, [2004] 3 S.C.R. 59, 2004 SCC 52, at paras.17-19. However, it is equally well settled that, in the interpretation of a statute, *Charter* values as an interpretative tool can only play a role where there is a genuine ambiguity in the legislation. In other words, where the legislation permits two different, yet equally plausible, interpretations, each of which is equally consistent with the apparent purpose of the statute, it is appropriate to prefer the interpretation that accords with *Charter* principles. However, where a statute is not ambiguous, the court must give effect to the clearly expressed legislative intent and not use the *Charter* to achieve a different result. In *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 62, Iaccobuci J., writing for a unanimous court, firmly reiterated this rule:
>
>> ... to the extent this Court has recognized a "*Charter* values" interpretive principle, such principle can only receive application in circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations. [Emphasis in original.]

To the same effect: *Bell ExpressVu Ltd. Partnerships v. Rex*, [2002] 2 S.C.R. 559 at ¶ 27 - 30, 60 - 66.

[39] Section 67(1) is not ambiguous: "rates . . . shall always . . . be charged equally to all persons and at the same rate" in substantially similar "circumstances and conditions in respect of service of the same description". The Board cannot reduce the rate to a low income customer who receives the same service as a high income customer. There is no latitude for the interpretive presumption.

Conclusion

[40] The Board did not err in its conclusion that s. 67(1) precludes the Board from considering DLA's rate assistance program for low income customers. I would dismiss the appeal without costs.

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Fichaud, J.A.

Concurred in:

Saunders, J.A.

Freeman, J.A.

NOVA SCOTIA COURT OF APPEAL

Citation: Dalhousie Legal Aid Service v. Nova Scotia Power Inc., 2006 NSCA 74

Date: 20060620
Docket: CA 248695
Registry: Halifax

Between:

Dalhousie Legal Aid Service

Appellant

v.

Nova Scotia Power Inc.

Respondent

Revised judgment: The text of the original judgment has been corrected according to this erratum dated **September 18, 2006**.

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Judge(s): Saunders, Freeman and Fichaud, JJ.A.

Appeal Heard: May 29, 2006, in Halifax, Nova Scotia

Held: Appeal is dismissed without costs, per reasons for judgment of Fichaud, J.A.; Saunders and Freeman, JJ.A. concurring.

Counsel: Claire McNeil and Vincent Calderhead, for the appellant
Daniel Campbell, Q.C., for the respondent
Richard Melanson, for Nova Scotia Utility and Review Board
Stephen McGrath, for the Attorney General of Nova Scotia

Erratum:

[1] In ¶ 27 "Section 47(1) of the *Telecommunications Act*" should read "Section 47(a) of the *Telecommunications Act*".

TAB 3

NOVA SCOTIA COURT OF APPEAL

Citation: Boulter v. Nova Scotia Power Incorporated, 2009 NSCA 17

Date: 200900213
Docket: CA 292954
Registry: Halifax

Between:

Denise Boulter, Yvonne Carvery, Laura Lannon,
Wayne MacNaughton, Karan Whitman

Appellants

-and-

Affordable Energy Coalition

Appellant

-and-

Nova Scotia General Government and Employees Union

Appellants

-and-

Nova Scotia Power Incorporated
and Attorney General of Nova Scotia

Respondents

Judge: The Honourable Justice Fichaud

Appeal Heard: December 2, 2008

Subject: Section 15(1) of *Charter of Rights*

Summary: Appellants claimed that s. 67(1) of *Public Utilities Act* violated s. 15(1) of *Charter of Rights*. Section 67(1) required the Utility and Review Board to set the same power rates for all consumers of power. This precluded a rate affordability program for low income consumers. The Board held that s. 67(1) did not violate s. 15(1) of the *Charter*. The appellants appealed to the Court of Appeal.

Issue: Does s. 67(1) violate s. 15(1) of the *Charter*?

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Result: Poverty is not an analogous ground under s. 15(1). Section 67(1) did not treat protected classes of sex, race, national or ethnic origin, age, disability or marital status differently than their respective comparator groups. Section 67(1) did not breach s. 15(1) of the *Charter* either directly or by adverse effect.

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This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 35 pages.

NOVA SCOTIA COURT OF APPEAL

Citation: Boulter v. Nova Scotia Power Incorporation, 2009 NSCA 17

Date: 20090213
Docket: CA 292954
Registry: Halifax

Between:

Denise Boulter, Yvonne Carvery, Laura Lannon,
Wayne MacNaughton, Karan Whitman

Appellants

-and-

Affordable Energy Coalition

Appellant

-and-

Nova Scotia General Government and Employees Union

Appellant

-and-

Nova Scotia Power Incorporated
and Attorney General of Nova Scotia

Respondents

Judge(s): Saunders, Hamilton and Fichaud, JJ.A.

Appeal Heard: December 1, 2008, in Halifax, Nova Scotia

Held: Appeal is dismissed without costs per reasons for judgment of Fichaud, J.A.; Saunders and Hamilton concurring.

Counsel: Vincent Calderhead, for the appellant Boulter
Claire McNeil, for the appellants Carvery, Lannon, MacNaughton, Whitman and Affordable Energy Coalition
David Roberts for the appellant, NSGEU
Daniel M. Campbell, Q.C., for the respondent NSPI
Glenn R. Anderson, Q.C., Louise Walsh Poirier and Duane C. Eddy for the AGNS

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Reasons for judgment:

[1] Nova Scotia Power Inc. is a virtual monopolist in the supply of electricity in Nova Scotia. The Nova Scotia Utility and Review Board sets the electricity rates to be charged by Nova Scotia Power. The Board acts under ss. 44 and 67(1) of the *Public Utilities Act*. Section 67(1) does not permit the Board to set a rate for low income consumers different than the rate chargeable to other consumers for the same circumstances and conditions respecting electrical service. The appellants applied to the Board for an order that s. 67(1) violates s. 15(1) of the *Charter of Rights*. The Board ruled that there was no violation of s. 15(1). The appellants appeal. They submit that s. 67(1) discriminates based on poverty, which the appellants say is an analogous ground under s. 15(1). Alternatively, they cite evidence that women, racial minorities, recent immigrants, the aged, the disabled, single mothers and their children are disproportionately represented among the poor, and contend that ss. 67(1) discriminates by adverse effect based on the listed categories of sex, race, national or ethnic origin, age and disability in s. 15(1) and the recognized analogous category of marital status.

Public Utility
Regulation of NSPI

[2] Section 2(e)(iv) of the *Public Utilities Act*, RSNS 1989 c. 380 ("*PUA*") defines "public utility" to include the owner of a plant for the production or delivery of electrical power. That is the business of Nova Scotia Power Incorporated ("NSPI"). Though its shares are privately owned, NSPI is a public utility under the *PUA*. NSPI is vertically integrated, provides electrical service throughout Nova Scotia, and supplies over 95% of the electricity generation,

transmission and distribution in the province. No potential competitor can supply electricity without approval of the regulator. NSPI is a virtual monopolist.

[3] The regulator is the Nova Scotia Utility and Review Board ("Board"). The Board is constituted by the *Utility and Review Board Act*, SNS 1992 c. 11 ("*UARB Act*"), and regulates NSPI under the *PUA*.

[4] Sections 18 and 35 of the *PUA* give the Board "general supervision of all public utilities" and approval authority for capital expenditures exceeding $25,000. Section 52 requires every public utility to "furnish service and facilities reasonably safe and adequate and in all respects just and reasonable". Sections 107 to 109 prohibit the utility from engaging in “unjust discrimination” by either giving an unreasonable preference to a person or subjecting a person to an unreasonable disadvantage. Section 110 prohibits a consumer from receiving a discriminatory preference. Section 64(1) prohibits a public utility from receiving payment for service unless the Board has approved the utility's rates for the service. Section 45 says that the public utility may earn the annual return that "the Board deems just and reasonable" under the prescribed statutory conditions. Section 44 authorizes the Board by order to set the utility's rates for services.

[5] As NSPI's factum acknowledges, "the policy reason for regulation of prices and terms is that the utility as a virtual monopoly, would otherwise have an unacceptable degree of market power." An unregulated monopolist may have the market power to restrict supply below what would be the competitive level, charge prices above what would be the competitive level, and discriminate arbitrarily among consumers in price or supply. In the decision under appeal [2008 NSUARB 11], the Board described its rate-making role for NSPI:

> [117] The reasons for the Board's role in the regulation of public utilities are explained in its March 31, 2005 rate case decision as follows:
>
>> ... NSPI is not like an unregulated retailer. It is a virtual monopoly which operates its business on a cost-of-service basis. Providing electricity to all communities in the Province was not (and likely still is not) financially feasible for private, competitive companies. For that reason, the Province's electric service supplier is a cost-of-service monopoly. In return for undertaking and continuing the costs of electrification of the Province, the Utility is permitted, under the *Act*, to recover the reasonable and prudent costs of providing this service. Because it is a monopoly, regulation operates as a

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> surrogate for competition. One of the regulator's tasks is to balance the need for the Utility to recover its reasonable and prudent costs with the need to ensure that ratepayers are charged fair and reasonable rates.
>
> [18] It is in the interests of all Nova Scotians to ensure that NSPI continues to be a stable and financially sound company. This is a reality which the Board must consider when determining what, if any, rate increase is warranted.
>
> [19] In short, rates charged to customers are based on costs incurred by the Utility in providing service. If the Board finds certain costs to be imprudent or unreasonable, it can (and has) disallowed such expenditures and reduced proposed rate increases accordingly ...
>
> [Board Decision, March 31, 2005, 2005 NSUARB 27, p. 7]

[118] Electricity is an essential service. The cost of providing electricity to all areas of the province is in excess of $1 billion per year. These costs are passed on to each category of ratepayer (e.g., residential, small commercial, industrial, etc.). In order to protect the public interest, the Board must ensure that NSPI, a monopoly providing an essential service to the public, does not abuse its monopoly status by overcharging its customers as a whole or any customer class in particular. The Board meets this responsibility in two ways. During a general rate application, the Board reviews the revenue required by NSPI to comply with the sections of the *Act* noted above (as well as others), and satisfies itself that the costs NSPI proposes to recover from ratepayers reflect only those expenditures NSPI must or should incur, and that the costs of same are reasonable, justifiable and reflect a price which is as low as reasonably possible. The rates include an appropriate return to NSPI. Between rate hearings, the Board applies a similar test when considering capital expenditures proposed by NSPI which exceed $25,000.

[6] Section 67(1) of the *PUA* constrains the Board's rate-making discretion:

67 (1) All tolls, rates and charges shall always, under substantially similar circumstances and conditions in respect of service of the same description, be charged equally to all persons and at the same rate, and the Board may by regulation declare what shall constitute substantially similar circumstances and conditions.

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[7] The Board's decision under appeal (¶ 120) stated the Board's view of s. 67(1), "to ensure fairness between customer classes when rates are set", and elaborated:

> [121] Electricity rates are set on the basis that the costs incurred by the utility to serve its customers, together with a reasonable rate of return, are recovered from its customers. Customers are divided into customer classes. These classes reflect variations in the services required by different customers (e.g., domestic customers and industrial customers) which are received from the utility. Since the services required by each customer class differ, the utility's cost to serve each customer class also differs. For example, in order to serve domestic customers, the utility must have an extensive distribution system. Large industrial customers do not require this infrastructure and, therefore, the costs to serve these two classes of customers are quite different. As a result, the total revenue requirements of the utility must be fairly divided by customer class and allocated accordingly. The requirement for fair allocation of costs ensures that all customers pay for the cost of the service they receive and their rates do not subsidize the rates of other customers.
>
> [122] The focus of this proceeding is s. 67(1) of the *Act* which requires that the Board order like rates for like service. As noted by the Court of Appeal in *Dalhousie Legal Aid v. Nova Scotia Power Inc.* (2007), 245 N.S.R. (2d) 206, s. 67(1) is mandatory. The rates and charges "shall always ... be charged equally" to persons of similar circumstances and conditions in respect of service. The purpose of the section includes protection, in particular of people such as the Claimants, from NSPI abusing its monopoly power (but, of course, the section pre-dates the *Charter*). For example, it prevents NSPI from providing favourable rates, which are not based on cost, to, for example, its shareholders, its employees or their families, or to anyone (including the advantaged in society) based on non-cost related principles.
>
> [123] This is particularly important when analyzing s. 67(1) within the context of the *Act* as a whole. In exchange for its obligation to serve (s. 52), NSPI is given the opportunity to recover its costs of service and a reasonable return (s. 45). To the extent rates may not recover their cost of service (because they are based on ability to pay rather than cost) those costs will be assigned to other customers thereby raising their rates.

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> [124] The concept of fairness is central to the regulation of public utilities in this province. An important consideration for the Board (applying public utility principles) would be, if rates for certain customers are based on ability to pay, should rates for other customers (e.g., struggling businesses) also be based on ability to pay? These would be difficult questions indeed.

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Legal Proceedings

[8] In May and June 2004 NSPI applied to the Board for approval of a rate increase. Dalhousie Legal Aid Service intervened to propose a Rate Assistance Program for low income consumers of power. The Board's decision (2005 NSUARB 27) accepted that "all customers, regardless of income, receive 'substantially similar' service from NSP". This meant that section 67(1) of the *Act* required the Board to charge the "same rate" to residential customers, regardless of income. This court dismissed the appeal [*Dalhousie Legal Aid Service v. Nova Scotia Power Inc.*, 2006 NSCA 74 ("*DLAS*")] and concluded:

> [39] Section 67(1) is not ambiguous: "rates . . . shall always . . . be charged equally to all persons and at the same rate" in substantially similar "circumstances and conditions in respect of service of the same description". The Board cannot reduce the rate to a low income customer who receives the same service as a high income customer.

In *DLAS*, this court said (¶ 33) that the Act prescribed the Board's rate making function as "a proxy for competition, not an instrument of social policy", and (¶ 25): "It is for the Legislature to decide whether to expand the Board's purview" to authorize different residential rates based on income. The Supreme Court of Canada denied leave to appeal: [2006] SCCA No. 376.

[9] In *DLAS* the issue turned on statutory interpretation. There was no challenge to s. 67(1)'s constitutional validity.

[10] In *Boulter*, the Appellants challenge the validity of s. 67(1). They submit that poverty is an analogous ground under s. 15(1) of the *Charter*, and that s. 67(1)'s exclusion of the option for an ameliorative program to assist the poor discriminates contrary to s. 15(1). Alternatively, they cite evidence that women, racial minorities, seniors and children, recent immigrants, the disabled and single mothers demographically are over-represented among the poor, and submit that s. 67(1) discriminates based on the enumerated categories of sex, race, national or ethnic origin, age and disability, and the established analogous category of marital status in s. 15(1).

Evidence

[11] In October 2006 NSPI applied to the Board for approval of another rate increase. On October 31, 2006 Ms. Boulter on the one hand, and the Affordable Energy Coalition, Ms. Brown, Ms. Lannon, Mr. McNaughton and Ms. Whiteman on the other, as intervenors, filed with the Board Statements of Issue and Notices Pursuant to the *Constitutional Questions Act*, RSNS 1989, c.89. The Notices said that "sections 44 and 67(1) of the *Public Utilities Act* infringe the rights of low income consumers under section 15 of the *Charter*". I will describe these intervenors collectively as the "claimants". The claimants also alleged a violation of the *Human Rights Act*, RSNS 1989, c 214. The *Human Rights Act* was not argued in the Court of Appeal, and I will not discuss it further.

[12] The claimants filed evidence as to their circumstances and called nine other witnesses. Subject to a few restrictions, the Board accepted these other witnesses as experts.

[13] I repeat the Board’s description of the individual claimants’ circumstances:

> **<u>Yvonne Carvery</u>**
>
> [18] Yvonne Carvery is an African Nova Scotia senior and lives in Halifax. She receives income from the Canada Pension Plan and, after living in Uniacke Square for a number of years, now resides in a senior citizens complex. She is a diabetic and requires medication for that disease. She stated that her total annual income in 2006 was $12,797 and that her electricity costs are approximately $750. She indicated that she uses NSPI's budget plan to pay her electricity bills, which comprise approximately 6% of her annual income.
>
> [19] Ms. Carvery stated that she has difficulty meeting the costs of such basic needs as rent, food, telephone, etc., and, that when trying to make ends meet, she gives priority to rent and electricity.
>
> **<u>Laura Lannon</u>**
>
> [20] Laura Lannon grew up in Westville, is disabled and has a number of chronic illnesses. She moved to Halifax in 1993 and has worked sporadically since she was 19 years old. She receives a total monthly income of $824 from the Nova Scotia

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Department of Community Services ("DCS"). She is currently enrolled in a training program while on income assistance and receives a training allowance of $200 per month, but is only allowed to keep $150 per month under current DCS rules with the rest deducted from her monthly allowance. In addition, she receives a quarterly GST rebate of $19. Her total current annual income is approximately $11,916.

[21] Ms. Lannon stated that she has difficulty meeting her electricity expenses, and the costs of other basic needs, due to her limited income, despite using food banks and receiving assistance from private organizations. Her power has been disconnected a number of times and she is required to make a deposit with NSPI before power service is reconnected to her residence and has often paid late payment charges. She recently moved to a residence where her rent includes electricity costs but indicated that the building is not safe or properly maintained.

Wayne MacNaughton

[22] Wayne MacNaughton has lived in Halifax since 2001. He moved to Halifax from Ontario where he had steady employment until 1996, when he suffered retinal detachment in both of his eyes. As a result, he now has seriously reduced vision, particularly at night, which has made it difficult for him to find employment. Due to his illness, he is only able to do volunteer work and is paid an honorarium for these duties. He receives social assistance from DCS and his total monthly allowance is $541.50.

[23] Mr. MacNaughton has experienced homelessness and has lived in shelters and transient housing, but now lives in housing provided by the Metro Non-Profit Housing Association ("MNPHA").

[24] As a result of Mr. MacNaughton's financial circumstances, the cost of electricity was a significant burden. In January, 2002, Mr. MacNaughton moved into a new MNPHA building and pays a flat charge of $25 per month for electricity. In his pre-filed evidence, Mr. MacNaughton stated that life has changed for him since he moved to his current location. He has fewer worries about electricity bills since his costs are fixed.

Karan Whiteman

[25] Karan Whiteman moved to Canada from Trinidad in 1989 when she was 16 years old. She has a son and is currently

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> separated from her husband. She receives income assistance from the DCS, receiving a total monthly income, including child care benefits and GST rebate, of $1,130. Ms. Whiteman, in her pre-filed evidence, provided details of her expenses. Currently, her shelter expenses (rent and electricity) exceed the shelter allowance by $173.00. She frequently has to pay late charges and disconnection charges from NSPI. She indicated that on average she pays almost 14% of her income for electricity.
>
> **Denise Boulter**
>
> [26] Denise Boulter is a single parent who struggles to make ends meet. Although she has a medical history which affects her ability to be employed or attend school, she is now in the second year of a two year program at the Nova Scotia Community College in Kentville. She has been on social assistance sporadically since 2003. Ms. Boulter is currently a customer of NSPI and stated that she has had electricity bills in the past which resulted in a number of disconnection notices and had difficulty obtaining an account in her own name.
>
> [27] Ms. Boulter filed an update to her pre-filed evidence and responses to AG's IR's on November 23, 2007. Her current monthly income is $1,393.03 including GST rebate and child tax benefit. Her total expenses are $1,402.00 per month. She lives in a two bedroom apartment and is responsible for her electricity bill, which includes heat and hot water. She is on a budget billing plan with NSPI and pays $140.00 per month for electricity.
>
> [28] Ms. Boulter uses food banks whenever she can to supplement her dietary needs. She stated that any increase in power rates will further erode her ability to buy food and other necessities of life, including medical supplies.

[14] The evidence of the claimants' experts included the following points.

[15] Mr. Brendan Haley is a policy analyst with the Ecology Action Centre. He said that existing energy sufficiency programs are unaffordable to the poor. NSPI contributes $250,000 to the Salvation Army's program to assist low income Nova Scotians with their power bills. Mr. Haley said that this program does not adequately address the needs of those living in poverty.

[16] Ms. Carol Horne is a field worker with the Society of St. Vincent de Paul of Halifax. She acts as an intermediary and negotiator between persons in need and various agencies, including NSPI respecting electricity bills. She

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explained the consequences of power disconnection, the loss of light, heat and use of appliances. She noted the family consequences such as the concern that the child protection services may remove the children. She described how she tries to help her clients:

> First of all, I talk to Nova Scotia Power and get a payment history, look about what's happening with the account. Then I go to their home and we sit down and we look at what their income is, what's coming in and what's going out, and try to work out something so that we pay and then they can carry on from there. Like we'll make a payment to keep power on. Sometimes it makes two visits but we try to work out some way that they can put shelter first and that isn't always easy. But we try to work -- I try to work out something like that. I -- most of the people that I work with they -- we look at budgeting. And I say the term "budgeting" but I'm not sure it's budgeting that I do because when I'm going out, if you're not in housing and you're in regular apartments when we look at what their shelter costs are and what's coming in, we -- it could be up to 80 percent of the income coming in is going out in shelter. So I don't know how you ever budget that. Because it's a real -- when they're paying their rent and their power and whatever else they're paying and that goes first they have almost nothing left for food. So sometimes people decide to feed their children before they pay their power. So it's a real difficult time but those are the kind of things we look at.

[17] Mr. Charles MacDonald is the current chair of the Tetra Society of Metro Halifax and former executive director of the Nova Scotia Disabled Persons Commission. He spoke of the needs of persons with disabilities. He said that the disabled are more likely to be poor and to need government programs than are the able bodied. His written evidence referred to a 2001 federal government survey indicating that 27.9% of working age adults with disabilities lived below the Low Income Cut Offs, compared to 12.7% of the able bodied population. He said that the reasons for this social disadvantage included barriers to employment, a social and systemic failure to accommodate persons with disabilities and inadequate social supports. He explained the impact of electricity costs:

> The affordability of electricity is a factor in the ability of persons with disabilities to maintain their need for shelter. Electricity is a necessity and without it, persons with disability run the risk of losing their homes. In addition, electricity costs may result in persons with disabilities having to choose between equally

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> important needs such as their need for shelter and their need for food. Food shortages are a reflection that incomes are inadequate to meet basic needs. Persons with disabilities are at risk for homelessness and unaffordable electricity costs contribute to this vulnerability.

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[18] Paul O'Hara discussed the inadequacy of welfare and housing and energy assistance programs. He said that basic necessities, food, shelter, utilities including power, are not affordable under current government levels of support. Respecting power bills, he said:

> From my personal experience in advocating on behalf of clients, I can support my clients accounts of being told by CSR's "if you don't have the money then you will be cut off". The customer service representatives frequently do not offer alternatives such as a settlement agreements [*sic*], or waiver of deposits to clients who are experiencing financial difficulties and are behind on their bills.
>
> In the past I have negotiated settlement agreements on behalf of clients, sometimes in circumstances where settlement agreements have already been signed, but where the terms are so onerous and unrealistic given the client's income, that they have been breached. My experience is that my clients are so desperate to keep the lights on or get the lights back on, that they will agree to almost any terms.

[19] Nancy Brockway was qualified as an expert in low income rates, regulatory policy and rate design. She said that 26 American jurisdictions have adopted a form of low income affordability program for utility costs.

[20] Dr. Patricia Williams is an Associate Professor at Mount Saint Vincent University's Department of Applied Human Nutrition. She spoke to the affordability of a nutritious diet, in the broader context of food security. She examined affordability scenarios for a two parent family of four, a single mother with two children and a single adult male. I quote the findings from her report:

> **Major Findings**
>
> **Family of Four**
>
> Our data show that a basic nutritious diet for a family of four would cost at least $572.90 and $617.42/month in 2002 and

2004/05, respectively. When monthly costs for food, shelter, and other expenses considered essential for a basic standard of living were compared with average monthly incomes for a family of four with one adult working full time and the other part time, both earning minimum wage, the findings suggest this family would face a **deficit of $342.10** in 2002. Even when the 2006 increase in minimum wage to $7.15/hr was factored in, with the increasing cost of goods and services, findings indicate **an additional $427.93 is needed** each month to afford a basic nutritious food basket costing $617.42.

The same family of four relying on Income Assistance would face a potential **deficit of at least $277.00** in 2002 and **$380.53** in 2006.

Lone Parent Family

A basic nutritious diet for a lone female parent working full time with two children would cost at least $351.68 and $386.18/month in 2002 and 2006, respectively. The results show that whether earning $6.00/hr in 2002 or $7.15/hr in 2006, this household cannot even afford basic expenses before purchasing food; in fact this family would face a **deficit of at least $463.42** and**$373.84**, respectively after the cost of the NNFB was factored in.

The same lone parent family relying on Income Assistance would face a potential **deficit of $53.26** in 2002 and **$129.84** in 2006.

Single Adult Male

The monthly cost of the NNFB in 2002 for a 30-year-old male was $198.73/month; in 2006 this same basket cost $213.66/month. After the cost of a basic nutritious diet was factored in, the single male earning minimum wage and living in a boarding room was left with just $16.94 in 2002 and $108.45/month in 2006 to cover all other potential expenses. Again, even this minimal surplus assumes that he was able to rent a place for just over $300.00 per month and purchased **no** personal hygiene products, household and laundry cleaners, dental and prescriptions, costs associated with physical activity, education or savings for unexpected expenses.

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If this single adult male relied exclusively on income assistance he would face a **deficit of at least $160.73** in 2002 and **$300.30** in 2006. Both of these scenarios assume that the single adult male pays only approximately $300/month for shelter and $62.50 and $80.97 for power, heat and water in 2002 and 2006, respectively.

Female lone parent (attending university) with 2 children

Even with Canada and Nova Scotia Student loans, a Canada Study Grant, the Child Tax Benefit and GST credit, a lone mother of two children who is attending university full-time in 2005 would potentially be in **debt** each month by almost **$500.00** if she were to purchase a nutritious diet for herself and her children.

[Dr. Williams' emphasis]

Dr. Williams concluded:

Together this evidence shows that food insecurity is a significant problem in our province; low-income citizens cannot access enough healthy, safe food that they like and enjoy in a manner that is socially acceptable, or they worry that they will not be able to do so. Research has shown that those who are food insecure self-report their health as poorer and are at greater risk for chronic disease. Food insecurity is closely linked to poor nutritional intake.

Food insecurity may have negative and interrelated impacts on healthy eating, chronic disease prevention and management, healthy child development, educational achievement and social inclusion. It is clearly a barrier to the social, cultural, and economic development of families and communities in Nova Scotia.

. . .

This body of research shows that almost all people in the studied households relying on minimum wage earnings and **all** people in receipt of income assistance, or Student Assistance in Nova Scotia are unable to meet their basic needs, experience food insecurity and are likely to compromise their dietary intake in order to afford essential expenses, placing their health at risk.

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[Dr. Williams' emphasis]

[21] Dr. Richard Shillington was qualified as an expert in statistical analysis and social policy, particularly as it relates to poverty. He used the Low Income Cut Off, a Statistics Canada term that has been taken by researchers to determine the poverty line. He said that recent immigrants comprise about 1% of Nova Scotia's population but 2% of the poor and visible minorities comprise about 4% of the population but 8% of the poor. He said that women, single parents, seniors, aboriginals and the disabled are over-represented among the poor. He testified:

> Q. I just -- before you go on, could you just explain what the relationship is between Figure 7 that we've been talking about, and the table that's on the next page, which is headed Table 5?
>
> A. Sure. The next page is Table 5. And the data in -- that's reflected in Figure 7 is the -- is a graphic which is the poverty rates in 2001, which is the second last column to the right. And you're just selecting various categories. And so what you'll see in that, if you -- if you look at the bottom, in the various -- the bottom four rows, for recent immigrants, visible minorities, aboriginal identity, populations with disabilities, why does -- why are these data in here? This data, I actually brought out of Statistics Canada's publications. Why are these there? Because people who've done research in the area know that these are populations that regularly are over represented in poor populations. These are populations that are -- have a higher risk of living in poverty. Recent immigrants, visible minorities, persons who report an aboriginal identity, people with disabilities. And you look at the bottom four numbers, the overall poverty rate is 17 percent. Again, I'm looking at the second last column. The poverty rate for recent immigrants is 46 percent, which means that they're about 2-1/2 times more likely to be poor than general population. For the population with visibility minorities, the poverty rate is -- I need my glasses, excuse me -- 35 percent. So, they're more than twice as likely. For aboriginal identity, twice as likely. The 34 percent, compared to 17 percent. For people with -- population with disabilities, 23 percent poverty rate, about 1-1/2 times as likely. And if you go up to the line, it's about a third of the way down the page. For lone parents, that same chart, they're about four times as likely to be low income. And the reason is -- why would a lone parent family

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> be -- have a much higher poverty rate? You have a family with children. The presence of children increases all of the economic demands for the family. So, the family need more income to have the same standard of living, but there's only one adult. So, they can only have one income. You have much higher demands.

Later (¶ 48-49, 68, 83) I will discuss the Table 5 to which Dr. Shillington referred.

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[22] Mr. Bruce Porter, a human rights consultant, described the negative societal stigma of poverty, and the connection between the poverty stereotype and the discrimination suffered by racial minorities, single mothers and the disabled. His report said:

> 16. Though it intersects with other grounds of discrimination, as will be described below, discrimination because of poverty is a distinct form or prejudice and discrimination, similar in nature to other forms of discrimination such as discrimination because of race, citizenship, sex or disability.
>
> . . .
>
> 20. As with discrimination against other groups, discrimination against poor people encourages false generalizations about members of the group to accentuate imputed negative characteristics. Social assistance recipients, the homeless and other poor people, for example, are often characterized as able-bodied men who are idle at the tax-payers' expense. In fact, the majority of those relying on social assistance or who are homeless are women, children and persons with disabilities.
>
> . . .
>
> 67. From the standpoint of discrimination against poor people, lower utilities rates for low income households are the equivalent of a wheelchair ramp into housing for a wheelchair user. Accommodation of unique needs can make the difference between being housed and being homeless. The interest at stake is immense.
>
> 68. A regulation prohibiting the accommodation of the needs of low income households through lower rates is, in my view, an unreasonable refusal to give equal consideration and respect to

> the needs of poor people. The notion that poor people must "pay their way" without any assistance or accommodation of their needs, even at the cost of losing housing or access to a basic service, is a discriminatory notion based on stereotypes and prejudices about the poor and denying poor people equal dignity and respect.

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[23] Mr. Roger Colton testified respecting low income utility issues and the affordable energy burden. In his view the rates set by the Board under the *PUA* are unfair to the poor:

> While the Company is attentive to imposing collection fees and charges on payment-troubled low-income customers purportedly on the basis of ensuring cost-based rates and the lack of cross-subsidies, it fails completely to prevent the reverse cross-subsidies that can be traced to attributes that are disproportionately displayed by low-income customers. Indeed, when it comes to fundamental ratemaking principles, the Company not merely routinely, but nearly universally, engages in rate averaging that causes low-income customers to pay system costs that non-low-income customers cause the Company to incur. This process of rate averaging imposes higher costs, and thus higher rates, on low-income customers, which, in turn, both creates and exacerbates the payment-troubled status of these low-income customers ...

Mr. Colton proposed a rate assistance program with a credit based on income level.

[24] In response, the Attorney General of Nova Scotia submitted evidence of a manager with the provincial Department of Energy. He was unaware of any Canadian income based assistance program that has been approved by regulators of electricity rates. No witness testified for NSPI.

Board's Ruling

[25] The Board's written decision of February 4, 2008 (2008 NSUARB 11) held that the claimants' *Charter* claim failed the tests from *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, ¶ 88. The Board (¶144) accepted the claimants' proposed comparator groups - persons in poverty versus persons who are not in poverty – but determined that the *PUA* did not give anyone, in either comparator group, "affordable energy". The rates are based on NSPI's cost plus reasonable return, not the consumer's ability to pay. The *PUA*

relieves consumers in both comparator groups from the effects on price and supply of unchecked monopolistic market power. (¶155-59) Accordingly, in the Board's view, the claimants had not proven that the *PUA* imposed differential treatment between those living in poverty and those who do not live in poverty. The Board dismissed the *Charter* challenge.

[26] The claimants appeal to this court. Section 30(1) of the *UARB Act* permits an appeal to the Court of Appeal on issues of law or jurisdiction.

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Issues and Standard of Review

[27] The issues are whether the Board erred by ruling that s 67(1) does not infringe s. 15(1) of the *Charter* and, if there is an infringement, whether there is justification under s.1 of the *Charter*. Because of the s. 96 court's role to interpret the *Constitution*, the Board's decision on a constitutional challenge to the validity of legislation is reviewed for correctness: *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, at ¶ 58.

Section 15(1)

[28] Section 15(1) of the *Charter* says:

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

[29] In *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, at ¶ 88, the Supreme Court stated:

> (3) Accordingly, a court that is called upon to determine a discrimination claim under s. 15(1) should make the following three broad inquiries:
>
> (A) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?
>
> (B) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?

and

(C) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

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[30] In *R v. Kapp*, 2008 SCC 41 at ¶ 17, the Court restated *Law's* three inquiries as two tests:

> [17] The template in *Andrews*, as further developed in a series of cases culminating in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, established in essence a two-part test for showing discrimination under s. 15(1): (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? These were divided, in *Law*, into three steps, but in our view the test is, in substance, the same.

[31] Under *Kapp*'s first test, does s. 67(1) create a distinction based on an listed or analogous ground? I will address this question from the perspectives of the appellants' two submissions, first based on poverty as an analogous ground, then second based on sex, race, national or ethnic origin, age, disability and marital status. In my view the answer is No. So it is unnecessary to address *Kapp*'s second test.

Poverty as an Analogous Ground

[32] The claimants first contend that poverty is an analogous ground under s. 15(1) and that, by excluding the option of an income based rate assistance program, s. 67(1) creates a distinction based on poverty. Ms. Boulter's factum says:

> 147 It is submitted that 'poverty' meets the criteria to be considered an analogous ground of discrimination within s. 15 of the *Charter* and that this Court ought to affirm, or re-affirm, that principle.

The factum of the other claimants says:

> 94. The Appellants argue that:
>
> . . .
>
> - . . . poverty is an analogous ground, and those living in poverty are disproportionately impacted and burdened by being treated in an identical manner to other consumers of electricity.

[33] I respectfully disagree that poverty is an analogous ground under s. 15(1).

[34] In *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, Justices McLachlin and Bastarache for the majority stated the criteria to identify an analogous ground:

> 13 What then are the criteria by which we identify a ground of distinction as analogous? The obvious answer is that we look for grounds of distinction that are analogous or like the grounds enumerated in s. 15 -- race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. It seems to us that what these grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity. This suggests that the thrust of identification of analogous grounds at the second stage of the *Law* analysis is to reveal grounds based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law. To put it another way, s. 15 targets the denial of equal treatment on grounds that are actually immutable, like race, or constructively immutable, like religion. Other factors identified in the cases as

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> associated with the enumerated and analogous grounds, like the fact that the decision adversely impacts on a discrete and insular minority or a group that has been historically discriminated against, may be seen to flow from the central concept of immutable or constructively immutable personal characteristics, which too often have served as illegitimate and demeaning proxies for merit-based decision making.

Later authorities have taken these principles to govern the definition of analogous grounds. *Delisle v. Canada (Deputy Attorney General*, [1999] 2 SCR 989 at ¶ 43, per Bastarache, J. for majority. *Baier v. Alberta*, [2007] 2 SCR 673 at ¶ 64-65 per Rothstein, J. for majority. *Clyke v. Nova Scotia (Minister of Community Services)*, 2005 NSCA 3 at ¶ 52. *Brebric v. Niksic*, [2002] O.J. No. 2974 (O.C.A.) at ¶ 19. *R. v. Banks*, 2007 ONCA 19 at ¶ 100, leave to appeal denied [2007] SCCA No. 139. *Forrest v. Canada (Attorney General)*, [2006] F.C.J. No. 1850 (FCA) at ¶ 16.

[35] In short, under *Corbiere* the test is whether poverty is a personal characteristic that either (1) is actually immutable or (2) is constructively immutable because it is changeable only at unacceptable cost to personal identity or, put differently, the government has no legitimate interest in expecting the individual to change. I will return to this test shortly.

[36] The Supreme Court has identified citizenship, marital status, sexual orientation and possibly language as analogous grounds. *Law Society of British Columbia v. Andrews*, [1989] 1 SCR 143. *Lavoie v. Canada*, [2002] 1 SCR 769 at ¶ 39, 41. *Miron v. Trudel*, [1995] 2 SCR 418. *Nova Scotia v. Walsh*, [2002] 4 SCR 325. *Egan v. Canada*, [1995] 2 SCR 513. *Vriend v. Alberta*, [1998] 1 SCR 493. *M. v. H.*, [1999] 2 SCR 3. *Little Sisters Book and Art Emporium v. Canada*, [2000] 2 SCR 1120. *Gosselin v. Quebec*, [2005] 1 SCR 238, ¶ 12. See Hogg, *Constitutional Law of Canada* (5th ed. Supp) ¶ 55.8(b).

[37] In *Gosselin v. Quebec (Attorney General)*, [2002] 4 SCR 429 a regulation under *Quebec's Social Aid Act* set the base amount of welfare for recipients aged under 30 at roughly one third the amount for recipients aged 30 and above. Welfare recipients under 30 could increase their welfare payments by taking education and work experience programs. Ms. Gosselin brought a class action on behalf of the affected welfare recipients aged under 30. She challenged the regulation under s. 15(1) of the *Charter*, among other arguments. The challenge was based on age, an enumerated ground, not poverty. Chief Justice McLachlin for the majority held that the law did not discriminate within the meaning of *Law*'s

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contextual factors, and the Court dismissed the s. 15(1) claim. The Chief Justice did not address poverty as an analogous ground. But the result of the discrimination analysis was that social assistance recipients with financial circumstances at least as dire as the claimants' circumstances here failed in their s. 15(1) challenge to a law that targeted persons in poverty. The majority also dismissed Ms. Gosselin’s claim under s. 7 of the *Charter*, that the welfare restrictions violated her security of the person contrary to principles of fundamental justice.

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[38] In *Kapp* Chief Justice MacLachlin and Justice Abella said:

> 41 We would therefore formulate the test under s. 15(2) as follows. A program does not violate the s. 15 equality guarantee if the government can demonstrate that: (1) the program has an ameliorative or remedial purpose; and (2) the program targets a **disadvantaged group** identified by the enumerated or **analogous grounds**.
>
> . . .
>
> 55 . . . Section 15(2)'s purpose is to protect government programs targeting the conditions of a **specific and identifiable disadvantaged group, as contrasted with broad societal legislation, such as social assistance programs**.
>
> . . .
>
> 57 We have earlier suggested that a distinction based on the enumerated or analogous grounds in a government program will not constitute discrimination under s. 15 if, under s. 15(2), (1) the program has an ameliorative or remedial purpose; and (2) the program targets a **disadvantaged group** identified by the enumerated or **analogous grounds**.

[emphasis added]

One may deduce from these passages, though the point was *obiter*, that the receipt of social assistance *per se* does not define a specific and identifiable disadvantaged group as an analogous ground.

[39] The Ontario Court of Appeal has twice discussed economic status as an analogous ground. In *Falkiner v. Ontario (Ministry of Community and Social Services)* (2002), 59 O.R. (3d) 481 (C.A.) Justice Laskin for the Court held that receipt of social assistance was a protected ground under s. 15 (¶ 84-93), but (¶88) "economic disadvantage ... alone does not justify protection under s. 15". Five years later, in *Banks*, Justice Juriansz for the Court held that anti-panhandling legislation did not violate s. 15(1), and continued:

> **104** It is worth noting that the appellants took care not to argue that "poverty" in and of itself is a ground of discrimination. While the "poor" undoubtedly suffer from disadvantage, without further categorization, the term signifies an amorphous group, which is not analogous to the grounds enumerated in s. 15. The "poor" are not a discrete and insular group defined by a common personal characteristic. While it is common to speak of the "poor" collectively, the group is, in actuality, the statistical aggregation of all individuals who are economically disadvantaged at the time for any reason. Within this unstructured collection, there may well be groups of persons defined by a shared personal characteristic that constitute an analogous ground of discrimination under s. 15.
>
> **105** *Falkiner v. Ontario (Ministry of Community and Social Services)* (2002), 59 O.R. (3d) 481 (C.A.), on which the appellants rely, is distinguishable from the present case. The differential treatment in that case was based on three grounds: sex, marital status and "receipt of social assistance". *Falkiner* did not recognize poverty as a ground of discrimination.

[40] In *Dartmouth/Halifax (County) Regional Housing Authority v. Sparks* (1993), 119 N.S.R. (2d) 91 (CA) this court held that public housing tenancy was an analogous ground under s. 15(1). In *R. v. Rehberg* (1994), 127 NSR (2d) 331 (SC) Justice Kelly, citing *Sparks*, said that poverty may be an analogous ground. These decisions predated *Corbiere*. The principles underlying the earlier Nova Scotia decisions have been overtaken by the Supreme Court of Canada's more recent expression of the governing principles.

[41] Returning to the *Boulter* case, the claimants' presentation poignantly depicts the burden of poverty. But that burden and the sympathy it evokes are not the defining criteria for an analogous ground under s. 15(1).

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[42] In my view, poverty is not a personal characteristic, under *Corbiere*, that is (1) “actually immutable” or (2) "constructively immutable" in that either the government “has no legitimate interest in expecting us to change” or it "is changeable only at unacceptable cost to personal identity". Poverty is a clinging web, but financial circumstances may change, and individuals may enter and leave poverty or gain and lose resources. Economic status is not an indelible trait like race, national or ethnic origin, color, gender or age. As to the second test, the government has a legitimate interest, not just to promote affirmative action that would ameliorate the circumstances attending an immutable characteristic, but to eradicate that mutable characteristic of poverty itself. That objective is shared by those living in poverty. Ms. Boulter's factum says (¶ 9) "Ms. Boulter is desperately trying to escape from poverty via her educational qualifications from the Community College", and the claimants’ experts propose transformational governmental assistance. Economic status, poverty or wealth, is not an adopted emblem of identity like religion, citizenship or marital status, that the individual observes peacefully free of government meddling. Poverty *per se* does not suit the legal pattern for an analogous ground under *Corbiere*’s formulation.

[43] That poverty’s plight appeals for relief does not mean the redress is constitutional. Pure wealth redistribution, that is legally directed but unconnected to *Charter* criteria, in my view occupies what *Hogg* (¶ 55.8) describes as “the daily fare of politics, and is best [done] not by judges but by elected and accountable legislative bodies”. The elected officials may assess, for instance, whether Dr. Williams’ compelling findings (above ¶ 20) warrant action or whether to add “social conditions” to the grounds of prohibited discrimination in the *Human Rights Act*, as recommended by The Canadian Human Rights Review Board Panel: *Promoting Equality: A New Vision* (Ottawa, Dept. of Justice, 2000) pp. 106-113. I emphasize at this point that I am *not* denying poverty as an analogous ground *because* it is “political”. Political issues are constitutionally reviewable: *Newfoundland (Treasury Board) v. Newfoundland and Labrador Association of Public and Private Employees (NAPE)*, [2004] 3 SCR 381 at ¶ 80. Rather, the claimants’ poverty claim does not on its merits satisfy *Corbiere*’s legal criteria for analogous grounds under s. 15(1), and therefore the issue moves to the legislative arena.

[44] Insofar as the appellants rely on poverty as an analogous ground, I would dismiss the appeal and affirm the Board’s dismissal of the s. 15(1) challenge.

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Listed and Recognized Analogous Grounds

[45] The individual claimants have traits that are protected by s. 15(1). Ms. Carvery is African Nova Scotian, a senior and diabetic. Ms. Lannon is disabled. Mr. MacNaughton has seriously reduced vision. Ms. Whiteman is a single mother, an immigrant and a member of a racial minority. Ms. Boulter is a single mother who suffers clinical depression and adjustment disorder.

[46] The individual claimants have incomes below the Low Income Cut-Offs ("LICO") defined by Statistics Canada. Ms. Carvery receives Old Age Security and the Guaranteed Income Supplement. The other claimants receive income assistance from Nova Scotia's Department of Community Services. Their poverty requires them to ration their needs, including power, food, clothing, gifts for children, and social interaction. Individuals with more fortunate economic circumstances do not have to priorize among basic needs.

[47] The claimants do not say that the *PUA* or s. 67(1) advertently discriminates on the basis of sex, age, race, national or ethnic origin, disability or marital status. To the contrary, s. 67(1), bolstered by ss. 107-110 of the *PUA* (above ¶ 4), prescribe equal rates for the same electrical service. Rather the claimants submit that s. 67(1) fosters adverse effect discrimination. Ms. Boutler's factum says:

> 96. To be clear, this *Charter* challenge does not claim that the statute intends to disproportionately exclude equality-seekers from the benefits and protections of the *Act*, nor do we allege that, through the *PUA*, the Province intended to disproportionately *burden* equality seekers. These are, however, the undenied and undeniable effects of s. 67 of the *Act*. In directing that all consumers will be treated identically, the legislature, through the statute, violates the substantive equality rights of the members of disadvantaged groups by prohibiting accommodation of their circumstances. [emphasis in original]

[48] The claimants rely principally on demographic evidence from Dr. Shillington of over-representation among the poor of the disabled, women, single mothers, racial minorities, recent immigrants, children and the aged. I reproduce

Table 5 from Statistics Canada's 2001 Census, that was Dr. Shillington's key source and was a significant basis of the claimants' submissions on this issue:

Table 5

Selected Statistics on Poverty, Nova Scotia, 2001 and 1996

	Total	**Poor**	**Distribution**		**Poverty Rate**	
			Total	**Poor**	**2001**	**1996**
Unattached Individuals	**116,370**	**44,760**	**100%**	**100%**	**38%**	**41%**
Working-age women	37,290	16,320	32%	36%	44%	46%
Working-age men	41,215	15,090	35%	34%	37%	40%
Senior women	27,795	10,805	24%	24%	39%	38%
Senior men	10,070	2,540	9%	6%	25%	31%
Economic Families	**261,325**	**34,845**	**100%**	**100%**	**13%**	**16%**
Couples with no children under age 18	131,445	10,050	50%	29%	8%	8%
Couples with children under age 18	86,130	8,290	33%	24%	10%	12%
Lone-parent families with children under 18	24,230	12,650	9%	36%	52%	64%
Other families	19,520	3,850	7%	11%	20%	22%
All persons*	**886,885**	**147,015**	**100%**	**100%**	**17%**	**19%**
Children 0-17	198,850	39,420	100%	100%	20%	23%
Aged 0-5	57,025	12,925	29%	33%	23%	27%
Aged 6-17	141,820	26,495	71%	67%	19%	21%
Aged 65+	118,490	16,800	13%	11%	14%	15%
Females	457,175	83,815	52%	57%	18%	21%
Males	429,710	63,205	48%	43%	15%	17%
Population	**886,885**	**147,015**	**100%**	**100%**	**17%**	**19%**
Recent immigrants	5,705	2,640	1%	2%	46%	45%
Visible Minorities	34,245	12,085	4%	8%	35%	38%
Aboriginal identity	9,545	3,275	1%	2%	34%	32%

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With disabilities	185,260	43,050	21%	29%	23%	29%

Source: Statistics Canada: 2001 Census

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[49] Table 5 shows that the 2001 poverty rate for the entire population was 17%, or 147,015 persons from a Nova Scotia total of 886,885. But the poverty rate was: among the disabled - 23%; among visible minorities - 35%; among recent immigrants - 46%; among single parent families with children under 18 years of age - 52%; among unattached senior women- 39%. Some later statistics, showing reduced poverty rates, also were in evidence, but the proportional disparities among these groups generally remained.

[50] From the demographic data, the claimants submit that individuals in the protected categories under s. 15(1) are more likely to be poor, and therefore more likely than those not in poverty to have to priorize power costs against other basic needs. By requiring equal power rates for equal electrical service, s. 67(1) excludes the option of a rate reduction for those in poverty. The exclusion of the ameliorative option, the claimants say, perpetuates an existing disadvantage based on sex, race, national or ethnic origin, age, disability and marital status, and constitutes adverse effect discrimination under s. 15(1).

[51] I will move to the legal principles under s. 15(1). In *Kapp* the Supreme Court said the first question under s. 15(1) is "Does the law create a distinction based on an enumerated or analogous ground?" That distinction may be on the law's face or an adverse effect that violates substantive equality. But, if no distinction based on a listed or analogous ground emanates from the law, the answer to *Kapp*'s first question is No.

[52] This requirement of a distinction means that the s. 15(1) analysis involves comparison.

[53] *Hodge v. Canada (Minister of Human Resources Development)*, [2004] 3 SCR 357 underlined the significance and the principles of comparator analysis under s. 15(1), and illustrated the application of those principles. Justice Binnie for the Court began:

> (1) A person asking for equal treatment necessarily does so by reference to other people with whom he or she can legitimately invite comparison. Claims of discrimination under s. 15(1) of the *Canadian Charter of Rights and Freedoms*

> can only be evaluated "by comparison with the condition of others in the social and political setting in which the question arises": *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 164. A s. 15(1) claim will likely fail unless it can be demonstrated that the comparison, thus invited, is to a "comparator group" with whom the claimant shares the characteristics relevant to qualification for the benefit or burden in question apart from the personal characteristic that is said to be the ground of the wrongful discrimination. [S.C.C.'s underlining]

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Justice Binnie noted the pervasive effect of comparison analysis throughout s. 15(1):

> 17. . . . It is worth repeating that the selection of the comparator group is not a threshold issue that, once decided, can be put aside. On the contrary, each step in the s. 15(1) analysis proceeds "on the basis of a comparison". Indeed in many of the decided cases, the characteristics of the "comparator group" are only developed as the analysis proceeds, especially when considering the "contextual factors" relevant at the third stage, i.e., whether discrimination, as opposed to just a "distinction", has been established.

[54] Justice Binnie explained the steps of comparator analysis.

[55] First the claimant and the comparator group must share the "characteristics relevant to qualification for the benefit or burden in question". The relevance is determined initially from an analysis of the legislation, to determine the legislature's objective, and to identify the "universe of people potentially entitled to equal treatment". (¶ 24-25) Justice Binnie said:

> 26 Nevertheless, in a government benefits case, the initial focus is on what the legislature is attempting to accomplish. It is not open to the court to rewrite the terms of the legislative program except to the extent the benefit is being made available or the burden is being imposed on a discriminatory basis.

[56] Second, the claimant and the comparator group must share all those relevant characteristics to qualify for the benefit or burden, "apart from the personal characteristic that is said to be the ground of the wrongful discrimination". Justice Binnie explained:

> 23 The appropriate comparator group is the one which mirrors the characteristics of the claimant (or claimant group) relevant to the benefit or advantage sought except that the statutory definition includes a personal characteristic that is offensive to the *Charter* or omits a personal characteristic in

> a way that is offensive to the *Charter*. An example of the former is the requirement that spouses be of the opposite sex; *M. v. H.*, *supra*. An example of the latter is the omission of sexual orientation from the Alberta *Individual's Rights Protection Act*; *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

[57] The characteristic that is backed out of the comparison must be a prohibited ground under s. 15(1). Justice Binnie said:

> 33 If the claim to equality is to succeed, the ground has to be a personal characteristic enumerated or analogous to those listed in s. 15(1). This too is occasionally lost sight of. In *Martin*, the excluded chronic pain sufferers at one point attempted to compare themselves to another group of chronic pain sufferers who had suffered workplace injuries at an earlier date. The earlier group had obtained greater benefits under the *Workers' Compensation Act* than the later group of sufferers, but in the interim the benefit the earlier group had received had been terminated and the group grandfathered. Gonthier J. rejected the group of earlier sufferers as a relevant comparator group because what differentiated them from the claimants was not the type of disability but simply the *date* of their respective workplace accidents, which was not a prohibited ground of discrimination. [emphasis in original]

[58] To explain this point, Justice Binnie referred to *Gosselin*, that I discussed earlier (¶ 37):

> 36 In *Gosselin*, *supra*, McLachlin C.J. for the majority noted, at para. 28:
>
> > The Regulation at issue made a distinction on the basis of an enumerated ground, age. People under 30 were subject to a different welfare regime than people 30 and over.
>
> 37 Much of the claimant's argument in *Gosselin* was rejected because it put the focus on the disadvantages attaching to welfare recipients as a class rather than differentiating *within* that general class between the two age groups. The evidence of discrimination was therefore not properly aligned with the alleged ground of discrimination. [emphasis in original]

In short, to support a s. 15(1) claim based on age, there must be a distinction based on age, not merely a disadvantage attaching to welfare recipients of all ages. (See *Gosselin* ¶ 35). I will return to this when applying the principles to the *Boulter* case. (below ¶ 67)

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[59] In *Hodge*, the s. 15(1) claim of discrimination based on marital status, failed this last point. The differential treatment did not turn on marital status. Justice Binnie explained:

> 40 Section 44(1)(d) of the CPP targets the benefit (survivor's pension) at surviving "spouses". The statutory definition includes common law spouses as well as married spouses. This presents a problem for the respondent. She was not in any sort of relationship at all with the deceased at the date of his death. The survivor's pension was denied on the basis that the respondent was not, at the relevant time, a spouse. It was not denied, as it was in *Miron*, because at the relevant time she was a *common law* spouse rather than a *married* spouse.

[60] Ms. Hodge then advanced an effect-based argument that separated spouses suffer economic dependency after separation, and that Statistics Canada reports a 50% poverty rate among elderly unattached women. Justice Binnie commented:

> 44. . . . The respondent points out that the "particular vulnerability" of these women "is due to the near impossibility of entering or re-entering the work force and the inadequacy of our pension systems in general". The legislature may, of course, extend the responsibility of common law spouses beyond the point where at common law the relationship would end, to deal with matters such as economic dependence, but Parliament has not done so in the CPP. On the contrary, s. 2(1) defines the requisite common law relationship in terms of cohabitation. In the absence of any demonstration that this definition itself runs afoul of s. 15(1), we are not at liberty to ignore it.

[61] In *Auton (Guardian ad litem of) v. British Columbia* , [2004] 3 SCR 657, Chief Justice Mclachlin for the Court adopted *Hodge*'s comparator analysis:

> 50 The law pertaining to the choice of comparators is extensively discussed in *Hodge*, *supra*, and need not be repeated here. That discussion establishes the following propositions.
>
> 51 First, the choice of the correct comparator is crucial, since the comparison between the claimants and this group permeates every stage of the analysis. "[M]isidentification of the proper comparator group at the outset can doom the outcome of the whole s. 15(1) analysis": *Hodge*, *supra*, at para. 18.
>
> 52 Second, while the starting point is the comparator chosen by the claimants, the Court must ensure that the comparator is appropriate and should substitute an appropriate comparator if the one chosen by the claimants is not appropriate: *Hodge*, *supra*, at para. 20.

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> 53 Third, the comparator group should mirror the characteristics of the claimant or claimant group relevant to the benefit or advantage sought, except for the personal characteristic related to the enumerated or analogous ground raised as the basis for the discrimination: *Hodge*, *supra*, at para. 23. The comparator must align with both the benefit and the "universe of people potentially entitled" to it and the alleged ground of discrimination: *Hodge*, at paras. 25 and 31.

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[62] The authorities have applied the comparator principles from *Hodge*: *(Canada (Attorney General) v. Hislop*, [2007] 1 SCR 429, ¶ 37-38; *Clyke* (NSCA) at ¶ 40; *Downey v. Nova Scotia (WCAT)*, 2008 NSJ No. 314 (C.A.) at ¶ 46, 59, 62, 67; *Wynberg v. Ontario*, [2006] O.J. No. 2732 (C.A.) at ¶ 18-20, 107-8; *Howe v. Canada (Attorney General)*, 2007 BCJ No. 1207 (C.A.). Though in *Kapp* (¶ 22) the Chief Justice and Justice Abella cautioned against formalistic and artificial comparator analysis, I do not read *Kapp* as altering the *Hodge* principles.

[63] Applying the *Hodge* principles to the *Boulter* case, the court should first analyze the legislative purpose of any benefit or burden under the *PUA*.

[64] I refer to the provisions of the *PUA* and the Board's commentary extracted earlier (¶ 4-6). The *PUA* does not deliver electrical service. NSPI, a private company, produces and sells electricity. Neither does the *PUA* provide the consumer with insurance against power costs as, for instance, medical or hospital insurance legislation does for health care. The power rates set by the Board are not calculated based on a benchmark of consumer "affordability". The rates are set to approximate what NSPI could charge in a competitive market, and include cost recovery to NSPI plus a reasonable rate of return.

[65] The benefit of the *PUA*'s electrical rating provisions is the relief from the potential misuse of monopolistic market power. The unrestricted monopolist may raise its price above what would be the competitive market level, and reduce its supply below what would be a competitive market level, and discriminate arbitrarily, in price or supply, among consumers. The Board's rate powers under the *PUA* protect power consumers from these vicissitudes. That is a "benefit of the law" under s. 15(1) of the *Charte*r.

[66] The "universe of people potentially entitled to equal treatment" under *Hodge* comprises consumers of residential power in Nova Scotia. It is consumers to whom the *PUA*'s benefit is directed. The claimants are consumers of residential power.

[67] Next, as stated in *Hodge* and *Auton*, the comparator group should "mirror the characteristics of the claimant or claimant group relevant to the benefit or advantage sought, except for the personal characteristic related to the enumerated or analogous ground listed as the basis of the discrimination." Counsel for Ms. Boulter urged the court to back out poverty from the comparator group. This would compare the complainants to a group with more substantial income. I disagree. I have already expressed my view that poverty is not an analogous ground under s. 15(1). The grounds at issue here, according to the claimants, are sex, race, national or ethnic origin, age and disability. It is each of those traits, in turn, that must be backed out for the comparator analysis. To back out poverty would misalign the evidence with the alleged ground of discrimination, as noted in *Gosselin* and by Justice Binnie in *Hodge* (above ¶ 58). To consider the claimants' submission based on sex, one would compare a female claimant under LICO to male consumers of residential power also under LICO. To consider the disability claim, one would compare a disabled claimant under LICO with non-disabled consumers of residential power under LICO. And so on, for the other claimant categories in this s. 15(1) claim.

[68] I refer to Dr Shillington's Table 5 from Statistics Canada (above ¶ 48). If the 83,815 females in poverty are backed out, there remain 63,205 males who are beneath the LICO threshold and must priorize their expenses for basic needs. If one backs out the 12,085 individuals who are visible minorities and 3,275 persons of aboriginal identity who are below LICO, there remain 131,655 individuals who are not visible minorities or of aboriginal identity and who have income below LICO. If one backs out 2,640 recent immigrants under LICO, there remain 144,375 persons under LICO who are not recent immigrants. If one backs out 39,420 children up to age 17 plus 16,800 seniors aged 65 and over, there remain 90,795 individuals between 18 and 64 with incomes below LICO. If one backs out 43,050 persons with disabilities, there remain 103,965 persons without disability under LICO. There are 12,650 lone parent families with children under age 18, but there are 22,195 other Economic Families including 8,290 couples with children under 18, all under the LICO threshold and who must priorize their expenses for basic needs as do the claimants. In each case, the claimant group and the comparator group both have substantial numbers living in poverty, who must priorize power costs against costs of other basic needs.

[69] I quoted Dr. Williams' report earlier (¶ 20). Dr. Williams found that each category, family of four, single parent, single adult male and single adult female, suffered significant monthly deficits. Dr. Williams concluded:

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> This body of research shows that almost all people in the studied households relying on minimum wage earnings and **all** people in receipt of income assistance, or Student assistance in Nova Scotia are unable to meet their basic needs, experience food insecurity and are likely to compromise their dietary intake in order to afford essential expenses, placing their health at risk." [Dr. Williams' emphasis]

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[70] I return to the purpose of the power rating process under the *PUA*. The *PUA*, unlike medical and hospital insurance legislation, is not intended to deliver insured power rates or even affordable power rates. It is intended to relieve consumers from the potential arbitrary price hikes or supply restrictions that may result from a monopolist's market power. Without the *PUA*, the claimants and others in poverty, inside and outside the protected groups under s. 15(1), would pay higher monopolistic power prices for more restricted monopolistic power supply than they do under the *PUA*.

[71] Subject to the claimants' adverse effects submission that I will address next, in my view the comparator analysis does not establish that the *PUA* creates a distinction based on sex, race, national or ethnic origin, age, disability or marital status.

[72] The claimants attempt to circumvent the *Hodge* comparator analysis. They suggest that comparator analysis, though relevant to direct discrimination, is supplanted for adverse effect discrimination by a need to show only that the *PUA* fails to ameliorate the over-representation of s. 15(1) protected groups among the poor. The *PUA*'s omission would perpetuate an existing disadvantage, which the complainants submit suffices to prove an adverse effect distinction. They urge that the error in the decision under appeal was the Board's failure to apply this alternative approach to the s. 15(1) claim.

[73] With respect, I disagree. The comparator analysis applies generally to s. 15(1) claims for either direct or adverse effect discrimination. Otherwise s. 15(1) would afford simply a freestanding duty of affirmative action instead of what the *Charter* intends, a remedy for differential treatment (on protected grounds) that is discriminatory. This point is supported by the leading decisions of the Supreme Court of Canada.

[74] In *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 SCR 3 ("*Meorin*"), Justice MacLachlin, as she then was, for the Court held that the traditional separate tests for direct and adverse effect discrimination under human rights legislation should be synthesized into one approach. She said that under s. 15(1) of the *Charter* there is only one approach for both direct and adverse effect discrimination:

> [47] The conventional analysis differs in substance from the approach this Court has taken to s. 15(1) of the *Canadian Charter of Rights and Freedoms*. In the *Charter* context, the distinction between direct and adverse effect discrimination may have some analytical significance but, because the principal concern is the effect of the impugned law, it has little legal importance. As Iacobucci J. noted at para. 80 of *Law*, *supra*:
>
> > While it is well established that it is open to a s. 15(1) claimant to establish discrimination by demonstrating a discriminatory legislative purpose, proof of legislative intent is not required in order to found a s. 15(1) claim: *Andrews*, *supra*, at p. 174. What is required is that the claimant establish that either the purpose or the effect of the legislation infringes s. 15(1), such that the onus may be satisfied by showing only a discriminatory effect. [Emphasis in original.]

[75] *Law*'s three-step test and *Kapp*'s two-step test (above ¶ 29-30) apply whether the distinction is direct or by adverse effect. Justice Iacobucci's statement in *Law* (¶ 80) is quoted in the passage from *Meorin* above. In *Kapp* ¶ 18, Chief Justice McLachlin and Justice Abella quoted Justice McIntyre's seminal ruling in *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143, at 174:

> I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.

[76] The test searches for a distinction by comparing the claimant to a comparator. The claimant's characteristics may be selected to accommodate the uneven territory of adverse effect discrimination. So discrimination against a definable claimant subgroup of a protected class will suffice: *Brooks v. Canada Safeway Ltd.*, [1989] 1 SCR 1219, at 1247 (pregnant women); *Janzen v. Platy Enterprises Ltd.*, [1989] 1 SCR 1252, at 1288-89 (women subject to sexual

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harassment); *Symes v. Canada*, [1993] 4 SCR 695, at pages 769-771; *Nova Scotia (Workers' Compensation Board) v. Martin*; *Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 SCR 504, at ¶ 76-77, 81 (types of disability). In *Kapp*, ¶ 55, Chief Justice McLachlin and Justice Abella said:

> "Not all members of the group need to be disadvantaged, as long as the group as a whole has experienced discrimination."

[77] But it remains necessary, even for adverse effect discrimination, that the claimants' group or subgroup be treated differently than the comparator group, whose members do not have the protected characteristic but are otherwise similar to those in the claimant group or subgroup. In *Symes* pages 770-71, Justice Iacobucci said:

> Following upon this acknowledgment, however, the important thing to realize is that there is a difference between being able to point to individuals negatively affected by a provision, and being able to prove that a group or subgroup is suffering an adverse effect in law by virtue of an impugned provision. As already noted, proof of inequality is a comparative process: *Andrews, supra*. If a group or subgroup of women could prove the adverse effect required, the proof would come in a comparison with the relevant body of men. Accordingly, although individual men might be negatively affected by an impugned provision, those men would not belong to a group or subgroup of men able to prove the required adverse effect. In other words, only women could make the adverse effects claim, and this is entirely consistent with statements such as that found in *Brooks, supra* to the effect that "only women have the capacity to become pregnant" (at p. 1242).
>
> Looking at this point a different way, if s. 63 creates an adverse effect upon women (or a subgroup) in comparison with men (or a subgroup), the initial s. 15(1) inquiry would be satisfied: a distinction would have been found based upon the personal characteristic of sex. [Justice Iacobucci's emphasis]

[78] The leading decisions to rule that adverse effect discrimination violated s. 15(1) are *Eldridge v. British Columbia*, [1997] 3 SCR 624 and *Vriend v. Alberta*, [1998] 1 SCR 493. Though these rulings predated *Law* and *Hodge*, their reasons support the need for comparator analysis.

[79] In *Eldridge* the absence of deaf translation meant the deaf could not communicate with medical personnel while persons with hearing could. The legislation and policies were silent respecting deafness, so the distinction was by adverse effect. But there was a distinction based on disability. Justice LaForest's

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reasons (¶ 58-60, 71, 76, 80) recognize the need for differential treatment based on disability. He stated the point succinctly:

> [80] In my view, therefore, the failure of the Medical Services Commission and hospitals to provide sign language interpretation where it is necessary for effective communication constitutes a *prima facie* violation of the s. 15(1) rights of deaf persons. This failure denies them the equal benefit of the law and discriminates against them in comparison with hearing persons.

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[80] In *Vriend*, Alberta's human rights legislation omitted sexual orientation as a prohibited ground. Justices Cory and Iacobucci for the majority ruled that the omission violated s. 15(1), sexual orientation being an analogous ground. As the law said nothing about sexual orientation, the distinction was by adverse effect. Justices Cory and Iacobucci (¶ 81-82) stated that the omission created distinctions with two comparator groups:

> [81] It is clear that the *IRPA*, by reason of its underinclusiveness, does create a distinction. The distinction is simultaneously drawn along two different lines. The first is the distinction between homosexuals, on one hand, and other disadvantaged groups which are protected under the Act, on the other. Gays and lesbians do not even have formal equality with reference to other protected groups, since those other groups are explicitly included and they are not.
>
> [82] The second distinction, and, I think, the more fundamental one, is between homosexuals and heterosexuals. ... This was well expressed by W. N. Renke, "Case Comment: *Vriend v. Alberta*: Discrimination, Burdens of Proof, and Judicial Notice" (1996), 34 *Alta. L. Rev.* 925, at pp. 942-43:
>
>> If both heterosexuals and homosexuals equally suffered discrimination on the basis of sexual orientation, neither might complain of unfairness if the *IRPA* extended no remedies for discrimination on the basis of sexual orientation. A person belonging to one group would be treated like a person belonging to the other. Where, though, discrimination is visited virtually exclusively against persons with one type of sexual orientation, an absence of legislative remedies for discrimination based on sexual orientation has a differential impact. The absence of remedies has no real impact on heterosexuals, since they have no complaints to make concerning sexual orientation discrimination. The absence of remedies has a real impact on homosexuals, since they are the persons discriminated against on the basis of sexual orientation.

[81] *Eldridge* and *Vriend* do not, as the claimants suggest, stand for the principle that an adverse effect claim escapes comparator analysis. In *Eldridge* the deaf had

no translation and those with hearing did not need translation. In *Vriend* homosexuals had no human rights protection and heterosexuals did not need protection. These were adverse effect distinctions, on protected grounds, between the claimants and comparator groups of persons without the protected trait but otherwise similar to the claimants. Essentially this is the *Hodge* approach.

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[82] The results in *Eldridge* and *Vriend* may be compared to the outcome in *Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia*, [2007] 2 SCR 391. Chief Justice McLachlin and Justice LeBel for the majority dismissed a s. 15(1) challenge to legislation that adversely affected employment positions known as "women's jobs", and that were occupied disproportionately by women (see ¶ 16). The ruling said (¶ 165):

> "The differential and adverse effects of the legislation on some groups of workers relate essentially to the type of work they do, not to the persons they are."

[83] In *Boulter*, Dr. Shillington's Table 5 establishes that each claimant group and its respective comparator group contain substantial numbers of persons in poverty. Both the complainant and comparator groups have substantial numbers of persons whose power costs add to their unwieldy burden of living expenses, forcing prioritization among basic needs. The *PUA* does not treat the complainants differently than it treats the comparator groups, either directly or by adverse effect, based on sex, race, ethnic or national origin, age, disability or marital status.

Conclusion

[84] Despite their impressive presentation to the Board and to this court, the claimants have not established that s. 67(1) draws a distinction on a listed or analogous ground under *Kapp*'s first test. I would dismiss the appeal without costs.

Fichaud, J.A.

Concurred in:

Saunders, J.A.

Hamilton, J.A.

TAB 4

COURT FILE NO.: 273/07
DATE: 20080516

2008 CanLII 23487 (ON SCDC)

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

KITELEY, CUMMING, AND SWINTON JJ.

B E T W E E N:	
ADVOCACY CENTRE FOR TENANTS-ONTARIO and INCOME SECURITY ADVOCACY CENTRE on behalf of LOW-INCOME ENERGY NETWORK	***Paul Manning*** and ***Mary Truemner***, for the Appellant
Appellant	
- and -	
ONTARIO ENERGY BOARD	***Michael Millar***, for Ontario Energy Board
	Fred Cass and ***David Stevens,*** for Enbridge Gas Distribution Inc.
Respondent	
	Robert Warren, for Consumers Council of Canada
	HEARD at Toronto: February 25, 2008

KITELEY and CUMMING JJ.

The Appeal

[1] The Respondent Ontario Energy Board (the "Board") is the provincial economic regulator for the natural gas and electricity sectors. The Board exercises its jurisdiction within the statutory authority established by the Legislature, being the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B (the "*Act*").

[2] By a majority (2:1) decision dated April 26, 2007, the Board determined that the *Act* does not explicitly grant to the Board jurisdiction to order the implementation of a low income affordability program: *Enbridge Gas Distribution Inc.* (April 26, 2007), EB-2006-0034 (Ont. Energy Bd.) (the "Board Decision"). The Board also found that the Board does not gain the requisite jurisdiction through the doctrine of necessary implication.

[3] Enbridge Gas Distribution Inc. ("EGD") sought approval by the Board of EGD's 2007 gas distribution rates based simply upon the Board's traditional, standard "cost of service" rate-making principles. The Appellant Low Income Energy Network ("LIEN") had intervened in the application before the Board. LIEN argues that without a rate affordability program, the interests of low-income consumers are not protected. LIEN proposed that the Board accept as an issue in the EGD proceeding the following matter:

> Should the residential rate schedules for EGD include a rate affordability assistance program for low-income consumers? If so, how should such a program be funded? How should eligibility criteria be determined? How should levels of assistance be determined?

[4] LIEN seeks from the Board the introduction of a rate affordability assistance program to make natural gas distribution rates affordable to poor people. The underlying premise of the proposal of LIEN is that low income consumers (estimated to be about 18% of households in Ontario) should pay less for gas distribution services than other consumers. LIEN emphasizes that the supply of natural gas (or other source of energy) serves to meet basic human needs such as warmth from heating and the generation of power. Those who cannot afford to use natural gas as a source of energy may be placed at a significant disadvantage. LIEN submits that the Board can consider ability to pay in setting rates if it is necessary to meet broad public policy concerns. Access to an essential service is arguably such a concern. The supply of natural gas can be considered a necessity that is available from a single source with prices set by the Board in the public interest.

[5] The majority of the Board held that the LIEN proposal amounted to an income redistribution scheme. The Board noted that such a scheme would require a consumer rate class based upon income characteristics and would implicitly require subsidization of this new class by other rate classes. It is undisputed that a common, if not universal, historical feature of rate-making for a natural monopoly is the application of the same charges to all consumers within a given consumer classification based upon cost of service, that is, cost causality.

[6] Section 33 of the *Act* provides for an appeal to this Court on a question of law or jurisdiction. LIEN seeks a declaration that the Board has the jurisdiction to order a "rate affordability assistance program" for low income consumers of the utility, EGD, within its franchise areas as the distributor of natural gas.

[7] The position of EGD, the Board and the intervenor, the Consumers Council of Canada, is that LIEN's quite understandable and commendable concern is an issue of public policy to be dealt with by the Legislature and falls outside the jurisdiction of the Board.

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The Standard of Review

[8] The issue is whether the Board is correct in its determination that it does not have jurisdiction to implement a low income affordability program.

[9] There is common ground that the standard of review is correctness. That is, this Court will interpret the statutory grant of authority on the basis of its own opinion as to a statute's construction, rather than deferring to the Board's determination of the issue. A tribunal's determination that it has no jurisdiction will be set aside as a "wrongful declining of jurisdiction" if the Court is of the view that the tribunal's decision is wrong. Donald J.M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada*, looseleaf (Toronto: Canvasback Publishing, 1998) at 14-3 to 14-4.

Analysis of the Board's Jurisdiction

A. Applicable Principles

[10] The Court is to be guided by the principles of statutory interpretation as set forth in Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed., (Toronto: Butterworths, 1994) at 131:

> There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just.

[11] The words of the *Act* are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme and object of the legislation and the Legislature's intent. *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, [2006] 1 S.C.R. 140 at para. 37 [*Atco*].

[12] The statute shall be interpreted as being remedial and given such "fair, large and liberal interpretation as best ensures the attainment of its objects." *Legislation Act*, S.O. 2006, c. 21, Schedule F, s. 64 (1).

[13] A statutory administrative tribunal obtains its jurisdiction from two sources: explicit powers expressly granted by statute, and implicit powers by application of the common law doctrine of jurisdiction by necessary implication. *Atco*, *supra*, at para. 38.

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[14] The Court must apply a "pragmatic or functional" analysis in determining the issue of jurisdiction, by considering the wording of the *Act* conferring jurisdiction upon the Board, the purpose of the *Act* creating the Board, the reason for the Board's existence, the area of expertise of its members and the nature of the problem before the Board. *Union des employés de Service, local 298 v. Bibeault,* [1988] 2 S.C.R. 1048 at 1088.

B. The Wording of the Act

[15] Section 36 of the *Act* confers the Board's jurisdiction:

> **36.** (1) No gas transmitter, gas distributor or storage company shall sell gas or charge for the transmission, distribution or storage of gas except in accordance with an order of the Board, which is not bound by the terms of any contract.
>
> ….
>
> (2) The Board may make orders approving or fixing just and reasonable rates for the sale of gas by gas transmitters, gas distributors and storage companies, and for the transmission, distribution and storage of gas.
>
> (3) In approving or fixing just and reasonable rates, the Board may adopt any method or technique that it considers appropriate.

[16] LIEN submits that the Board's authority to fix "just and reasonable rates" by adopting "any method or technique it considers appropriate", conferred by s. 36 (2) and (3) of the *Act* is very broad and the statutory language must be given its ordinary meaning.

[17] The Board argues that the word "rates" is in the plural form in s. 36 (2) to allow the Board to set different rates for different classes of consumers based upon the costs of serving those consumers. For example, large industrial users are typically considerably more expensive to serve than residential consumers. Separate rate classes are a necessity to ensure that consumers reimburse for the actual costs of the service they receive.

[18] The majority opinion in the Board Decision is of the view that the words "any method or technique" cannot reasonably be interpreted to mean "a fundamental replacement of the rate making process based on cost causality with one based on income level as a rate grouping determinant." (p.9)

[19] The phrase "approving or fixing just and reasonable rates" in the present s. 36 (2) was first introduced by s. 17 (1) of Bill 38, *An Act to Establish the Ontario Energy Board*, 1st Sess., 26th Leg., Ontario, 1960 by the then Minister of Energy Resources, the Hon. Robert Macaulay. He outlined for the Legislature the philosophy underlying rate setting (*Legislature of Ontario Debates*, 9 (8 February 1960) at 199 (Hon. Macaulay)):

> First, why are there rate controls? There are rate controls because, in effect, the distribution of natural gas is a monopoly, a public utility. Secondly…it is fair that whatever rate is charged should be one designated, not only in the interests of the consumer, but also in the interests of the distributor…[O]ne really should have in mind 3 basic objectives: First, the rate should be low enough to secure to the user a fair and just rate. Second, the rate should be adequate to pay for good service and replacement and retirement of the used portion of the assets. Third, it should be high enough to attract a sufficient return on capital….

[20] He went on to explain the purpose of the Government's policy (at 205):

> "[F]irst, to protect the consumer, and to see that he pays a fair and just rate, not more or less, and that is competitive with other fuels. Second, to make sure the rate is sufficient to provide adequate service, replacements and safety for the company providing the service. Third, it is that the company should be able to charge a rate which is sufficient to attract the necessary capital to expand.

[21] The present s.36 (3) replaced s.19 of the old *Ontario Energy Board Act*, R.S.O. 1980, c. 332, which required a traditional cost of service analysis in very prescriptive terms:

> 19 (2) In approving or fixing rates and other charges under subsection (1), the board shall determine a rate base for the transmitter, distributor or storage company, and shall determine whether the return on the rate base …is reasonable.
>
> The rate base …shall be the total of,
>
> (a) a reasonable allowance for the cost of the property that is used or useful in serving the public, less an amount considered adequate by the Board for depreciation, amortization and depletion;
>
> (b) a reasonable allowance for working capital; and
>
> (c) such other amounts as, in the opinion of the Board, ought to be included.

[22] The authority was granted in s. 36 (3) to use "any method or technique it considers appropriate" in approving "just and reasonable rates" i.e., employing methods other than simply on a traditional cost of service basis as proscribed in the repealed s. 19 to set rates for the gas sector. This aligned the approach for natural gas with the non-prescriptive authority seen governing Ontario Hydro as a Crown corporation in rate setting for electricity distributors.

[23] Thus, under the former *Act* the phrase "just and reasonable rates" was limited to the cost of service basis articulated in prescriptive detail in s. 19. The change in repealing s. 19 and allowing the Board to "adopt any method or technique it considers appropriate" provides greater flexibility to the Board to employ other methods of rate making in approving and fixing "just and

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reasonable rates" rather than simply the traditional cost of service regulation seen in the former s. 19.

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[24] Subsection 36 (3) allows the Board to adopt "any method or technique that it considers appropriate" in fixing "just and reasonable rates." The majority Board Decision view is that this provision, considered within the context of the *Act* as a whole, allows the Board to employ flexible techniques and methods for cost of service analyses in determining rates, for example, the incentive rate mechanisms currently used for the major gas utilities.

[25] In the same rate setting proceeding that is under review, EGD reportedly asked the Board to approve two fuel-switching programs to enable residential consumers to shift from electric-water heaters to gas-water heaters, given that the latter promote conservation inasmuch as there is greater energy efficiency. The programs are identical except that there is a subsidy offered for the low income group of $800 per participant but a subsidy of only $600 for other consumers. Vice Chair Kaiser in dissenting points out that none of the parties have objected to this proposal and no one has argued that the Board does not have jurisdiction to approve different subsidies based upon income levels.

[26] Indeed, the majority opinion in the Board Decision allows that the Board has ordered that specific funding be channeled aimed at low income consumers for "Demand Side Management Programs."

[27] As well, the Board on occasion has reduced a significant rate increase because of so-called "rate shock" by spreading the increase over a number of years. Although this does not in itself suggest an unequal approach as between residential consumers it does indicate that the Board considers it has jurisdiction to take "ability to pay" into account in rate setting.

[28] EGD, like other utilities, makes annual contributions to enable emergency financial relief through the so-called "Winter Warmth Program" which provides funds as a subsidy to some low income consumers, enabling them to be able to heat their homes in winter months. These subsidies are taken into account as costs of the utility in the approval and fixing of rates by the Board. Although the program is funded by all consumers, to some extent there is indirect cross-subsidization within the residential consumer class.

[29] The Board points out that this is a relatively small program in the nature of a charitable objective, involving the United Way, which is specific to individual consumers in a financial crisis situation. But the fact remains that its implementation means that some residential consumers are paying less for the distribution and purchase of natural gas than other residential consumers are paying. If the Board has jurisdiction to approve utilities paying subsidies to the benefit of low income consumers then it arguably has jurisdiction to order utilities to provide special rates on a low income basis.

[30] Section 79 of the *Act* explicitly authorizes the Board to provide rate protection for rural or remote consumers of an electricity distributor. The majority decision argues that it is a reasonable inference that the Legislature, by virtue of the explicit singling out of a single

category of consumers in s. 79, did not intend this benefit to apply to other categories of consumers. The Board argues that if s. 36 (2) and (3) are intended to allow for differential rate setting for subsets of residential consumers, then s. 79 is unnecessary. The majority decision considers the existence of s. 79 as indicating that the Legislature has been explicit on issues that it considers warrant special treatment through a subsidy. The majority decision argues that the existence of s. 79 implicitly excludes any intent to confer jurisdiction to depart from simply the cost of service approach employed to implement the mandate given to the Board by s. 36.

[31] Moreover, the majority decision points out that rural rate assistance through s. 79 does not consider income level as an eligibility determinant. Rather, eligibility is based upon location and the inherent higher costs of service related to density levels. The assistance from the program is conferred upon all consumers within a given geographical area irrespective of their income level. Hence, this program arguably serves simply to mitigate the effect of the cost differential related to geography and remains consistent with a rate making process based upon cost causality. Nevertheless, "rate protection" through s. 79 operates as a subsidy paid by some of Ontario's residential electricity consumers for the benefit of others and represents a departure from the principle of cost causality being applied on the same basis to all consumers within a given class (i.e., residential, commercial and industrial).

[32] As pointed out in the dissent by Board Vice Chair Gordon Kaiser, s. 79 was introduced in 1999 when the authority to regulate rates for *electricity* distributors was transferred to the Ontario Energy Board. Prior thereto, electricity distributors were regulated by Ontario Hydro, a Crown corporation which had established the policy of setting special rates in remote and rural areas through the now repealed s. 108 of the *Power Corporation Act,* R.S.O. 1990, c. P. 18. The inference can be made, as Vice Chair Kaiser asserts, that s. 79 was introduced into the *Act* to expressly indicate to the Board that this significant historical policy must continue.

C. The Purpose of the Act and the Reason for the Board's existence

[33] The objectives for the Board with respect to natural gas regulation are set forth in s. 2 of the *Act*:

> (2) The Board, in carrying out its responsibilities under this or any other Act in relation to gas, shall be guided by the following objectives:
>
> 1. To facilitate competition in the sale of gas to users.
> 2. To protect the interests of consumers with respect to prices and the reliability and quality of gas service.
> 3. To facilitate rational expansion of transmission and distribution systems.
> 4. To facilitate rational development and safe operation of gas storage.
> 5. To promote energy conservation and energy efficiency in a manner consistent with the policies of the Government of Ontario.

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5.1To facilitate the maintenance of a financially viable gas industry for the transmission, distribution and storage of gas.
6. To promote communication within the gas industry and the education of consumers.

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[34] The Board is charged under s. 2 of the *Act* with protecting "the interests of consumers with respect to prices …." The Board argues that this provision speaks to consumers as a single class, not to a particular subset of consumers. The majority decision of the Board says the Board's mandate is to balance the interests of consumers as a single group with the interests of the regulated utility in the setting of "just and reasonable rates."

[35] The Divisional Court has emphasized in the past that the Board's mandate to fix just and reasonable rates **"**is unconditioned by directed criteria and is broad; the board is expressly allowed to adopt any method it considers appropriate." *Natural Resource Gas Ltd. v Ontario Energy Board*, [2005] O.J. No. 1520 at para. 13 (Div. Ct.). The Divisional Court also stated in *Enbridge Gas Distribution Inc. v. Ontario Energy Board* (2005), 75 O.R. (3d) 72, [2005] O.J. No. 756 at para.24:

> …[T]he legislation involves economic regulation of energy resources, including setting prices for energy which are fair and reasonable to the distributors and the suppliers, while at the same time are a reasonable cost for the consumer to pay. This will frequently engage the balancing of competing interests, as well as consideration of broad public policy.

[36] Writing for the majority of the Supreme Court of Canada in *Atco, supra,* at para. 62 Bastarache J. stated that "[r]ate regulation serves several aims – sustainability, equity and efficiency – which underlie the reasoning as to how rates are fixed."

D. The Area of Expertise of its Members and the Nature of the Problem before the Board

[37] The Board was asked to consider the application of the utility to establish rates. In that context, an intervenor asked the Board to consider whether, as a factor in rate-setting, the Board could consider the interests of low-income consumers and establish a rate affordability program. That issue of rate-setting is squarely within the jurisdiction of the Board.

[38] The majority opinion in the Board Decision correctly states that the Board's mandate for economic regulation is "rooted in the achievement of economic efficiencies, the establishment of fair returns for natural monopolies and the development of appropriate costs allocation methodologies".. However, that does not answer the question as to the full scope of the Board's jurisdiction in approving or fixing "just and reasonable rates" and adopting "any method or technique that it considers appropriate" in so doing.

[39] The Board's regulatory power is designed to act as a proxy in the public interest for competition in view of a natural gas utility's geographical natural monopoly. Absent the intervention of the Board as a regulator in rate-setting, gas utilities (for the benefit of their

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shareholders) would be in a position to extract monopolistic rents from consumers, in particular, given a relatively inelastic demand curve for their commodity. Clearly, a prime purpose of the *Act* and the Board is to balance the interests of consumers of natural gas with those of the natural gas suppliers. The Board's mandate through economic regulation is directed primarily at avoiding the potential problem of excessive prices resulting because of a monopoly distributor of an essential service.

[40] In performing this regulatory function, it is consistent for the Board to seek to protect the interests of *all* consumers vis-a-vis the reality of a monopoly. The Board must balance the respective interests of the utility and the collective interest of all consumers in rate setting. *Re Union Gas Ltd. and Ontario Energy Board et al.* (1983), 1 D.L.R. (4th) 698 (Div. Ct.), (1983) 43 O.R. (2d) 489 at 501. The Board's regulatory power is primarily a proxy for competition rather than an instrument of social policy. *Dalhousie Legal Aid Service v. Nova Scotia Power Inc.,* (2006), 268 D.L.R. (4th) 408 at para. 33 [*Dalhousie*].

[41] *Dalhousie* dealt with a request for a low income affordability program like that advanced by LIEN. However, it involved a consideration of rate setting under s. 67 (1) of the Nova Scotia *Public Utilities Act* ,R.S.N.S. 1989, c. 380, which is very different in wording with respect to jurisdiction to that seen in s. 36 of the *Act* at hand. The Nova Scotia provision expressly provides that "rates shall always, under substantially similar circumstances and conditions in respect of service of the same description, be charged equally to all persons and at the same rate …." Hence, the Nova Scotia Utility and Review Board found that it did not have jurisdiction to order low income affordability programs.

[42] Section 36 of the *Act* has broad language, empowering the Board to set "just and reasonable" rates for the distribution of natural gas. The supply of natural gas can be considered a necessity that is available from a single source with prices set by the Board in the public interest. The Board has traditionally set rates on a "cost of service" basis, that is, on the basis of cost causality and employing a complex cost allocation exercise. In brief, this approach first looks to the utility's capital investments and maintenance costs including a fair rate of return to determine revenues required. The revenue requirement is then divided amongst the utility's rate paying consumers on a rate class basis (i.e., residential, commercial, industrial, etc.).

[43] The rates have been traditionally designed with the principled objective of having each rate class pay for the actual costs that class imposes upon the utility. That is, the Board has sought to avoid inter-class and intra class subsidies. See RP-2003-0063 (2005) at 5. Consistent with this approach, the Board has refused the establishment of a special rate class to provide redress for aboriginal consumers. *Decision with Reasons* EBRO493 (1997) (O.E.B.). In that case, the Ontario Native Alliance ("ONA") requested the Board to order a utility to evaluate the establishment of a rate class for the purpose of providing a special rate class for aboriginal peoples. At 316-17, the Board stated:

> The Board is required by the legislation to "fix just and reasonable rates", and in doing so it attempts to ensure that no undue discrimination occurs between rate classes, and that

> the principles of cost causality are followed in allocating the underlying rates. While the board recognizes ONA's concerns, the Board finds that the establishment of a special rate class to provide redress for aboriginal consumers of Centra does not meet the above criteria and it is not prepared to order the studies requested by ONA.

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[44] This decision would be within the Board's jurisdiction and a like response to LIEN in the case at hand would arguably be consistent and reasonable. However, the Board in dealing with the ONA request did not decline on the basis of jurisdiction. Rather, it said that it should not exercise its jurisdiction as requested by ONA for the reasons given.

[45] A low income rate affordability program would necessarily lead to treating consumer groups on a differentiated basis with higher prices for a majority of residential consumers and subsidization of the low-income subset by the majority group and/or other classes of consumers.

[46] If the Board were to reduce the rates for one class of consumers based upon an income determinant, the Board would have to increase the rates for another class or classes of consumers. In effect, such a rate reduction would impose a regressive indirect tax upon those required to pick up the shortfall. Such an approach would arguably be a dramatic departure from the Board's regulatory function as implemented to date, which has been to protect the collective interest of consumers dealing with a monopoly supplier through a "cost of service" calculation and then to treat consumers equally through determining rates to pay for the "cost of service" on a cost causality basis for classes of consumers.

[47] The Board's mandate has not been directed to the public interest in social or distributive justice through a differentiation of rates on the basis of income. That need is seen to be met through other mechanisms and programs legislated by the provincial Legislature and/or Parliament, for example, by refundable tax credits and social assistance.

[48] Indeed, the provincial income tax legislation previously provided for public tax expenditures to assist low income consumers with rising electricity costs. This was done through an "Ontario home electricity payment" by reference to income levels. *Income Tax Act*, R.S.O. 1990, c.1.2, s. 8.6.1, as rep. by *Income Tax Amendment Act (Ontario Home Electricity Relief), 2006*, S.O. 2006, c. 18, s. 1. As well, Parliament has provided a one-time relief for energy costs to low income families and seniors in Canada through the *Energy Costs Assistance Measures Act*, S.C. 2005, c. 49.

[49] The Board is an economic regulator, rather than a formulator of social policy. While no doubt the Board must take into account broad policy considerations, rate-setting is at the core of the Board's jurisdiction. *Garland v. Consumers' Gas Company* (2000), 185 D.L.R. (4th) 536 at paras. 17, 45-46 (Ont. S.C.J.). Special rates for low income consumers would not be based upon economic principles of regulation but rather on the social principle of ability to pay. Any program to subsidize low income consumers would require a source of funding which is a matter of public policy. See generally *Re Rate Concessions to Poor Persons and Senior Citizens*, 14 Pub. Util. Rep. 4th 87 at 94 (Or. 1976).

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[50] This view of the nature and limit of the regulatory function is generally accepted as the norm in other jurisdictions. See for example *Washington Gas light Co. v. Public Service Commission of the District of Columbia* (1982), 450 A.2d 1187 at para. 38 (D.C. Ct. App.); *State of Louisiana v. the Council of the City of New Orleans and New Orleans Public Service, Inc.* (1975), 309 So. 2nd 290 at 294 (La. Sup. Ct.).

[51] The historical common law approach for public utility regulation has been that consumers with similar cost profiles are to be treated equally so far as reasonably possible with respect to the rates paid for services. See, for example, *St. Lawrence Rendering Co. Ltd. v. The City of Cornwall,* [1951] O.R. 669-685 at 683; *Chastain et al. v. British Columbia Hydro and Power Authority* (1972), 32 D.L.R. (3d) 443 at 454 (B.C.S.C); *Canada (Attorney General)* v. *Toronto (City)* (1893), 23 S.C.R. 514 at 519-520.

Conclusions on the Board's Jurisdiction

[52] We agree that the traditional approach of "cost of service" is the root principle underlying the determination of rates by the Board because that is necessary to meet the fundamental, core objective of balancing the interests of all consumers and the natural monopoly utility in rate/price setting.

[53] However, the Board is authorized to employ "any method or technique that it considers appropriate" to fix "just and reasonable rates." Although "cost of service" is necessarily an underlying fundamental factor and starting point to determining rates, the Board must determine what are "just and reasonable rates" within the context of the objectives set forth in s. 2 of the *Act*. Objective #2 therein speaks to protecting "the interests of consumers with respect to prices."

[54] The "cost of service" determination will establish a benchmark global amount of revenues resulting from an estimated quantity of units of natural gas or electricity distributed. The Board could use this determination to fix rates on a cost causality basis. This has been the traditional approach.

[55] However, in our view, the Board need not stop there. Rather, the Board in the consideration of its statutory objectives might consider it appropriate to use a specific "method or technique" in the implementation of its basic "cost of service" calculation to arrive at a final fixing of rates that are considered "just and reasonable rates." This could mean, for example, to further the objective of "energy conservation", the use of incentive rates or differential pricing dependent upon the quantity of energy consumed. As well, to further the objective of protecting "the interests of consumers" this could mean taking into account income levels in pricing to achieve the delivery of affordable energy to low income consumers on the basis that this meets the objective of protecting "the interests of consumers with respect to prices."

[56] The Board is engaged in rate-setting within the context of the interpretation of its statute in a fair, large and liberal manner. It is not engaged in setting social policy.

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[57] This is not, of course, to imply any preferred course of action in rate setting by the Board. The Board in its discretion may determine that "just and reasonable rates" are those that follow from the approach of "cost causality" once the "cost of service" amount is determined. That is, the principle of equality of rates for consumers within a given class (e.g., residential consumers) may be viewed as the most just and reasonable approach. A determination by the Board that all residential gas consumers (with relatively minor deviations through such programs as the "Winter Warmth Program") pay the same distribution rates is not in itself discriminatory on a prohibited ground. Indeed, it can be seen as a non-discriminatory policy in terms of prices paid.

[58] Nor is it to suggest that as a matter of public policy, objectives of distributive justice or conservation in respect of energy consumption are best achieved by rate setting as compared to, for instance, tax expenditures or social assistance devised and implemented by the Legislature through mechanisms independent of the operation of the *Act*. It is noted that the Minister is given the authority in s. 27 of the *Act* to issue policy statements as to matters that the Board must pursue; however, the Minister has not issued any policy statement directing the board to base rates on considerations of the ability to pay. Moreover, the power granted to a regulatory authority "must be exercised reasonably and according to the law, and cannot be exercised for a collateral object or an extraneous and irrelevant purpose, however commendable." *Re Multi Malls Inc. et al. and Minister of Transportation and Communications et al* (1977), 14 O.R. (2d) 49 at 55 (C.A.). As we have said, cost of service is the starting point building block in rate setting, to meet the fundamental concern of balancing the interests of all consumers with the interests of the natural monopoly utility.

[59] Nor does our conclusion presume as to what methods or techniques may be available in determining "just and reasonable rates." Efficiency and equity considerations must be made. Rather, this is to say only that so long as the global amount of return to the utility based upon a "cost of service" analysis is achievable, then the rates/prices (and the methods and techniques to determine those rates/prices) to generate that global amount is a matter for the Board's discretion in its ultimate goal and responsibility of approving and fixing "just and reasonable rates."

[60] The issue before the Court is that of jurisdiction, not how and the manner by which the Board should exercise the jurisdiction conferred upon it.

[61] In our view, and we so find, the Board has the jurisdiction to take into account the ability to pay in setting rates. We so find having taken into account the expansive wording of s. 36 (2) and (3) of the statute and giving that wording its ordinary meaning, having considered the purpose of the legislation within the context of the statutory objectives for the Board seen in s. 2, and being mindful of the history of rate setting to date in giving efficacy to the promotion of the legislative purpose.

[62] We also find that that interpretation is appropriate taking into account the criteria articulated in *Driedger,* above, namely it complies with the legislative text, it promotes the legislative purpose and the outcome is reasonable and just.

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[63] As indicated above, a statutory administrative tribunal obtains its jurisdiction from explicit powers or implicit powers. Having found that the jurisdiction to consider ability to pay in rate setting is explicitly within the *Act,* we need not consider the doctrine of necessary implication or the related principle of implied exclusion.

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

[64] Before concluding, it is appropriate to mention the submission made on behalf of LIEN in respect of s. 15 (1) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), c. 11 (the "*Charter*").

[65] LIEN says it raises the *Charter* simply within the context of it being an interpretive tool in discerning the meaning of an asserted ambiguous s. 36 of the *Act*. LIEN says it does not raise any issue that the *Act* or the Board's actions or inactions are contrary to the *Charter*.

[66] LIEN argues that in the absence of clear statutory provisions, the requirement for "just and reasonable rates" must be interpreted to comply with s. 15. The *Charter* applies to provincial legislation and can be used as an interpretive tool. *R. v. Rogers*, [2006] 1 S.C.R. 554, [2006] S.C.J. No. 15 at para. 18. In our view, as stated above, the *Act* provides the Board with the requisite jurisdiction without having to look to the *Charter*.

[67] While we heard submissions from LIEN, we declined to hear from counsel for the respondents on this issue. We agree with our colleague Swinton J. that such an argument requires a full evidentiary record.

Disposition

[68] For the reasons given, the appeal is allowed and it is declared that the Board has the jurisdiction to establish a rate affordability assistance program for low income consumers purchasing the distribution of natural gas from the utility, EGD.

[69] All parties agree that there is not to be any award of costs in respect of this appeal.

KITELEY J.

CUMMING J.

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Swinton J. (dissenting):

[70] The sole issue in this appeal is whether the Ontario Energy Board (the "Board") erred in holding that it had no jurisdiction, when setting residential rates for gas distribution, to order a rate affordability program for low income consumers. In my view, the majority of the Board was correct in concluding that the Board lacked jurisdiction to make such an order.

[71] The majority of the Board predicated its decision on the understanding that the appellants' proposal contemplated the establishment of a rate group for low income residential consumers that would be funded by general rates. I, too, proceed on that assumption. While there were no details of a specific program put forth by the appellants during the hearing, it is inevitable that the Board, in setting lower rates for the economically disadvantaged, would have to impose higher rates on other consumers.

The Board's Practice in Setting Rates

[72] Pursuant to the *Ontario Energy Board Act, 1998,* S.O. 1998, c. 15, Schedule B (the "Act"), the Board has authority to set rates for both gas and electricity. It has traditionally set rates for gas through a "cost of service" assessment, in which it seeks to determine a utility's total cost of providing service to its customers over a one year period (the "test year"). According to the Board's factum, these costs include the rate base (which is essentially the net book value of the utility's total capital investments) and the utility's operational and maintenance costs for the test year, among other things. The utility's total costs for the test year (usually including a rate of return on the rate base portion) forms the revenue requirement. The revenue requirement is then divided amongst the utility's ratepayers on a rate class basis (that is, residential, small commercial, industrial, etc.).

[73] With respect to gas, it has always been the Board's practice to allocate the revenue requirement to the different rate classes on the basis of how much of that cost the rate class actually causes ("cost causality"). To the greatest extent possible, the Board has striven to avoid inter-class subsidies (see, for example, Decision with Reasons, RP-2003-0063 (2005), p. 5).

The Proper Approach to Statutory Interpretation

[74] To determine the issue in this appeal, it is necessary to consider the powers conferred on the Board by its constituent legislation, the *Ontario Energy Board Act*. That Act must be interpreted using the modern principles of statutory interpretation described by Professor Ruth Sullivan in *Driedger on the Construction of Statutes* (3rd ed.) (Toronto: Butterworths, 1994) as follows:

> There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the

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> legislation, the consequences of proposed interpretations, the presumptions of special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just. (at p. 131)

[75] The words of a statute are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, its objects, and the intent of the Legislature (*ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, [2006] 1 S.C.R. 140 at para. 37).

The Words of the Provision in Issue

[76] Subsection 36(2) of the Act gives the Board the broad authority to approve or fix "just and reasonable" rates for the distribution of gas. On its face, those words might encompass the power to set rates according to income. However, the words do not explicitly confer the power to do so, and the Supreme Court of Canada commented in *ATCO, supra* that a discretionary grant of authority to a tribunal cannot be viewed as conferring unlimited discretion. A regulatory tribunal must interpret its powers "within the confines of the statutory regime and principles generally applicable to regulatory matters, for which the legislature is assumed to have had regard in passing that legislation" (at para. 50).

[77] The appellants also rely on s. 36(3), which states that in approving or fixing just and reasonable rates, the Board may adopt "any method or technique that it considers appropriate". These words were added to the Act in 1998. Examples of methods or techniques used by the Board for setting gas distribution rates are cost of service regulation and incentive regulation.

[78] On its face, the words of s. 36(3) do not confer the jurisdiction to provide special rates for low income customers. The subsection replaced an earlier provision of the Act which required a traditional cost of service analysis in setting rates. I agree with the conclusion of the Board majority as to the meaning of s. 36(3) (Reasons, p. 10):

> It gives the Board the flexibility to employ other methods of ratemaking in fixing just and reasonable rates, such as incentive ratemaking, rather than the traditional costs of service regulation specified in section 19 of the old Act. The change in the legislation was coincident with the addition of the regulation of the electricity sector to the Board's mandate. The granting of the authority to use methods other than cost of service to set rates for the gas sector was an alignment with the non-prescriptive authority to set rates for the electricity sector. The Board is of the view that if the intent of the legislature by the new language was to include ratemaking considering income level as a rate class determinant, the new Act would have made this provision explicit given the opportunity

at the time of the update of the Act and the resultant departure from the Board's past practice.

The Regulatory Context

[79] According to longstanding principles governing public utilities developed under the common law, a public utility like the respondent Enbridge Gas Distribution Inc. ("Enbridge") must treat all its customers equally with respect to the rates they pay for a particular service (*Attorney General of Canada v. The Corporation of the City of Toronto* (1892), 23 S.C.R. 514 at 519-20; St. *Lawrence Rendering Co. Ltd. v. Cornwall*, [1951] O.R. 669 (H.C.J.) at 683; *Chastain v. British Columbia Hydro and Power Authority* (1972), 32 D.L.R. (3d) 443 (B.C.S.C.) at 454).

[80] As noted in the Board's majority reasons, the Board is, at its core, an economic regulator (Reasons, p. 4). Rate setting is at the core of its jurisdiction (*Garland v. Consumer's Gas Company* (2000), 185 D.L.R. (4th) 536 (Ont. S.C.J.) at para. 45). I agree with the majority's description of economic regulation as being "rooted in the achievement of economic efficiencies, the establishment of fair returns for natural monopolies and the development of appropriate cost allocation methodologies" (Reasons, p. 4).

[81] Historically, in setting rates, the Board has engaged in a balancing of the interests of the regulated utility and consumers. The Board has not historically balanced the interests of different groups of consumers. As the Divisional Court stated in *Union Gas Ltd. v. Ontario (Energy Board)* (1983), 43 O.R. (2d) 489 at p. 11 (Quicklaw):

> … it is the function of the O.E.B. to balance the interest of the appellant in earning the highest possible return on the operation of its enterprise (a monopoly) with the conflicting interest of its customers to be served as cheaply as possible.

See, as well, *Northwestern Utilities v. The City of Edmonton*, [1929] 1 S.C.R. 186 at 192.

[82] In a similar vein, the Supreme Court in *ATCO, supra* spoke of a "regulatory compact" which ensures that all customers have access to a utility at a fair price. The Court went on to state (at para. 63):

> Under the regulatory compact, the regulated utilities are given exclusive rights to sell their services within a specified area at rates that will provide companies the opportunity to earn a fair rate of return for all their investors. In return for this right of exclusivity, utilities assume a duty to adequately and reliably serve all customers of their defined territories, and are required to have their rates and certain operations regulated…

The Court described the object of the Act "to protect both the customer *and* the investor" (at para. 64).

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[83] The Legislature, in conferring power on the Board, must be taken to have had regard to the principles generally applicable to rate regulation (*ATCO, supra* at paras. 50 and 64). I agree with the submission of Enbridge that those principles are the following:

> (a) customers of a public utility must be treated equally insofar as the rate for a particular service or class of services is concerned; and
>
> (b) the Legislature will be presumed not to have intended to authorize discrimination among customers of a public utility unless it has used specific words to express this intention.

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[84] Thus, the considerations of justice and reasonableness in the setting of rates have been and are those between the utility and consumers as a group, not among different groups of consumers based on their ability to pay.

Other Provisions of the Act

[85] In applying s. 36(2), the Board must be bound by the objectives set out in s. 2 of the Act, which includes

> 2. To protect the interests of consumers with respect to prices and the reliability and quality of gas service.

[86] The appellants submit that these words are broad enough to permit the Board to order a rate affordability assistance program. However, that is not obvious from the words used, which refer to "consumers" as a whole, and not to any particular subset of consumers. Indeed, it can be argued that any low income rate affordability program would run counter to the stated objective, given that such a program must almost certainly be funded through higher rates paid by other consumers. The result would be to provide benefits to one group of consumers at the expense of others.

[87] The reason for this conclusion lies in the Board's historical approach to rate setting, as described earlier in these reasons. The Board sets a revenue requirement for utilities before allocating those costs to the different rate classes. The only way the utility could recover its revenue requirement, given a rate class with lower rates for low income consumers, would be to increase the rates charged to other classes. Therefore, such higher prices can not be seen as protecting the interests of consumers with respect to prices, as set out in objective 2.

[88] Moreover, the Act contains an explicit provision in s. 79 that allows the Board to provide rate protection for rural and remote customers of electricity distributors. Subsection 79(1) provides:

> The Board, in approving just and reasonable rates for a distributor who delivers electricity to rural or remote consumers, shall provide rate protection for those consumers

> or prescribed classes of those consumers by reducing the rates that would otherwise apply in accordance with the prescribed rules.

Section 79 also provides grandfathering for those who had a subsidy prior to the change in the Act. As well, it explicitly allows the distributor to be compensated for the subsidized rates through contributions from other consumers, as provided by the regulations.

[89] This section was added to the Act in 1998, when the Board was given the authority over electricity rate regulation. Section 79 ensured the ongoing protection of rural rates put in place when electricity distribution was regulated by Ontario Hydro.

[90] One of the principles of statutory interpretation is "implied exclusion". As Professor Sullivan has stated, this principle operates "whenever there is reason to believe that if the legislature had meant to include a particular thing within its legislation, it would have referred to that thing expressly" (*supra,* p. 186). While the purpose of s. 79 of the Act was to protect a pre-existing policy to assist rural and remote residential consumers, nevertheless, it is telling that there is no similar explicit power to order special rates or rate subsidies for other groups elsewhere in the Act.

The Significance of Ordering Rate Affordability Programs

[91] An appropriate interpretation can be justified in terms of its promotion of the legislative purpose and the reasonableness of the outcome (see Sullivan, quoted above at para. 5).

[92] The ability to order a rate affordability program would significantly change the role that the Board has played – indeed, the majority of the Board stated a number of times that the proposal to base rates on income level would be a "fundamental" departure from its current practice. In the past, the Board has acted as an economic regulator, balancing the interests of the utility and its shareholders against the interests of consumers as a group. Were it to assume jurisdiction over rate affordability programs, it would carry out an entirely different function. It would enter into the realm of social policy, weighing the interests of low income consumers against those of other consumers. This is not a role that the Board has traditionally played. This is not where its expertise lies, nor is it well-suited to taking on such a role.

[93] An examination of the particular case before the Board illustrates this. The appellants seek a rate affordability assistance program for gas in response to Enbridge's application for a rate increase for gas distribution – that is, for the *delivery* of natural gas. Customers can make arrangements for the purchase of the commodity of natural gas with a variety of suppliers in the competitive market. Therefore, were the Board to assume jurisdiction to order a rate affordability assistance program here, it could address only one part of the problem that low income consumers face in meeting their heating costs – the cost of distribution of gas.

[94] In addition, the Board would have to consider eligibility criteria for a rate affordability assistance program that reasonably would take into account existing programs for assistance to

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low income consumers. Obviously, this would include social assistance programs. As well, Enbridge, in its factum, has identified other programs which provide assistance for low income consumers. For example, the Ontario government has implemented a program to assist low income customers with rising electricity costs through amendments to income tax legislation (*Income Tax Act*, R.S.O. 1990, c. I.2, s. 8.6.1, as amended S.O. 2006, c.18, c.1). At the federal level, there was one-time relief for low income families and senior citizens provided by the *Energy Costs Assistance Measures Act*, S.C. 2005, c. 49.

[95] Moreover, in order to cover the lower costs, the Board would have to increase the rates of other customers in a manner that would inevitably be regressive in nature, as it is difficult to conceive how the Board would be able to determine, in a systematic way, the ability of these other customers to pay.

[96] Clearly, the determination of the need for a subsidy for low income consumers is better made by the Legislature. That body has the ability to consider the full range of existing programs, as well as a wide range of funding options, while the Board is necessarily limited to allocating the cost to other consumers. The relative advantages of a legislative body in establishing social programs of the kind proposed are well described in the following excerpt from a decision of the Oregon Public Utility Commissioner (*Re Rate Concessions to Poor Persons and Senior Citizens* (1976), 14 PUR 4th 87 at p. 94):

> Utility bills are not poor persons' only problems. They also cannot afford adequate shelter, transportation, clothing or food. The legislative assembly is the only agency which can provide comprehensive assistance, and can fund such assistance from the general tax funds. It has the information and responsibility to deal with such matters, and can do so from an overall perspective. It can determine the needs of various groups and compare those needs to existing social programs. If it determines a special program is needed to deal with energy costs, it can affect all energy sources rather than only those the commissioner regulates.
>
> With clear authority to establish social welfare policy, the legislative assembly also can monitor all state and federal welfare programs and the sources and extent of aid given to different groups. Without such overview, as independent agencies aid various segments of society, the total aid given each group is unknown, and unequal treatment of different groups becomes likely.

[97] Where the issue of rate affordability programs has arisen in other jurisdictions, courts and boards have ruled that a public utilities board does not have jurisdiction to set rates based on ability to pay (see, for example, *Washington Gas Light Co. v. Public Service Commission of the District of Columbia* (1982), 450 A. 2d 1187 (D.C. Ct. App.) at para. 38; *Dalhousie Legal Aid Service v. Nova Scotia Power Inc.* (2006), 268 D.L.R. (4th) 408 (N.S.C.A.) at 419; Alberta Energy and Utilities Board Decision 2004-066, Section 9.2.6 at 161, as well as the Oregon case, *supra*).

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[98] The appellants distinguish the *Dalhousie Legal Aid* case because the Nova Scotia legislation is different from Ontario's. Specifically, s. 67(1) of the *Public Utilities Act*, R.S.N.S. 1989, c. 380 provides that "[a]ll tolls, rates and charges shall always, under substantially similar circumstances and conditions in respect of service of the same description, be charged equally to all persons and at the same rate".

[99] While the language of the two statutes does differ, nevertheless, the reasons of the Nova Scotia Court of Appeal make it clear that the Board's role is not to set social policy. At para. 33, Fichaud J.A, observed, "The Board's regulatory power is a proxy for competition, not an instrument of social policy."

[100] Moreover, the principle in s. 67(1) of the Nova Scotia Act requiring that rates be charged equally is a codification of the common law, set out earlier in these reasons. The Ontario Board has long operated according to the same principles.

[101] The appellants submit that the recent decision in *Allstream Corp. v. Bell Canada*, [2005] F.C.J. No. 1237 (C.A.) assists their case. There, the Federal Court of Appeal upheld a decision of the Canadian Radio-Television and Telecommunications Commission (the "CRTC") approving special facilities tariffs submitted by Bell for the provision of optical fibre services pursuant to certain customer-specific arrangements. All but one related to a Quebec government initiative aimed at supporting the construction of broadband networks for rural municipalities, school boards and other institutions. The Court determined that the Commission's decision approving the tariffs was not patently unreasonable, given the exceptional circumstances of the case that justified a deviation from the normal practice of rate determination. The Court noted that the Commission considered matters that were not purely economic, but noted that such considerations were part of the Commission's wide mandate under s. 7 of the *Telecommunications Act,* S.C. 1993, c. 38 (at paras. 34-35).

[102] Section 7 of that Act, unlike s. 2 of the *Ontario Energy Board Act,* expressly includes the power "to respond to the economic and social requirements of users of telecommunications services" (s. 7(h)), as well as to enrich and strengthen the social and economic fabric of Canada and its regions (s. 7(a)). Moreover, while s. 27(2)(b) of that Act forbids unjust discrimination in rates charged, s. 27(6) explicitly permits reduced rates, with the approval of the Commission, for any charitable organization or disadvantaged person.

[103] In contrast to the broad mandate given to the CRTC, the objectives of the Board are much more confined. When the Board's objectives go beyond the economic realm, specific reference has been made to other objectives, such as conservation and consumer education (s. 2 (5) and (6)). There is no reference to the consideration of economic and social requirements of consumers.

[104] The appellants have also pointed out that the Board has in the past authorized programs that transfer benefits to lower income customers. The Winter Warmth program is one in which individuals can apply for emergency financial relief with heating bills. It is triggered by an

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application from a particular customer, and the program is funded by all customers. The fact that the Board has approved this charitable program does not lead to the conclusion that it has jurisdiction to set rates on the basis of income level.

[105] With respect to the Demand Side Management (DSM) programs, the majority of the Board explained that this is not equivalent to a rate class based on income level. At p. 11 of its Reasons, the majority stated,

> The Board is vigilant in ensuring that customer groups are afforded the opportunity to receive the benefits of the costs charged. In the case of Demand Side Management (DSM) programs, for example, the Board has ordered that specific funding be channeled for programs aimed at low income customers. It cannot be argued that this constitutes discriminatory pricing. Rather, the contrary. It is an attempt to avoid discrimination against low income customers who also pay for DSM programs but may not have equal opportunities to take advantage of these programs.

[106] Were the Board to assume jurisdiction to order a rate affordability assistance program, it would be taking on a significant new role as a regulator of social policy. Given the dramatic change in the role that it has historically played, as well as the departure from common law principles, it would require express language from the Legislature to confer such jurisdiction

Jurisdiction by Necessary Implication

[107] In order to impute jurisdiction to a regulatory body, there must be evidence that the exercise of the power in question is a practical necessity for the regulatory body to accomplish the goals prescribed by the Legislature (*ATCO, supra* at paras. 51, 77). In this case, there is no evidence that the power to implement a rate affordability assistance program is a practical necessity for the Board to meet its objectives as set out in s. 2.

The Role of the Charter

[108] The appellants submit that the values found in s. 15 of the *Canadian Charter of Rights and Freedoms* should be considered in the interpretation of the ratemaking provisions of the Act. However, the Charter has no relevance in interpretation unless there is genuine ambiguity in the statutory provision (*R. v. Rodgers*, [2006] 1 S.C.R. 554 at paras. 18-19). A genuine ambiguity is one in which there are "two or more plausible readings, each equally in accordance with the intentions of the statute" (at para. 18).

[109] In my view, there is no ambiguity in the interpretation of s. 36 of the Act, and therefore, there is no need to resort to the Charter.

[110] In any event, the appellants' argument is, in fact, that the failure of the Board to order a rate affordability program is discriminatory on the basis of sex, race, age, disability and social assistance, because of the adverse impact on these groups (Factum, para. 43, as well as para. 47).

Such an argument can not be made without a full evidentiary record, and the inclusion of statistical material in the Appeal Book is not a sufficient basis on which to address this equality argument.

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Conclusion

[111] For these reasons, I am of the view that the majority decision of the Board was correct, and that the Board has no jurisdiction to order rate affordability assistance programs for low income consumers. Therefore, I would dismiss the appeal.

____

Swinton J.

Released: May 16, 2008

COURT FILE NO.: 273/07
DATE: 20080516

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

KITELEY, CUMMING AND SWINTON JJ.

B E T W E E N:

ADVOCACY CENTRE FOR TENANTS-ONTARIO and INCOME SECURITY ADVOCACY CENTRE on behalf of LOW-INCOME ENERGY NETWORK

Appellant

- and -

ONTARIO ENERGY BOARD

Respondent

REASONS FOR JUDGMENT

Released: May 16, 2008

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TAB 5

British Columbia Utilities Commission

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ORDER NUMBER
G-5-17

IN THE MATTER OF
the *Utilities Commission Act*, RSBC 1996, Chapter 473

and

British Columbia Hydro and Power Authority
2015 Rate Design Application

BEFORE:
D.M. Morton, Commissioner/Panel Chair
D. A. Cote, Commissioner
K. A. Keilty, Commissioner

on January 20, 2017

ORDER

WHEREAS:

A. On September 24, 2015, the British Columbia Hydro and Power Authority (BC Hydro) filed with the British Columbia Utilities Commission (Commission), pursuant to sections 58-61 of the *Utilities Commission Act*, the first module of a rate design application (2015 RDA);

B. In the 2015 RDA, BC Hydro sought approvals related to residential, general service and transmission service rates as well as approval to amend the terms and conditions in BC Hydro's Electric Tariff;

C. By Order G-156-15 dated September 30, 2015 and Order G-166-15 dated October 14, 2015, the Commission established, among other things, a preliminary regulatory timetable for review of the 2015 RDA comprised of an initial round of information requests (IRs) and a procedural conference to be held on January 12, 2016, which was later adjourned to January 19, 2016;

D. By Order G-175-15 dated November 3, 2015, the Commission determined, among other things, scoping issues related to the Cost of Service Study (COSS) as well as the review processes and timelines related to a number of expedited processes proposed by BC Hydro;

E. The Commission also approved by Order G-175-15, for the Minimum Reconnection Charge to be set at $30 per meter on an interim basis, effective December 1, 2015 and approved the establishment of a new deferral account for BC Hydro to record the difference between the reconnection charges collected at the interim rate and the reconnection charges that would have been collected had they been billed at the current rate for the period December 1, 2015 through March 31, 2016;

F. On December 21, 2015, BC Hydro filed updated Electric Tariff Terms and Conditions;

G. Subsequent to the procedural conference on January 19, 2016, the Commission issued Order G-12-16 which, among other things, included a regulatory timetable that allowed for a second round of IRs, the filing of an evidentiary update on load resource balance and long-run marginal cost, a timetable for the submission of

intervener evidence, one round of IRs on intervener evidence, and a deadline for BC Hydro's filing of rebuttal evidence. The Commission also established that the COSS and street lighting rate class segmentation would proceed by way of a single Negotiated Settlement Process (NSP);

H. A Streamlined Review Process (SRP) was held on January 25, 2016, regarding BC Hydro's proposed freshet rate pilot and proposed pricing principles for existing transmission service rates. Following the SRP, the Commission issued Order G-17-16 and attached Reasons for Decision approving the proposed two-year freshet rate pilot with the rate being effective for the period of March 1, 2016 to October 31, 2017;

I. By Orders G-16-16 and G-20-16 dated February 9, 2016 and February 19, 2016, respectively, the Commission approved amendments to certain medium general service (MGS), large general service (LGS) and transmission rate schedules;

J. On March 7 and 8, 2016, an NSP was held in Vancouver. Subsequent to the NSP, on April 11, 2016, the Commission issued Order G-47-16 approving the Negotiated Settlement Agreement pertaining to BC Hydro's COSS and street lighting rate class segmentation;

K. By Order G-50-16 dated April 13, 2016, the Commission amended the regulatory timetable and ordered that an oral hearing be held August 16 through 18 and August 23 through 24, 2016;

L. By Order G-61-16 dated May 4, 2016, the Commission determined that the review of the Residential E-Plus rate design would proceed by way of a written hearing in accordance with the final argument phase of the 2015 RDA proceeding;

M. The following interveners filed evidence in the proceeding: Commercial Energy Consumers Association of British Columbia; British Columbia Old Age Pensioners' Organization *et al.* (BCOAPO); and the E-Plus Homeowners Group;

N. On July 6, 2016, BC Hydro filed rebuttal evidence in response to BCOAPO's intervener evidence;

O. On August 4, 2016, BC Hydro filed an evidentiary update which included excerpts from its F2017-F2019 Revenue Requirements Application with respect to BC Hydro's load resource balance and long-run marginal cost of new supply;

P. The oral hearing concluded on August 24, 2016 in Vancouver, and by Commission letter dated August 29, 2016, the Commission determined the schedule for final arguments, which provided for the following:

- Filing of final arguments from BC Hydro (on orders it seeks from the Commission and the Commission's jurisdiction to approve rates specific to low-income customers) and BCOAPO (related to the orders it seeks from the Commission) on September 26, 2016;
- Filing of interveners' final arguments and BC Hydro and BCOAPO final arguments in response to each other on October 11, 2016; and
- Filing of BC Hydro and BCOAPO reply arguments (related to the orders it seeks from the Commission) on October 24, 2016;

Q. The evidentiary phase of the proceeding closed on August 29, 2016, subject to the delivery of responses to outstanding Undertakings from the oral hearing; and

R. The Commission has considered the 2015 RDA and the evidence and submissions presented to it, including jurisdictional issues, and makes the following determinations.

NOW THEREFORE pursuant to sections 58-61 of the *Utilities Commission Act*, for the reasons outlined in the decision issued concurrently with this order, the Commission orders as follows:

1. The Residential Inclining Block (RIB) Pricing Principles for each of F2017-F2019 as described in section 5.2.5.1 of the 2015 Rate Design Application (RDA) are approved, effective April 1, 2017.

2. BC Hydro is directed to phase out the Residential E-Plus rate program over five years, commencing April 1, 2017. BC Hydro is directed to submit a compliance filing within 30 days of the date of this decision which outlines a proposal for achieving the five-year phase-out period of the E-Plus program and which results in rates being charged to E-Plus customers at the end of the five-year phase-out period that equate to other British Columbia residential customers at that time. BC Hydro is directed to waive the requirement of having an alternative heating system in working order and to eliminate the possibility of service being interrupted over the five-year transition period.

3. The Small General Service (SGS) rate proposal, as described in section 6.2.1 of the 2015 RDA, is approved effective April 1, 2017.

4. The Medium General Service (MGS) rate proposal, as described in section 6.3.1 of the 2015 RDA, and as shown in the draft tariff sheets in Appendix F-1E of the 2015 RDA, is approved effective April 1, 2017.

5. The Large General Service (LGS) rate proposal, as described in section 6.4.1 of the 2015 RDA, and as shown in the draft tariff sheets in Appendix F-1E of the 2015 RDA, is approved effective April 1, 2017.

6. The General Service – Control Group proposal, as described in section 6.7.2 of the 2015 RDA, and as shown in the draft tariff sheets in Appendix F-1E of the 2015 RDA, is approved effective April 1, 2017.

7. The General Service – Distribution Utilities proposal, as described in section 6.7.3 of the 2015 RDA, is approved effective April 1, 2017.

8. The Tariff Supplement No. 82 proposal, as described in section 6.7.1 of the 2015 RDA, is approved effective April 1, 2017.

9. The Rate Schedule 1823 F2017-F2019 Pricing Principles, as described in section 7.2.2 of the 2015 RDA, are approved effective April 1, 2017.

10. The Electric Tariff proposal, as shown in draft tariff sheets filed on December 21, 2015 as Exhibit B-1-1 and as amended by Appendix C of BC Hydro's Final Argument, is approved effective April 1, 2017.

11. BC Hydro is directed to file tariff sheets regarding the Electric Tariff proposal within 15 business days of the date of this order. BC Hydro is further directed to include the amended definition of "Radio-off Meter" as part of the amended Electric Tariff sheets as part of this filing.

12. BC Hydro is directed to file tariff sheets regarding the SGS, MGS and LGS proposals, and the General Service – Control Group proposal, 30 days prior to the effective date.

13. The Minimum Reconnection interim rate established by the Commission in Order G-175-15, are approved as permanent, effective April 1, 2017.

14. British Columbia Old Age Pensioners' Organization *et al.*'s (BCOAPO) request to establish an essential services usage block (ESUB) rate for qualified low-income ratepayers is denied.

15. The establishment of a pilot Crisis Intervention Fund is approved. BC Hydro is directed to prepare and file, within six months of the date of this order, a proposed crisis assistance pilot program for residential customers who have arrears with BC Hydro and are unable to pay their electricity bills. BC Hydro has indicated that it is prepared to work collaboratively with the low-income advisory group in the development of its proposal, and the Commission expects that it will do so.

16. BCOAPO's proposals to amend the Electric Tariff to exempt low-income customers from the minimum reconnection charge and account charge and to waive security deposits for low-income customers are denied.

17. BCOAPO's proposal to exempt low-income customers from late payment charges and the proposal to ban the use of external credit scores are denied.

18. BCOAPO's request for the Commission to recommend that BC Hydro be required to expand installs of its low-income Energy Conservation Assistance Program is denied.

19. BC Hydro is directed to provide an analysis to the Commission of the costs and benefits associated with BCOAPO's requested customer segmentation analysis and data collection and reporting within six months of the establishment of the low-income advisory group. BC Hydro has indicated it is prepared to work collaboratively with the low-income advisory group in this analysis, and the Commission expects that it will do so.

DATED at the City of Vancouver, in the Province of British Columbia, this 20th day of January 2017.

BY ORDER

Original signed by:

D. M. Morton
Commissioner/Panel Chair

TAB 6

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ORDER NUMBER
G-87-17

IN THE MATTER OF
the *Utilities Commission Act*, RSBC 1996, Chapter 473

and

BCOAPO Application for Reconsideration and Variance of Order G-5-17
in the matter of the British Columbia Hydro and Power Authority 2015 Rate Design Application

BEFORE:
D. M. Morton, Commissioner/Panel Chair
D. A. Cote, Commissioner
K. A. Keilty, Commissioner

on June 2, 2017

ORDER

WHEREAS:

A. On January 20, 2017, the British Columbia Utilities Commission (Commission) issued Order G-5-17 and the accompanying Decision in the matter of the British Columbia Hydro and Power Authority (BC Hydro) 2015 Rate Design Application (RDA Decision);

B. On February 17, 2017, British Columbia Old Age Pensioners' Organization, Disability Alliance BC, Council of Senior Citizens' Organizations of BC, Tenant Resource and Advisory Centre, Active Support Against Poverty, Together Against Poverty Society and the BC Poverty Reduction Coalition (collectively, BCOAPO) filed an application for reconsideration and variance of paragraphs 14, 16 and 17 (as it relates to the late payment charges) contained within Order G-5-17. (BCOAPO Application for Reconsideration) The Application for Reconsideration is made pursuant to section 99 of the *Utilities Commission Act* (UCA);

C. By letter dated February 24, 2017, the Commission established phase one of the reconsideration process for the BCOAPO Application for Reconsideration and invited submissions from BC Hydro and all Registered Interveners in the BC Hydro 2015 Rate Design Application proceeding that address specific questions on whether the threshold for reconsideration has been met;

D. The Commission received submissions from British Columbia Sustainable Energy Association and the Sierra Club of British Columbia (BCSEA), Commercial Energy Consumers Association of British Columbia (CEC), FortisBC Energy Inc. and FortisBC Inc. (collectively, FEI), BC Hydro and Movement of United Professionals (MoveUP) and a reply submission from BCOAPO; and

E. The Commission has reviewed the BCOAPO Application for Reconsideration and the phase one submissions and considers that the BCOAPO Application for Reconsideration should be denied.

NOW THEREFORE pursuant to section 99 of the *Utilities Commission Act*, and for the reasons attached as Appendix A to this order, the British Columbia Utilities Commission denies the BCOAPO application for reconsideration and variance of paragraphs 14, 16 and 17 (as it relates to the late payment charges) contained within Order G-5-17.

DATED at the City of Vancouver, in the Province of British Columbia, this *2nd* day of June 2017.

BY ORDER

Original signed by:

D. M. Morton
Commissioner/Panel Chair

Attachment

BCOAPO Application for Reconsideration and Variance of Order G-5-17
in the matter of the British Columbia Hydro and Power Authority 2015 Rate Design Application

REASONS FOR DECISION

1.0 BCOAPO Application for Reconsideration

On January 20, 2017, the British Columbia Utilities Commission (Commission) issued Order G-5-17 and the accompanying Decision in the matter of the British Columbia Hydro and Power Authority (BC Hydro) 2015 Rate Design Application (RDA Decision).

On February 17, 2017, British Columbia Old Age Pensioners' Organization, Disability Alliance BC, Council of Senior Citizens' Organizations of BC, Tenant Resource and Advisory Centre, Active Support Against Poverty, Together Against Poverty Society and the BC Poverty Reduction Coalition (collectively, BCOAPO) filed an application for reconsideration and variance of paragraphs 14, 16 and 17 (as it relates to the late payment charges) contained within Order G-5-17. (BCOAPO Application for Reconsideration) The Application for Reconsideration is made pursuant to section 99 of the *Utilities Commission Act* (UCA). The relevant sections of Order G-5-17 read as follows:

> 14. British Columbia Old Age Pensioners' Organization et al.'s (BCOAPO) request to establish an essential services usage block (ESUB) rate for qualified low-income ratepayers is denied.
>
> 16. BCOAPO's proposals to amend the Electric Tariff to exempt low-income customers from the minimum reconnection charge and account charge and to waive security deposits for low-income customers are denied.
>
> 17. BCOAPO's proposal to exempt low-income customers from late payment charges [is] denied.

BCOAPO states that the "grounds on which this reconsideration application is based are that the Commission erred in law in finding sections 23, 38, and 58 to 61 of the UCA do not provide the Commission with jurisdiction to order low-income rates." The specific errors are that the Commission erred in law and in fact:

1. in artificially bifurcating its analysis on undue discrimination into personal characteristics and a "cost of service rationale";
2. as a result of (a), failing to consider socioeconomic evidence relevant to the determination of undue discrimination;
3. in applying the wrong test to its interpretation of sections 23, 38, and 58 to 61 of the UCA;
4. in finding a lack of legislative intent to provide the Commission with jurisdiction to order low-income rates; and
5. misconstruing the regulatory regimes and relevant decisions in other Canadian jurisdictions.[1]

BCOAPO seeks the following variance to paragraphs 14, 16 and 17 of Order G-5-17:

[1] Exhibit B-1, p. 2.

14. BCOAPO's request to establish an essential services usage block (ESUB) rate for qualified low-income ratepayers is granted.

16. BCOAPO's proposals to amend the Electric Tariff to exempt low-income customers from the minimum reconnection charge and account charge and to waive security deposits for low-income customers are granted.

17. BCOAPO's proposal to exempt low-income customers from late payment charges is granted and the proposal to ban the use of external credit scores is denied.[2]

2.0 Phase One Reconsideration Process

The Commission's process for addressing reconsideration applications is to proceed in two phases. The first phase is a preliminary examination in which the application is assessed in light of some or all of the following questions:

a. Should there be a reconsideration by the Commission?
b. If there is to be a reconsideration, should the Commission hear new evidence and should new parties be given the opportunity to present evidence?
c. If there is to be reconsideration, should it focus on the items from the application for reconsideration, a subset of these items or additional items?

After the first phase evidence has been received, the Commission generally applies the following criteria to determine whether or not a reasonable basis exists for reconsideration:

a. the Commission has made an error in fact or law;
b. there has been a fundamental change in circumstances or facts since the Decision;
c. a basic principle had not been raised in the original proceedings; or
d. a new principle has arisen as a result of the Decision.

In addition, the Commission will exercise its discretion to reconsider, in other situations, wherever it deems there to be just cause.

This Reconsideration Application is based on errors of law and fact with respect to the Commission's jurisdiction. In such circumstances, the Commission applies the following criteria to determine whether the reconsideration application should proceed to the second phase to be considered on its merits:

a. the claim of error is substantiated on a prima facie basis; and
b. the error has material implications.

By letter dated February 24, 2017, the Commission established phase one of the reconsideration process for the BCOAPO Application for Reconsideration and invited submissions from BC Hydro and all Registered Interveners in the BC Hydro 2015 Rate Design Application proceeding. The Commission received submissions from BC Sustainable Energy Association and the Sierra Club of British Columbia (BCSEA), Commercial Energy Consumers

[2] Exhibit B-1, p. 2.

Association of British Columbia (CEC), FortisBC Energy Inc. and FortisBC Inc. (collectively, FEI), BC Hydro and Movement of United Professionals (MoveUP) and a reply submission from BCOAPO.

The BCOAPO Application for Reconsideration and the submissions filed by the parties relating to the questions outlined in the Commission's February 24, 2017 phase one procedural letter are summarized below.

2.1 BCOAPO Application for Reconsideration

2.1.1 Claim of Errors

In its Application for Reconsideration, BCOAPO submits that the Commission made the following errors of law:

1. Artificially bifurcating the analysis on undue discrimination into personal characteristics and a "cost of service rationale"[3]

BCOAPO submits that "the Commission erred in failing to consider together the three rationales [ability to pay, cost reflectivity and efficiency] that BCOAPO argued collectively provide the Commission with jurisdiction to make distinctions between customers based on income, and in so doing, applied the wrong test in assessing whether the proposed discrimination is 'undue'."

BCOAPO submits that the "Commission begins its analysis of its jurisdiction to order BC Hydro to implement BCOAPO's low-income proposals by rejecting [the] argument that ability to pay should be considered together with 'non-status justifications' in a holistic and integrative rate-setting analysis". BCOAPO submits that the Commission's analysis improperly bifurcated the three interrelated factors into two categories: personal characteristics (or ability to pay) and cost of service factors (cost reflectivity and efficiency). The Commission then went on to separately consider whether the non-status justifications (i.e. cost of service reasons) were independently sufficient to justify discrimination in rates.

BCOAPO argues that all three contributing factors must be examined in concert, in a balancing exercise. It states that the "weight of each factor needs to be added to the other two factors to determine collectively the three justifications for discrimination can overcome the appellation of 'undue discrimination'."

BCOAPO submits that while cost of service may be the starting point of the Commission's jurisdiction, the Commission has the discretion to consider factors in addition to the cost of service , such as ability to pay.

2. Failing to consider socioeconomic evidence relevant to the determination of undue discrimination[4]

BCOAPO submits that because the Commission considered affordability in isolation and determined that it did not have jurisdiction to order discrimination in rates based solely on the personal characteristics of the customer, it failed to consider the socio-economic evidence regarding energy poverty.

BCOAPO states that "[s]pecifically, the Commission erred in not considering the weight of BCOAPO's affordability argument in light of the evidence on the breadth and depth of poverty experienced by BC Hydro's customers. Such evidence goes to the weight to be afforded to BCOAPO's affordability argument, which is one of the three interrelated factors going to whether the discrimination is undue."

[3] Exhibit B-1, pp. 4-5.
[4] Exhibit B-1, pp. 5-6.

3. Misinterpreting and misapplying sections 23, 38, and 58 to 61 of the UCA[5]

BCOAPO submits that the "only statutory restrictions on the Commission's jurisdiction with respect to rates are set out in sections 59 to 61 of the UCA. In a nutshell, the statutory restrictions prohibit the Commission from ordering rates that are 'unjust, unreasonable, unduly discriminatory or unduly preferential'. There is no statutory restriction limiting the Commission's consideration of 'just and reasonable' to cost of service factors."

BCOAPO submits that both sections 23 and 38 of the UCA contain broadly worded "catch-all" provisions that "provide the Commission with a broad mandate to do a fulsome analysis to determine what orders are necessary and advisable for the public interest and to ensure utilities are providing a service that is 'adequate, safe, efficient, just and reasonable.'" BCOAPO submits that it did not argue that these sections provide explicit jurisdiction to set low-income rates; but rather, that those sections inform the Commission's rate approval authority.

BCOAPO also submits that "the Commission did not consider [sections] 23 and 38 of the UCA harmoniously with the scheme of the Act, the object of the Act, and the intention of, in this case, the provincial legislature. Instead, it drew conclusions based on a 'plain reading' of sections 23 and 38, divorced from the context of the broader statute of which those sections are part. In so doing, the Commission applied only the first piece of Driedger's approach to statutory interpretation. Although the [RDA] Decision states that sections 23 and 38 should be interpreted 'harmoniously within the scheme of the Act' (p. 54) the Commission fails to conduct such an analysis."

BCOAPO submits that the Commission erred by unnecessarily limiting the broad authority granted by sections 23 and 38. As a result, the Commission failed to examine the rate-setting provisions in sections 58-61 of the UCA in the context of the broader authority granted by sections 23 and 38. In so doing, "the Commission unreasonably limited the scope of [sections] 59-61 to cost of service considerations."

BCOAPO also states that similarly "the Commission unnecessarily limited its broad authority under section 60(1)(b.1) to set rates using 'any mechanism, formula or other method of setting the rate that it considers advisable'". BCOAPO submits that there is nothing in the language of the UCA that precludes the Commission from considering income and ability to pay as part of its "mechanism, formula, or other method."

BCOAPO also submits that the Commission's broad authority under section 60(1)(b.1) is expressly excluded from the requirement set out in section 5(c) and (d) of *Special Direction No. 7* which require that the Commission must otherwise ensure that BC Hydro's domestic service is provided on a cost of service basis.

4. Finding a lack of legislative intent to provide the Commission with jurisdiction to order low-income rates[6]

BCOAPO submits that it provided reference to statements made in the legislature by the Honourable Robert H. McClelland underscoring the Commission's public interest function when the UCA was introduced for second reading. However, the Commission said on page 65 of the 2015 RDA Decision that it could "find no evidence that included in government energy policy is an intention to provide low-income rates"[7]. BCOAPO submits that "it is not a question of whether the legislature intends to provide low-income rates per se; but rather, a question of whether the legislature intended the Commission's regulatory powers to be broad enough to approve such rates where necessary for the public interest."

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[5] Exhibit B-1, pp. 6-8.
[6] Exhibit B-1, p. 8-9.
[7] British Columbia Power and Hydro Authority 2015 Rate Design Application, Decision, p. 65.

BCOAPO also submits that the Commission erred by accepting "as evidence of legislative intent the legislature's refusal, on three occasions, to pass proposed amendments to the Act to explicitly provide the Commission with the authority to create a low-income rate." BCOAPO submits the Commission erred in law in relying on a private member's bill never adopted by the legislature to interpret the state of the law, and in finding that section 37 of the *Interpretation Act* does not apply to preclude such reliance.

5. Misconstruing the regulatory regimes and relevant decisions in other Canadian jurisdictions[8]

BCOAPO notes that the Panel found similarities between the UCA and Ontario legislation are insufficient for the decisions in Ontario to provide guidance in the present case. On the other hand, the Panel found sufficient similarities between the UCA and Nova Scotia legislation for the decisions from Nova Scotia to provide guidance.

BCOAPO submits that finding Nova Scotia's legislation (and relevant decisions made under it) directly applicable to the issue of the Commission's jurisdiction under the UCA reveals "an error in statutory interpretation", considering that the wording in the Nova Scotia legislation is "much stricter" than the UCA. BCOAPO submits that the UCA "does not contain an absolute requirement that rates always be charged equally to all persons under substantially similar circumstances and conditions in respect of service of the same description" as required by the Nova Scotia legislation. In addition, the Commission failed to look at Nova Scotia's provision that is comparable to section 59(2) of the UCA in the context of the broad authority granted to the Commission by sections 23 and 38 of the UCA.

BCOAPO submits that the Ontario and Manitoba legislation, "with their broad authority to conduct contextual analysis in rate setting and approval, are more directly applicable to the Commission's jurisdiction under the UCA."

Finally, BCOAPO submits that the "Commission should not have ascribed the weight it did to the tribunal decisions in Alberta and New Brunswick." BCOAPO submits those decisions have "significantly less precedential value than the Ontario Superior Court of Justice decision which was confirmed by the Ontario Court of Appeal."

BCOAPO submits that the alleged errors led to the finding that the Commission does not have the jurisdiction to consider low-income proposals, which in turn "had the material impact that these proposals were rejected by the Commission without any adequate analysis of their desirability as a public interest objective."

BCOAPO relies on its submissions above in its reply to the submissions of those parties who oppose the application for reconsideration as set out in the next part of this decision.

2.1.2 Material Implications

BCOAPO submits that the material impact on BC Hydro's low-income customers from the rejection of the low-income proposals is severe and the low-income customers "will continue to face difficult choices with respect to which bills to pay and disconnections for their ultimate inability to pay."[9]

2.2 Other Parties' Phase One Submissions

BCSEA and MoveUP both support a reconsideration of paragraphs 14, 16 and 17 (as it relates to late payment charges) of Order G-5-17 on the grounds that the claim of error is substantiated on a *prima facie* basis and the

[8] Exhibit B-1, pp. 8-9.
[9] Exhibit B-1, pp. 9-10.

errors have material implications.[10] BCSEA endorse BCOAPO's submissions regarding the alleged errors and MoveUP adopts the submissions from BCOAPO and BCSEA regarding the alleged errors and the material impact of those errors.

CEC, FEI and BC Hydro do not support a reconsideration of paragraphs 14, 16 and 17 (as it relates to late payment charges) on the basis that BCOAPO has not established a *prima facie* basis for the alleged errors.[11] BC Hydro also submits that "any such error if substantiated would not have significant material implications."

BC Hydro submits that most of the BCOAPO Application for Reconsideration restates arguments made during the BC Hydro 2015 RDA proceeding rather than identifying alleged errors and notes that "[r]econsideration applications should not be opportunities to re-argue issues which were fully argued and which the Commission considered but did not accept."[12]

2.2.1 Claim of Errors

The phase one submissions regarding whether the Commission should order a reconsideration of Order G-5-17 are summarized below in relation to the specific errors alleged in the BCOAPO Application for Reconsideration.

1. Artificially bifurcating the analysis on undue discrimination into personal characteristics and a "cost of service rationale"

BCSEA submits that the Commission's finding that it does not have the jurisdiction to approve low-income rates in the absence of an economic or a cost of service basis reason is "circular and unreasonable because that was the same proposition that the panel took as the starting point of its analysis".[13]

FEI refers to BCOAPO's Final Submission dated September 26, 2016, its Responding Argument dated October 11, 2016 and its Reply Argument dated October 24, 2016, all filed in the BC Hydro 2015 RDA proceeding. FEI states that BCOAPO asserted three "regulatory justifications" for the establishment of an ESUB rate for low-income customers: (i) improved cost reflectivity; (ii) improved efficiency of collections; and (iii) bill affordability. FEI also states that separately, and as a threshold issue, BCOAPO also argued that the Commission has jurisdiction to order programs targeted at low-income residential ratepayers without any reliance on the regulatory justifications now included in its jurisdictional argument.[14]

FEI submits that the Commission's determination on jurisdiction "is consistent with the form in which BCOAPO previously presented its argument" and "[m]ore importantly, after determining that it does not have jurisdiction to order rates or programs based only on customers' ability to pay, the Commission went on to consider and rejected BCOAPO's position that cost reflectivity and efficiency in collections justified the establishment of an ESUB rate."[15]

FEI submits that "the Commission was correct to treat BCOAPO's 'ability to pay' rationale for the ESUB rate and other low-income proposals as a threshold issue of jurisdiction." FEI further submits that if "the UCA does not grant the Commission authority to set rates based on the personal characteristics of customers and their ability to pay for utility services, then clearly the Commission should not consider affordability justifications and

[10] Exhibit C1-1, p. 5; Exhibit C5-1, p. 2.
[11] Exhibit C2-1, p. 2, Exhibit C3-1, p. 1, Exhibit C4-1, p. 1.
[12] Exhibit C4-1, p. 3.
[13] Exhibit C1-1, p. 5.
[14] Exhibit C3-1, p. 2.
[15] Exhibit C3-1, p. 2.

associated economic evidence for the purposes of determining whether to order the implementation of the ESUB rate and other low-income programs."[16]

BC Hydro submits that BCOAPO provided no legal basis:

- for the proposition that its "holistic" analysis is both correct and preferred to the analysis that the Commission did undertake;
- upon which the Commission could conclude, as a matter of law, that a consideration that by itself is not legally relevant in a rate-setting context (ability to pay) becomes relevant when it is considered "holistically" with other legally relevant factors (cost reflectivity and efficiency); and
- for the proposition that the analysis the Commission did perform with respect to the review of its jurisdiction was incorrect.[17]

BC Hydro also submits that the Commission began its "jurisdictional analysis by, correctly, considering whether it has the jurisdiction to determine and set low-income rates in the absence of a cost of service (i.e. cost reflectivity and/or efficiency) rationale. After performing this analysis, the Commission then [went] on to consider the specific low-income proposals put forward by the BCOAPO in the RDA proceeding to determine whether they have a regulatory justification."[18]

Finally, BC Hydro submits that "the Commission concluded, based on its interpretation of the UCA, that it does not have jurisdiction to approve a low-income rate in the absence of a cost reflectivity or efficiency reason." BC Hydro states: "BCOAPO's proposed 'holistic' analysis would have the Commission afford weight to a factor – affordability - that it does not have the jurisdiction to consider and that is legally not relevant regardless of how it might be weighed vis-a-vis other legally relevant factors."[19]

2. Failing to consider socioeconomic evidence relevant to the determination of undue discrimination

BCSEA submits that the original Panel erred in finding that low-income rates are unduly discriminatory without weighing the socioeconomic evidence.[20]

BC Hydro submits that "[t]his argument is directly connected to the one preceding" and that BCOAPO's analysis "would have the Commission afford weight to a factor – affordability – that it does not have jurisdiction to consider." BC Hydro further submits that "BCOAPO provide no legal basis on which to support its argument that the socioeconomic evidence it put forward should give greater weight to the affordability factor as a consideration… affordability is either a relevant consideration or not and the significance of the issue does not elevate it as a factor if, as the Commission concluded, it is a lawfully irrelevant consideration in ratemaking."[21]

3. Misinterpreting and misapplying sections 23, 38, and 58 to 61 of the UCA

BCSEA submits that the Commission erred in its statutory interpretation of the UCA and whether it provides the jurisdiction to approve a low-income rate and, specifically the Commission failed to apply the modern approach.[22] In addition, BCSEA states that the error is not only the use of the phrase "plain meaning" but also

[16] Exhibit C3-1, p. 3.
[17] Exhibit C4-1, pp. 3-4.
[18] Exhibit C4-1, p. 4.
[19] Ibid.
[20] Exhibit C1-1, pp. 5-6.
[21] Exhibit C4-1, p. 5.
[22] Exhibit C1-1, p. 5.

the Commission's interpretation of sections 23 and 38 of the UCA with no reference to the context of the complete UCA.[23]

CEC submits that the "Commission's reasoning on interpreting sections 23, 38 and 58 to 61 of the UCA were reasonable and the Commission provided sound conclusions supported by the law and the evidence".[24]

FEI submits that BCOAPO recognized, in its Final Submission dated September 26, 2016,[25] that the Commission cannot exceed the powers granted to it in the UCA, and that whether the Commission has a particular power is determined using the two-stage framework described in ATCO[26]; i.e., jurisdiction is derived either from (i) an express grant from the UCA (explicit powers) or (ii) jurisdiction by necessary implication (implicit powers). FEI submits BCOAPO then argued that the wording of sections 23 and 38 and the Commission's public interest function "give the Commission the express jurisdiction to consider proposed low-income programs, subject to [s]ections 59 and 60 of the UCA."[27]

FEI notes that because BCOAPO previously relied on sections 23 and 38 "as providing a source of 'express jurisdiction', it was incumbent on the Commission to specifically consider whether those provisions could support the grant of jurisdiction being asserted." FEI submits that BCOAPO is being inconsistent to now claim that the Commission erred in doing so.[28]

FEI submits that the BCOAPO Application for Reconsideration is "effectively a concession that the only potential source of the required jurisdiction to establish the ESUB rate and other low-income proposals is the jurisdiction by necessary implication doctrine" and goes on to list the following reasons that the jurisdiction BCOAPO maintains can't be based on implicit power:

- Sections 23 and 38 are "broadly drafted" and only address the issue of service and not the issue of rate setting;
- The Supreme Court of Canada held in ATCO[29] that in order to impute jurisdiction to a regulatory body by necessary implication in such circumstances "there must be evidence that the exercise of that power is a practical necessity for the regulatory body to accomplish the objects prescribed by the legislature". Here, the Commission has no such legislatively prescribed objects and there is no evidence demonstrating that the imputed jurisdiction is a "practical necessity" for its functioning;
- The jurisdiction that is sought to be implied is contrary to both the established interpretation of the UCA's rate setting provisions and the "common law standards regarding the duty on public utilities having practical monopolies to 'treat all residential customers alike' in the supply of services."[30]

FEI also submits that "BCOAPO's statutory interpretation analysis ignores the clear terms of [section] 59 which prohibit rate discrimination or preference and further provide that a public utility must not 'extend to any person a form of agreement, rule, facility or privilege, unless the agreement, rule, facility or privilege is regularly

[23] Exhibit C1-1, p. 6.
[24] Exhibit C2-1, p. 2.
[25] British Columbia Power and Hydro Authority 2015 Rate Design Application, BCOAPO Final Argument.
[26] ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board), [2006] 1 S.C.R. 140, 2006 SCC 4, para. 38.
[27] Exhibit C3-1, p. 3.
[28] Exhibit C3-1, p. 4.
[29] ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board), [2006] 1 S.C.R. 140, 2006 SCC 4, para. 77.
[30] Exhibit C3-1, pp. 4-5.

and uniformly extended to all persons under substantially similar circumstances and conditions for the service of the same description'."[31]

BC Hydro notes that each of the arguments in the BCOAPO Application for Reconsideration related to sections 23, 38 and 59-61 of the UCA were put forward in the BC Hydro 2015 RDA proceeding and "disagreement with the Commission's findings should not be a sufficient basis upon which to allow a reconsideration application in the absence of a demonstrable *prima facie* error." BC Hydro goes on to submit that regardless, "the Commission correctly interpreted the specific provisions of the UCA within the context of the legislative framework and engaged in a statutory interpretation analysis consistent with Driedger's modern approach." [32]

BC Hydro submits that the Commission's RDA Decision, "when read as a whole, identifies the following: the Commission reviewed the UCA to determine whether it had explicit jurisdiction to approve low-income rates, it also reviewed the express and implied powers of the UCA. The Commission reviewed each of the provisions against this backdrop and in relation to each other. Finally, it conducted an exhaustive review of Hansard extracts to determine legislative intent, if any."[33]

BC Hydro also submits that the "Commission noted that there is no evidence to indicate that [sections] 23 and 38 had ever been interpreted in such a way as to inform the ratemaking powers of the Commission and that the rate-setting provisions of the UCA are founded on characteristics of service."[34]

4. Finding a lack of legislative intent to provide the Commission with jurisdiction to order low-income rates.

MoveUP submits that the Commission's acceptance of the 2008, 2014, and 2016 Private Members Bills introduced by MLA John Horgan as evidence of legislative intent is another error made by the Commission. MoveUP states that it "is only in the face of other evidence of legislative intent that a failed amendment attempt can form part of the basis upon which legislative intent can be found, otherwise a failed Private Members Bill or Bills could be used to redefine the law and legislative intent."[35]

In addition, MoveUp states that "any determination of legislative intent requires a fulsome and often time intensive examination of any number of sources including, but not limited to, a picture of how the legislation has evolved over time, Hansard and committee discussions about it, government policy papers, and reports from law commissions or Commissions of Inquiry." MoveUP submits that the original Panel erred in basing its determination on legislative intent only on "one small sliver of the possible bodies of information available."[36]

FEI submits that the Commission "committed no error" in considering the legislatures' refusal on three separate occasions to pass proposed amendments to the UCA regarding low-income rates.[37] FEI cites the majority decision of Rothstein J. in *Reference re Broadcasting Regulatory Policy CRTC* 2010-167 and *Broadcasting Order CRTC* 2010-168, [2012] 3 SCR 489 where evidence of broadcasters' lobbying efforts in the lead-up to enactment of a provision in the *Copyright Act:*

> Notwithstanding successive amendments to the *Copyright Act*, Parliament has not amended section 21 in the fashion requested by the broadcasters. Parliament's silence is not necessarily

[31] Exhibit C3-1, p. 5
[32] Exhibit C4-1, p. 6.
[33] Exhibit C4-1, p. 7.
[34] Ibid.
[35] Exhibit C5-1, p. 2.
[36] Exhibit C5-1, pp. 2-3.
[37] Exhibit C3-1, p. 5.

> determinative of legislative intention. However, in the context of repeated urging from broadcasters, Parliament's silence strongly suggests that it is Parliament's intention to maintain the balance struck by [section] 21.[38]

BC Hydro argues that, with respect to the Commission's consideration of Hansard extracts "[t]he fact that the Commission does not find certain evidence persuasive does not support a *prima facie* conclusion that the Commission erred in law." With respect to the private member's bills, BC Hydro submits that BCOAPO "are mischaracterizing the Commission's use and consideration of the evidence when it argues that the Commission 'rel[ied] on the private member's bill never adopted by the legislature.' Nowhere in the 2015 RDA Decision did the Commission rely on the evidence that the legislature had not adopted private member's bills to interpret the state of the law. The Commission acknowledged that the failure of the legislature to pass the bills was background and supported the Commission's view that the legislature had expressly turned down low-income amendments in the past."[39]

5. Misconstruing the regulatory regimes and relevant decisions in other Canadian jurisdictions

With respect to BCOAPO's submission that the *Ontario Energy Board Act* and Manitoba's *Public Utilities Board Act* are more directly applicable to the UCA, FEI submits that "[t]he Reconsideration Application does not raise any reason to doubt the correctness of the reasons given by the Commission in the RDA Decision that the legislation in those jurisdictions is not sufficiently similar to the UCA."[40] With respect to BCOAPO's submissions regarding Nova Scotia's *Public Utilities Act*, FEI submits that "the distinctions between the Nova Scotia legislation and the UCA, if any, are *de minimus* and should not have prevented the Commission from taking some guidance from an appellate court in another jurisdiction on a comparable jurisdictional issue."[41]

BC Hydro submits that "the Commission 'examined in detail' relevant case law provided by the various parties in argument in an effort to determine whether the rulings of other jurisdictions could 'be helpful in providing guidance to the Commission.' BC Hydro notes that the 'Commission explicitly stated that it is 'not bound by decisions in other jurisdictions'."[42]

BC Hydro submits that "the fact that the Commission does not find evidence persuasive does not constitute an error of law" and further states that the legislation in other jurisdictions "merely provided directional guidance" to the Commission.[43]

2.2.2 Material Implications

In its letter dated February 24, 2017, the Commission requested that, for any alleged error in fact or law, the phase one submissions provide support that the error has significant material implications.

BCSEA submits that the errors have "significant financial and quality of life consequences for qualified low-income customers of BC Hydro."[44] BC Hydro submits that the errors do not have significant material implications, given that "the disputed orders do not turn on those alleged errors." BC Hydro goes on to state that "regardless of the Commission's determinations with respect to its jurisdiction to order low-income rates,

[38] Exhibit C3-1, p. 6.
[39] Exhibit C4-1, p. 8.
[40] Exhibit C3-1, p. 6.
[41] Exhibit C3-1, p. 7.
[42] Exhibit C4-1, p. 9.
[43] Exhibit C4-1, p. 9.
[44] Exhibit C1-1, p. 7.

the affordability pillar of BCOAPO's regulatory justifications would not have been established and the requested low-income rates would not have been ordered."[45]

2.2.3 Whether the Commission should hear new evidence and should new parties be given the opportunity to present evidence, if there is to be a reconsideration of Order G-5-17

There were no parties that participated in phase one of the reconsideration process that supported new evidence or the opportunity for new parties to present evidence.

2.2.4 Whether a Commission reconsideration of Order G-5-17 should focus on the items from the BCOAPO Application for Reconsideration, a subset of these items, or additional items

BCSEA submits that the reconsideration process should focus on the items from the BCOAPO Application for Reconsideration. FEI and BC Hydro submit that, if the Commission orders a reconsideration of Order G-5-17, it should only focus on those items from the Application that have met the required criteria for reconsideration.

3.0 Commission Determination

For the reasons set out below, the Panel determines that there is no need to proceed to phase two of the reconsideration process. The Panel is not persuaded by the arguments of BCOAPO, or the interveners supporting its position, that the claims of error have been substantiated on a *prima facie* basis. Therefore, there is no need to consider whether the claims of error have material implications. **BCOAPO's request for reconsideration is denied**.

1. Artificially bifurcating the analysis on undue discrimination into personal characteristics and a "cost of service rationale"

The Panel considers several submissions made by BCOAPO in its Final Argument in the RDA proceeding to be relevant here. On page 32 of its Final Argument, BCOAPO submitted that the Commission has the express jurisdiction and implied powers to order implementation of low-income programs. The starting point of the analysis required an examination of the grammatical and ordinary meaning of the relevant sections of the UCA. The next step was to apply a contextual and purposive analysis.[46]

BCOAPO further submitted on page 32 of its Final Argument that read together contextually, sections 23 and 38 give the Commission the express jurisdiction to ensure public utilities are providing services in the public interest, as well as to consider the public interest in making orders and regulations. More specifically, the consideration of the public interest, in conjunction with Commission's powers to ensure, *inter alia,* the "convenience… of the public", "service of the public", adequate [service]" and "efficient [service]" give the Commission the express jurisdiction to consider low-income programs subject to sections 59 and 60 of the UCA.

[45] Exhibit C4-1, pp. 9-10.
[46] British Columbia Power and Hydro Authority 2015 Rate Design Application, BCOAPO Final Argument, p. 32.

Finally, BCOAPO also submitted on page 33 in its Final Argument that when read together, sections 59-60 ground the Commission's rate setting jurisdiction in a traditional cost of service analysis while also giving the Commission discretion to consider other factors, such as ability to pay and efficiency.[47]

The Panel is not persuaded that any *prima facie* error was made by the Commission in its analysis of sections 23, 38 and 59-60 of the UCA. In its RDA Decision, the Commission agreed with BC Hydro that is empowered to do only those things – including setting rates – that it is expressly authorized to do by the UCA, or which are necessarily implied by the UCA.[48]

The Commission noted that there are no words regarding customers' financial circumstances or incomes and expressions to that effect in the rate-making sections of the UCA are conspicuously absent[49]. With regard to sections 23 and 38, the Commission concluded that a plain reading of those sections did not support the view that they provide jurisdiction to set low-income rates regardless of those sections' public interest provisions. There is no reference to the characteristics of the ratepayer or no requirement to consider the economic status of a ratepayer. Those sections address the issues of service and general supervision. They do not address rate-making.[50]

The Panel also wishes to make an additional point. Section 1 of the UCA contains definitions for "rate" and "service". Those definitions apply throughout the UCA. "Service" is defined in terms of use and accommodation, a product or commodity, or the plant, equipment, apparatus, etc. However, "rate" is defined in terms of the charge or compensation of a public utility. The definitions apply to different concepts. While sections 23 and 38 address general supervisory powers and service, these concepts are distinct from rate setting.

The RDA Decision also addressed whether jurisdiction by necessary implication applies to an analysis of sections 23 and 38 in the context of setting low-income rates. The RDA Decision states that the doctrine of necessary implication requires a statutory objective of implementing low-income rates and there is no evidence that low-income rates are a statutory objective.[51]

BCOAPO acknowledged there is no explicit provision in the UCA setting out the objectives, but it can be inferred from sections 23 and 38.[52] While the RDA Decision referred to this as a circular argument,[53] the Panel fails to see how sections that are not concerned with rate setting can be the basis for necessarily implying a power into the specific rate setting provisions which does not contain any such "public interest" provisions. The Panel also notes that there are many other provisions in the UCA that contain references to public interest that do not affect rate setting principles. The Panel is of the view that the legislation expressly requires the public interest to be taken into consideration when considering some provisions while others do not. The flaw in the argument of BCOAPO is that it is conflating public interest provisions related to service and general supervision with express rate-setting provisions contained in sections 59-60 of the UCA.

2. Failing to consider socioeconomic evidence relevant to the determination of undue discrimination

The Panel agrees with BC Hydro's submission on this issue. BCOAPO is asking the Commission to consider a factor - affordability – that it does not have jurisdiction to consider. In finding that, in the absence of a cost of

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[47] British Columbia Power and Hydro Authority 2015 Rate Design Application, BCOAPO Final Argument, pp. 32-33.
[48] British Columbia Power and Hydro Authority 2015 Rate Design Application, Decision, p. 53.
[49] Ibid.
[50] Ibid., p. 54.
[51] Ibid.
[52] Ibid., p. 51.
[53] Ibid., p. 54.

service justification, the Commission has no jurisdiction to make distinctions between customers based on income and that BCOAPO failed to make a persuasive argument that low-income customers can be differentiated on the basis of the costs to service them, the socioeconomic evidence is otherwise not relevant to the issue of the Commission's jurisdiction.

3. Misinterpreting and misapplying sections 23, 38, and 58 to 61 of the UCA

The Panel disagrees with BCOAPO's assertion that the Commission misinterpreted and misapplied sections 23, 38, and 58 to 61 of the UCA. The Commission drew its conclusions regarding those sections on a plain reading of those sections and also within the context of the legislative framework as explained above and in its RDA Decision.

For example, regarding BCOAPO's assertion that section 60(1)(b.1) confers broad authority to set rates using "any mechanism, formula or other method of setting the rate that it considers advisable,"[54] the Commission instead considered the statutory intent of that subsection finding that the intent was to eliminate a bias against utility energy conservation investments and encourage performance based regulation and not to provide a jurisdictional basis for low-income rates.[55] These findings also address BCOAPO's argument regarding *Special Direction No. 7*.[56]

Further, the Panel agrees with FEI's submission that BCOAPO's statutory interpretation analysis ignores the clear terms of section 59 which prohibit rate discrimination or preference and further provide that a "public utility" must not "extend to any person a form of agreement, rule, facility or privilege, unless the agreement, rule, facility or privilege is regularly and uniformly extended to <u>all persons under substantially similar circumstances and conditions for the service of the same description</u>." The Panel notes that the underlined provision in section 59(2)(b) above relates to provision of service under substantially similar circumstances and conditions and is not to be interpreted to mean that persons under substantially similar circumstances and conditions (with regard to affordability) can be offered service of the same description at a different rate. This is made clear by the provisions of section 59(4)(c) which provides that it is a question of fact, of which the Commission is the sole judge whether a service is offered or provided under substantially similar circumstances and conditions.

Further there is nothing in the context of the legislative framework to link the rate-setting provisions in sections 58-61 to the broader authority granted by sections 23 and 38, and BCPOAPO failed to provide any persuasive evidence to support its assertion that there is such a link. Therefore the Panel disagrees that by not doing so unreasonably limited the scope of sections 59-61 to cost of service considerations.

4. Finding a lack of legislative intent to provide the Commission with jurisdiction to order low-income rates

BCOAPO provided no persuasive evidence in the original proceeding of legislative intent to provide the Commission with jurisdiction to order low-income rates. Further, no new evidence of this intent is provided in its reconsideration request. In the absence of explicit jurisdiction, or jurisdiction by necessary implication, granted in the UCA and of persuasive evidence of legislative intent to provide that jurisdiction, the Commission rightly concluded that there is no such jurisdiction.

We agree with BC Hydro's analysis that the Commission did not rely on the evidence that the legislature had not adopted private member's bills to interpret the state of the law, and this fact was "background and supported the Commission's view that the legislature had expressly turned down low-income amendments in the past."[57]

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[54] Exhibit B-1, p. 7.
[55] British Columbia Power and Hydro Authority 2015 Rate Design Application, Decision, p. 66.
[56] Ibid., p. 60.
[57] Exhibit C4-1, p. 8.

In the RDA Decision, the Commission found that it was not precluded from considering the handling of proposed bills by the British Columbia Legislature as *guidance* in determining legislative intent.[58]

Further, BCOAPO argues that "it is not a question of whether the legislature intends to provide low-income rates per se; but rather, a question of whether the legislature intended the Commission's regulatory powers to be broad enough to approve such rates where necessary for the public interest."[59] The Commission found and this Panel agrees that there is no basis to conclude from the UCA, Hansard or otherwise that the legislature intended that the Commission's powers were broad enough to approve low-income rates where necessary for the public interest.

5. Misconstruing the regulatory regimes and relevant decisions in other Canadian jurisdictions

The Commission expressly stated that it would examine how statutes similar to the UCA have been interpreted by the courts and commissions in other jurisdictions. It noted that while it was not bound by decisions in other jurisdictions, the decisions could be helpful in providing guidance if the cases were sufficiently similar. The Commission stated it would review the cases to determine whether they have application and provide direction for this jurisdiction.[60]

The Commission explained in the RDA Decision why it was of the view that some of the cited cases did not provide useful guidance while others did provide guidance. Those cases that the Commission decided did not provide useful guidance were based on the difference in the statutory provisions in other jurisdictions compared to British Columbia.

The Panel agrees with BC Hydro that finding evidence to be not persuasive does not constitute an error in law. Further, the Commission explicitly stated that the legislation in other jurisdictions provided "directional guidance" to the Commission.[61]

[58] British Columbia Power and Hydro Authority 2015 Rate Design Application, Decision, p. 66.
[59] Exhibit B-1, p. 8.
[60] British Columbia Power and Hydro Authority 2015 Rate Design Application, Decision, p. 67.
[61] Ibid., p. 79.

TAB 7

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *British Columbia Old Age Pensioners' Organization v. British Columbia Utilities Commission,*
2017 BCCA 400

2017 BCCA 400 (CanLII)

Date: 20171117
Dockets: CA44248; CA44557

Docket: CA44248

Between:

British Columbia Old Age Pensioners' Organization, Active Support Against Poverty, Council of Senior Citizens' Organizations of BC, Disability Alliance BC, Together Against Poverty Society, and the Tenant Resource and Advisory Centre ("BCOAPO et al.") and Movement of United Professionals

Appellants
(Intervenors)

And

British Columbia Utilities Commission

Respondent
(Administrative Tribunal)

And

British Columbia Hydro and Power Authority

Respondent
(Applicant)

And

FortisBC Energy Inc. and FortisBC Inc. (collectively, "Fortis"), Commercial Energy Consumers' Association of British Columbia, British Columbia Sustainable Energy Association, Sierra Club of British Columbia, Association of Major Power Customers, Non Integrated Areas Ratepayers Group, Zone II Ratepayers Group

Respondents
(Intervenors)

And

Attorney General of British Columbia

Respondent

- and -

Docket: CA44557

Between:

British Columbia Old Age Pensioners' Organization, Active Support Against Poverty, Council of Senior Citizens' Organizations of BC, Disability Alliance BC, Together Against Poverty Society, and the Tenant Resource and Advisory Centre ("BCOAPO et al.") and Movement of United Professionals

Appellants
(Intervenors)

And

British Columbia Utilities Commission

Respondent
(Administrative Tribunal)

And

British Columbia Hydro and Power Authority

Respondent
(Applicant)

And

FortisBC Energy Inc. and FortisBC Inc. (collectively, "Fortis"), Commercial Energy Consumers' Association of British Columbia, British Columbia Sustainable Energy Association, Sierra Club of British Columbia

Respondents
(Intervenors)

And

Attorney General of British Columbia

Respondent

Before: The Honourable Mr. Justice Goepel
(In Chambers)

On appeal from: Decisions and Orders of the British Columbia Utilities Commission, dated January 20, 2017 (Order Number G-5-17) and June 2, 2017 (Order Number G-87-17).

2017 BCCA 400 (CanLII)

Counsel for the Appellant, British Columbia Old Age Pensioners' Organization et al.:	M.G. Underhill E. Pritchard L. Worth
Counsel for the Appellant, Movement of United Professionals:	J. Quail
Counsel for the Respondent, FortisBC Energy Inc. and FortisBC Inc.:	L.B. Herbst, Q.C. N.T. Hooge
Counsel for the Respondent, British Columbia Hydro and Power Authority:	M. Vesely C.C. Ferguson
Counsel for the Respondent, British Columbia Utilities Commission:	P. Miller T. Shoranick
Place and Date of Hearing:	Vancouver, British Columbia September 19, 2017
Place and Date of Judgment:	Vancouver, British Columbia November 17, 2017

2017 BCCA 400 (CanLII)

Summary:

BCOAPO and MoveUp apply for leave to appeal two orders of the BC Utilities Commission. The orders were made in the context of a Rate Design Application submitted by BC Hydro, which proposed utility rates for classes of customers. BCOAPO and MoveUp had intervened in the application process, requesting the implementation of strategies to assist low-income ratepayers. In the first order, the Commission denied most of the low-income proposals on the basis that it lacked jurisdiction under the Utilities Commission Act to set low-income rates without an economic or cost of service justification. The second order denied a request for reconsideration.

Held: Applications for leave to appeal dismissed. In the circumstances of this case the decision of whether or not to grant leave comes down to a consideration of the merits. Assessing whether there is some prospect the appeal will succeed on its merits must be done in light of the standard of review on which the merits of the appeal would be judged. In this case, the Commission interpreted and applied provisions of its home statute and thus its decision would be reviewed on a standard of reasonableness. Given the standard of review, this appeal has no prospect of success.

2017 BCCA 400 (CanLII)

Reasons for Judgment of the Honourable Mr. Justice Goepel:

INTRODUCTION

[1] The applicants, British Columbia Old Age Pensioners' Organization, Active Support Against Poverty, Council of Senior Citizens' Organizations of BC, Disability Alliance BC, Together Against Poverty Society, and the Tenant Resource and Advisory Centre (collectively, "BCOAPO") and the Movement Of United Professionals ("MoveUp") seek leave under s. 101 of the *Utilities Commission Act*, R.S.B.C. 1996, c. 473 [*UCA*] to appeal the following orders of the British Columbia Utilities Commission:

1. Order G-5-17, pronounced on January 20, 2017 (the "Original Decision"); and

2. Order G-87-17, pronounced on June 2, 2017 (the "Reconsideration Decision").

2017 BCCA 400 (CanLII)

[32] The applicants further submit pursuant to factor (e) that there is a clear public benefit to be derived from the appeal. In this regard, they submit that the impact of the decision on BC Hydro's low-income customers is severe. They submit the appeal can settle an important jurisdictional question and if successful, will enable the Commission to consider a substantive issue of important public interest.

[33] The applicants also point out that the issue of a regulatory body's jurisdiction to order low-income rates has been considered by other appellate bodies, albeit not with respect to the specific legislation that governs the Commission. In that regard, they point to the decisions in *Dalhousie Legal Aid Service v. Nova Scotia Power Inc.*, 2006 NSCA 74; *Advocacy Centre for Tenants-Ontario v. Ontario Energy Board*, 293 D.L.R. (4th) 684, 2008 CanLII 23487 (Ont. S.C.J.) and a recent Manitoba hydro general rate application: Manitoba Public Utilities Board Order No. 73/15, Final Order with respect to Manitoba Hydro's 2014/15 and 2015/16 General Rate Application.

[34] In my respectful opinion, the question of whether or not to grant leave on this application comes down to a consideration of the merits.

[35] The merits analysis plays a major role in the courts' gatekeeper function. In *Collins*, Mr. Justice Chiasson in discussing the merits test observed:

> [32] It is apparent to me that this Court equates "some prospect of success" with "a substantial question to be argued". I would not apply a test that limits the consideration to whether a proposed appeal is "not wholly devoid of merit". In my mind, that is not consistent with the gatekeeper function described by Frankel J.A. It also is not consistent with the development of the reasonableness standard in the law of judicial review and the deference owed by courts to tribunals where the issue does not concern true jurisdiction, and particularly, where the issue involves the construction of a tribunal's home statute or one closely related to its function.

[36] In this case, I find that the applicants' appeal is not one with some prospect of success. The foundation of the applicants' submission is that their appeal raises a jurisdictional issue which is to be determined on the question of correctness. The jurisprudence, however, suggests otherwise. This case involves the interpretation by the Commission of its home statute. A decision of an administrative tribunal

interpreting or applying its home statute is to be reviewed on a reasonableness standard: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at para. 39. The Supreme Court of Canada has recently reiterated this point in the context of a statutory right of appeal: *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47.

2017 BCCA 400 (CanLII)

[37] This case turns on the Commission's interpretation of its jurisdiction to approve a low-income rate in the absence of economic or cost of service justification. The Commission interpreted and applied the provisions of its home statute governing rate making. This lies at the core of its expertise and competence. In reaching its decision the Commission undertook a textual, contextual and purposive analysis of the key provisions. It considered the Hansard evidence tendered by each party and concluded that this extrinsic evidence reinforced its interpretation. It also extended its review to decisions of courts and tribunals from other Canadian jurisdictions and examined with care whether the relevant statutory provisions in those jurisdictions were comparable.

[38] Ultimately the Commission rejected the appellants' submissions and held that the *UCA* did not provide the Commission with the jurisdiction to approve a low-income rate in the absence of an economic or cost of service justification. In their submissions the applicants do not suggest the Commission's findings are unreasonable. They have not put forward a credible argument or basis for this Court, given the deferential standard of review, to reverse the Commission's conclusion. Given the standard of review, I have reached the conclusion that there is no prospect that this appeal can succeed.

[39] I would also note that pursuant to s. 59(4) of the *UCA*, it is a finding of fact of which the Commission is the sole judge, whether a rate is unjust, unreasonable or unduly discriminatory. The Commission in its reasons found as a fact that the low-income rates proposed by the applicants were unjust, unreasonable and unduly discriminatory and therefore not in accordance with sections 59–60 of the *UCA*. Pursuant to s. 79 of the *UCA* that finding, which goes to the heart of the applicants'

rate submissions, cannot be challenged on appeal. In the result, even if the applicants could convince this Court that the Commission's interpretation of its home statute was unreasonable the appeal would have no practical utility.

[40] The applications for leave to appeal are dismissed.

"The Honourable Mr. Justice Goepel"

2017 BCCA 400 (CanLII)

TAB 8

Information and Privacy Commissioner *Appellant*

v.

Alberta Teachers' Association *Respondent*

and

Attorney General of British Columbia, Information and Privacy Commissioner of British Columbia and B.C. Freedom of Information and Privacy Association *Interveners*

Information and Privacy Commissioner *Appelant*

c.

Alberta Teachers' Association *Intimée*

et

Procureur général de la Colombie-Britannique, Information and Privacy Commissioner of British Columbia et B.C. Freedom of Information and Privacy Association *Intervenants*

2011 SCC 61 (CanLII)

Indexed as: Alberta (Information and Privacy Commissioner) *v.* Alberta Teachers' Association

2011 SCC 61

File No.: 33620.

2011: February 16; 2011: December 14.

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

Répertorié : Alberta (Information and Privacy Commissioner) *c.* Alberta Teachers' Association

2011 CSC 61

N° du greffe : 33620.

2011 : 16 février; 2011 : 14 décembre.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Administrative law — Judicial review — Implied decision — Decision of adjudicator quashed on judicial review on basis of Information and Privacy Commissioner's failure to comply with statutory time limits — Issue of time limits not raised with Commissioner or adjudicator — Adjudicator consequently not specifically addressing issue and not issuing reasons in this regard — Whether a matter that was not raised at tribunal may be judicially reviewed — Whether reasons given by tribunal in other decisions may assist in determination of reasonableness of implied decision — Personal Information Protection Act, S.A. 2003, c. P-6.5, s. 50(5).

Administrative law — Standard of review — Whether a tribunal's decision relating to interpretation of its home statute or statutes closely connected to its functions is reviewable on standard of correctness or

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Droit administratif — Contrôle judiciaire — Décision implicite — Décision d'une déléguée annulée à l'issue d'un contrôle judiciaire au motif que le commissaire à l'information et à la protection de la vie privée n'a pas observé le délai prescrit — Inobservation du délai non soulevée devant le commissaire ou sa déléguée — La déléguée n'a donc ni examiné ni abordé expressément la question dans ses motifs — Une question qui n'a pas été soulevée devant un tribunal administratif peut-elle faire l'objet d'un contrôle judiciaire? — Les motifs du tribunal administratif dans d'autres affaires peuvent-ils permettre de se prononcer sur le caractère raisonnable d'une décision implicite? — Personal Information Protection Act, S.A. 2003, ch. P-6.5, art. 50(5).

Droit administratif — Norme de contrôle — La décision d'un tribunal administratif qui interprète sa propre loi constitutive ou une loi étroitement liée à son mandat est-elle assujettie à la norme de la décision correcte ou

reasonableness — Whether category of true questions of jurisdiction or vires should be maintained when tribunal is interpreting its home statute or statutes closely connected to its functions.

The Information and Privacy Commissioner received complaints that the Alberta Teachers' Association ("ATA") disclosed private information in contravention of the Alberta *Personal Information Protection Act* ("*PIPA*"). At the time, s. 50(5) of *PIPA* provided that an inquiry must be completed within 90 days of the complaint being received unless the Commissioner notified the parties that he was extending the time period and he provided an anticipated date for completing the inquiry. The Commissioner took 22 months from the initial complaint before extending the estimated date on which the inquiry would be concluded. Seven months later, an adjudicator delegated by the Commissioner issued an order, finding that the ATA had contravened the Act. The ATA applied for judicial review of the adjudicator's order. In argument, it claimed for the first time that the Commissioner had lost jurisdiction due to his failure to extend the period for completion of the inquiry within 90 days of the complaint being received. The chambers judge quashed the adjudicator's decision on that basis. A majority of the Court of Appeal upheld the chambers judge's decision.

Held: The appeal should be allowed.

Per McLachlin C.J. and LeBel, Fish, Abella, Charron and Rothstein JJ.: Although the timelines issue was not raised before the Commissioner or the adjudicator, the adjudicator implicitly decided that providing an extension after 90 days did not automatically terminate the inquiry. The adjudicator's decision was subject to judicial review on a reasonableness standard and her decision was reasonable. The adjudicator's order should be reinstated and the matter should be remitted to the chambers judge to consider issues not dealt with and resolved in the judicial review.

A court has discretion not to undertake judicial review of an issue and generally will not review an issue that could have been, but was not, raised before the tribunal. However, in this case, the rationales for the general rule have limited application. The Commissioner has consistently expressed his views in other cases, so we have the benefit of his expertise. No evidence was required to consider the timelines issue and no prejudice was alleged.

à celle de la décision raisonnable? — La catégorie des véritables questions de compétence doit-elle subsister relativement à l'interprétation par un tribunal administratif de sa propre loi constitutive ou d'une loi étroitement liée à son mandat?

Le commissaire à l'information et à la protection de la vie privée a reçu des plaintes selon laquelle l'Alberta Teachers' Association (« ATA ») avait communiqué des renseignements privés et enfreint de ce fait la *Personal Information Protection Act* de l'Alberta (« *PIPA* »). Suivant le par. 50(5) de la *PIPA* alors en vigueur, l'enquête du commissaire devait prendre fin au plus tard 90 jours après la réception de la plainte, sauf avis du commissaire aux parties de la prorogation du délai et de la date prévue d'achèvement de l'enquête. Le commissaire n'a prorogé l'enquête et fixé la date de son achèvement que 22 mois après le dépôt de la première plainte. Sept mois plus tard, la personne qu'il a déléguée a rendu une ordonnance dans laquelle elle concluait que l'ATA avait contrevenu à la Loi. L'ATA a demandé le contrôle judiciaire de l'ordonnance et fait valoir pour la première fois qu'en ne prorogeant pas l'enquête au plus tard 90 jours après la réception de la plainte, le commissaire avait perdu compétence. Le juge en cabinet a annulé la décision de la déléguée pour ce motif. La Cour d'appel a confirmé à la majorité la décision du juge.

Arrêt : Le pourvoi est accueilli.

La juge en chef McLachlin et les juges LeBel, Fish, Abella, Charron et Rothstein : Même si la question de l'observation du délai n'a pas été soulevée devant le commissaire ou sa déléguée, cette dernière a conclu tacitement que l'omission de proroger le délai avant l'expiration des 90 jours impartis n'avait pas automatiquement mis fin à l'enquête. Au regard de la norme de contrôle de la décision raisonnable à laquelle elle est assujettie, la décision de la déléguée est raisonnable. L'ordonnance de la déléguée est rétablie, et l'affaire est renvoyée au juge en cabinet pour qu'il statue sur les questions qui n'ont pas déjà été examinées et réglées lors du contrôle judiciaire.

La cour de justice jouit du pouvoir discrétionnaire d'entreprendre ou non un contrôle judiciaire et, en règle générale, elle s'en abstient lorsque la question aurait pu être soulevée devant le tribunal administratif mais qu'elle ne l'a pas été. Toutefois, les considérations qui justifient la règle générale ont une application limitée en l'espèce. Le commissaire a exprimé son opinion dans d'autres décisions, ce qui donne accès à son expertise. Nul élément de preuve n'était requis pour trancher la question de l'observation du délai, et nul préjudice n'était allégué.

2011 SCC 61 (CanLII)

In the present appeal, the letter notifying the parties of the extension was sent after the expiration of 90 days. An inquiry was conducted and the adjudicator ultimately rendered an order against the ATA. The issue raised by the ATA on judicial review could only be decided in one of two ways — either the consequence of an extension was that the inquiry was terminated or not. Both the Commissioner and the adjudicator implicitly decided that providing an extension after 90 days did not result in the inquiry being automatically terminated.

In this case, a reasonableness standard applied on judicial review. The Commissioner was interpreting his own statute and the question was within his specialized expertise. Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, unless the question falls into a category of question to which the correctness standard continues to apply. The timelines question does not fall into such a category: it is not a constitutional question, a question regarding the jurisdictional lines between competing specialized tribunals, a question of central importance to the legal system as a whole, nor a true question of jurisdiction or *vires*. Experience has shown that the category of true questions of jurisdiction is narrow and it may be that the time has come to reconsider whether this category exists and is necessary to identify the appropriate standard of review. Uncertainty has plagued standard of review analysis for many years. The "true questions of jurisdiction" category has caused confusion to counsel and judges alike and without a clear definition or content to the category, courts will continue to be in doubt on this question. For now, it is sufficient to say that, unless the situation is exceptional, the interpretation by a tribunal of its home statute or statutes closely connected to its function should be presumed to be a question of statutory interpretation subject to deference on judicial review. As long as the "true question of jurisdiction" category remains, a party seeking to invoke it should be required to demonstrate why the court should not review a tribunal's interpretation of its home statute on the standard of reasonableness.

The deference due to a tribunal does not disappear because its decision was implicit. Parties cannot gut the deference owed to a tribunal by failing to raise the

En l'espèce, les parties ont été informées par lettre de la prorogation du délai de 90 jours après l'expiration de celui-ci. La déléguée a mené l'enquête à terme, puis rendu une ordonnance défavorable à l'ATA. La question soulevée par l'ATA lors du contrôle judiciaire ne pouvait appeler que l'une de deux conclusions possibles : soit la prorogation n'avait pas mis fin à l'enquête, soit elle y avait mis fin. Le commissaire et sa déléguée ont implicitement décidé que la prorogation du délai après les 90 jours impartis n'a pas automatiquement mis fin à l'enquête.

Dans la présente affaire, la décision était assujettie à la norme de contrôle de la décision raisonnable. Le commissaire interprétait sa propre loi constitutive, et la question relevait de son expertise. Lorsqu'un tribunal administratif interprète sa propre loi constitutive ou une loi étroitement liée à son mandat, la déférence est habituellement de mise, sauf si la question relève d'une catégorie de questions à laquelle la norme de la décision correcte demeure applicable. La question de l'observation du délai n'appartient pas à une telle catégorie : elle n'est pas de nature constitutionnelle, elle n'a pas trait à la délimitation des compétences respectives de tribunaux spécialisés concurrents, elle ne revêt pas une importance capitale pour le système juridique dans son ensemble et elle ne touche pas véritablement à la compétence. L'expérience enseigne que peu de questions appartiennent à la catégorie des véritables questions de compétence, et le temps est peut-être venu de se demander si cette catégorie existe et si elle est nécessaire pour arrêter la norme de contrôle applicable. Pendant de nombreuses années, l'incertitude a pesé sur l'analyse relative à la norme de contrôle. La catégorie des « questions touchant véritablement à la compétence » a semé la confusion tant chez les juges que chez les avocats et, sans une définition claire ni de précision quant à sa teneur, les cours de justice demeureront dans l'incertitude à ce sujet. Pour l'heure, il suffit d'affirmer que, sauf situation exceptionnelle, il convient de présumer que l'interprétation par un tribunal administratif de sa propre loi constitutive ou d'une loi étroitement liée à son mandat est une question d'interprétation législative commandant la déférence en cas de contrôle judiciaire. Tant que subsiste la catégorie des « véritables questions de compétence », la partie qui prétend soulever une question qui y appartient doit établir les raisons pour lesquelles le contrôle visant l'interprétation de sa loi constitutive par un tribunal administratif ne devrait pas s'effectuer au regard de la norme de la décision raisonnable.

Un tribunal administratif ne cesse pas d'avoir droit à la déférence parce que sa décision est implicite. Les parties ne sauraient, en omettant de soulever une

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issue before the tribunal and thereby mislead the tribunal on the necessity of providing reasons. When the decision under review concerns an issue that was not raised before the decision maker, the reviewing court can consider reasons which could have been offered in support of the decision. When a reasonable basis for an implied decision is apparent, a reviewing court should uphold the decision as reasonable. In some cases, it may be that the reviewing court cannot adequately show deference without first providing the decision maker the opportunity to give its own reasons for the decision. It will generally be inappropriate to find that there is no reasonable basis for the tribunal's decision without first giving the tribunal an opportunity to provide one.

question et en induisant ainsi le tribunal administratif en erreur quant à la nécessité de motiver sa décision, écarter la déférence due à ce dernier. Lorsque la décision contestée porte sur une question qui n'a pas été soulevée devant le décideur, la juridiction de révision peut prendre en compte les motifs qui auraient pu être donnés à l'appui. Lorsque la décision tacite a un fondement raisonnable manifeste, la juridiction de révision devrait la déclarer raisonnable et la confirmer. Il peut arriver parfois qu'une juridiction de révision ne puisse manifester la déférence voulue sans offrir d'abord au décideur administratif la possibilité d'exposer les motifs de sa décision. Il ne convient généralement pas qu'elle conclue à l'absence d'assise raisonnable sans offrir d'abord au tribunal administratif la possibilité d'en fournir une.

Reasons given by a tribunal in other decisions on the same issue can assist a reviewing court in determining whether a reasonable basis for an implied decision exists. Other decisions by the Commissioner and the adjudicator have provided consistent analyses of the similarly worded s. 69(6) of the *Freedom of Information and Protection of Privacy Act* ("*FOIPA*"). The Commissioner has held that a similar 90-day time limit in s. 69(6) applies only to his duty to complete an inquiry and not to extending time to complete an inquiry. His interpretation of s. 69(6) systematically addresses the text of that provision, its purposes, and the practical realities of conducting inquiries. His interpretation of s. 69(6) satisfies the values of justification, transparency and intelligibility in administrative decision making.

La juridiction de révision peut s'en remettre aux motifs d'autres décisions du tribunal administratif sur le même point pour décider si une décision implicite a un fondement raisonnable ou non. Dans d'autres décisions, le commissaire et ses délégués interprètent de manière constante le par. 69(6) de la *Freedom of Information and Protection of Privacy Act* (« *FOIPA* »), dont le libellé est semblable. Le commissaire conclut que le délai apparenté de 90 jours prévu au par. 69(6) ne vise que l'achèvement de l'enquête, et non la prorogation du délai pour la mener à terme. Son interprétation du par. 69(6) aborde successivement le texte de la disposition, son objet et l'expérience du commissaire au chapitre de la tenue d'enquêtes. Elle satisfait également aux exigences de justification, de transparence et d'intelligibilité du processus décisionnel administratif.

It is reasonable to assume that the Commissioner's interpretations of s. 69(6) of *FOIPA* are the reasons of the adjudicator in this case. Both s. 50(5) of *PIPA* and s. 69(6) of *FOIPA* govern inquiries conducted by the Commissioner. They are identically structured and use almost identical language. It was reasonable for the adjudicator to apply the Commissioner's interpretation of s. 69(6) of *FOIPA* to s. 50(5) of *PIPA*. The interpretation does not render statutory requirements of notice meaningless. No principle of statutory interpretation requires a presumption that an extension must be granted before the expiry of the 90-day time limit simply because s. 50(5) is silent as to when an extension of time can be granted. The distinction between mandatory and directory provisions does not arise in this case because this is not a case of failure by a tribunal to comply with a legislative direction. Therefore, there exists a reasonable basis for the adjudicator's implied decision in this case.

On peut certes présumer que les motifs du commissaire interprétant le par. 69(6) de la *FOIPA* sont repris par la déléguée en l'espèce. Le paragraphe 50(5) de la *PIPA* et le par. 69(6) de la *FOIPA* s'appliquent aux enquêtes du commissaire, ils sont conçus de la même manière et leurs libellés sont presque identiques. La déléguée pouvait légitimement appliquer au par. 50(5) de la *PIPA* l'interprétation du par. 69(6) de la *FOIPA* par le commissaire. Pareille conclusion ne rend pas inutile l'obligation légale de donner un avis. Aucun principe d'interprétation législative n'établit de présomption voulant que la prorogation doive intervenir avant l'expiration du délai de 90 jours seulement parce que le par. 50(5) ne précise pas la période pendant laquelle le délai peut être prorogé. La distinction entre les dispositions législatives impératives et celles qui sont directives ne joue pas en l'espèce, car il ne s'agit pas d'un cas où le tribunal administratif a omis de se conformer à une prescription du législateur. Par conséquent, la décision implicite de la déléguée avait une assise raisonnable.

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Per Binnie and Deschamps JJ.: There is agreement with Cromwell J. that the concept of jurisdiction is fundamental to judicial review of administrative tribunals and to the rule of law. Administrative tribunals operate within a legal framework dictated by the Constitution and limited by their respective statutory mandates and it is the courts that determine the outer limits of those mandates. On the other hand, the notion of a "true question of jurisdiction or *vires*" is not helpful at the practical everyday level of deciding whether or not the courts are entitled to intervene in a particular administrative decision.

The middle ground lies in the more nuanced approach adopted in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, that if the issue relates to the interpretation and application of a tribunal's own statute, is within its expertise and does not raise issues of general legal importance, the standard of reasonableness will generally apply. The expression "issues of general legal importance" means issues whose resolution has significance outside the operation of the statutory scheme under consideration. "Reasonableness" is a deceptively simple omnibus term which gives reviewing judges a broad discretion to choose from a variety of levels of scrutiny from the relatively intense to the not so intense. The calibration will be challenging enough for reviewing judges without superadding an elusive search for something that can be labelled a true question of *vires* or jurisdiction.

On the other hand, Rothstein J.'s creation of a "presumption" based on insufficient criteria simply adds a further step to what should be a straightforward analysis. A simplified approach would be that if the issue before the reviewing court relates to the interpretation or application of a tribunal's "home statute" and related statutes that are also within the core function and expertise of the decision maker, and the issue does not raise matters of legal importance beyond the statutory scheme under review, the Court should afford a measure of deference under the standard of reasonableness. Otherwise, the last word on questions of law should be left with the courts.

Per Cromwell J.: In this case the applicable standard of review is reasonableness. The Commissioner's power to extend time is granted in broad terms in the context

Les juges Binnie et Deschamps : Le juge Cromwell a raison d'affirmer que la notion de compétence est fondamentale dans le contrôle judiciaire des décisions des tribunaux administratifs et pour la primauté du droit. Les tribunaux administratifs exercent leurs fonctions dans le cadre juridique que dicte la Constitution et que délimitent leurs mandats légaux respectifs, et ce sont les cours de justice qui déterminent la portée de ces mandats. Par contre, la notion de « question touchant véritablement à la compétence » ne se révèle pas utile au quotidien pour déterminer concrètement si une cour de justice est admise ou non à s'immiscer dans une décision administrative donnée.

La démarche nuancée de la Cour dans l'arrêt *Canada (Commission canadienne des droits de la personne) c. Canada (Procureur général)*, 2011 CSC 53, [2011] 3 R.C.S. 471, selon laquelle lorsqu'il s'agit d'interpréter et d'appliquer sa propre loi, dans son domaine d'expertise et sans que soit soulevée une question de droit générale, la norme de la décision raisonnable s'applique habituellement, constitue un compromis entre les points de vue qui s'opposent en l'espèce. Une « question de droit générale » s'entend d'une question dont le règlement n'importe pas seulement pour le régime législatif considéré. La « raisonnabilité » est une notion générale d'apparence trompeusement simple qui confère à la juridiction de révision le pouvoir discrétionnaire étendu de choisir entre divers degrés d'examen, allant de celui relativement intense à celui qui l'est moins. Les juges saisis de demandes de contrôle judiciaire ont déjà suffisamment à faire pour déterminer l'intensité de l'examen nécessaire sans qu'on leur demande en plus de rechercher un élément insaisissable susceptible d'être qualifié de question touchant véritablement à la compétence.

En revanche, la création par le juge Rothstein d'une présomption fondée sur des critères insuffisants ne fait qu'ajouter une étape à une analyse qui devrait être simple. Suivant une démarche simplifiée, lorsque la décision visée par le contrôle judiciaire a trait à l'interprétation ou à l'application de la loi constitutive du tribunal administratif ou d'une loi connexe qui relève elle aussi essentiellement du mandat et de l'expertise du décideur, et qu'elle ne soulève pas de questions de droit générales, au-delà du régime législatif en cause, la Cour devrait se montrer déférente suivant la norme de la décision raisonnable. Sinon, il appartient à la cour de justice de statuer en dernier ressort sur les questions de droit.

Le juge Cromwell : La norme de contrôle applicable en l'espèce est celle de la décision raisonnable. Le pouvoir de prorogation est conféré au commissaire en

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of a detailed and highly specialized statutory scheme which it is the Commissioner's duty to administer and under which he is required to exercise many broadly granted discretions. The adjudicator's decision on the timeliness issue should be reinstated and the matter should be remitted to the chambers judge to consider the issues not dealt with and resolved in the judicial review proceedings. Courts have a constitutional responsibility to ensure that administrative action does not exceed its jurisdiction, but they must also give effect to legislative intent when determining the applicable standard of judicial review. The standard of review analysis identifies the limits of the legality of a tribunal's actions and defines the limits of the role of the reviewing court. When existing jurisprudence has not already satisfactorily determined the standard of review applicable to the case at hand, the courts apply several relevant factors. These factors allow the courts to identify questions that are reviewable on a standard of correctness. Elevating to a virtually irrefutable presumption the general guideline that a tribunal's interpretation of its home statute will not often raise a jurisdictional question goes well beyond saying that deference will usually result where a tribunal's interpretation of its home statute is in issue. The terms "jurisdictional" and "*vires*" are unhelpful to the standard of review analysis but true questions of jurisdiction and *vires* do exist. There are legal questions in "home" statutes whose resolution legislatures do not intend to leave to the tribunal. As this Court's recent jurisprudence confirms, as a matter of either constitutional law or legislative intent, a tribunal must be correct on certain issues. The fact that s. 50(5) of *PIPA* is in the Commissioner's home statute did not relieve the reviewing court of its duty to consider the argument that the provision was one whose interpretation the legislator intended to be reviewed for correctness, by examining the provision and other relevant factors.

termes généraux dans le contexte d'un régime législatif détaillé et très spécialisé qu'il lui incombe d'administrer et en application duquel il est appelé à exercer de nombreux pouvoirs discrétionnaires accordés de manière générale. Il convient de rétablir la décision du commissaire concernant l'observation du délai et de renvoyer l'affaire au juge en cabinet pour qu'il statue sur les questions qui n'ont pas déjà été examinées et réglées lors du contrôle judiciaire. Une cour de justice a l'obligation constitutionnelle de s'assurer que les actes de l'Administration n'outrepassent pas les limites de sa compétence, mais elle doit aussi tenir compte de l'intention du législateur lorsqu'elle détermine la norme de contrôle applicable. L'analyse relative à la norme de contrôle délimite la légalité des actes du tribunal administratif et circonscrit la fonction de la cour de justice siégeant en révision. Lorsque la jurisprudence existante ne détermine pas déjà de façon satisfaisante la norme de contrôle applicable à la décision, la cour de justice applique plusieurs considérations pertinentes. Ces considérations lui permettent de déterminer quelle décision est susceptible de contrôle selon la norme de la décision correcte. Élever au rang de présomption pour ainsi dire irréfutable l'énoncé général voulant que l'interprétation par un tribunal administratif de sa loi constitutive soulève rarement une question de compétence va beaucoup plus loin qu'affirmer que la déférence est habituellement de mise envers un tribunal administratif qui interprète sa loi constitutive. L'emploi du mot « compétence » est inutile dans l'analyse relative à la norme de contrôle, mais les questions touchant véritablement à la compétence existent. Une loi constitutive renferme des dispositions qui soulèvent des questions de droit sur lesquelles le législateur n'a pas voulu que le tribunal administratif ait le dernier mot. Comme le confirme la jurisprudence récente de la Cour, suivant le droit constitutionnel ou l'intention du législateur, la décision du tribunal administratif sur certaines questions doit être correcte. La présence du par. 50(5) de la *PIPA* dans la loi constitutive du commissaire ne soustrait pas la cour de justice siégeant en révision à son obligation de se pencher — par l'examen de la disposition et de toute autre considération pertinente — sur la thèse selon laquelle le législateur a voulu que le contrôle de l'interprétation de la disposition s'effectue selon la norme de la décision correcte.

Cases Cited

By Rothstein J.

Discussed: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; **distinguished:** *Kellogg Brown and Root Canada v. Information and Privacy Commissioner (Alta.)*, 2007 ABQB 499, 434 A.R.

Jurisprudence

Citée par le juge Rothstein

Arrêt analysé : *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190; **distinction d'avec l'arrêt :** *Kellogg Brown and Root Canada c. Information and Privacy Commissioner (Alta.)*, 2007 ABQB 499,

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letter of August 1, 2007, the Commissioner notified the parties that he was extending the 90-day period for completion of an inquiry and provided them with an anticipated date for completion of February 1, 2009. This was done after the expiry of the 90-day period. An inquiry was conducted and the Commissioner's delegated adjudicator ultimately rendered an order against the ATA. The issue raised by the ATA on judicial review, but not before the Commissioner or the adjudicator, was whether the result of the Commissioner not extending the completion date of the inquiry before the 90-day period expired resulted in the automatic termination of the inquiry. This issue could only be decided in one of two ways: either the consequence of an extension after 90 days was that the inquiry was automatically terminated or that it was not. Both the Commissioner and the adjudicator implicitly decided that providing an extension after 90 days did not result in the inquiry being automatically terminated. The Commissioner's decision was implicit in his giving notice of an extension and an anticipated date for completion after 90 days. The adjudicator's decision was implicit in her proceeding with the inquiry and rendering an order. In this appeal, this Court is reviewing the adjudicator's implied decision because hers is the decision under judicial review.

lettre du 1er août 2007, le commissaire a informé les parties qu'il prorogeait le délai de 90 jours et que la date prévue d'achèvement de l'enquête était le 1er février 2009. Le délai de 90 jours impartis avait déjà expiré. La déléguée du commissaire a mené l'enquête à terme, puis rendu une ordonnance défavorable à l'ATA. La question non soulevée devant le commissaire ou sa déléguée, mais que l'ATA a soumise lors du contrôle judiciaire, était celle de savoir si l'omission du commissaire de proroger le délai avant l'expiration des 90 jours impartis avait automatiquement mis fin à l'enquête. Seulement deux conclusions étaient possibles : soit la prorogation après les 90 jours ne mettait pas automatiquement fin à l'enquête, soit elle y mettait fin. Le commissaire et sa déléguée ont implicitement décidé que la prorogation du délai après les 90 jours impartis n'avait pas mis fin automatiquement à l'enquête. Le commissaire, en informant les parties de la prorogation et en leur précisant la date prévue d'achèvement, et la déléguée, en effectuant l'enquête et en rendant une ordonnance, se sont implicitement prononcés sur la question. Puisque la décision implicite de la déléguée est celle visée par le contrôle judiciaire, c'est cette décision que notre Cour examine dans le présent pourvoi.

B. *What Is the Applicable Standard of Review and How Is It Applied to Implicit Decisions on Issues Not Raised Before the Administrative Tribunal?*

B. *Détermination de la norme de contrôle et application de celle-ci à une décision implicite sur un point non soulevé devant le tribunal administratif*

[30] The narrow question in this case is: Did the inquiry automatically terminate as a result of the Commissioner extending the 90-day period only after the expiry of that period? This question involves the interpretation of s. 50(5) *PIPA*, a provision of the Commissioner's home statute. There is authority that "[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" (*Dunsmuir*, at para. 54; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at para. 28, *per* Fish J.). This principle applies unless the interpretation of the home statute falls into one of the categories of questions to

[30] Seule la question suivante se pose en l'espèce : la prorogation du délai par le commissaire après les 90 jours impartis a-t-elle automatiquement mis fin à l'enquête? Dès lors, il faut interpréter le par. 50(5) de la *PIPA*, une disposition de la loi constitutive du Commissariat. Suivant la jurisprudence, « [l]orsqu'un tribunal administratif interprète sa propre loi constitutive ou une loi étroitement liée à son mandat et dont il a une connaissance approfondie, la déférence est habituellement de mise » (*Dunsmuir*, par. 54; *Smith c. Alliance Pipeline Ltd.*, 2011 CSC 7, [2011] 1 R.C.S. 160, par. 28, le juge Fish). Le principe ne vaut cependant pas lorsque l'interprétation de la loi constitutive relève

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which the correctness standard continues to apply, i.e., "constitutional questions, questions of law that are of central importance to the legal system as a whole and that are outside the adjudicator's expertise, . . . '[q]uestions regarding the jurisdictional lines between two or more competing specialized tribunals' [and] true questions of jurisdiction or *vires*" (*Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, at para. 18, *per* LeBel and Cromwell JJ., citing *Dunsmuir*, at paras. 58, 60-61).

d'une catégorie de questions à laquelle la norme de la décision correcte demeure applicable, à savoir les « questions constitutionnelles, [les] questions de droit qui revêtent une importance capitale pour le système juridique dans son ensemble et qui sont étrangères au domaine d'expertise du décideur, [les] questions portant sur la "délimitation des compétences respectives de tribunaux spécialisés concurrents" [et] les questions touchant véritablement à la compétence » (*Canada (Commission canadienne des droits de la personne) c. Canada (Procureur général)*, 2011 CSC 53, [2011] 3 R.C.S. 471, par. 18, les juges LeBel et Cromwell, citant *Dunsmuir*, par. 58, 60-61).

[31] The timelines question is not a constitutional question; nor is it a question regarding the jurisdictional lines between two or more competing specialized tribunals.

[31] La question de l'observation du délai n'est pas de nature constitutionnelle et elle n'a pas trait à la délimitation des compétences respectives de tribunaux spécialisés concurrents.

[32] And it is not a question of central importance to the legal system as a whole, but is one that is specific to the administrative regime for the protection of personal information. The timelines question engages considerations and gives rise to consequences that fall squarely within the Commissioner's specialized expertise. The question deals with the Commissioner's procedures when conducting an inquiry, a matter with which the Commissioner has significant familiarity and which is specific to *PIPA*. Also, in terms of interpreting s. 50(5) *PIPA* consistently with the purposes of the Act, the relevant considerations include the interests of all parties in the timely completion of inquiries, the importance of keeping the parties informed of the progression of the process and the effect of automatic termination of an inquiry on individual privacy interests. These considerations fall within the Commissioner's expertise, which centres upon balancing the rights of individuals to have their personal information protected against the need of organizations to collect, use or disclose personal information for purposes that are reasonable (s. 3 *PIPA*).

[32] Elle ne revêt pas non plus une importance capitale pour le système juridique dans son ensemble, mais vise précisément le régime administratif de protection des renseignements personnels. Elle met en jeu des considérations et des conséquences qui relèvent bel et bien de l'expertise du commissaire dans son domaine spécialisé. Elle touche à la procédure d'enquête propre à la *PIPA* et dont le commissaire a une connaissance approfondie. En outre, les considérations qui président à l'interprétation du par. 50(5) conformément aux objets de la *PIPA* comprennent l'intérêt de toutes les parties en cause à ce que l'enquête soit menée à terme avec célérité, l'importance de tenir les parties informées du déroulement du processus et les conséquences de la cessation automatique de l'enquête sur le droit de chacun au respect de sa vie privée. Ces considérations relèvent elles aussi de l'expertise du commissaire, laquelle est axée sur la mise en balance du droit de chacun à la protection de ses renseignements personnels, d'une part, et du besoin de l'organisme de recueillir, d'utiliser ou de communiquer des renseignements à des fins valables, d'autre part (art. 3 de la *PIPA*).

[33] Finally, the timelines question does not fall within the category of a "true question of jurisdiction or *vires*". I reiterate Dickson J.'s oft-cited

[33] Enfin, la question de l'observation du délai n'appartient pas à la catégorie des « questions touchant véritablement à la compétence ». Rappelons

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warning in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, that courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so" (p. 233, cited in *Dunsmuir*, at para. 35). See also *Syndicat des professeurs du collège de Lévis-Lauzon v. CEGEP de Lévis-Lauzon*, [1985] 1 S.C.R. 596, at p. 606, *per* Beetz J., adopting the reasons of Owen J.A. in *Union des employés de commerce, local 503 v. Roy*, [1980] C.A. 394. As this Court explained in *Canada (Canadian Human Rights Commission)*, "*Dunsmuir* expressly distanced itself from the extended definition of jurisdiction" (para. 18, citing *Dunsmuir*, at para. 59). Experience has shown that the category of true questions of jurisdiction is narrow indeed. Since *Dunsmuir*, this Court has not identified a single true question of jurisdiction (see *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, [2011] 1 S.C.R. 3, at paras. 33-34; *Smith v. Alliance Pipeline Ltd.*, at paras. 27-32; *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678, at paras. 31-36). Although this Court held in *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, 2009 SCC 50, [2009] 3 S.C.R. 309, that the question was jurisdictional and therefore subject to review on a correctness standard, this was based on an established pre-*Dunsmuir* jurisprudence applying a correctness standard to this type of decision, not on the Court finding a true question of jurisdiction (para. 10).

la mise en garde maintes fois citée du juge Dickson dans *Syndicat canadien de la Fonction publique, section locale 963 c. Société des alcools du Nouveau-Brunswick*, [1979] 2 R.C.S. 227, à savoir que les cours de justice doivent « éviter de qualifier trop rapidement un point de question de compétence, et ainsi de l'assujettir à un examen judiciaire plus étendu, lorsqu'il existe un doute à cet égard » (p. 233, cité dans l'arrêt *Dunsmuir*, par. 35). Voir également *Syndicat des professeurs du collège de Lévis-Lauzon c. CEGEP de Lévis-Lauzon*, [1985] 1 R.C.S. 596, p. 606, le juge Beetz, reprenant les motifs du juge Owen dans *Union des employés de commerce, local 503 c. Roy*, [1980] C.A. 394. Comme l'explique notre Cour dans *Canada (Commission canadienne des droits de la personne)*, dans *Dunsmuir*, « la Cour se distancie expressément des définitions larges de la compétence » (par. 18, citant *Dunsmuir*, par. 59). L'expérience enseigne que peu de questions appartiennent à la catégorie des véritables questions de compétence. Depuis *Dunsmuir*, la Cour n'en a relevé aucune (voir *Celgene Corp. c. Canada (Procureur général)*, 2011 CSC 1, [2011] 1 R.C.S. 3, par. 33-34; *Smith c. Alliance Pipeline Ltd.*, par. 27-32; *Nolan c. Kerry (Canada) Inc.*, 2009 CSC 39, [2009] 2 R.C.S. 678, par. 31-36). Quant à l'arrêt *Northrop Grumman Overseas Services Corp. c. Canada (Procureur général)*, 2009 CSC 50, [2009] 3 R.C.S. 309, la Cour y statue que la question soulevée a trait à la compétence et appelle donc l'application de la norme de la décision correcte, et ce, en suivant une jurisprudence bien établie, antérieure à *Dunsmuir*, qui applique cette norme au type de décision en cause, et non en relevant une question qui touche véritablement à la compétence (par. 10).

[34] The direction that the category of true questions of jurisdiction should be interpreted narrowly takes on particular importance when the tribunal is interpreting its home statute. In one sense, anything a tribunal does that involves the interpretation of its home statute involves the determination of whether it has the authority or jurisdiction to do what is being challenged on judicial review. However, since *Dunsmuir*, this Court has departed from that definition of jurisdiction. Indeed, in view of recent jurisprudence, it may be that the time has

[34] La consigne voulant que la catégorie des véritables questions de compétence appelle une interprétation restrictive revêt une importance particulière lorsque le tribunal administratif interprète sa loi constitutive. En un sens, tout acte du tribunal qui requiert l'interprétation de sa loi constitutive soulève la question du pouvoir ou de la compétence du tribunal d'accomplir cet acte. Or, depuis *Dunsmuir*, la Cour s'est écartée de cette définition de la compétence. En effet, au vu de la jurisprudence récente, le temps est peut-être venu de

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come to reconsider whether, for purposes of judicial review, the category of true questions of jurisdiction exists and is necessary to identifying the appropriate standard of review. However, in the absence of argument on the point in this case, it is sufficient in these reasons to say that, unless the situation is exceptional, and we have not seen such a situation since *Dunsmuir*, the interpretation by the tribunal of "its own statute or statutes closely connected to its function, with which it will have particular familiarity" should be presumed to be a question of statutory interpretation subject to deference on judicial review.

[35] Justice Cromwell takes issue with my querying whether the category of true question of jurisdiction exists and is necessary. He says that this proposition "undermine[s] the foundation of judicial review of administrative action" (para. 92).

[36] Judges and administrative law counsel well know of the uncertainty and confusion that has plagued standard of review analysis for many years. That was the animating reason for this Court's decision in *Dunsmuir*. At para. 32 of *Dunsmuir*, Bastarache and LeBel JJ. wrote:

> Despite efforts to refine and clarify it, the present system has proven to be difficult to implement. The time has arrived to re-examine the Canadian approach to judicial review of administrative decisions and develop a principled framework that is more coherent and workable.

At para. 158, Deschamps J. wrote:

> The law of judicial review of administrative action not only requires repairs, it needs to be cleared of superfluous discussions and processes.

At para. 145, Binnie J. wrote:

> The present incarnation of the "standard of review" analysis requires a threshold debate about the four factors (non-exhaustive) which critics say too often leads to unnecessary delay, uncertainty and costs as arguments rage before the court about balancing expertise

se demander si, aux fins du contrôle judiciaire, la catégorie des véritables questions de compétence existe et si elle est nécessaire pour arrêter la norme de contrôle applicable. Cependant, faute de plaidoirie sur ce point en l'espèce, je me contente d'affirmer que, sauf situation exceptionnelle — et aucune ne s'est présentée depuis *Dunsmuir* —, il convient de présumer que l'interprétation par un tribunal administratif de « sa propre loi constitutive ou [d']une loi étroitement liée à son mandat et dont il a une connaissance approfondie » est une question d'interprétation législative commandant la déférence en cas de contrôle judiciaire.

[35] Le juge Cromwell exprime son désaccord avec mon interrogation concernant l'existence et la nécessité de la catégorie des véritables questions de compétence. À son avis, mes propos « minent l'assise du contrôle judiciaire des actes de l'Administration » (par. 92).

[36] Juges et avocats spécialisés en droit administratif sont bien au fait de l'incertitude et de la confusion qui, pendant de nombreuses années, ont pesé sur l'analyse relative à la norme de contrôle et qui sont à l'origine de l'arrêt *Dunsmuir*. Les juges Bastarache et LeBel écrivent ce qui suit au par. 32 de cet arrêt :

> Malgré les efforts pour l'améliorer et le clarifier, le mécanisme actuel s'est révélé difficile à appliquer. Le temps est venu de revoir le contrôle judiciaire des décisions administratives au Canada et d'établir un cadre d'analyse rationnel qui soit plus cohérent et fonctionnel.

La juge Deschamps opine pour sa part au par. 158 :

> Les règles régissant le contrôle judiciaire de l'action gouvernementale ont besoin de plus qu'une simple réforme. Le droit, en ce domaine, doit être débarrassé des grilles d'analyse et des débats inutiles.

Puis, au par. 145, le juge Binnie ajoute :

> La démarche actuelle commande l'examen préalable de quatre facteurs (non exhaustifs) qui, selon les détracteurs du mécanisme, prolongent indûment l'instance, accroissent l'incertitude et majorent les coûts, des arguments étant alors présentés à la cour quant à l'adéquation

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against the "real" nature of the question before the administrator, or whether the existence of a privative clause trumps the larger statutory purpose, and so on. And this is all mere preparation for the argument about the actual substance of the case. While a measure of uncertainty is inherent in the subject matter and unavoidable in litigation (otherwise there wouldn't be any), we should at least (i) establish some presumptive rules and (ii) get the parties away from arguing about the tests and back to arguing about the substantive merits of their case. [Emphasis deleted.]

Although these passages in *Dunsmuir* pertain to the approach to standard of review prior to *Dunsmuir*, I believe they are relevant in response to Justice Cromwell's expressed opinion.

[37] The continuing uncertainty about standard of review when the issue is the tribunal's interpretation of its home statute is well exemplified in the cases that have come before this Court subsequent to *Dunsmuir*. In *Nolan v. Superintendent of Financial Services* (2006), 209 O.A.C. 21, the Ontario Divisional Court thought the appropriate standard of review was correctness. The Court of Appeal applied a reasonableness standard (*sub nom. Kerry (Canada) Inc. v. DCA Employees Pension Committee*, 2007 ONCA 416, 86 O.R. (3d) 1), as did this Court (*sub nom. Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678). In *Alliance Pipeline Ltd. v. Smith*, 2008 FC 12, 34 C.E.L.R. (3d) 138, the judicial review judge applied a reasonableness standard, but the Court of Appeal (2009 FCA 110, 389 N.R. 363) found it unnecessary to decide whether reasonableness or correctness was the appropriate standard of review. This Court applied a reasonableness standard (2011 SCC 7, [2011] 1 S.C.R. 160). In *Celgene Corp. v. Canada (Attorney General)*, 2009 FC 271, 344 F.T.R. 45, the judicial review judge applied a correctness standard. The Federal Court of Appeal (2009 FCA 378, 315 D.L.R. (4th) 270) and this Court (2011 SCC 1, [2011] 1 S.C.R. 3) doubted that this was the proper standard. Without engaging in a standard of review analysis and for reasons of practicality, in *Northrop Grumman*, this Court applied a standard of correctness based on precedent. In the present appeal, both the judicial

de l'expertise du décideur administratif avec la nature « véritable » de la question à trancher ou quant à la préséance de la clause privative sur l'objet général de la loi, etc. Et tout cela n'est que le prélude à la plaidoirie sur la véritable question de fond. Le doute va jusqu'à un certain point de soi en la matière, comme dans tout litige (sinon il n'y en aurait pas), mais nous devrions à tout le moins (i) établir quelques présomptions et (ii) faire en sorte que les parties cessent de débattre des critères applicables et fassent plutôt valoir leurs prétentions sur le fond. [Italiques supprimés.]

Même si ces extraits de *Dunsmuir* ont trait à la démarche qui avait cours auparavant pour déterminer la norme de contrôle, j'estime qu'ils demeurent pertinents en réponse à l'opinion exprimée par le juge Cromwell.

[37] Les pourvois entendus par notre Cour depuis *Dunsmuir* montrent bien l'incertitude que suscite toujours la norme de contrôle lorsque le litige a pour objet l'interprétation de sa loi constitutive par un tribunal administratif. Dans *Nolan c. Superintendent of Financial Services* (2006), 209 O.A.C. 21, la Cour divisionnaire de l'Ontario a estimé que la bonne norme de contrôle était celle de la décision correcte. La Cour d'appel a plutôt appliqué la norme de la décision raisonnable (*sub nom. Kerry (Canada) Inc. c. DCA Employees Pension Committee*, 2007 ONCA 416, 86 O.R. (3d) 1), et notre Cour s'est rangée à son avis (*sub nom. Nolan c. Kerry (Canada) Inc.*, 2009 CSC 39, [2009] 2 R.C.S. 678). Dans *Alliance Pipeline Ltd. c. Smith*, 2008 CF 12, 34 C.E.L.R. (3d) 138, le juge saisi de la demande de contrôle judiciaire a retenu la norme de la raisonnabilité, tandis que la Cour d'appel (2009 CAF 110, 389 N.R. 363) a jugé inutile de décider laquelle des deux normes devait s'appliquer. Notre Cour a opté pour la norme de la décision raisonnable (2011 CSC 7, [2011] 1 R.C.S. 160). Dans *Celgene Corp. c. Canada (Procureur général)*, 2009 CF 271, 344 F.T.R. 45, le juge de première instance a effectué le contrôle au regard de la norme de la décision correcte. La Cour d'appel fédérale (2009 CAF 378, 315 D.L.R. (4th) 270) et notre Cour (2011 CSC 1, [2011] 1 R.C.S. 3) ont dit douter qu'il s'agisse de la bonne norme. Sans entreprendre d'analyse relative à la norme de contrôle et pour des raisons d'ordre pratique,

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review court and the Court of Appeal applied a correctness standard of review.

[38] These examples demonstrate that the "true questions of jurisdiction" category has caused confusion to counsel and judges alike and has unnecessarily increased costs to clients before getting to the actual substance of the case. Avoiding using the label "jurisdictional" only to engage in a search for the legislators' intent, as my colleague suggests at paras. 96-97, simply leads to the same debate about what constitutes a jurisdictional question. As Binnie J. directly put it in *Dunsmuir*, our objective should be to get the parties away from arguing about standard of review to arguing about the substantive merits of the case.

[39] What I propose is, I believe, a natural extension of the approach to simplification set out in *Dunsmuir* and follows directly from *Alliance* (para. 26). True questions of jurisdiction are narrow and will be exceptional. When considering a decision of an administrative tribunal interpreting or applying its home statute, it should be presumed that the appropriate standard of review is reasonableness. As long as the true question of jurisdiction category remains, the party seeking to invoke it must be required to demonstrate why the court should not review a tribunal's interpretation of its home statute on the deferential standard of reasonableness.

[40] In Justice Cromwell's view, saying that jurisdictional questions are exceptional is not an answer to a plausible argument that a particular provision falls outside the presumption of reasonableness review and into the exceptional category of correctness review. Nor does it assist, he says, in

dans *Northrop Grumman*, notre Cour a appliqué la norme de la décision correcte en s'appuyant sur la jurisprudence. Dans la présente affaire, la juridiction de révision et la Cour d'appel ont toutes deux conclu à l'application de la norme de la décision correcte.

[38] Il appert de ces exemples que la catégorie des « questions touchant véritablement à la compétence » sème la confusion tant chez les juges que chez les avocats et qu'elle accroît inutilement les frais de justice supportés par les parties avant que l'affaire ne soit entendue au fond. Éviter de recourir à la notion de « question de compétence » pour s'en tenir à la recherche de l'intention du législateur comme le propose mon collègue aux par. 96-97 de ses motifs a seulement pour effet de relancer le débat quant à ce qui constitue une question de compétence. Comme le dit sans détour le juge Binnie dans *Dunsmuir*, nous devrions chercher à faire en sorte que les parties cessent de débattre de la norme de contrôle et fassent plutôt valoir leurs prétentions sur le fond.

[39] À mon sens, ce que je préconise en l'espèce découle naturellement de la volonté de simplification qui anime notre Cour dans *Dunsmuir*, et donne directement suite à *Alliance* (par. 26). Les véritables questions de compétence ont une portée étroite et se présentent rarement. Il convient de présumer que la norme de contrôle à laquelle est assujettie la décision d'un tribunal administratif qui interprète sa loi constitutive ou qui l'applique est celle de la décision raisonnable. Tant que subsiste la catégorie des véritables questions de compétence, la partie qui prétend soulever une question qui y appartient doit établir les raisons pour lesquelles le contrôle visant l'interprétation de sa loi constitutive par le tribunal administratif ne devrait pas s'effectuer au regard de la norme déférente de la décision raisonnable.

[40] Dans l'optique du juge Cromwell, l'affirmation voulant que les questions de compétence soient exceptionnelles ne peut être opposée à la thèse plausible qu'une disposition donnée échappe à l'application de la présomption d'assujettissement à la norme de la décision raisonnable et appartient à

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determining by what means the presumption may be rebutted.

la catégorie des questions exceptionnelles appelant la norme de la décision correcte. Il ajoute qu'elle ne contribue pas non plus à la détermination des moyens par lesquels la présomption peut être réfutée.

[41] Both Binnie J. and Cromwell J. object to the *creation of a presumption* of reasonableness review of the home statute of the tribunal. With respect, I find the objection perplexing in view of judicial and academic opinion that the presumption was implicitly already established in *Dunsmuir*. Professor D. J. Mullan writes in "The McLachlin Court and the Public Law Standard of Review: A Major Irritant Soothed or a Significant Ongoing Problem?", in D. A. Wright and A. M. Dodek, eds., *Public Law at the McLachlin Court: The First Decade* (2011), 79, at p. 108:

> Justice John Evans of the Federal Court of Appeal has argued in his 2009 10th Heald Lecture delivered at the College of Law at the University of Saskatchewan that in *Dunsmuir* (reinforced by *Khosa*), the Court had now established (re-established?) a very strong presumption of deferential review when a statutory authority is interpreting its home, or constitutive, statute, or any other frequently encountered statute, or even common or civil law principle. I too accept that . . . .

Both Justice Evans and Professor Mullan are recognized as leading scholars in the field of administrative law in Canada.

[42] As I have explained, I am unable to provide a definition of what might constitute a true question of jurisdiction. The difficulty with maintaining the category of true questions of jurisdiction is that without a clear definition or content to the category, courts will continue, unnecessarily, to be in doubt on this question. However, at this stage, I do not rule out, in our adversarial system, counsel raising an argument that might satisfy a court that a true question of jurisdiction exists and applies in a particular case. The practical approach is to direct the courts and counsel that at this time, true questions of jurisdiction will be exceptional and, should the

[41] Les juges Binnie et Cromwell s'opposent tous deux à l'*établissement d'une présomption* assujettissant à la norme de la décision raisonnable l'interprétation de sa loi constitutive par le tribunal administratif. Soit dit en tout respect, leur désaccord me paraît déroutant au vu de l'opinion judiciaire et doctrinale selon laquelle *Dunsmuir* établit déjà tacitement cette présomption. Le professeur D. J. Mullan écrit ce qui suit dans « The McLachlin Court and the Public Law Standard of Review : A Major Irritant Soothed or a Significant Ongoing Problem? », in D. A. Wright et A. M. Dodek, dir., *Public Law at the McLachlin Court : The First Decade* (2011), 79, p. 108 :

> [TRADUCTION] En 2009, le juge John Evans de la Cour d'appel fédérale a soutenu lors de la dixième conférence Heald tenue à la faculté de droit de l'Université de la Saskatchewan que dans *Dunsmuir* (puis dans *Khosa*), la Cour applique désormais (ou de nouveau?) la très forte présomption voulant que la déférence s'impose lors du contrôle de la décision de l'autorité déléguée qui interprète sa loi habilitante ou constitutive, une autre loi ou quelque autre texte législatif auquel elle a souvent affaire, voire un principe de common law ou de droit civil. Je le reconnais également . . .

Tant le juge Evans que le professeur Mullan sont des sommités reconnues en droit administratif canadien.

[42] Comme je l'explique précédemment, je ne peux offrir de définition quant à ce qui peut constituer une question touchant véritablement à la compétence. Or, si on conserve cette catégorie sans la définir clairement ni préciser sa teneur, les cours de justice demeureront inutilement dans l'incertitude à ce sujet. Cependant, à ce stade, je n'exclus pas que, dans notre système fondé sur le principe du contradictoire, un avocat puisse convaincre une cour de l'existence et de l'application d'une question touchant véritablement à la compétence dans une affaire donnée. Concrètement, il convient d'indiquer aux tribunaux et aux plaideurs que, pour

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TAB 9

City of Edmonton *Appellant*

v.

Edmonton East (Capilano) Shopping Centres Limited (as represented by AEC International Inc.) *Respondent*

and

Attorney General of British Columbia, Assessment Review Board for the City of Edmonton and British Columbia Assessment Authority *Interveners*

Indexed as: Edmonton (City) *v.* Edmonton East (Capilano) Shopping Centres Ltd.

2016 SCC 47

File No.: 36403.

2016: March 23; 2016: November 4.

Present: McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Municipal law — Taxation — Property assessments — Assessment Review Board for City of Edmonton — Taxpayer filing complaint disputing municipal property assessment amount — Board increasing property assessment as requested in City's response to complaint — Lower courts agreeing with taxpayer that Board cannot increase property assessment — Whether Board had power to increase assessment — Municipal Government Act, R.S.A. 2000, c. M-26, s. 467.

Administrative law — Appeals — Standard of review — Boards and tribunals — Assessment Review Board for City of Edmonton — Taxpayer filing complaint disputing municipal property assessment amount — Board increasing property assessment as requested in City's response to complaint — Standard of review applicable to Board's decision to increase taxpayer's property assessment —

Ville d'Edmonton *Appelante*

c.

Edmonton East (Capilano) Shopping Centres Limited (représentée par AEC International Inc.) *Intimée*

et

Procureur général de la Colombie-Britannique, Assessment Review Board for the City of Edmonton et British Columbia Assessment Authority *Intervenants*

Répertorié : Edmonton (Ville) *c.* Edmonton East (Capilano) Shopping Centres Ltd.

2016 CSC 47

N° du greffe : 36403.

2016 : 23 mars; 2016 : 4 novembre.

Présents : La juge en chef McLachlin et les juges Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté et Brown.

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Droit municipal — Fiscalité — Évaluation foncière — Comité de révision des évaluations de la Ville d'Edmonton — Dépôt par un contribuable d'une plainte visant à contester le montant d'une évaluation foncière municipale — Augmentation de l'évaluation foncière par le Comité conformément à ce qui a été demandé par la Ville dans sa réponse à la plainte — Les cours d'instance inférieure convenant avec le contribuable que le Comité ne peut augmenter l'évaluation foncière — Le Comité avait-il le pouvoir d'augmenter l'évaluation? — Municipal Government Act, R.S.A. 2000, c. M-26, art. 467.

Droit administratif — Appels — Norme de contrôle — Organismes et tribunaux administratifs — Comité de révision des évaluations de la Ville d'Edmonton — Dépôt par un contribuable d'une plainte visant à contester le montant d'une évaluation foncière municipale — Augmentation de l'évaluation foncière par le Comité conformément à ce qui a été demandé par la Ville dans sa

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Whether Board's decision reasonable — Municipal Government Act, R.S.A. 2000, c. M-26, s. 470.

The taxpayer Company owns a shopping centre in Edmonton, Alberta. For the 2011 taxation year, the City of Edmonton assessed the value of the mall at approximately $31 million. The Company disputed this assessment by filing a complaint with the Assessment Review Board. The Company's position was that the assessed value exceeded the market value of the mall and was inequitable when compared to the assessed value of other properties. It sought a reduction in the assessed value to approximately $22 million.

When reviewing the Company's submissions and evidence, the City discovered what it determined was an error in its original assessment. The City requested that the Board increase the assessed value of the shopping centre to approximately $45 million. While the Company expressed concern about the City's change in position, it did not dispute the Board's power to increase the assessment in this case. Under s. 467(1) of the *Municipal Government Act*, after hearing a complaint, an assessment review board may "change" the assessment or "decide that no change is required". The Board ultimately increased the assessment to approximately $41 million. A decision of an assessment review board may be appealed to the Court of Queen's Bench, with permission, on a question of law or jurisdiction of sufficient importance to merit an appeal. On appeal to the Alberta Court of Queen's Bench, the chambers judge set aside the Board's decision and remitted the matter to the Board for a hearing *de novo*. This order was affirmed on appeal to the Alberta Court of Appeal. This Court must determine what the appropriate standard of review is for the Board's implicit decision that it could increase the Company's property assessment and determine if the Board's decision withstands scrutiny on that standard.

Held (McLachlin C.J. and Moldaver, Côté and Brown JJ. dissenting): The appeal should be allowed, the decision of the Court of Appeal set aside and the Board's decision reinstated.

Per Abella, Cromwell, Karakatsanis, Wagner and Gascon JJ.: The standard of review in this case is reasonableness. Unless the jurisprudence has already settled the applicable standard of review, the reviewing court should begin by considering whether the issue involves

réponse à la plainte — Norme de contrôle applicable à la décision du Comité d'augmenter l'évaluation foncière du contribuable — La décision du Comité était-elle raisonnable? — Municipal Government Act, R.S.A. 2000, c. M-26, art. 470.

La Société contribuable est propriétaire d'un centre commercial à Edmonton (Alberta). Pour l'exercice 2011, la Ville d'Edmonton a établi la valeur du centre commercial à environ 31 millions de dollars. La Société a contesté cette évaluation en déposant une plainte auprès du Comité de révision des évaluations. Selon la Société, la valeur imposable du centre commercial excédait sa valeur marchande et était inéquitable comparativement à la valeur imposable d'autres propriétés. Elle a demandé que cette valeur soit réduite à environ 22 millions de dollars.

Lorsqu'elle a examiné les observations et la preuve présentées par la Société, la Ville a constaté ce qu'elle a jugé être une erreur dans son évaluation initiale. La Ville a demandé au Comité d'augmenter à environ 45 millions de dollars la valeur imposable du centre commercial. Bien qu'elle ait exprimé certaines réserves quant à ce changement de position, la Société n'a pas contesté le pouvoir du Comité d'augmenter l'évaluation en l'espèce. Suivant le par. 467(1) du *Municipal Government Act*, après avoir entendu la plainte, le comité de révision des évaluations peut « modifier » l'évaluation ou « décider qu'aucun changement n'est requis ». Le Comité a finalement augmenté l'évaluation à environ 41 millions de dollars. La décision du comité de révision des évaluations est susceptible d'appel devant la Cour du Banc de la Reine, sur permission de celle-ci, à l'égard d'une question de droit ou de compétence suffisamment importante pour justifier un appel. Lors de l'appel devant la Cour du Banc de la Reine de l'Alberta, le juge en cabinet a annulé la décision du Comité et lui a renvoyé l'affaire pour nouvelle audition. Cette ordonnance a été confirmée par la Cour d'appel de l'Alberta. La Cour doit déterminer quelle est la norme de contrôle applicable à la décision implicite du Comité selon laquelle il pouvait augmenter l'évaluation foncière de la Société, et si la décision du Comité résiste à une analyse suivant cette norme.

Arrêt (la juge en chef McLachlin et les juges Moldaver, Côté et Brown sont dissidents) : Le pourvoi est accueilli, la décision de la Cour d'appel est annulée et la décision du Comité est rétablie.

Les juges Abella, Cromwell, Karakatsanis, Wagner et Gascon : La norme de contrôle applicable en l'espèce est celle de la décision raisonnable. À moins que la jurisprudence n'établisse déjà la norme de contrôle applicable, la cour de révision doit d'abord se demander si elle est

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the interpretation by an administrative body of its own statute or statutes closely connected to its function. If so, the standard of review is presumed to be reasonableness. This presumption of deference on judicial review respects the principle of legislative supremacy and the choice made to delegate decision making to a tribunal, rather than the courts. A presumption of deference on judicial review also fosters access to justice to the extent the legislative choice to delegate a matter to a flexible and expert tribunal provides parties with a speedier and less expensive form of decision making.

In this case, the framework from *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, provides a clear answer. The substantive issue here — whether the Board had the power to increase the assessment — turns on the interpretation of s. 467(1) of the Act, the Board's home statute. The issue does not fall within one of the four categories identified in *Dunsmuir* as calling for correctness review. Accordingly, the standard of review is presumed to be reasonableness.

A statutory right of appeal is not a new category of correctness and should not be added to the list of correctness categories enumerated in *Dunsmuir*. Recognizing issues arising on statutory appeals as a new category to which the correctness standard applies would go against strong jurisprudence from this Court.

The presumption of reasonableness is grounded in the legislature's choice to give a specialized tribunal responsibility for administering the statutory provisions, and the expertise of the tribunal in so doing. Expertise arises from the specialization of functions of administrative tribunals like the Board which have a habitual familiarity with the legislative scheme they administer. Expertise may also arise where legislation requires that members of a given tribunal possess certain qualifications. However, expertise is not a matter of the qualifications or experience of any particular tribunal member. Rather, expertise is something that inheres in a tribunal itself as an institution.

en présence d'une question portant sur l'interprétation par un organisme administratif de sa propre loi constitutive ou d'une loi étroitement liée à son mandat. Dans l'affirmative, la norme de contrôle applicable est présumée être celle de la décision raisonnable. La présomption de déférence en cas de contrôle judiciaire respecte le principe de la suprématie législative et la décision de déléguer le pouvoir décisionnel à un tribunal administratif plutôt qu'aux cours de justice. Cette présomption favorise également l'accès à la justice dans la mesure où le choix du législateur de déléguer une question à un tribunal administratif souple et spécialisé assure aux parties un processus décisionnel plus rapide et moins coûteux.

Le cadre établi dans l'arrêt *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, fournit une réponse claire en l'espèce. La question de fond que soulève la présente affaire — soit celle de savoir si le Comité avait le pouvoir d'augmenter l'évaluation — concerne l'interprétation du par. 467(1) de la Loi, la loi constitutive du Comité. Elle ne relève pas de l'une des quatre catégories qui, suivant l'arrêt *Dunsmuir*, commandent l'application de la norme de la décision correcte. En conséquence, la norme de contrôle applicable est présumée être celle de la décision raisonnable.

Les questions visées par un droit d'appel prévu par la loi ne constituent pas une nouvelle catégorie de questions à laquelle s'applique la norme de la décision correcte et elles ne devraient pas être ajoutées à la liste des catégories de questions à laquelle s'applique la norme de la décision correcte selon l'arrêt *Dunsmuir*. Il serait contraire à la jurisprudence bien établie de la Cour de considérer que les questions se soulevant dans le cadre d'un appel prévu par la loi forment une nouvelle catégorie de questions à laquelle s'applique la norme de la décision correcte.

La présomption d'application de la norme de la décision raisonnable repose sur le choix du législateur de confier à un tribunal administratif spécialisé la responsabilité d'appliquer les dispositions législatives, ainsi que sur l'expertise de ce tribunal en la matière. L'expertise découle de la spécialisation des fonctions des tribunaux administratifs qui, comme le Comité, appliquent un régime législatif qui leur est familier. L'expertise peut aussi découler du fait que la loi exige que les membres d'un tribunal administratif donné possèdent certaines qualifications. Cependant, l'expertise n'est pas une question touchant aux qualifications ou à l'expérience d'un membre donné d'un tribunal administratif. C'est plutôt quelque chose d'inhérent au tribunal administratif en tant qu'institution.

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This Court has often applied a reasonableness standard on a statutory appeal from an administrative tribunal, even when the appeal clause contained a leave requirement and limited appeals to questions of law, or to questions of law or jurisdiction. In light of this strong line of jurisprudence — combined with the absence of unusual statutory language — there was no need for the Court of Appeal to engage in a long and detailed contextual analysis. Inevitably, the result would have been the same. The presumption of reasonableness is not rebutted here.

La Cour a souvent appliqué la norme de la décision raisonnable en cas d'appel formé en vertu de la loi contre la décision d'un tribunal administratif, et ce, même lorsque la disposition établissant le droit d'appel imposait l'obligation d'obtenir une autorisation et limitait les appels aux questions de droit, ou aux questions de droit ou de compétence. À la lumière de ce fort courant jurisprudentiel — conjugué à l'absence de libellé législatif inhabituel — la Cour d'appel n'avait pas besoin de procéder à une analyse contextuelle longue et détaillée. Le résultat aurait inévitablement été le même. La présomption d'application de la norme de la décision raisonnable n'est pas réfutée en l'espèce.

The contextual approach can generate uncertainty and endless litigation concerning the standard of review. As in British Columbia, legislatures can specify the applicable standard of review; unfortunately explicit legislative guidance is not common.

Le recours à une analyse contextuelle peut être source d'incertitude et d'interminables litiges au sujet de la norme de contrôle applicable. Les législateurs peuvent, comme l'a fait celui de la Colombie-Britannique, indiquer la norme de contrôle applicable; malheureusement, il est peu fréquent de trouver des indications explicites dans les lois pertinentes.

The Board's decision to increase the Company's property assessment was reasonable. Given that the Company did not dispute the Board's power to increase the assessment in this case, it is not surprising the Board did not explain why it was of the view that it could increase the assessment. Accordingly, the Board's decision should be reviewed in light of the reasons which could be offered in support of it. It was reasonable for the Board to interpret s. 467(1) of the Act to permit it to increase the Company's property assessment at the City's request. While s. 460(3) of the Act provides that only assessed persons and taxpayers may make complaints, the scheme of the Act does not require that municipalities be empowered to file a "complaint" against an assessment. The Act provides other mechanisms by which municipalities can change or seek changes to an assessment. The Board's interpretation of s. 467(1) of the Act is consistent with the ordinary meaning of "change" in s. 467(1) and the overarching policy goal of the Act, to ensure assessments are correct, fair and equitable. The alternative would permit taxpayers to use the complaints process to prevent assessments made in error from being corrected, thereby frustrating the Act's purpose.

La décision du Comité d'augmenter l'évaluation foncière de la Société était raisonnable. Comme la Société n'a pas contesté le pouvoir du Comité d'augmenter l'évaluation en l'espèce, il n'est pas surprenant que celui-ci n'ait pas expliqué pourquoi il était d'avis qu'il pouvait augmenter l'évaluation. En conséquence, la décision du Comité devrait être examinée à la lumière des motifs qui pourraient être donnés à l'appui de celle-ci. Il était raisonnable pour le Comité de considérer que le par. 467(1) de la Loi lui permettait d'augmenter l'évaluation foncière de la Société à la demande de la Ville. Si le par. 460(3) de la Loi précise que seuls les contribuables et les personnes visées peuvent déposer une plainte, l'économie générale de la Loi n'exige pas que les municipalités disposent du pouvoir de déposer une « plainte » contre une évaluation. La Loi prévoit d'autres mécanismes permettant aux municipalités de modifier une évaluation ou de demander des changements à celle-ci. L'interprétation que donne le Comité au par. 467(1) de la Loi s'accorde avec le sens ordinaire du mot « modifier » figurant à cette disposition et l'objectif fondamental de la Loi, c'est-à-dire faire en sorte que les évaluations soient exactes, justes et équitables. Conclure autrement aurait pour effet que les contribuables pourraient se servir du processus de contestation pour empêcher la correction d'évaluations établies erronément, situation qui ferait obstacle à la réalisation de l'objet de la Loi.

Per McLachlin C.J. and Moldaver, Côté and Brown JJ. (dissenting): The appropriate standard of review of the Assessment Review Board's decision is correctness. The legislature of Alberta created a municipal assessment

La juge en chef McLachlin et les juges Moldaver, Côté et Brown (dissidents) : La norme de contrôle applicable à la décision du Comité de révision des évaluations est celle de la décision correcte. Le législateur albertain

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complaints regime that allows certain questions squarely within the expertise of an assessment review board to be reviewed on a deferential standard through the ordinary mechanism of judicial review. The legislature, however, also designated certain questions of law and jurisdiction — for which standardized answers are necessary across the province — to be the subject of an appeal to the Court of Queen's Bench. The statutory scheme and the Board's lack of relative expertise in interpreting the law lead to the conclusion that the legislature intended that the Board's decisions on such questions be reviewed on a correctness standard. As a result, even were the Board's interpretation presumptively owed deference on the basis that the Board is interpreting its home statute, this presumption of deference has been rebutted by clear signals of legislative intent. Consistency in the understanding and application of these legal questions is necessary, and only courts can provide such consistency.

The existence of a statutory right of appeal can, in combination with other factors, lead to a conclusion that the proper standard of review is correctness. A statutory right of appeal, like a privative clause, is an important indicator of legislative intent and, depending on its wording, it may be at ease with judicial intervention. But a statutory right of appeal is not a new "category" of correctness review. The ostensibly contextual standard of review analysis should not be confined to deciding whether new categories have been established. An approach to the standard of review analysis that relies exclusively on categories and eschews any role for context risks introducing the vice of formalism into the law of judicial review. In every case, a court must determine what the appropriate standard of review is for this question decided by this decision maker. This is not to say that a full contextual standard of review analysis must be conducted in every single case. Where a standard of review analysis is performed and the proper standard of review is determined for a particular question decided by a particular decision maker, that standard of review should apply in the future to similar questions decided by that decision maker. Disregard for the contextual analysis would represent a significant departure from *Dunsmuir* and from this Court's post-*Dunsmuir* jurisprudence.

The question at issue here is not one which falls within the Board's expertise. An administrative decision maker

a créé un régime de contestation des évaluations municipales qui permet que certaines questions relevant clairement de l'expertise d'un tel comité soient contrôlées selon une norme déférente dans le cadre du processus ordinaire de contrôle judiciaire. Toutefois, le législateur a également prévu que certaines questions de droit et de compétence — auxquelles des réponses uniformes sont nécessaires partout dans la province — doivent faire l'objet d'un appel devant la Cour du Banc de la Reine. Le régime législatif et le manque d'expertise relative du Comité en matière d'interprétation des lois mènent à la conclusion que le législateur entendait que les décisions du Comité à l'égard de telles questions soient contrôlées selon la norme de la décision correcte. Par conséquent, même si l'interprétation du Comité est présumée commander la déférence du fait que celui-ci interprète sa loi constitutive, cette présomption est réfutée par des indications claires de l'intention du législateur. La cohérence dans l'interprétation et l'application de ces questions juridiques est nécessaire, et seules les cours de justice peuvent assurer cette cohérence.

L'existence d'un droit d'appel statutaire peut, combinée à d'autres facteurs, permettre de conclure que la norme de contrôle applicable est celle de la décision correcte. Un droit d'appel statutaire, comme une clause privative, constitue un indice important de l'intention du législateur et, selon son libellé, il peut s'accommoder de l'intervention judiciaire. Cependant, un droit d'appel statutaire ne forme pas une nouvelle « catégorie » à laquelle s'applique la norme de la décision correcte. L'analyse de détermination de la norme de contrôle applicable — analyse manifestement contextuelle — ne devrait pas se limiter à la question de savoir si de nouvelles catégories ont été établies. Le recours à une analyse reposant exclusivement sur des catégories et n'accordant aucun rôle au contexte risque d'introduire un trop grand formalisme dans le droit relatif au contrôle judiciaire. Dans tous les cas, la cour de révision doit déterminer la norme de contrôle applicable à une question donnée tranchée par un décideur donné. Cela ne veut pas dire qu'une analyse contextuelle complète est chaque fois nécessaire. Lorsqu'une analyse de détermination de la norme de contrôle applicable est effectuée et que la norme de contrôle appropriée à l'égard d'une question donnée tranchée par un décideur donné est déterminée, cette norme devrait s'appliquer à l'avenir aux questions semblables tranchées par ce décideur. Faire abstraction de l'analyse contextuelle représenterait une rupture importante avec l'arrêt *Dunsmuir* et la jurisprudence de la Cour depuis cet arrêt.

La question en litige en l'espèce ne relève pas de l'expertise du Comité. Un décideur administratif n'a pas

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is not entitled to blanket deference in all matters simply because it is an expert in some matters. An administrative decision maker is entitled to deference on the basis of expertise only if the question before it falls within the scope of its expertise, whether specific or institutional. Expertise is a relative concept. It is not absolute. While the Board may have familiarity with the application of the assessment provisions of the Act, the legislature has recognized that the Board's specialized expertise does not necessarily extend to general questions of law and jurisdiction. The Board's decisions may, instead, be appealed on these questions of law and jurisdiction. The legislature created a tribunal with expertise in matters of valuation and assessment. In light of this lack of relative expertise on questions of law and jurisdiction, it cannot be maintained that a presumption applies that the legislature intended that the Board's determinations on questions of law and jurisdiction be owed deference.

Applying the proper standard, the Board erred in increasing the Company's property assessment in this case and the appeal should be dismissed. The Board's decision to increase the assessed value based on the City's submissions must be quashed because the Board considered information that it was statutorily prohibited from considering. Assessment review boards have jurisdiction only to adjudicate the issues that are raised in the assessed person's complaint form. The Board in this case erred by hearing and partially accepting the City's new and revised assessment based on an entirely new classification, one which was not the subject of the Company's complaint. The word "change" in s. 467(1) of the Act should be given its ordinary and grammatical meaning. The Board is not precluded from ever increasing an assessment; however, the Board's decision-making authority in this case was limited to the specific matters that were raised in the Company's complaint. The Board had no authority to inquire into the fairness and equity of the assessment generally and to consider or accept elements of the new assessment proposed by the City in increasing the assessment.

droit à une déférence absolue à l'égard de toute question du simple fait qu'il agit comme expert dans certaines matières. La déférence s'impose à l'égard d'un tel décideur en raison de son expertise uniquement si la question dont il est saisi relève de son champ d'expertise, qu'elle soit spécifique ou institutionnelle. L'expertise constitue un concept relatif, et non absolu. Bien que le Comité puisse être familier avec l'application des dispositions de la Loi en matière d'évaluation, le législateur a reconnu que son expertise spécialisée ne s'étend pas nécessairement aux questions générales de droit et de compétence. Les décisions du Comité peuvent plutôt être portées en appel en ces matières. Le législateur a créé un tribunal doté d'une expertise en matière d'évaluation foncière. Vu ce manque d'expertise relative en ce qui concerne les questions de droit et de compétence, on ne peut soutenir que le législateur est présumé avoir voulu que les décisions du Comité à cet égard commandent la déférence.

Suivant la norme de contrôle appropriée, le Comité a commis une erreur en augmentant l'évaluation foncière de la Société en l'espèce et le pourvoi doit être rejeté. Comme le Comité a considéré des renseignements que la loi lui interdisait d'examiner, sa décision d'augmenter la valeur imposable sur la base des observations de la Ville doit être annulée. Les comités de révision des évaluations n'ont compétence que pour statuer sur les questions soulevées dans le formulaire de plainte de la personne visée. En l'espèce, le Comité a commis une erreur en entendant la plainte et en acceptant partiellement la nouvelle évaluation révisée établie par la Ville sur le fondement d'une classification entièrement nouvelle, laquelle ne faisait pas l'objet de la plainte de la Société. Le mot « modifier » figurant au par. 467(1) de la Loi devrait être interprété suivant son sens ordinaire et grammatical. Rien n'empêche le Comité d'augmenter une évaluation; toutefois, le pouvoir décisionnel du Comité en l'espèce était limité aux questions précises soulevées dans la plainte de la Société. Le Comité n'avait pas compétence pour se pencher sur le caractère juste et équitable de l'évaluation en général, ni pour examiner ou accepter les éléments de la nouvelle évaluation proposée par la Ville en vue de hausser l'évaluation foncière.

Cases Cited

By Karakatsanis J.

Applied: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; **distinguished:** *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161; **approved:** *Edmonton (City) v. Army & Navy Department Stores Ltd.*, [2002] A.M.G.B.O. No. 126

Jurisprudence

Citée par la juge Karakatsanis

Arrêt appliqué : *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190; **distinction d'avec l'arrêt :** *Tervita Corp. c. Canada (Commissaire de la concurrence)*, 2015 CSC 3, [2015] 1 R.C.S. 161; **arrêt approuvé :** *Edmonton (City) c. Army & Navy Department*

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of the *MGA*, the Board's home statute. The standard of review is presumed to be reasonableness.

l'évaluation — concerne l'interprétation du par. 467(1) de la *MGA*, la loi constitutive du Comité. La norme de contrôle applicable est présumée être celle de la décision raisonnable.

(2) Categories That Rebut the Presumption of Reasonableness

(2) Catégories de questions permettant de réfuter la présomption d'application de la norme de la décision raisonnable

[24] The four categories of issues identified in *Dunsmuir* which call for correctness are constitutional questions regarding the division of powers, issues "both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise", "true questions of jurisdiction or *vires*", and issues "regarding the jurisdictional lines between two or more competing specialized tribunals" (paras. 58-61). When the issue falls within a category, the presumption of reasonableness is rebutted, the standard of review is correctness and no further analysis is required (*Canadian Artists' Representation v. National Gallery of Canada*, 2014 SCC 42, [2014] 2 S.C.R. 197, at para. 13; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895, at para. 22).

[24] Les quatre catégories de questions qui, suivant l'arrêt *Dunsmuir*, commandent l'application de la norme de la décision correcte sont les questions constitutionnelles touchant au partage des compétences, les questions qui sont « à la fois, d'une importance capitale pour le système juridique dans son ensemble et étrangère[s] au domaine d'expertise de l'arbitre », les questions « touchant véritablement à la compétence », et les questions relatives à la « délimitation des compétences respectives de tribunaux spécialisés concurrents » (par. 58-61). Lorsque la question relève de l'une de ces catégories, la présomption d'application de la norme de la décision raisonnable est réfutée, la norme de la décision correcte s'applique et aucune autre analyse n'est nécessaire (*Front des artistes canadiens c. Musée des beaux-arts du Canada*, 2014 CSC 42, [2014] 2 R.C.S. 197, par. 13; *McLean c. Colombie-Britannique (Securities Commission)*, 2013 CSC 67, [2013] 3 R.C.S. 895, par. 22).

(a) *Is the Issue on Appeal a True Question of Jurisdiction?*

a) *La question en appel constitue-t-elle une question touchant véritablement à la compétence?*

[25] The chambers judge found, and the Company submits, that whether the Board had the power to increase the assessment is a true question of jurisdiction reviewable on correctness. The Court of Appeal did not agree that this issue was a true question of jurisdiction.

[25] Le juge en cabinet a conclu — et la Société soutient — que la question de savoir si le Comité avait le pouvoir de hausser l'évaluation constitue une question qui touche véritablement à la compétence et est susceptible de contrôle selon la norme de la décision correcte. La Cour d'appel n'a pas considéré qu'il s'agissait d'une telle question.

[26] This category is "narrow" and these questions, assuming they indeed exist, are rare (*Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615, at para. 39; *Alberta (Information and Privacy Commissioner) v. Alberta*

[26] Cette catégorie est « restreinte » et ces questions, si tant est qu'elles existent, sont rares (*Société Radio-Canada c. SODRAC 2003 Inc.*, 2015 CSC 57, [2015] 3 R.C.S. 615, par. 39; *Alberta (Information and Privacy Commissioner) c. Alberta Teachers'*

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Teachers' Association, 2011 SCC 61, [2011] 3 S.C.R. 654, at paras. 33-34). It is clear here that the Board may hear a complaint about a municipal assessment. The issue is simply one of interpreting the Board's home statute in the course of carrying out its mandate of hearing and deciding assessment complaints. No true question of jurisdiction arises.

Association, 2011 CSC 61, [2011] 3 R.C.S. 654, par. 33-34). Il est clair en l'espèce que le Comité peut entendre une plainte relative à une évaluation municipale. La question porte simplement sur l'interprétation par le Comité de sa loi constitutive dans l'exécution de son mandat consistant à entendre et à trancher les plaintes en matière d'évaluation. Aucune question touchant véritablement à la compétence ne se pose.

(b) *Is a Statutory Right of Appeal a New Category of Correctness?*

b) *Les questions visées par un droit d'appel prévu par la loi constituent-elles une nouvelle catégorie de questions à laquelle s'applique la norme de la décision correcte?*

[27] The Court of Appeal concluded that when the decisions of a tribunal are subject to a statutory right of appeal (or a right to apply for leave to appeal), rather than ordinary judicial review, the standard of review on such appeals is correctness. It determined that a statutory appeal should be recognized as "an addition to or a variation of" the list of correctness categories enumerated in *Dunsmuir* (Court of Appeal reasons, at para. 24). Slatter J.A. reasoned that the existence of a statutory right of appeal is a strong indication that the legislature intended the courts to show less deference than they would in an ordinary judicial review.

[27] La Cour d'appel a conclu que, lorsque les décisions d'un tribunal administratif sont assujetties à un droit d'appel prévu par la loi (ou susceptibles d'appel sur autorisation) — plutôt qu'au processus ordinaire de contrôle judiciaire —, la norme de contrôle applicable en appel est celle de la décision correcte. Elle a statué que les questions se soulevant dans le cadre d'un appel prévu par la loi devraient être considérées comme [TRADUCTION] « un ajout ou une modification » à la liste des catégories de questions à laquelle s'applique la norme de la décision correcte selon l'arrêt *Dunsmuir* (motifs de la Cour d'appel, par. 24). Le juge Slatter a expliqué que l'existence d'un droit d'appel légal tendait fortement à indiquer que le législateur avait voulu que les cours de justice fassent preuve d'une déférence moindre que lors d'un contrôle judiciaire ordinaire.

[28] I disagree. In my view, recognizing issues arising on statutory appeals as a new category to which the correctness standard applies — as the Court of Appeal did in this case — would go against strong jurisprudence from this Court.

[28] Je ne peux souscrire à cette conclusion. À mon avis, il serait contraire à la jurisprudence bien établie de la Cour de considérer — comme l'a fait la Cour d'appel en l'espèce — que les questions se soulevant dans le cadre d'un appel prévu par la loi forment une nouvelle catégorie de questions à laquelle s'applique la norme de la décision correcte.

[29] At least six recent decisions of this Court have applied a reasonableness standard on a statutory appeal from a decision of an administrative tribunal (*McLean*; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC

[29] Dans au moins six arrêts récents, la Cour a appliqué la norme de la décision raisonnable dans un appel formé en vertu de la loi contre la décision d'un tribunal administratif (*McLean*; *Smith c. Alliance*

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7, [2011] 1 S.C.R. 160; *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633; *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, [2015] 3 S.C.R. 147; *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, 2015 SCC 45, [2015] 3 S.C.R. 219).

Pipeline Ltd., 2011 CSC 7, [2011] 1 R.C.S. 160; *Bell Canada c. Bell Aliant Communications régionales*, 2009 CSC 40, [2009] 2 R.C.S. 764; *Sattva Capital Corp. c. Creston Moly Corp.*, 2014 CSC 53, [2014] 2 R.C.S. 633; *Ontario (Commission de l'énergie) c. Ontario Power Generation Inc.*, 2015 CSC 44, [2015] 3 R.C.S. 147; *ATCO Gas and Pipelines Ltd. c. Alberta (Utilities Commission)*, 2015 CSC 45, [2015] 3 R.C.S. 219).

[30] In *Saguenay*, this Court confirmed that whenever a court reviews a decision of an administrative tribunal, the standard of review "must be determined on the basis of administrative law principles . . . regardless of whether the review is conducted in the context of an application for judicial review or of a statutory appeal" (para. 38, per Gascon J.; see also *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226, at paras. 17, 21, 27 and 36; *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, at paras. 2 and 21).

[30] Dans l'arrêt *Saguenay*, notre Cour a confirmé que, chaque fois qu'une cour de justice contrôle la décision d'un tribunal administratif, la norme d'intervention « doit être déterminée en fonction des principes du droit administratif [. . .] lorsque le contrôle s'exerce par suite d'une demande de révision judiciaire, mais aussi lorsqu'il procède par voie d'appel prévu par une loi » (par. 38, le juge Gascon; voir aussi *Dr Q c. College of Physicians and Surgeons of British Columbia*, 2003 CSC 19, [2003] 1 R.C.S. 226, par. 17, 21, 27 et 36; *Barreau du Nouveau-Brunswick c. Ryan*, 2003 CSC 20, [2003] 1 R.C.S. 247, par. 2 et 21).

[31] The Court of Appeal relied on this Court's decision in *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161, where the statutory appeal clause was referred to when finding the standard of review was correctness (para. 36). However, the Court in *Tervita* relied upon the unique statutory language of that particular appeal clause: a decision of the tribunal was appealable "as if it were a judgment of the Federal Court" (*Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), s. 13(1)). Obviously, judgments of the Federal Court do not benefit from deference on appeal (except on questions of fact, for entirely different reasons). *Tervita* does not stand for the proposition that all issues arising on all statutory appeals are reviewable on the correctness standard.

[31] La Cour d'appel s'est appuyée sur l'arrêt *Tervita Corp. c. Canada (Commissaire de la concurrence)*, 2015 CSC 3, [2015] 1 R.C.S. 161, dans lequel notre Cour s'est référée à la disposition législative créant le droit d'appel pour conclure à l'application de la norme de la décision correcte (par. 36). Cependant, dans *Tervita*, notre Cour s'est fondée sur le libellé particulier de cette disposition : les décisions du tribunal sont susceptibles d'appel « tout comme s'il s'agissait de jugements de la Cour fédérale » (*Loi sur le Tribunal de la concurrence*, L.R.C. 1985, c. 19 (2e suppl.), par. 13(1)). De toute évidence, les jugements de la Cour fédérale n'appellent pas la déférence en appel (sauf à l'égard des questions de fait, et ce, pour des motifs tout à fait différents). L'arrêt *Tervita* ne permet pas d'affirmer que toute question se soulevant dans tout appel prévu par la loi est susceptible de contrôle suivant la norme de la décision correcte.

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(3) Contextual Analysis

[32] The Court of Appeal also conducted a review of the relevant contextual factors to support the conclusion that the standard of review is correctness. The presumption of reasonableness may be rebutted if the context indicates the legislature intended the standard of review to be correctness (*Saguenay*, at para. 46; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283, at para. 16).

[33] The presumption of reasonableness is grounded in the legislature's choice to give a specialized tribunal responsibility for administering the statutory provisions, and the expertise of the tribunal in so doing. Expertise arises from the specialization of functions of administrative tribunals like the Board which have a habitual familiarity with the legislative scheme they administer: ". . . in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime" (*Dunsmuir*, at para. 49, quoting D. J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93; see also *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 25). Expertise may also arise where legislation requires that members of a given tribunal possess certain qualifications. However, as with judges, expertise is not a matter of the qualifications or experience of any particular tribunal member. Rather, expertise is something that inheres in a tribunal itself as an institution: ". . . at an institutional level, adjudicators . . . can be presumed to hold relative expertise in the interpretation of the legislation that gives them their mandate, as well as related legislation that they might often encounter in the course of their functions" (*Dunsmuir*, at para. 68). As this Court has often remarked, courts "may not be as well qualified as a given agency to provide interpretations of that agency's constitutive statute that make sense given

(3) Analyse contextuelle

[32] La Cour d'appel a également examiné les facteurs contextuels pertinents qui permettent d'étayer la conclusion selon laquelle la norme de contrôle applicable est celle de la décision correcte. La présomption d'application de la norme de la décision raisonnable peut être réfutée si le contexte indique que le législateur a voulu que la norme de contrôle applicable soit celle de la décision correcte (*Saguenay*, par. 46; *Rogers Communications Inc. c. Société canadienne des auteurs, compositeurs et éditeurs de musique*, 2012 CSC 35, [2012] 2 R.C.S. 283, par. 16).

[33] La présomption d'application de la norme de la décision raisonnable repose sur le choix du législateur de confier à un tribunal administratif spécialisé la responsabilité d'appliquer les dispositions législatives, ainsi que sur l'expertise de ce tribunal en la matière. L'expertise découle de la spécialisation des fonctions des tribunaux administratifs qui, comme le Comité, appliquent un régime législatif qui leur est familier : [TRADUCTION] « . . . dans beaucoup de cas, les personnes qui se consacrent quotidiennement à l'application de régimes administratifs souvent complexes possèdent ou acquièrent une grande connaissance ou sensibilité à l'égard des impératifs et des subtilités des régimes législatifs en cause » (*Dunsmuir*, par. 49, citant D. J. Mullan, « Establishing the Standard of Review : The Struggle for Complexity? » (2004), 17 *C.J.A.L.P.* 59, p. 93; voir aussi *Canada (Citoyenneté et Immigration) c. Khosa*, 2009 CSC 12, [2009] 1 R.C.S. 339, par. 25). L'expertise peut aussi découler du fait que la loi exige que les membres d'un tribunal administratif donné possèdent certaines qualifications. Cependant, comme dans le cas des juges, l'expertise n'est pas une question touchant aux qualifications ou à l'expérience d'un membre donné d'un tribunal administratif. C'est plutôt quelque chose d'inhérent au tribunal administratif en tant qu'institution : « . . . sur le plan institutionnel, on peut présumer que les arbitres [. . .] possèdent une expertise relative dans l'interprétation de la loi dont ils tiennent leur mandat ainsi que des dispositions législatives connexes qu'ils

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TAB 10

Paul Conway *Appellant*

v.

Her Majesty The Queen and Person in charge of the Centre for Addiction and Mental Health *Respondents*

and

Attorney General of Canada, Ontario Review Board, Mental Health Legal Committee and Mental Health Legal Advocacy Coalition, British Columbia Review Board, Criminal Lawyers' Association and David Asper Centre for Constitutional Rights, and Community Legal Assistance Society *Interveners*

Indexed as: R. *v.* Conway

2010 SCC 22

File No.: 32662.

2009: October 22; 2010: June 11.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Remedies — Accused not criminally responsible by reason of mental disorder detained in mental health facility — Accused alleging violations of his constitutional rights and seeking absolute discharge as remedy under s. 24(1) of Canadian Charter of Rights and Freedoms — Accused also seeking as remedy order directing mental health facility to provide him with particular treatment — Whether Review Board has jurisdiction to grant remedies under s. 24(1) of Charter — If so, whether accused entitled to remedies sought — Criminal Code, R.S.C. 1985, c. C-46, ss. 672.54, 672.55.

Constitutional law — Charter of Rights — Remedies — Court of competent jurisdiction — Remedial

Paul Conway *Appelant*

c.

Sa Majesté la Reine et Responsable du Centre de toxicomanie et de santé mentale *Intimés*

et

Procureur général du Canada, Commission ontarienne d'examen, Mental Health Legal Committee et Mental Health Legal Advocacy Coalition, British Columbia Review Board, Criminal Lawyers' Association et David Asper Centre for Constitutional Rights, et Community Legal Assistance Society *Intervenants*

Répertorié : R. *c.* Conway

2010 CSC 22

N° du greffe : 32662.

2009 : 22 octobre; 2010 : 11 juin.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit constitutionnel — Charte des droits — Réparations — Accusé non responsable criminellement pour cause de troubles mentaux détenu dans un établissement de santé mentale — Accusé ayant allégué la violation de ses droits constitutionnels et demandé sa libération inconditionnelle en guise de réparation fondée sur l'art. 24(1) de la Charte canadienne des droits et libertés — Accusé ayant également demandé, à titre de réparation, qu'il soit ordonné à l'établissement de santé mentale de lui offrir un traitement en particulier — La commission d'examen a-t-elle compétence pour accorder des réparations en application de l'art. 24(1) de la Charte? — Dans l'affirmative, l'accusé a-t-il droit aux réparations demandées? — Code criminel, L.R.C. 1985, ch. C-46, art. 672.54, 672.55.

Droit constitutionnel — Charte des droits — Réparations — Tribunal compétent — Pouvoir de réparation

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jurisdiction of administrative tribunals under s. 24(1) of Canadian Charter of Rights and Freedoms — New approach.

des tribunaux administratifs suivant l'art. 24(1) de la Charte canadienne des droits et libertés — Nouvelle démarche.

Criminal law — Mental disorder — Review Board — Remedial jurisdiction under Canadian Charter of Rights and Freedoms — Accused not criminally responsible by reason of mental disorder detained in mental health facility — Accused alleging violations of his constitutional rights and seeking absolute discharge as remedy under s. 24(1) of Canadian Charter of Rights and Freedoms at his disposition hearing before Review Board — Board concluding accused was a threat to public safety and not entitled to absolute discharge under Criminal Code — Whether Review Board has jurisdiction to grant absolute discharge as remedy under s. 24(1) of Charter — If so, whether accused entitled to remedy sought — Criminal Code, R.S.C. 1985, c. C-46, s. 672.54.

Droit criminel — Troubles mentaux — Commission d'examen — Pouvoir de réparation suivant la Charte canadienne des droits et libertés — Accusé non responsable criminellement pour cause de troubles mentaux détenu dans un établissement de santé mentale — Accusé ayant allégué la violation de ses droits constitutionnels et demandé sa libération inconditionnelle en guise de réparation fondée sur l'art. 24(1) de la Charte canadienne des droits et libertés lors de l'audience tenue par la commission d'examen — Commission d'examen concluant que l'accusé mettrait en péril la sécurité du public et n'a pas droit à la libération inconditionnelle suivant le Code criminel — La commission d'examen avait-elle le pouvoir d'accorder la libération inconditionnelle à titre de réparation fondée sur l'art. 24(1) de la Charte? — Dans l'affirmative, l'accusé avait-il droit à la réparation demandée? — Code criminel, L.R.C. 1985, ch. C-46, art. 672.54.

Administrative law — Boards and tribunals — Jurisdiction — Remedial jurisdiction of administrative tribunals under s. 24(1) of Canadian Charter of Rights and Freedoms — New approach.

Droit administratif — Organismes et tribunaux administratifs — Compétence — Pouvoir de réparation des tribunaux administratifs suivant l'art. 24(1) de la Charte canadienne des droits et libertés — Nouvelle démarche.

In 1984, C was found not guilty by reason of insanity on a charge of sexual assault with a weapon. Since the verdict, he has been detained in mental health facilities and diagnosed with several mental disorders. Prior to his annual review hearing before the Ontario Review Board in 2006, C alleged that the mental health centre where he was being detained had breached his rights under the *Canadian Charter of Rights and Freedoms*. He sought an absolute discharge as a remedy under s. 24(1) of the *Charter*. The Board unanimously concluded that C was a threat to public safety, who would, if released, quickly return to police and hospital custody. This made him an unsuitable candidate for an absolute discharge under s. 672.54(*a*) of the *Criminal Code*, which provides that an absolute discharge is unavailable to any patient who is a "significant threat to the safety of the public". The Board therefore ordered that C remain in the mental health centre. The Board further concluded that it had no jurisdiction to consider C's *Charter* claims. A majority in the Court of Appeal upheld the Board's conclusion that it was not a court of competent jurisdiction for the purpose of granting an absolute discharge under s. 24(1) of the *Charter*. However, the Court of Appeal unanimously concluded that it was unreasonable for the Board not to address the

Accusé d'agression sexuelle armée, C a été déclaré non coupable pour cause d'aliénation mentale en 1984. Depuis lors, il a été détenu dans des établissements psychiatriques et on lui a diagnostiqué plusieurs troubles mentaux. Avant l'examen annuel de son cas par la Commission ontarienne d'examen en 2006, C a allégué que le centre de santé mentale où il était détenu avait violé les droits que lui conférait la *Charte canadienne des droits et libertés*. Il a demandé sa libération inconditionnelle à titre de réparation sur le fondement du par. 24(1) de la *Charte*. La Commission a conclu à l'unanimité que C représentait un risque pour la sécurité du public et que, s'il était libéré, il se retrouverait rapidement sous garde policière, puis à l'hôpital. Il n'était donc pas admissible à la libération inconditionnelle, l'al. 672.54*a*) du *Code criminel* écartant celle-ci dans le cas d'un patient qui représente « un risque important pour la sécurité du public ». La Commission a donc ordonné que C demeure détenu au centre de santé mentale. Elle a par ailleurs conclu qu'elle ne pouvait pas examiner les demandes de C prenant appui sur la *Charte*. Les juges majoritaires de la Cour d'appel ont confirmé sa conclusion selon laquelle elle n'avait pas compétence pour accorder une libération inconditionnelle sur le fondement du par. 24(1) de la *Charte*. La Cour d'appel a

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treatment impasse plaguing C's detention. This issue was remitted back to the Board.

Before this Court, the issue is whether the Ontario Review Board has jurisdiction to grant remedies under s. 24(1) of the *Charter*. C has requested, in addition to an absolute discharge, remedies dealing with his conditions of detention: an order directing the mental health centre to provide him with access to psychotherapy and an order prohibiting the centre from housing him near a construction site.

Held: The appeal should be dismissed.

When the *Charter* was proclaimed, its relationship with administrative tribunals was a blank slate. However, various dimensions of the relationship quickly found their way to this Court. The first wave of relevant cases started in 1986 with *Mills v. The Queen*, [1986] 1 S.C.R. 863. The *Mills* cases established that a court or administrative tribunal was a "court of competent jurisdiction" under s. 24(1) of the *Charter* if it had jurisdiction over the person, the subject matter, and the remedy sought. The second wave started in 1989 with *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038. The *Slaight* cases established that any exercise of statutory discretion is subject to the *Charter* and its values. The third and final wave started in 1990 with *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, followed in 1991 by *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5, and *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22. The cases flowing from this trilogy, which deal with s. 52(1) of the *Constitution Act, 1982*, established that specialized tribunals with both the expertise and the authority to decide questions of law are in the best position to hear and decide the constitutionality of their statutory provisions.

This evolution of the case law over the last 25 years has cemented the direct relationship between the *Charter*, its remedial provisions and administrative tribunals. It confirms that we do not have one *Charter* for the courts and another for administrative tribunals and that, with rare exceptions, administrative tribunals with the authority to apply the law, have the jurisdiction to apply the *Charter* to the issues that arise in the proper

toutefois unanimement conclu que la Commission avait déraisonnablement omis de se prononcer sur l'impasse thérapeutique dans laquelle se trouvait C. Cette question a été renvoyée à la Commission.

La question que doit trancher la Cour est celle de savoir si la Commission ontarienne d'examen a compétence pour accorder réparation sur le fondement du par. 24(1) de la *Charte*. Outre sa libération inconditionnelle, C a sollicité des mesures de réparation relatives aux conditions de sa détention : une ordonnance enjoignant au centre de santé mentale de lui permettre de bénéficier d'une psychothérapie et une autre interdisant à l'établissement de le loger près d'un chantier de construction.

Arrêt : Le pourvoi est rejeté.

Lors de la promulgation de la *Charte*, son interaction avec les tribunaux administratifs restait à déterminer. Il s'est toutefois écoulé peu de temps avant que la Cour ne soit appelée à se prononcer sur divers aspects de cette interaction. La première vague jurisprudentielle s'est amorcée en 1986 avec l'arrêt *Mills c. La Reine*, [1986] 1 R.C.S. 863. Cet arrêt et ceux rendus dans sa foulée ont établi qu'une cour de justice ou un tribunal administratif était un « tribunal compétent » au sens du par. 24(1) de la *Charte* s'il avait compétence à l'égard des parties, de l'objet du litige et de la réparation demandée. L'arrêt *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038, a marqué le début de la deuxième vague en 1989. Dans cet arrêt et ceux qui l'ont suivi, la Cour a conclu que le pouvoir discrétionnaire devait être exercé dans le respect de la *Charte* et des valeurs qui la sous-tendent. La troisième et dernière vague a vu le jour en 1990 avec l'arrêt *Douglas/Kwantlen Faculty Assn. c. Douglas College*, [1990] 3 R.C.S. 570, suivi en 1991 de *Cuddy Chicks Ltd. c. Ontario (Commission des relations de travail)*, [1991] 2 R.C.S. 5, et de *Tétreault-Gadoury c. Canada (Commission de l'emploi et de l'immigration)*, [1991] 2 R.C.S. 22. Les arrêts inspirés de cette trilogie portant sur l'application du par. 52(1) de la *Loi constitutionnelle de 1982* ont établi qu'un tribunal spécialisé jouissant à la fois de l'expertise et du pouvoir requis pour trancher des questions de droit était le mieux placé pour se prononcer sur la constitutionnalité des dispositions législatives le régissant.

Cette évolution de la jurisprudence au cours des 25 dernières années a affermi la relation directe entre la *Charte*, ses dispositions réparatrices et les tribunaux administratifs. Elle confirme qu'il n'y a pas une *Charte* pour les cours de justice et une autre pour les tribunaux administratifs et que, sauf rares exceptions, le tribunal administratif investi du pouvoir d'appliquer la loi a compétence pour appliquer la *Charte* aux questions

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exercise of their statutory functions. The evolution also confirms that expert tribunals should play a primary role in determining *Charter* issues that fall within their specialized jurisdiction and that in exercising their statutory functions, administrative tribunals must act consistently with the *Charter* and its values.

soulevées dans le cadre de l'exercice approprié de ses attributions légales. Elle confirme également que les tribunaux spécialisés doivent jouer un rôle de premier plan dans le règlement des questions liées à la *Charte* qui relèvent de leur compétence particulière et que les tribunaux administratifs doivent se conformer à la *Charte* et aux valeurs qui la sous-tendent dans l'exercice de leurs attributions légales.

Moreover, the jurisprudential evolution affirms the practical advantages and the constitutional basis for allowing Canadians to assert their *Charter* rights in the most accessible forum available, without the need for bifurcated proceedings between superior courts and administrative tribunals. Any scheme favouring bifurcation is, in fact, inconsistent with the well-established principle that an administrative tribunal is to decide all matters, including constitutional questions, whose essential factual character falls within the tribunal's specialized statutory jurisdiction.

Qui plus est, l'évolution jurisprudentielle confirme les avantages pratiques et le fondement constitutionnel de la solution qui consiste à permettre aux Canadiens de faire valoir les droits et les libertés que leur garantit la *Charte* devant le tribunal qui est le plus à leur portée sans qu'ils aient à fractionner leur recours et saisir à la fois une cour supérieure et un tribunal administratif. Tout régime qui favorise le fractionnement des recours est en fait incompatible avec le principe bien établi selon lequel un tribunal administratif se prononce sur toutes les questions, y compris celles de nature constitutionnelle, dont le caractère essentiellement factuel relève de la compétence spécialisée que lui confère la loi.

A merger of the three distinct constitutional streams flowing from this Court's administrative law jurisprudence calls for a new approach that consolidates this Court's gradual expansion of the scope of the *Charter* and its relationship with administrative tribunals. When a *Charter* remedy is sought from an administrative tribunal, the initial inquiry should be whether the tribunal can grant *Charter* remedies generally. The answer to this question flows from whether the administrative tribunal has the jurisdiction, explicit or implied, to decide questions of law. If it does, and unless the legislature has clearly demonstrated its intent to withdraw the *Charter* from the tribunal's authority, the tribunal will have the jurisdiction to grant *Charter* remedies in relation to *Charter* issues arising in the course of carrying out its statutory mandate. The tribunal is, in other words, a court of competent jurisdiction under s. 24(1) of the *Charter*. This approach has the benefit of attributing *Charter* jurisdiction to a tribunal as an institution, rather than requiring litigants to test, remedy by remedy, whether the tribunal is a court of competent jurisdiction.

La fusion des trois courants distincts sur la compétence constitutionnelle qui se dégagent de la jurisprudence de notre Cour en droit administratif appelle une nouvelle démarche qui tienne compte de cet élargissement progressif de la portée de la *Charte* par la Cour et de l'interaction de la *Charte* avec les tribunaux administratifs. Lorsque réparation est demandée à un tribunal administratif en application de la *Charte*, il convient de déterminer initialement si le tribunal peut accorder des réparations sur le fondement de la *Charte* en général. À cette fin, il faut se demander si le tribunal administratif a le pouvoir exprès ou tacite de trancher une question de droit. Si tel est le cas et que le législateur n'a pas clairement manifesté l'intention de soustraire l'application de la *Charte* à la compétence du tribunal, ce dernier a compétence pour accorder réparation sur le fondement de la *Charte* relativement à une question se rapportant à celle-ci soulevée dans le cadre de l'exécution de son mandat légal. En d'autres mots, il s'agit d'un tribunal compétent au sens du par. 24(1) de la *Charte*. Cette démarche présente l'avantage de reconnaître la compétence que confère la *Charte* au tribunal en tant qu'institution au lieu d'exiger que les parties fassent déterminer à chaque fois s'il est un tribunal compétent pour accorder une réparation donnée.

Once the initial inquiry has been resolved in favour of *Charter* jurisdiction, the remaining question is whether the tribunal can grant the particular remedy sought given its statutory scheme. Answering this question is necessarily an exercise in discerning legislative intent, namely, whether the remedy sought is the kind

Une fois tranchée la question préliminaire et reconnue la compétence fondée sur la *Charte*, il reste à déterminer si le tribunal peut accorder la réparation précise demandée eu égard au régime législatif qui le régit. Il est alors nécessaire de cerner l'intention du législateur, à savoir si la réparation demandée est de celles que

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of remedy that the legislature intended would fit within the statutory framework of the particular tribunal. Relevant considerations include the tribunal's statutory mandate and function.

le législateur a voulu que le tribunal en cause puisse accorder eu égard au cadre législatif établi. Les considérations pertinentes englobent le mandat légal du tribunal et sa fonction.

In this case, C seeks certain *Charter* remedies from the Board. The first inquiry, therefore, is whether the Board is a court of competent jurisdiction under s. 24(1). The answer to this question depends on whether the Board is authorized to decide questions of law. The Board is a quasi-judicial body with significant authority over a vulnerable population. It operates under Part XX.1 of the *Criminal Code* as a specialized statutory tribunal with ongoing supervisory jurisdiction over the treatment, assessment, detention and discharge of NCR patients: accused who have been found not criminally responsible by reason of mental disorder. Part XX.1 of the *Criminal Code* provides that any party to a review board hearing may appeal the board's disposition on a question of law, fact or mixed fact and law. The *Code* also authorizes appellate courts to overturn a review board's disposition if it was based on a wrong decision on a question of law. This statutory language is indicative of the Board's authority to decide questions of law. Given this conclusion, and since Parliament has not excluded the *Charter* from the Board's mandate, it follows that the Board is a court of competent jurisdiction for the purpose of granting remedies under s. 24(1) of the *Charter*.

Dans la présente affaire, C demande à la Commission de lui accorder certaines réparations sur le fondement de la *Charte*. La première question qui se pose est donc celle de savoir si la Commission est un tribunal compétent au sens du par. 24(1), ce qui dépend de son pouvoir de trancher des questions de droit. La Commission est un organisme quasi judiciaire exerçant un grand pouvoir sur des gens vulnérables. Régie par la partie XX.1 du *Code criminel*, elle constitue un tribunal spécialisé d'origine législative possédant un pouvoir de surveillance continu à l'égard du traitement, de l'évaluation, de la détention et de la libération des patients non responsables criminellement : des accusés qui ont été déclarés non responsables criminellement pour cause de troubles mentaux. La partie XX.1 du *Code criminel* dispose que toute partie à une audience d'une commission d'examen peut interjeter appel de la décision rendue par celle-ci en invoquant un motif de droit, de fait ou mixte de droit et de fait. De plus, le *Code criminel* prévoit que la cour d'appel peut infirmer la décision lorsqu'il s'agit d'une erreur de droit. Le libellé employé par le législateur permet de conclure que la Commission a le pouvoir de trancher des questions de droit. Partant, et comme le législateur n'a pas soustrait l'application de la *Charte* à sa compétence, la Commission est un tribunal compétent aux fins d'accorder réparation sur le fondement du par. 24(1) de la *Charte*.

The next question is whether the remedies sought are the kinds of remedies which would fit within the Board's statutory scheme. This requires consideration of the scope and nature of the Board's statutory mandate and functions. The review board regime is intended to reconcile the "twin goals" of protecting the public from dangerous offenders and treating NCR patients fairly and appropriately. Based on the Board's duty to protect public safety, its statutory authority to grant absolute discharges only to non-dangerous NCR patients, and its mandate to assess and treat NCR patients with a view to reintegration rather than recidivism, it is clear that Parliament intended that dangerous NCR patients have no access to absolute discharges. C cannot, therefore, obtain an absolute discharge from the Board. The same is true of C's request for a treatment order. Allowing the Board to prescribe or impose treatment is expressly prohibited by s. 672.55 of the *Criminal Code*. Finally, neither the validity of C's complaint about the location of his room nor, obviously, the propriety of his request for an order prohibiting the mental health centre from housing him near a construction site, have been considered

La question qui se pose ensuite est celle de savoir si les réparations demandées sont conciliables avec le régime législatif de la Commission, ce qui exige d'examiner l'étendue et la nature du mandat et des attributions de celle-ci. Le système des commissions d'examen vise à concilier le « double objectif » de protéger le public face aux délinquants dangereux et de traiter de façon juste et appropriée les patients non responsables criminellement. Étant donné l'obligation de la Commission de protéger le public, son pouvoir légal d'accorder la libération inconditionnelle à ces patients seulement s'ils ne sont pas dangereux et son mandat consistant à évaluer et à traiter ces patients dans la perspective d'une réinsertion, et non d'une récidive, le législateur a clairement voulu empêcher qu'un patient non responsable criminellement, mais dangereux, bénéficie d'une libération inconditionnelle. La Commission ne peut donc pas accorder à C une libération inconditionnelle. Elle ne peut non plus ordonner qu'on lui prodigue un traitement particulier. Permettre à la Commission de prescrire ou d'imposer un traitement est expressément interdit à l'art. 672.55 du *Code criminel*. Enfin,

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by the Board. It may well be that the substance of C's complaint can be fully addressed within the Board's statutory mandate and the exercise of its discretion in accordance with *Charter* values. If so, resort to s. 24(1) of the *Charter* may not add to the Board's capacity to either address the substance of C's complaint or provide appropriate redress.

la Commission ne s'est pas prononcée sur la validité de la plainte de C concernant l'emplacement de sa chambre ni, manifestement, sur le bien-fondé de la demande d'ordonnance interdisant au centre de santé mentale de le loger à proximité d'un chantier de construction. Il se peut fort bien qu'il ressortisse au mandat légal de la Commission et à son pouvoir discrétionnaire exercé dans le respect des valeurs de la *Charte* de statuer au fond sur la plainte de C. Si tel est le cas, le recours au par. 24(1) de la *Charte* ne peut accroître le pouvoir de la Commission de statuer au fond sur la plainte de C ou d'accorder la réparation qui convient.

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

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

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

[76] In the case of *Okwuobi*, the issue was the jurisdiction of the Administrative Tribunal of Québec to hear rights claims for minority language education under the *Charter of the French language*, R.S.Q., c. C-11, and the *Canadian Charter*. Based on *Martin* and *Paul*, the Court concluded:

> As will become clear, the fact that the ATQ is vested with the ability to decide questions of law is crucial, and is determinative of its jurisdiction to apply the *Canadian Charter* in this appeal. The quasi-judicial structure of the ATQ, discussed briefly above, may be indicative of

[73] L'arrêt *Martin* a été rendu de pair avec l'arrêt *Paul c. Colombie-Britannique (Forest Appeals Commission)*, dans lequel M. Paul avait été accusé d'avoir contrevenu à l'art. 96 du *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, ch. 159, qui interdisait généralement l'abattage d'arbres sur les terres de la Couronne. M. Paul avait reconnu avoir coupé des arbres visés par l'interdiction, mais prétendu en avoir le droit en tant qu'Autochtone, invoquant l'art. 35 de la *Loi constitutionnelle de 1982*. Il s'agissait de déterminer si la Forest Appeals Commission de la province avait le pouvoir de considérer sa prétention constitutionnelle.

[74] Au nom de la Cour, le juge Bastarache applique la méthode établie dans l'arrêt *Martin* pour déterminer si la commission avait le pouvoir d'examiner et d'appliquer l'art. 35 de la *Loi constitutionnelle de 1982*. Il s'agissait donc de savoir si la loi habilitante de la commission lui accordait expressément ou implicitement le pouvoir d'interpréter le droit ou de trancher des questions s'y rapportant.

[75] Le *Forest Practices Code* prévoyait qu'une partie à une instance devant la commission pouvait présenter des observations concernant les faits, le droit et la compétence, de même qu'interjeter appel d'une décision de la commission sur une question de droit ou de compétence. On ne pouvait donc conclure que le mandat de la commission se limitait à l'examen de simples questions de fait, de sorte que notre Cour a statué que la Forest Appeals Commission avait le pouvoir de se prononcer sur des questions de droit, dont celle de l'application de l'art. 35 de la *Loi constitutionnelle de 1982*.

[76] Dans l'affaire *Okwuobi*, le litige portait sur la compétence du Tribunal administratif du Québec de statuer sur une demande d'enseignement dans la langue de la minorité sous le régime de la *Charte de la langue française*, L.R.Q., ch. C-11, et celui de la *Charte canadienne*. S'appuyant sur les arrêts *Martin* et *Paul*, notre Cour conclut :

> Comme on le constatera facilement, l'attribution au TAQ du pouvoir de trancher des questions de droit est cruciale pour définir sa compétence à l'égard de l'application de la *Charte canadienne* en l'espèce. Bien qu'elle ne joue pas un rôle déterminant pour apprécier

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a legislative intention that constitutional questions be considered and decided by the ATQ, but the structure of the ATQ is not determinative. This is evidenced by the recent decisions of this Court in *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54, and *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55. [para. 28]

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

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

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

The Merger

[78] The jurisprudential evolution leads to the following two observations: first, that administrative tribunals with the power to decide questions of law, and from whom constitutional jurisdiction has not been clearly withdrawn, have the authority to resolve constitutional questions that are linked to matters properly before them. And secondly,

l'étendue de la compétence de cet organisme, la structure quasi judiciaire du TAQ, déjà abordée brièvement, peut témoigner de la volonté du législateur de conférer au TAQ le pouvoir d'examiner et de trancher les questions constitutionnelles. Cette conclusion se dégage de l'examen des arrêts récents de notre Cour *Nouvelle-Écosse (Workers' Compensation Board) c. Martin*, [2003] 2 R.C.S. 504, 2003 CSC 54, et dans *Paul c. Colombie-Britannique (Forest Appeals Commission)*, [2003] 2 R.C.S. 585, 2003 CSC 55. [par. 28]

Dans l'arrêt *Okwuobi*, notre Cour arrive à la conclusion que le Tribunal administratif du Québec avait le pouvoir de trancher des questions de droit. Par conséquent, la compétence constitutionnelle était présumée, et cette présomption n'était pas réfutée.

[77] Ces arrêts confirment que le tribunal administratif investi du pouvoir de trancher des questions de droit et dont la compétence pour appliquer la *Charte* n'est pas clairement écartée a le pouvoir — et le devoir — correspondant d'examiner et d'appliquer la Constitution, y compris la *Charte*, pour se prononcer sur ces questions de nature juridique. Comme le fait observer la juge McLachlin dans l'arrêt *Cooper* :

> [T]out tribunal qui est appelé à trancher des questions de droit dispose des pouvoirs afférents à cette tâche. Le fait que la question de droit porte sur les effets de la *Charte* ne change rien. La *Charte* n'est pas un texte sacré que seuls les initiés des cours supérieures peuvent aborder. C'est un document qui appartient aux citoyens, et les lois ayant des effets sur les citoyens ainsi que les législateurs qui les adoptent doivent s'y conformer. Les tribunaux administratifs et les commissions qui ont pour tâche de trancher des questions juridiques ne sont pas soustraits à cette règle. Ces organismes déterminent les droits de beaucoup plus de justiciables que les cours de justice. Pour que les citoyens ordinaires voient un sens à la *Charte*, il faut donc que les tribunaux administratifs en tiennent compte dans leurs décisions. [par. 70]

La fusion

[78] L'évolution de la jurisprudence appelle les deux observations suivantes. D'abord, un tribunal administratif possédant le pouvoir de trancher des questions de droit et dont la compétence constitutionnelle n'est pas clairement écartée peut résoudre une question constitutionnelle se rapportant à une affaire dont il est régulièrement saisi. En second

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they must act consistently with the *Charter* and its values when exercising their statutory functions. It strikes me as somewhat unhelpful, therefore, to subject every such tribunal from which a *Charter* remedy is sought to an inquiry asking whether it is "competent" to grant a particular remedy within the meaning of s. 24(1).

lieu, il doit agir conformément à la *Charte* et aux valeurs qui la sous-tendent en s'acquittant de ses fonctions légales. Il m'apparaît donc quelque peu inutile de soumettre tout tribunal de ce type auquel réparation est demandée sur le fondement de la *Charte* à un examen visant à déterminer s'il est « compétent » au sens du par. 24(1) pour accorder la réparation sollicitée.

[79] Over two decades of jurisprudence has confirmed the practical advantages and constitutional basis for allowing Canadians to assert their *Charter* rights in the most accessible forum available, without the need for bifurcated proceedings between superior courts and administrative tribunals (*Douglas College*, at pp. 603-4; *Weber*, at para. 60; *Cooper*, at para. 70; *Martin*, at para. 29). The denial of early access to remedies is a denial of an appropriate and just remedy, as Lamer J. pointed out in *Mills*, at p. 891. And a scheme that favours bifurcating claims is inconsistent with the well-established principle that an administrative tribunal is to decide all matters, including constitutional questions, whose essential factual character falls within the tribunal's specialized statutory jurisdiction (*Weber*; *Regina Police Assn.*; *Quebec (Commission des droits de la personne et des droits de la jeunesse)*; *Quebec (Human Rights Tribunal)*; *Vaughan*; *Okwuobi*. See also *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 49.).

[79] Depuis plus de deux décennies, la jurisprudence confirme les avantages pratiques et le fondement constitutionnel de la solution qui consiste à permettre aux Canadiens de faire valoir les droits et les libertés que leur garantit la *Charte* devant le tribunal qui est le plus à leur portée sans qu'ils aient à fractionner leur recours et saisir à la fois une cour supérieure et un tribunal administratif (*Douglas College*, p. 603-604; *Weber*, par. 60; *Cooper*, par. 70; *Martin*, par. 29). Comme le signale le juge Lamer dans l'arrêt *Mills*, empêcher le demandeur d'obtenir rapidement réparation équivaut à lui refuser une réparation convenable et juste (p. 891). Et le régime qui favorise le fractionnement des recours est incompatible avec le principe bien établi selon lequel un tribunal administratif se prononce sur toutes les questions, y compris celles de nature constitutionnelle, dont le caractère essentiellement factuel relève de la compétence spécialisée que lui confère la loi (*Weber*; *Regina Police Assn.*; *Québec (Commission des droits de la personne et des droits de la jeunesse)*; *Québec (Tribunal des droits de la personne)*; *Vaughan*; *Okwuobi*. Voir également l'arrêt *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, par. 49.).

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

[80] Si, comme dans les affaires de la trilogie *Cuddy Chicks*, le tribunal spécialisé doté du pouvoir de se prononcer sur des questions de droit est le mieux placé pour trancher une question constitutionnelle lorsque réparation est sollicitée sur le fondement de l'art. 52 de la *Loi constitutionnelle de 1982*, rien ne s'oppose à ce qu'il soit également le mieux placé pour se pencher sur une question constitutionnelle lorsque réparation est demandée en application du par. 24(1) de la *Charte*. Dans l'arrêt *Weber*, la juge McLachlin dit que « [s]i un arbitre peut conclure qu'une loi porte atteinte à la *Charte*, il semble qu'il puisse déterminer si un

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TAB 11

2012 SCC 12 (CanLII)

Gilles Doré *Appellant*

v.

Pierre Bernard, in his capacity as Assistant Syndic of the Barreau du Québec, Tribunal des professions and Attorney General of Quebec *Respondents*

and

Federation of Law Societies of Canada, Canadian Civil Liberties Association and Young Bar Association of Montreal *Interveners*

Indexed as: Doré *v.* Barreau du Québec

2012 SCC 12

File No.: 33594.

2011: January 26; 2012: March 22.

Present: McLachlin C.J. and Binnie, LeBel, Fish, Abella, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Administrative law — Judicial review — Standard of review — Disciplinary council — Lawyer challenging constitutionality of council's decision — Proper approach to judicial review of discretionary administrative decisions engaging Charter protections — Whether framework developed in R. v. Oakes appropriate to determine if discretionary administrative decisions comply with Canadian Charter of Rights and Freedoms.

Law of professions — Discipline — Barristers and solicitors — Lawyer writing private letter to judge and criticizing him — Disciplinary council finding lawyer in breach of duty to behave with objectivity, moderation and dignity and reprimanding him — Whether council properly balanced relevant Charter values with statutory objectives — Whether decision reasonable — Code of ethics of advocates, R.R.Q. 1981, c. B-1, r. 1, art. 2.03.

Gilles Doré *Appelant*

c.

Pierre Bernard, ès qualités de syndic adjoint du Barreau du Québec, Tribunal des professions et procureur général du Québec *Intimés*

et

Fédération des ordres professionnels de juristes du Canada, Association canadienne des libertés civiles et Association du Jeune Barreau de Montréal *Intervenantes*

Répertorié : Doré *c.* Barreau du Québec

2012 CSC 12

N^{o} du greffe : 33594.

2011 : 26 janvier; 2012 : 22 mars.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Fish, Abella, Rothstein et Cromwell.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit administratif — Contrôle judiciaire — Norme de contrôle — Comité de discipline — Contestation par un avocat de la constitutionnalité de la décision du Comité — Approche correcte du contrôle judiciaire des décisions administratives de nature discrétionnaire mettant en cause les protections conférées par la Charte — Le cadre d'analyse élaboré dans R. c. Oakes convient-il pour apprécier la conformité à la Charte canadienne des droits et libertés de décisions administratives de nature discrétionnaire?

Droit des professions — Discipline — Avocats et procureurs — Lettre privée adressée par un avocat à un juge dans laquelle il critique ce dernier — Décision du Comité de discipline de réprimander l'avocat pour avoir manqué à son obligation de faire preuve d'objectivité, de modération et de dignité — Le Comité a-t-il correctement mis en balance les valeurs pertinentes consacrées par la Charte et les objectifs visés par la loi? — La décision était-elle raisonnable? — Code de déontologie des avocats, R.R.Q. 1981, ch. B-1, r. 1, art. 2.03.

D appeared before a judge of the Superior Court of Quebec on behalf of a client. In the course of D's argument, the judge criticized D. In his written reasons rejecting D's application, the judge levied further criticism, accusing D of using bombastic rhetoric and hyperbole, of engaging in idle quibbling, of being impudent and of doing nothing to help his client discharge his burden. D then wrote a private letter to the judge calling him loathsome, arrogant and fundamentally unjust, and accusing him of hiding behind his status like a coward, of having a chronic inability to master any social skills, of being pedantic, aggressive and petty, and of having a propensity to use his court to launch ugly, vulgar and mean personal attacks.

The Assistant Syndic of the Barreau du Québec filed a complaint against D based on that letter alleging that D had violated art. 2.03 of the *Code of ethics of advocates*, which states that the conduct of advocates "must bear the stamp of objectivity, moderation and dignity". The Disciplinary Council of the Barreau du Québec found that the letter was likely to offend, rude and insulting, that the statements had little expressive value, and that the judge's conduct, which resulted in a reprimand from the Canadian Judicial Council, could not be relied on as justification for it. The Council rejected D's argument that art. 2.03 violated s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*, finding that the limitation on freedom of expression was reasonable. Based on the seriousness of D's conduct, the Council reprimanded D and suspended his ability to practice law for 21 days. On appeal to the Tribunal des professions, D abandoned his constitutional challenge to the specific provision, arguing instead that the sanction itself violated his freedom of expression. The Tribunal found that D had exceeded the objectivity, moderation and dignity expected of him and that the decision to sanction D was a minimal restriction on his freedom of expression. On judicial review, the Superior Court of Quebec upheld the decision of the Tribunal.

Before the Quebec Court of Appeal, D no longer appealed the actual sanction of 21 days, challenging only the decision to reprimand him as a violation of the *Charter*. The Court of Appeal applied a full *Oakes* analysis under s. 1 of the *Charter* and upheld the

D a comparu devant un juge de la Cour supérieure du Québec pour le compte de son client. Au cours de la plaidoirie de D, le juge a formulé des critiques à l'égard de ce dernier. Dans les motifs écrits par lesquels il a rejeté la requête présentée par D, le juge a formulé d'autres critiques à l'égard de D, l'accusant de faire de la rhétorique ronflante et de l'hyperbole, de se perdre en arguties sans fondement, de faire preuve d'outrecuidance et de n'avoir rien fait pour assister son client à se décharger de son fardeau. D a adressé une lettre privée au juge, dans laquelle il le décrit comme un être exécrable, arrogant et foncièrement injuste et l'accuse de se cacher lâchement derrière son statut, d'être chroniquement incapable de maîtriser quelque aptitude sociale, d'adopter un comportement pédant, hargneux et mesquin et de démontrer une propension à se servir de sa tribune pour s'adonner à des attaques personnelles mesquines, repoussantes et vulgaires.

Le syndic adjoint du Barreau du Québec a formulé une plainte contre D fondée sur cette lettre. Selon la plainte, D avait contrevenu à l'art. 2.03 du *Code de déontologie des avocats*, qui énonce que la conduite de l'avocat « doit être empreinte d'objectivité, de modération et de dignité ». Le Comité de discipline du Barreau du Québec a conclu que la lettre de D était de nature à choquer et constituait des propos grossiers et injurieux, que les propos de l'avocat n'avaient que peu de valeur sur le plan expressif et que D ne pouvait invoquer la conduite du juge — qui avait écopé pour sa part d'une réprimande du Conseil canadien de la magistrature — pour justifier la lettre. Le Comité de discipline a rejeté l'argument de D selon lequel l'art. 2.03 violerait l'al. 2*b*) de la *Charte canadienne des droits et libertés*, concluant que la restriction à la liberté d'expression était raisonnable. Estimant que le manquement de D à son obligation était grave, le Comité de discipline a réprimandé ce dernier et a suspendu son droit de pratique durant 21 jours. Dans l'appel interjeté devant le Tribunal des professions, D a abandonné la contestation constitutionnelle de la disposition pertinente, faisant plutôt valoir que sa liberté d'expression était brimée par la réprimande elle-même. Le Tribunal était d'avis que D n'avait pas fait preuve de l'objectivité, de la modération et de la dignité qu'on attendait de lui et que la décision de lui infliger une sanction constituait une restriction minimale à la liberté d'expression de D. À l'issue d'une révision judiciaire, la Cour supérieure du Québec a maintenu la décision du Tribunal.

Devant la Cour d'appel du Québec, D appelait, non plus de la suspension de son droit de pratique durant 21 jours, mais de la décision de le réprimander, qu'il considérait comme une violation de la *Charte*. Au terme d'une analyse complète fondée sur l'article premier de

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reprimand. It found that D's letter had limited importance compared to the values underlying freedom of expression, that the Council's decision had a rational connection to the important objective of protecting the public and that the effects of the decision were proportionate to its objectives.

cette dernière et exécutée suivant le modèle énoncé dans l'arrêt *Oakes*, la Cour d'appel a confirmé la réprimande. Elle a conclu que la lettre de D revêtait une importance limitée par rapport aux valeurs sous-jacentes à la liberté d'expression, que la décision du Comité avait un lien rationnel avec l'important objectif que constitue la protection du public et que la décision avait des effets proportionnels aux objectifs qu'elle visait.

Held: The appeal from the result should be dismissed.

Arrêt : Le pourvoi quant à l'issue est rejeté.

To determine whether administrative decision-makers have exercised their statutory discretion in accordance with *Charter* protections, the review should be in accordance with an administrative law approach, not a s. 1 *Oakes* analysis. The standard of review is reasonableness.

Pour déterminer si les décideurs administratifs ont exercé le pouvoir discrétionnaire que leur confère la loi en s'assurant de protéger les droits visés par la *Charte*, il faut effectuer la révision selon la démarche ressortissant au droit administratif, et non selon l'analyse fondée sur l'article premier, élaborée dans *Oakes*. La norme de contrôle est celle du caractère raisonnable.

In assessing whether a law violates the *Charter*, we are balancing the government's pressing and substantial objectives against the extent to which they interfere with the *Charter* right at issue. If the law interferes with the right no more than is reasonably necessary to achieve the objectives, it will be found to be proportionate, and, therefore, a reasonable limit under s. 1. But in assessing whether an adjudicated decision violates the *Charter*, we are engaged in balancing somewhat different but related considerations, namely, has the decision-maker disproportionately, and therefore unreasonably, limited a *Charter* right. In both cases, we are looking for whether there is an appropriate balance between rights and objectives, and the purpose of both exercises is to ensure that the rights at issue are not unreasonably limited.

Lorsque nous cherchons à déterminer si une loi viole la *Charte*, nous mettons en balance les objectifs urgents et réels du gouvernement, d'une part, et le degré d'atteinte au droit en cause protégé par la *Charte*, d'autre part. Si la loi ne restreint pas plus le droit qu'il n'est raisonnablement nécessaire de le faire pour atteindre les objectifs visés, la violation sera jugée proportionnelle et, de ce fait, la restriction raisonnable au sens de l'article premier. Toutefois, lorsque nous nous demandons si une décision en matière contentieuse viole la *Charte*, nous sommes appelés à mettre en balance des considérations quelque peu différentes, bien que liées. En effet, il s'agit alors de déterminer si le décideur a restreint le droit protégé par la *Charte* de manière disproportionnée et donc déraisonnable. Dans les deux cas, nous cherchons à savoir si un juste équilibre a été atteint entre les droits et les objectifs et, dans les deux cas aussi, les exercices visent à garantir que les droits en cause ne sont pas restreints de manière déraisonnable.

There is nothing in the administrative law approach which is inherently inconsistent with the strong protection of the *Charter*'s guarantees and values. An administrative law approach recognizes that administrative decision-makers are both bound by fundamental values and empowered to adjudicate them, and that administrative discretion is exercised in light of constitutional guarantees and the values they reflect. An administrative decision-maker exercising a discretionary power under his or her home statute, has, by virtue of expertise and specialization, particular familiarity with the competing considerations at play in weighing *Charter* values and will generally be in the best position to consider the impact of the relevant *Charter* guarantee on the specific facts of the case. Under a robust conception

Rien dans l'approche du droit administratif n'est intrinsèquement incompatible avec la solide protection conférée par la *Charte* des garanties qui y sont énoncées et des valeurs qui y sont consacrées. L'approche du droit administratif reconnaît que les décideurs administratifs sont à la fois liés par des valeurs fondamentales et habilités à statuer sur elles et que le pouvoir discrétionnaire de nature administrative est exercé à l'aune des garanties constitutionnelles et des valeurs qu'elles comportent. Le décideur administratif exerçant un pouvoir discrétionnaire en vertu de sa loi constitutive est, de par son expertise et sa spécialisation, particulièrement au fait des considérations opposées en jeu dans la mise en balance des valeurs consacrées par la *Charte* et est généralement le mieux placé pour juger de

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of administrative law, discretion is exercised in light of constitutional guarantees and the values they reflect.

When applying *Charter* values in the exercise of statutory discretion, an administrative decision-maker must balance *Charter* values with the statutory objectives by asking how the *Charter* value at issue will best be protected in light of those objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives.

On judicial review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* rights and values at play. Though this judicial review is conducted within the administrative framework, there is nonetheless conceptual harmony between a reasonableness review and the *Oakes* framework, since both contemplate giving a "margin of appreciation", or deference, to administrative and legislative bodies in balancing *Charter* values against broader objectives. In the *Charter* context, the reasonableness analysis is one that centres on proportionality, that is, on ensuring that the decision interferes with the relevant *Charter* guarantee no more than is necessary given the statutory objectives. If the decision is disproportionately impairing of the guarantee, it is unreasonable. If, on the other hand, it reflects a proper balance of the mandate with *Charter* protection, it is a reasonable one. But both decision-makers and reviewing courts must remain conscious of the fundamental importance of *Charter* values in the analysis.

Here, the decision to suspend D for 21 days was not before the Court. The only issue was whether the Council's decision to reprimand D reflected a proportionate balancing of the lawyer's expressive rights with its statutory mandate to ensure that lawyers behave with "objectivity, moderation and dignity" in accordance with art. 2.03 of the *Code of ethics*. In dealing

l'incidence de la protection conférée par la *Charte* au regard des faits précis de l'affaire. Selon une conception plus riche du droit administratif, le pouvoir discrétionnaire est exercé à l'aune des garanties constitutionnelles et des valeurs qu'elles comportent.

En appliquant les valeurs de la *Charte* dans l'exercice de son pouvoir discrétionnaire conféré par la loi, le décideur administratif doit mettre en balance les valeurs consacrées par la *Charte* et les objectifs visés par la loi et se demander comment protéger au mieux la valeur en jeu compte tenu des objectifs en question. Cette réflexion constitue l'essence même de l'analyse de la proportionnalité et exige que le décideur mette en balance la gravité de l'atteinte à la valeur protégée par la *Charte*, d'une part, et les objectifs que vise la loi, d'autre part.

Dans le contexte d'une révision judiciaire, il s'agit donc de déterminer si — en évaluant l'incidence de la protection pertinente offerte par la *Charte* et compte tenu de la nature de la décision et des contextes légal et factuel — la décision est le fruit d'une mise en balance proportionnée des droits et des valeurs en cause protégés par la *Charte*. Même si cette révision judiciaire est menée selon le cadre d'analyse du droit administratif, il existe néanmoins une harmonie conceptuelle entre l'examen du caractère raisonnable et le cadre d'analyse préconisé dans *Oakes* puisque les deux démarches supposent de donner une marge d'appréciation aux organes administratifs ou législatifs ou de faire preuve de déférence à leur égard lors de la mise en balance des valeurs consacrées par la *Charte*, d'une part, et les objectifs plus larges, d'autre part. Dans le contexte de la *Charte*, l'analyse du caractère raisonnable porte avant tout sur la proportionnalité, soit, sur la nécessité d'assurer que la décision n'interfère avec la garantie visée par la *Charte* pas plus qu'il n'est nécessaire compte tenu des objectifs visés par la loi. Si la décision porte atteinte à la garantie de manière disproportionnée, elle est déraisonnable. Si, par contre, elle établit un juste équilibre entre le mandat et la protection conférée par la *Charte*, elle est raisonnable. Cela étant dit, tant les décideurs que les tribunaux qui procèdent à la révision de leurs décisions doivent analyser les questions qui leur sont soumises en gardant à l'esprit l'importance fondamentale des valeurs consacrées par la *Charte*.

La Cour n'était pas appelée en l'espèce à se prononcer sur la décision de suspendre le droit de pratique de D durant 21 jours. La seule question à trancher était celle de savoir si la décision du Comité de réprimander l'avocat a établi un juste équilibre, soit un équilibre proportionné, entre le droit de l'avocat à la libre expression et le mandat légal du Comité — qui consiste à garantir

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with the appropriate boundaries of civility for a lawyer, the severity of the conduct must be interpreted in light of the expressive rights guaranteed by the *Charter*, and, in particular, the public benefit in ensuring the right of lawyers to express themselves about the justice system in general and judges in particular. We are, in other words, balancing the fundamental importance of open, and even forceful, criticism of our public institutions with the need to ensure civility in the profession. Disciplinary bodies must therefore demonstrate that they have given due regard to the importance of the expressive rights at issue, both in light of an individual lawyer's right to expression and the public's interest in open discussion. As with all disciplinary decisions, this balancing is a fact-dependent and discretionary exercise.

Proper respect for these expressive rights may involve disciplinary bodies tolerating a degree of discordant criticism. The fact that a lawyer is criticizing a judge, a tenured and independent participant in the justice system, may raise, not lower, the threshold for limiting a lawyer's expressive rights under the *Charter*. This does not, however, argue for an unlimited right on the part of lawyers to breach the legitimate public expectation that they will behave with civility. Lawyers potentially face criticisms and pressures on a daily basis. They are expected by the public, on whose behalf they serve, to endure them with civility and dignity. This is not always easy where the lawyer feels he or she has been unfairly provoked, as in this case. But it is precisely when a lawyer's equilibrium is unduly tested that he or she is particularly called upon to behave with transcendent civility. On the other hand, lawyers should not be expected to behave like verbal eunuchs. They not only have a right to speak their minds freely, they arguably have a duty to do so. But they are constrained by their profession to do so with dignified restraint.

A reprimand for a lawyer does not automatically flow from criticizing a judge or the judicial system. Such criticism, even when it is expressed vigorously, can be constructive. However in the context of disciplinary hearings, such criticism will be measured against

que les avocats agissent avec « objectivité, [. . .] modération et [. . .] dignité », conformément à l'art. 2.03 du *Code de déontologie*. Lorsqu'il s'agit de déterminer quand le comportement d'un avocat passe les bornes de la civilité, il faut tenir compte du droit à la liberté d'expression garanti par la *Charte* et, plus particulièrement, des avantages que procure à l'ensemble de la population l'exercice par les avocats du droit de s'exprimer au sujet du système de justice en général et au sujet des juges en particulier. Autrement dit, les valeurs mises en balance sont, d'une part, l'importance fondamentale d'une critique ouverte et même vigoureuse de nos institutions publiques et, d'autre part, la nécessité d'assurer la civilité dans l'exercice de la profession juridique. Les organes disciplinaires doivent donc démontrer qu'ils ont dûment tenu compte de l'importance du droit à la liberté d'expression en cause, tant dans la perspective du droit d'expression individuel des avocats que dans celle de l'intérêt public à l'ouverture des débats. Comme pour toutes les décisions disciplinaires, cette mise en balance dépend des faits et suppose l'exercice d'un pouvoir discrétionnaire.

Il peut découler du respect qui est dû à ce droit à la liberté d'expression que des organismes disciplinaires tolèrent certaines critiques acérées. Le fait qu'un avocat critique un juge, un acteur indépendant et nommé à titre inamovible du système de justice, pourrait hausser, et non abaisser, le seuil au-delà duquel il convient de limiter l'exercice par un avocat du droit à la liberté d'expression que lui garantit la *Charte*. Cela étant dit, il ne faut surtout pas voir là d'argument pour un droit illimité des avocats de faire fi de la civilité que la société est en droit d'attendre d'eux. Les avocats sont susceptibles d'être critiqués et de subir des pressions quotidiennement. Le public, au nom de qui ils exercent, s'attend à ce que ces officiers de justice encaissent les coups avec civilité et dignité. Ce n'est pas toujours facile lorsque l'avocat a le sentiment qu'il a été injustement provoqué comme en l'espèce. Il n'en demeure pas moins que c'est précisément dans les situations où le sang-froid de l'avocat est indûment testé qu'il est tout particulièrement appelé à adopter un comportement d'une civilité transcendante. Cela étant dit, on ne peut s'attendre à ce que les avocats se comportent comme des eunuques de la parole. Ils ont non seulement le droit d'exprimer leurs opinions librement, mais possiblement le devoir de le faire. Ils sont toutefois tenus par leur profession de s'exécuter avec une retenue pleine de dignité.

Un avocat qui critique un juge ou le système judiciaire n'est pas automatiquement passible d'une réprimande. Une telle critique, même exprimée vigoureusement, peut être constructive. Cependant, dans le contexte d'audiences disciplinaires, une telle critique

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the public's reasonable expectations of a lawyer's professionalism. As the Disciplinary Council found, D's letter was outside those expectations. His displeasure with the judge was justifiable, but the extent of the response was not.

In light of the excessive degree of vituperation in the letter's context and tone, the Council's decision that D's letter warranted a reprimand represented a proportional balancing of D's expressive rights with the statutory objective of ensuring that lawyers behave with "objectivity, moderation and dignity". The decision is, as a result, a reasonable one.

Cases Cited

Discussed: *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256; *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86, [2002] 4 S.C.R. 710; *Pinet v. St. Thomas Psychiatric Hospital*, 2004 SCC 21, [2004] 1 S.C.R. 528; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765; *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120; *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442; *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772; *Ahani v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 2, [2002] 1 S.C.R. 72; *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44; *Németh v. Canada (Justice)*, 2010 SCC 56, [2010] 3 S.C.R. 281; **referred to:** *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5; *R. v. Lanthier*, 2001 CanLII 9351; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567; *Suresh v. Canada (Minister of Citizenship and Immigration)*,

sera évaluée à la lumière des attentes raisonnables du public quant au professionnalisme dont un avocat doit faire preuve. Comme l'a conclu le Comité de discipline, la lettre de D ne satisfait pas à ces attentes. Son mécontentement à l'égard du juge était légitime, mais la teneur de sa réponse ne l'était pas.

À la lumière du degré excessif de vitupération dans le contenu de la lettre et de son ton, la conclusion du Comité selon lequel la lettre de D justifiait qu'il soit réprimandé repose sur un juste équilibre, soit un équilibre proportionné, entre le droit de D à la libre expression et l'objectif de la loi qui consiste à garantir que les avocats agissent avec « objectivité, modération et dignité ». Par conséquent, cette décision est raisonnable.

Jurisprudence

Arrêts analysés : *Multani c. Commission scolaire Marguerite-Bourgeoys*, 2006 CSC 6, [2006] 1 R.C.S. 256; *Chamberlain c. Surrey School District No. 36*, 2002 CSC 86, [2002] 4 R.C.S. 710; *Pinet c. St. Thomas Psychiatric Hospital*, 2004 CSC 21, [2004] 1 R.C.S. 528; *Ontario (Sûreté et Sécurité publique) c. Criminal Lawyers' Association*, 2010 CSC 23, [2010] 1 R.C.S. 815; *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038; *R. c. Oakes*, [1986] 1 R.C.S. 103; *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817; *Syndicat canadien de la Fonction publique, section locale 963 c. Société des alcools du Nouveau-Brunswick*, [1979] 2 R.C.S. 227; *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190; *R. c. Conway*, 2010 CSC 22, [2010] 1 R.C.S. 765; *Stoffman c. Vancouver General Hospital*, [1990] 3 R.C.S. 483; *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835; *Ross c. Conseil scolaire du district nº 15 du Nouveau-Brunswick*, [1996] 1 R.C.S. 825; *Eldridge c. Colombie-Britannique (Procureur général)*, [1997] 3 R.C.S. 624; *Little Sisters Book and Art Emporium c. Canada (Ministre de la Justice)*, 2000 CSC 69, [2000] 2 R.C.S. 1120; *États-Unis c. Burns*, 2001 CSC 7, [2001] 1 R.C.S. 283; *R. c. Mentuck*, 2001 CSC 76, [2001] 3 R.C.S. 442; *Université Trinity Western c. British Columbia College of Teachers*, 2001 CSC 31, [2001] 1 R.C.S. 772; *Ahani c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2002 CSC 2, [2002] 1 R.C.S. 72; *Lake c. Canada (Ministre de la Justice)*, 2008 CSC 23, [2008] 1 R.C.S. 761; *Canada (Premier ministre) c. Khadr*, 2010 CSC 3, [2010] 1 R.C.S. 44; *Németh c. Canada (Justice)*, 2010 CSC 56, [2010] 3 R.C.S. 281; **arrêts mentionnés :** *Catalyst Paper Corp. c. North Cowichan (District)*, 2012 CSC 2, [2012] 1 R.C.S. 5; *R. c. Lanthier*, 2001 CanLII 9351; *Alberta c. Hutterian Brethren of Wilson Colony*, 2009 CSC 37,

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dignity expected of him. Though it noted that the sanction imposed by the Disciplinary Council "seems harsh" (para. 135), the Tribunal held that it was not unreasonable, given the gravity of Mr. Doré's conduct and his lack of remorse.

[20] On judicial review, the Superior Court of Quebec upheld the decision of the Tribunal, including its view that the letter did not constitute a private act, and found the Tribunal's reasoning to be [TRANSLATION] "unassailable" (2008 QCCS 2450 (CanLII), at paras. 105, 109, 139 and 147). It concluded that by finding the decision to be a minimal restriction on Mr. Doré's freedom of expression, the Tribunal had "implicitly" held that the restriction was "justified in a free and democratic society" (para. 104).

[21] The Quebec Court of Appeal held that given the status and role of the parties, Mr. Doré could not reasonably have expected his letter to remain confidential or private. It acknowledged that the Disciplinary Council's decision was a breach of s. 2(*b*), but, applying a full s. 1 analysis, it found that Mr. Doré's letter had [TRANSLATION] "limited importance . . . compared to the values underlying freedom of expression, which are the pursuit of truth, participation in the community, individual self-fulfillment, and human flourishing" (para. 36). The court held that protecting the public was an important objective, and that the Disciplinary Council's decision had a rational connection with that objective, especially given the importance of a judge's position in the judicial system. On minimal impairment, assessing both the decision and the sanction, the Court of Appeal held that while the sanction was significant, it was targeted at the manner in which Mr. Doré criticized Justice Boilard, and did not prohibit the expression itself:

[TRANSLATION] The impugned decision appears to be measured and, in the present case, is a correct

privé de la lettre, estimant que Me Doré n'avait pas cessé « d'être officier de justice et avocat » (par. 77) et qu'il n'avait pas fait preuve de l'objectivité, de la modération et de la dignité qu'on attendait de lui. Même s'il a jugé que la sanction infligée par le Comité de discipline était « sévère » (par. 135), le Tribunal a conclu qu'elle n'était pas déraisonnable compte tenu de la gravité de la conduite de Me Doré et de son absence de repentir.

[20] À l'issue d'une révision judiciaire, la Cour supérieure du Québec a maintenu la décision du Tribunal, a notamment souscrit à l'opinion de ce dernier que la lettre ne constituait pas un acte privé et a conclu que le raisonnement du Tribunal était « sans reproche » (2008 QCCS 2450 (CanLII), par. 105, 109, 139 et 147). La Cour supérieure a jugé, en outre, qu'en concluant à l'existence d'une restriction minimale à la liberté d'expression de Me Doré, le Tribunal avait « implicitement » statué que la restriction était « justifiée dans une société libre et démocratique » (par. 104).

[21] La Cour d'appel du Québec a jugé qu'en raison du statut et de la fonction des parties, Me Doré ne pouvait raisonnablement s'attendre à ce que sa lettre demeure confidentielle ou privée. La Cour d'appel a toutefois reconnu que la décision du Comité de discipline contrevenait à l'al. 2*b*) mais, au terme d'une analyse complète fondée sur l'article premier, a conclu que la lettre de Me Doré revêtait une « importance limitée [. . .] par rapport aux valeurs sous-jacentes à la liberté d'expression, soit la recherche de la vérité, la participation à la prise de décision d'intérêt social et politique, la diversité des formes d'enrichissement et d'épanouissement » (par. 36). Soulignant l'importance de l'objectif de protection du public, la Cour d'appel a considéré que la décision du Comité de discipline avait un lien rationnel avec cet objectif en raison, notamment, de la position importante du juge dans le système judiciaire. Concernant l'atteinte minimale, après examen de la décision et de la sanction, la Cour d'appel a statué que, bien que cette dernière fût sévère, elle visait la manière dont Me Doré avait critiqué le juge Boilard, sans en interdire l'expression elle-même :

La décision attaquée me semble mesurée et constitue, en l'espèce, une application correcte de l'article 2.03

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application of section 2.03 of the *Code of ethics*. The sanction is significant (suspension of the right to practice for twenty-one days). It also involves the stigma attached to disciplinary guilt. It is not, however, unreasonable. In my view, it is a measured sanction of a lawyer who has been found guilty of a serious ethical offence. [para. 47]

It concluded by finding that the effects of the decision were proportionate to its objectives.

Analysis

[22] Mr. Doré's argument rests on his assertion that the finding of a breach of the *Code of ethics* violates the expressive rights protected by s. 2(*b*) of the *Charter*. Because the 21-day suspension had already been served when he was before the Court of Appeal, he did not appeal the penalty. The reasonableness of its length, therefore, is not before us.

[23] It is clear from the decisions of the Tribunal and the reviewing courts in this case that there is some confusion about the appropriate framework to be applied in reviewing administrative decisions for compliance with *Charter* values. Some courts have used the same s. 1 *Oakes* analysis used for determining whether a law complies with the *Charter*; others have used a classic judicial review approach.

[24] It goes without saying that administrative decision-makers must act consistently with the values underlying the grant of discretion, including *Charter* values (see *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86, [2002] 4 S.C.R. 710, at para. 71; *Pinet v. St. Thomas Psychiatric Hospital*, 2004 SCC 21, [2004] 1 S.C.R. 528, at paras. 19-23; and *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815, at paras. 62-75). The question then is what framework should be used to scrutinize how those values were applied?

[25] In *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, Lamer J., in his concurring

d[u] *Code de déontologie*. La sanction est importante (suspension du droit de pratique durant 21 jours). Elle comporte également le stigmate attaché à la culpabilité disciplinaire. Elle n'est toutefois pas déraisonnable. Elle m'apparaît empreinte de retenue à l'égard d'un avocat qui a commis une faute déontologique grave. [par. 47]

La Cour d'appel a conclu que la décision avait des effets proportionnels aux objectifs qu'elle visait.

Analyse

[22] Me Doré fonde sa thèse sur sa prétention que le fait de conclure à une violation du *Code de déontologie* enfreint la liberté d'expression protégée par l'al. 2*b*) de la *Charte*. Puisque la radiation avait déjà pris fin lorsqu'il a été entendu par la Cour d'appel, Me Doré n'a pas interjeté appel de la sanction. Nous n'avons donc pas à nous prononcer sur le caractère raisonnable de sa durée.

[23] Il ressort clairement des décisions du Tribunal et des cours qui ont procédé à la révision judiciaire en l'espèce qu'une certaine confusion entoure la question du cadre d'analyse applicable pour examiner la conformité des décisions administratives aux valeurs consacrées par la *Charte*. Certaines cours de justice ont eu recours au cadre d'analyse fondé sur l'article premier élaboré dans *Oakes*, qui sert à juger de la conformité des lois à la *Charte*, tandis que d'autres ont appliqué l'approche classique de la révision judiciaire.

[24] Il va sans dire que les décideurs administratifs doivent agir de manière compatible avec les valeurs sous-jacentes à l'octroi d'un pouvoir discrétionnaire, y compris les valeurs consacrées par la *Charte* (voir *Chamberlain c. Surrey School District No. 36*, 2002 CSC 86, [2002] 4 R.C.S. 710, par. 71; *Pinet c. St. Thomas Psychiatric Hospital*, 2004 CSC 21, [2004] 1 R.C.S. 528, par. 19-23; et *Ontario (Sûreté et Sécurité publique) c. Criminal Lawyers' Association*, 2010 CSC 23, [2010] 1 R.C.S. 815, par. 62-75). La question est donc celle de savoir quel cadre d'analyse il faut utiliser pour examiner l'application de ces valeurs.

[25] Dans l'arrêt *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038, le juge Lamer a

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reasons, said that the *Charter* applied to a labour adjudicator's decision and used the s. 1 framework developed in *R. v. Oakes*, [1986] 1 S.C.R. 103, to determine if the decision complied with the *Charter*. Writing for the majority, Dickson C.J. agreed with Lamer J. that the *Charter* applied to administrative decision-making. But while he applied the *Oakes* framework, he notably and presciently observed that "[t]he precise relationship between the traditional standard of administrative law review of patent unreasonableness and the new constitutional standard of review will be worked out in future cases" (p. 1049 (emphasis added)).

[26] Yet the approach taken in *Slaight* can only be properly understood in its context. Importantly, when Lamer J. held that discretionary administrative decisions implicating *Charter* values should be reviewed under the *Oakes* analysis, he did so in the context of the perceived inability of administrative law to deal with *Charter* infringements in the exercise of discretion. This concern permeates the reasons in *Slaight*. As Prof. Geneviève Cartier has noted:

> . . . while Lamer J thought the administrative law standard was ill-suited to *Charter* challenges because of its inability to inquire into the substance of discretionary decisions, Dickson CJ thought it was ill-suited because of its inability to properly unravel the value inquiries involved in any *Charter* litigation.

("The *Baker* Effect: A New Interface Between the *Canadian Charter of Rights and Freedoms* and Administrative Law — The Case of Discretion", in David Dyzenhaus, ed., *The Unity of Public Law* (2004), 61, at p. 68)

[27] The approach taken in *Slaight* attracted academic concern from administrative law scholars.

affirmé, dans des motifs concordants, que la décision rendue par un arbitre du travail était assujettie à la *Charte*. Il s'est, en outre, servi du cadre d'analyse fondé sur l'article premier élaboré dans *Oakes* pour apprécier la conformité à la *Charte* de la sentence arbitrale en cause dans cette affaire. Au nom des juges majoritaires de la Cour, le juge en chef Dickson a jugé, comme le juge Lamer, que les décisions administratives étaient assujetties à la *Charte*. Cela étant dit, tout en recourant au cadre d'analyse établi dans *Oakes*, il a notamment souligné, faisant en cela preuve de prescience, que « [l]e rapport précis entre la norme traditionnelle de contrôle, en droit administratif, du caractère déraisonnable manifeste et la nouvelle norme constitutionnelle de contrôle va se dégager de la jurisprudence à venir » (p. 1049 (je souligne)).

[26] Or, l'approche adoptée dans *Slaight* ne peut être correctement interprétée que dans son contexte. Fait important, c'est devant ce qui semblait être l'incapacité du droit administratif de traiter des violations de la *Charte* dans l'exercice d'un pouvoir discrétionnaire que le juge Lamer a jugé que les décisions administratives de nature discrétionnaire, mettant en cause les valeurs consacrées par la *Charte*, devraient être révisées en appliquant le cadre d'analyse élaboré dans *Oakes*. Cette conclusion imprègne l'ensemble des motifs formulés dans *Slaight*. Comme la professeure Geneviève Cartier l'a souligné :

> [TRADUCTION] . . . bien que, selon le juge Lamer, la norme de droit administratif ne soit pas adaptée aux contestations fondées sur la *Charte*, parce qu'elle ne permet pas d'examiner à fond les décisions de nature discrétionnaire, le juge en chef Dickson a estimé qu'elle n'est pas adaptée parce qu'elle ne permet pas de décortiquer adéquatement l'examen des valeurs que comportent les litiges intéressant la *Charte*.

(« The *Baker* Effect : A New Interface Between the *Canadian Charter of Rights and Freedoms* and Administrative Law — The Case of Discretion », dans David Dyzenhaus, dir., *The Unity of Public Law* (2004), 61, p. 68)

[27] L'approche adoptée dans l'arrêt *Slaight* a suscité des préoccupations chez les universitaires

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v. Burns, 2001 SCC 7, [2001] 1 S.C.R. 283; and *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442.

[1997] 3 R.C.S. 624, *Little Sisters Book and Art Emporium c. Canada (Ministre de la Justice)*, 2000 CSC 69, [2000] 2 R.C.S. 1120, *États-Unis c. Burns*, 2001 CSC 7, [2001] 1 R.C.S. 283 et *R. c. Mentuck*, 2001 CSC 76, [2001] 3 R.C.S. 442.

[32] Other cases, and particularly recently, have instead applied an administrative law/judicial review analysis in assessing whether the decision-maker took sufficient account of *Charter* values. This approach is seen in *Baker*; *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772; *Chamberlain*; *Ahani v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 2, [2002] 1 S.C.R. 72; *Pinet*; *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44; *Criminal Lawyers' Association*; and *Németh v. Canada (Justice)*, 2010 SCC 56, [2010] 3 S.C.R. 281.

[32] Dans d'autres affaires, plus particulièrement des affaires récentes, c'est plutôt l'analyse droit administratif/révision judiciaire qui a été effectuée pour déterminer si le décideur a pris suffisamment compte des valeurs consacrées par la *Charte*. C'est cette approche qui a été privilégiée dans *Baker*, *Université Trinity Western c. British Columbia College of Teachers*, 2001 CSC 31, [2001] 1 R.C.S. 772, *Chamberlain*; *Ahani c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2002 CSC 2, [2002] 1 R.C.S. 72, *Pinet*; *Lake c. Canada (Ministre de la Justice)*, 2008 CSC 23, [2008] 1 R.C.S. 761, *Canada (Premier ministre) c. Khadr*, 2010 CSC 3, [2010] 1 R.C.S. 44, *Criminal Lawyers' Association*, et *Németh c. Canada (Justice)*, 2010 CSC 56, [2010] 3 R.C.S. 281.

[33] The last decision of this Court to use the full s. 1 *Oakes* approach to determine whether the exercise of statutory discretion complied with the *Charter* was *Multani*. The academic commentary that followed was consistently critical. In brief, it generally argued that the use of a strict s. 1 analysis reduced administrative law to having a formal role in controlling the exercise of discretion (see Gratton and Sossin, at p. 157; David Mullan, "Administrative Tribunals and Judicial Review of *Charter* Issues after *Multani*" (2006), 21 *N.J.C.L.* 127; Stéphane Bernatchez, "Les rapports entre le droit administratif et les droits et libertés: la révision judiciaire ou le contrôle constitutionnel?" (2010), 55 *McGill L.J.* 641).

[33] C'est dans *Multani* que notre Cour a utilisé pour la dernière fois l'analyse intégrale fondée sur l'article premier élaborée dans *Oakes* pour juger de la conformité à la *Charte* de l'exercice d'un pouvoir discrétionnaire conféré par la loi. La doctrine qui a suivi a été uniformément critique. En somme, les auteurs, pour la plupart, ont fait valoir que le recours à une analyse fondée strictement sur l'art. 1 réduisait le droit administratif à un rôle formel dans le contexte de la révision de l'exercice du pouvoir discrétionnaire (voir Gratton et Sossin, p. 157; David Mullan, « Administrative Tribunals and Judicial Review of *Charter* Issues after *Multani* » (2006), 21 *R.N.D.C.* 127; Stéphane Bernatchez, « Les rapports entre le droit administratif et les droits et libertés : la révision judiciaire ou le contrôle constitutionnel? » (2010), 55 *R.D. McGill* 641).

[34] Since then, and largely as a result of the revised administrative law template found in *Dunsmuir*, this Court appears to have moved away from *Multani*, leading to the suggestion that it may have "decided to start from ground zero in building coherence in public law" (Gratton and Sossin,

[34] Depuis le prononcé de cet arrêt, et en grande partie à cause de la révision du modèle d'analyse des décisions administratives opérée par *Dunsmuir*, notre Cour semble s'être écartée de *Multani*, ce qui laisse croire qu'elle a peut-être [TRADUCTION] « décidé de faire table rase avant d'établir une

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at p. 161). Today, the Court has two options for reviewing discretionary administrative decisions that implicate *Charter* values. The first is to adopt the *Oakes* framework, developed for reviewing laws for compliance with the Constitution. This undoubtedly protects *Charter* rights, but it does so at the risk of undermining a more robust conception of administrative law. In the words of Prof. Evans, if administrative law is bypassed for the *Charter*, "a rich source of thought and experience about law and government will be overlooked" (p. 73).

[35] The alternative is for the Court to embrace a richer conception of administrative law, under which discretion is exercised "in light of constitutional guarantees and the values they reflect" (*Multani*, at para. 152, *per* LeBel J.). Under this approach, it is unnecessary to retreat to a s. 1 *Oakes* analysis in order to protect *Charter* values. Rather, administrative decisions are *always* required to consider fundamental values. The *Charter* simply acts as "a reminder that some values are clearly fundamental and . . . cannot be violated lightly" (Cartier, at p. 86). The administrative law approach also recognizes the legitimacy that this Court has given to administrative decision-making in cases such as *Dunsmuir* and *Conway*. These cases emphasize that administrative bodies are empowered, and indeed required, to consider *Charter* values within their scope of expertise. Integrating *Charter* values into the administrative approach, and recognizing the expertise of these decision-makers, opens "an institutional dialogue about the appropriate use and control of discretion, rather than the older command-and-control relationship" (Liston, at p. 100).

nouvelle cohérence en droit public » (Gratton et Sossin, p. 161). Aujourd'hui, la Cour a deux options quant à la révision des décisions administratives de nature discrétionnaire qui soulèvent des questions relatives aux valeurs consacrées par la *Charte*. La première consiste à adopter le cadre d'analyse décrit dans *Oakes* et élaboré pour examiner la constitutionnalité des lois. Cette approche protège indéniablement les droits visés par la *Charte*, mais elle le fait au détriment d'une conception plus riche du droit administratif. Comme l'exprime le professeur Evans, si les tribunaux étaient trop prompts à esquiver le droit administratif au profit de la *Charte*, [TRADUCTION] « une source précieuse de connaissances et d'expériences en matière de droit et de gouvernance ne sera pas prise en compte ou sera complètement perdue » (p. 73).

[35] En choisissant plutôt la seconde option, la Cour donnerait son aval à cette conception plus riche du droit administratif en vertu de laquelle le pouvoir discrétionnaire est exercé « à l'aune des garanties constitutionnelles et des valeurs que comportent celles-ci » (*Multani*, par. 152, le juge LeBel). Cette approche n'exige pas de se rabattre sur l'analyse requise par l'article premier telle qu'elle a été établie dans *Oakes* pour protéger les valeurs consacrées par la *Charte*; elle suppose plutôt que les décisions administratives prennent *toujours* en considération les valeurs fondamentales. La *Charte* n'agit alors que comme [TRADUCTION] « un rappel que certaines valeurs sont manifestement fondamentales et [. . .] ne peuvent être violées à la légère » (Cartier, p. 86). L'approche du droit administratif reconnaît, en outre, la légitimité que la Cour a donnée à la prise de décisions administratives dans des arrêts tels *Dunsmuir* et *Conway*. Ces derniers soulignent que les organismes administratifs ont le pouvoir, et même le devoir, de tenir compte des valeurs consacrées par la *Charte* dans leur domaine d'expertise. Intégrer ces valeurs dans l'approche qui préconise l'application des règles de droit administratif et reconnaître l'expertise des décideurs administratifs instaure [TRADUCTION] « un dialogue institutionnel quant à l'utilisation qui doit être faite du pouvoir discrétionnaire et quant à la révision appropriée de son exercice plutôt que de faire appel à la relation plus ancienne d'autorité et de contrôle » (Liston, p. 100).

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[36] As explained by Chief Justice McLachlin in *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, the approach used when reviewing the constitutionality of a law should be distinguished from the approach used for reviewing an administrative decision that is said to violate the rights of a particular individual (see also Bernatchez). When *Charter* values are applied to an individual administrative decision, they are being applied in relation to a particular set of facts. *Dunsmuir* tells us this should attract deference (para. 53; see also *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at para. 39). When a particular "law" is being assessed for *Charter* compliance, on the other hand, we are dealing with principles of general application.

[37] The more flexible administrative approach to balancing *Charter* values is also more consistent with the nature of discretionary decision-making. Some of the aspects of the *Oakes* test are, in any event, poorly suited to the review of discretionary decisions, whether of judges or administrative decision-makers. For instance, the requirement under s. 1 that a limit be "prescribed by law" has been held by this Court to apply to norms where "their adoption is authorized by statute, they are binding rules of general application, and they are sufficiently accessible and precise to those to whom they apply" (*Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295, at para. 53).

[38] Moreover, when exercising discretion under a provision or statutory scheme whose constitutionality is not impugned, it is conceptually difficult to see what the "pressing and substantial" objective of a decision is, or who would have the burden of defining and defending it.

[36] Comme la juge en chef McLachlin l'a expliqué dans *Alberta c. Hutterian Brethren of Wilson Colony*, 2009 CSC 37, [2009] 2 R.C.S. 567, l'examen de la constitutionnalité d'une loi doit être différent de la révision d'une décision administrative qui est contestée parce qu'elle porterait atteinte aux droits d'un individu en particulier (voir également Bernatchez). Lorsque les valeurs consacrées par la *Charte* sont appliquées à une décision administrative particulière, elles sont appliquées relativement à un ensemble précis de faits. *Dunsmuir* nous dit que la retenue s'impose dans un tel cas (par. 53; voir aussi *Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2002 CSC 1, [2002] 1 R.C.S. 3, par. 39). Par contre, lorsqu'on vérifie si une « loi » particulière respecte la *Charte*, il est question de principes d'application générale.

[37] L'approche plus souple du droit administratif pour mettre en balance les valeurs consacrées par la *Charte* est également plus compatible avec la nature de la prise de décision qui découle de l'exercice d'un pouvoir discrétionnaire. Quoi qu'il en soit, certains aspects du test élaboré dans *Oakes* conviennent peu à la révision des décisions prises à la suite de l'exercice d'un pouvoir discrétionnaire, qu'elles aient été prises par des juges ou par des décideurs administratifs. Par exemple, la Cour a jugé que l'exigence de l'article premier selon laquelle la restriction doit découler de l'application d'une « règle de droit » s'applique à des normes dont l'« adoption est autorisée par une loi, [des normes, en outre,] obligatoires et d'application générale et [. . .] suffisamment accessibles et précis[es] pour ceux qui y sont assujettis. » (*Greater Vancouver Transportation Authority c. Fédération canadienne des étudiantes et étudiants — Section Colombie-Britannique*, 2009 CSC 31, [2009] 2 R.C.S. 295, par. 53).

[38] En outre, lorsqu'un décideur exerce le pouvoir discrétionnaire que lui confère une disposition législative ou un régime légal dont la constitutionnalité n'est pas contestée, il est difficile, d'un point de vue conceptuel, d'imaginer ce qui pourrait constituer l'objectif « urgent et réel » d'une décision ou de savoir qui devrait assumer le fardeau de le définir et de le défendre.

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the standard of review is correctness (*Dunsmuir*, at para. 58). It is not at all clear to me, however, based on this Court's jurisprudence, that correctness should be used to determine whether an administrative decision-maker has taken sufficient account of *Charter* values in making a discretionary decision.

de la constitutionnalité d'une loi s'examine suivant la norme de la décision correcte (*Dunsmuir*, par. 58). Cela étant dit, compte tenu de la jurisprudence de la Cour, il n'est pas du tout clair, selon moi, que c'est cette norme qu'il faut appliquer pour déterminer si un décideur administratif a suffisamment tenu compte des valeurs consacrées par la *Charte* en rendant une décision à la suite de l'exercice d'un pouvoir discrétionnaire.

[44] This Court elaborated on the applicable standard of review to legal disciplinary panels in the pre-*Dunsmuir* decision of *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, where Iacobucci J. adopted a reasonableness standard in reviewing a sanction imposed for professional misconduct:

> Although there is a statutory appeal from decisions of the Discipline Committee, the expertise of the Committee, the purpose of its enabling statute, and the nature of the question in dispute all suggest a more deferential standard of review than correctness. These factors suggest that the legislator intended that the Discipline Committee of the self-regulating Law Society should be a specialized body with the primary responsibility to promote the objectives of the Act by overseeing professional discipline and, where necessary, selecting appropriate sanctions. In looking at all the factors as discussed in the foregoing analysis, I conclude that the appropriate standard is reasonableness *simpliciter*. Thus, on the question of the appropriate sanction for professional misconduct, the Court of Appeal should not substitute its own view of the "correct" answer but may intervene only if the decision is shown to be unreasonable. [Emphasis added; para. 42.]

[44] La Cour a approfondi la question de la norme de contrôle applicable aux décisions d'organismes disciplinaires dans l'arrêt *Barreau du Nouveau-Brunswick c. Ryan*, 2003 CSC 20, [2003] 1 R.C.S. 247, antérieur à *Dunsmuir*, et le juge Iacobucci y a retenu la norme de la décision raisonnable pour l'examen de la sanction infligée à l'égard d'une faute professionnelle :

> Bien que la loi prévoie un droit d'appel des décisions du comité de discipline, l'expertise du comité, l'objet de sa loi habilitante et la nature de la question en litige militent tous en faveur d'un degré plus élevé de déférence que la norme de la décision correcte. Ces facteurs indiquent que le législateur voulait que le comité de discipline du barreau autonome soit un organisme spécialisé ayant comme responsabilité primordiale la promotion des objectifs de la Loi par la surveillance disciplinaire de la profession et, au besoin, le choix de sanctions appropriées. Compte tenu de l'ensemble des facteurs pris en compte dans l'analyse qui précède, je conclus que la norme appropriée est celle de la décision raisonnable *simpliciter*. Par conséquent, sur la question de la sanction appropriée pour le manquement professionnel, la Cour d'appel ne devrait pas substituer sa propre opinion quant à la réponse « correcte » et ne peut intervenir que s'il est démontré que la décision est déraisonnable. [Je souligne; par. 42.]

[45] It seems to me that applying the *Dunsmuir* principles results in reasonableness remaining the applicable review standard for disciplinary panels. The issue then is whether this standard should be different when what is assessed is the disciplinary body's application of *Charter* protections in the exercise of its discretion. In my view, the fact that *Charter* interests are implicated does not argue for a different standard.

[45] Je suis d'avis que, si on applique les principes établis dans *Dunsmuir*, la norme de la décision raisonnable reste celle à laquelle il faut recourir pour réviser les décisions des comités de discipline. Il s'agit donc de se demander si c'est une norme différente dont les tribunaux doivent se servir lorsque l'analyse porte sur l'application par l'organisme disciplinaire des garanties visées par la *Charte* dans l'exercice du pouvoir discrétionnaire qui lui est conféré. À mon avis, il n'y a pas lieu d'appliquer une norme différente du fait que la *Charte* est en cause.

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[46] The starting point is the expertise of the tribunals in connection with their home statutes. Citing Prof. David Mullan, *Dunsmuir* confirmed the importance of recognizing that

> those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime . . . .

(para. 49, citing "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93.)

And, as Prof. Evans has noted, the "reasons for judicial restraint in reviewing agencies' decisions on matters in which their expertise is relevant do not lose their cogency simply because the question in issue also has a constitutional dimension" (p. 81).

[47] An administrative decision-maker exercising a discretionary power under his or her home statute, has, by virtue of expertise and specialization, particular familiarity with the competing considerations at play in weighing *Charter* values. As the Court explained in *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, adopting the observations of Prof. Danielle Pinard:

> [TRANSLATION] . . . administrative tribunals have the skills, expertise and knowledge in a particular area which can with advantage be used to ensure the primacy of the Constitution. Their privileged situation as regards the appreciation of the relevant facts enables them to develop a functional approach to rights and freedoms as well as to general constitutional precepts.

(p. 605, citing "Le pouvoir des tribunaux administratifs québécois de refuser de donner effet à des textes qu'ils jugent inconstitutionnels" (1987-88), *McGill L.J.* 170, at pp. 173-74.)

[48] This case, among others, reflected the increasing recognition by this Court of the distinct advantage that administrative bodies have in applying the *Charter* to a specific set of facts and in the

[46] Le premier point à considérer est l'expertise des tribunaux administratifs concernant leur loi constitutive. L'arrêt *Dunsmuir*, citant le professeur David Mullan, a confirmé qu'il importait de reconnaître que

> [TRADUCTION] les personnes qui se consacrent quotidiennement à l'application de régimes administratifs souvent complexes possèdent ou acquièrent une grande connaissance ou sensibilité à l'égard des impératifs et des subtilités des régimes législatifs en cause . . .

(par. 49, citant « Establishing the Standard of Review: The Struggle for Complexity? » (2004), 17 *C.J.A.L.P.* 59, p. 93.)

Comme le professeur Evans l'a souligné, les [TRADUCTION] « motifs invoqués pour faire montre de retenue dans le cadre de l'examen des décisions d'organismes relatives à leur champ d'expertise ne perdent pas leur bien-fondé du seul fait que la question en litige comporte également une dimension constitutionnelle » (p. 81).

[47] Le décideur administratif exerçant un pouvoir discrétionnaire en vertu de sa loi constitutive est, de par son expertise et sa spécialisation, particulièrement au fait des considérations opposées en jeu dans la mise en balance des valeurs consacrées par la *Charte*. Comme la Cour l'a expliqué en faisant siens les commentaires de la professeure Danielle Pinard dans *Douglas/Kwantlen Faculty Assn. c. Douglas College*, [1990] 3 R.C.S. 570 :

> . . . les tribunaux administratifs possèdent une compétence, une expertise et une connaissance d'un milieu particulier qu'ils pourraient avantageusement mettre au service de la mise en œuvre de la primauté de la Constitution. Leur position privilégiée quant à l'appréhension des faits pertinents leur permet d'élaborer une approche fonctionnelle des droits et libertés tout comme des préceptes constitutionnels généraux.

(p. 605, citant « Le pouvoir des tribunaux administratifs québécois de refuser de donner effet à des textes qu'ils jugent inconstitutionnels » (1987-88), *R.D. McGill* 170, p. 173-74.)

[48] Cette cause, entre autres, a illustré que la Cour reconnaît de plus en plus la position privilégiée qu'occupent les tribunaux administratifs en matière d'application de la *Charte* à un ensemble

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context of their enabling legislation (see *Conway*, at paras. 79-80). As Major J. noted in dissent in *Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75, tailoring the *Charter* to a specific situation "is more suited to a tribunal's special role in determining rights on a case by case basis in the tribunal's area of expertise" (para. 64; see also *C.U.P.E.*, at pp. 235-36).

particulier de faits dans le contexte de leur loi habilitante (voir *Conway*, par. 79-80). Comme le juge Major l'a signalé dans les motifs dissidents qu'il a signés dans *Mooring c. Canada (Commission nationale des libérations conditionnelles)*, [1996] 1 R.C.S. 75, leur « fonction particulière de détermination des droits au cas par cas dans leur domaine de spécialisation placerait même plutôt les tribunaux administratifs en meilleure position » pour appliquer la *Charte* à une situation donnée (par. 64; voir aussi *S.C.F.P.*, p. 235-236).

[49] These principles led the Court to apply a reasonableness standard in *Chamberlain*, where McLachlin C.J. found that a school board had acted unreasonably in refusing to approve the use of books depicting same-sex parented families. She held that the board had failed to respect the "values of accommodation, tolerance and respect for diversity" which were incorporated into its enabling legislation and "reflected in our Constitution's commitment to equality and minority rights" (para. 21). Similarly, in *Pinet*, Binnie J. used a reasonableness standard to review, for compliance with s. 7 of the *Charter*, a decision of the Ontario Review Board to return the appellant to a maximum security hospital, observing that a reasonableness review best reflected "the expertise of the members appointed to Review Boards" (para. 22). The purpose of the exercise was to determine whether the decision was "the least onerous and least restrictive" of the liberty interests of the appellant while considering "public safety, the mental condition and other needs of the individual concerned, and his or her potential reintegration into society" (paras. 19 and 23). In *Pinet*, the test was laid out in the statute, but Binnie J. made it clear that the emphasis on the least infringing decision was a constitutional requirement.

[49] Ces principes ont amené la Cour à appliquer la norme de la décision raisonnable dans *Chamberlain*, où la juge en chef McLachlin a conclu que le refus d'un conseil scolaire d'approuver l'utilisation de manuels présentant des familles homoparentales était déraisonnable. Elle a jugé que le conseil n'avait pas respecté les « valeurs d'accommodement, de tolérance et de respect de la diversité » qui sont incorporées dans sa loi habilitante et qui « se traduisent par la protection constitutionnelle du droit à l'égalité et des droits des minorités » (par. 21). De même, dans *Pinet*, le juge Binnie a appliqué la norme de la décision raisonnable à l'examen de la conformité à l'art. 7 de la *Charte* de la décision de la Commission ontarienne d'examen de renvoyer l'appelant dans un hôpital à sécurité maximum, en signalant que c'est cette norme qui tient le mieux compte de « l'expertise des membres des commissions d'examen » (par. 22). Il s'agissait de juger si la décision était « [la] moins sévèr[e] et [la] moins privativ[e] » pour la liberté de l'appelant tout en tenant compte de « la sécurité du public, de l'état mental de l'individu en cause et de ses besoins, notamment sa réinsertion sociale éventuelle » (par. 19 et 23). Dans cette affaire, le critère était énoncé dans la loi, mais le juge Binnie a exposé clairement que la recherche de la décision la moins attentatoire était une exigence constitutionnelle.

[50] In *Lake*, where the Court was reviewing the Minister's decision to surrender a Canadian citizen for extradition, implicating ss. 6(1) and 7 of the *Charter*, the Court again applied a reasonableness standard. LeBel J. held that deference is owed to the Minister's decision, as the Minister is closer

[50] L'affaire *Lake* portait sur la révision d'une décision ministérielle d'extradition visant un citoyen canadien et faisant intervenir le par. 6(1) et l'art. 7 de la *Charte*. Là encore, la Cour a appliqué la norme de la décision raisonnable. Le juge LeBel a déclaré qu'il y a lieu, en raison de l'expertise du

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[52] So our choice is between saying that every time a party argues that *Charter* values are implicated on judicial review, a reasonableness review is transformed into a correctness one, or saying that while both tribunals and courts can interpret the *Charter*, the administrative decision-maker has the necessary specialized expertise and discretionary power in the area where the *Charter* values are being balanced.

[53] The decisions of legal disciplinary bodies offer a good example of the problem of applying a correctness review whenever *Charter* values are implicated. Most breaches of art. 2.03 of the *Code of ethics* calling for "objectivity, moderation and dignity", necessarily engage the expressive rights of lawyers. That would mean that most exercises of disciplinary discretion under this provision would be transformed from the usual reasonableness review to one for correctness.

[54] Nevertheless, as McLachlin C.J. noted in *Catalyst*, "reasonableness must be assessed in the context of the particular type of decision making involved and all relevant factors. It is an essentially contextual inquiry" (para. 18). Deference is still justified on the basis of the decision-maker's expertise and its proximity to the facts of the case. Even where *Charter* values are involved, the administrative decision-maker will generally be in the best position to consider the impact of the relevant *Charter* values *on the specific facts of the case*. But both decision-makers and reviewing courts must remain conscious of the fundamental importance of *Charter* values in the analysis.

[52] Donc, nous avons le choix entre, d'une part, affirmer que, chaque fois qu'une partie prétend que des valeurs consacrées par la *Charte* sont en cause dans le cadre d'une révision judiciaire, un examen suivant la norme de la décision correcte doit se substituer à celui suivant la norme de la décision raisonnable ou, d'autre part, affirmer que, bien que les tribunaux et les cours de justice puissent interpréter la *Charte*, le décideur administratif possède l'expertise particulière exigée et le pouvoir discrétionnaire voulu dans le domaine où les valeurs consacrées par la *Charte* sont mises en balance.

[53] Les décisions d'organismes disciplinaires qui œuvrent relativement aux professions juridiques fournissent un bon exemple des problèmes que pose la révision judiciaire suivant la norme de la décision correcte dès lors que des valeurs consacrées par la *Charte* sont en cause. Le droit à la liberté d'expression des avocats est nécessairement en jeu dans la plupart des contraventions à l'art. 2.03 du *Code de déontologie*, qui exige que les avocats aient une conduite empreinte « d'objectivité, de modération et de dignité ». Il s'ensuit que la révision du caractère raisonnable normalement effectuée à l'égard de la plupart des décisions disciplinaires discrétionnaires fondées sur cette disposition deviendrait un contrôle de la justesse.

[54] Quoi qu'il en soit, comme la juge en chef McLachlin l'a souligné dans *Catalyst*, « le caractère raisonnable de la décision s'apprécie dans le contexte du type particulier de processus décisionnel en cause et de l'ensemble des facteurs pertinents. Il s'agit essentiellement d'une analyse contextuelle » (par. 18). Il continue donc à être justifié de faire preuve de déférence à l'endroit du décideur administratif compte tenu de son expertise et de sa proximité aux faits de la cause puisque, même quand les valeurs consacrées par la *Charte* sont en jeu, il sera généralement le mieux placé pour juger de l'incidence des valeurs pertinentes de ce type *au regard des faits précis de l'affaire*. Cela étant dit, tant les décideurs que les tribunaux qui procèdent à la révision de leurs décisions doivent analyser les questions qui leur sont soumises en gardant à l'esprit l'importance fondamentale des valeurs consacrées par la *Charte*.

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[55] How then does an administrative decision-maker apply *Charter* values in the exercise of statutory discretion? He or she balances the *Charter* values with the statutory objectives. In effecting this balancing, the decision-maker should first consider the statutory objectives. In *Lake*, for instance, the importance of Canada's international obligations, its relationships with foreign governments, and the investigation, prosecution and suppression of international crime justified the *prima facie* infringement of mobility rights under s. 6(1) (para. 27). In *Pinet*, the twin goals of public safety and fair treatment grounded the assessment of whether an infringement of an individual's liberty interest was justified (para. 19).

[55] Comment un décideur administratif applique-t-il donc les valeurs consacrées par la *Charte* dans l'exercice d'un pouvoir discrétionnaire que lui confère la loi? Il ou elle met en balance ces valeurs et les objectifs de la loi. Lorsqu'il procède à cette mise en balance, le décideur doit d'abord se pencher sur les objectifs en question. Dans *Lake*, par exemple, l'importance des obligations internationales du Canada, ses relations avec les gouvernements étrangers ainsi que l'enquête, la poursuite et la répression du crime à l'échelle internationale justifiait, *prima facie*, la violation de la liberté de circulation visée au par. 6(1) (par. 27). Dans *Pinet*, c'est le double objectif de protection de la sécurité du public et de traitement équitable qui a fondé l'évaluation de la violation du droit à la liberté pour déterminer si elle était justifiée (par. 19).

[56] Then the decision-maker should ask how the *Charter* value at issue will best be protected in view of the statutory objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives. This is where the role of judicial review for reasonableness aligns with the one applied in the *Oakes* context. As this Court recognized in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160, "courts must accord some leeway to the legislator" in the *Charter* balancing exercise, and the proportionality test will be satisfied if the measure "falls within a range of reasonable alternatives". The same is true in the context of a review of an administrative decision for reasonableness, where decision-makers are entitled to a measure of deference so long as the decision, in the words of *Dunsmuir*, "falls within a range of possible, acceptable outcomes" (para. 47).

[56] Ensuite, le décideur doit se demander comment protéger au mieux la valeur en jeu consacrée par la *Charte* compte tenu des objectifs visés par la loi. Cette réflexion constitue l'essence même de l'analyse de la proportionnalité et exige que le décideur mette en balance la gravité de l'atteinte à la valeur protégée par la *Charte*, d'une part, et les objectifs que vise la loi, d'autre part. C'est à cette étape que le rôle de la révision judiciaire visant à juger du caractère raisonnable de la décision s'apparente à celui de l'analyse effectuée dans le contexte de l'application du test de l'arrêt *Oakes*. Comme la Cour l'a reconnu dans *RJR-MacDonald Inc. c. Canada (Procureur général)*, [1995] 3 R.C.S. 199, par. 160, « les tribunaux doivent accorder une certaine latitude au législateur » lorsqu'ils procèdent à une mise en balance au regard de la *Charte* et il sera satisfait au test de proportionnalité si la mesure « se situe à l'intérieur d'une gamme de mesures raisonnables ». Il en est de même dans le contexte de la révision d'une décision administrative pour en évaluer le caractère raisonnable où il convient de faire preuve d'une certaine déférence à l'endroit des décideurs à condition que la décision, comme l'affirme la Cour dans *Dunsmuir*, « [appartienne] aux issues possibles acceptables » (par. 47).

[57] On judicial review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the

[57] Dans le contexte d'une révision judiciaire, il s'agit donc de déterminer si — en évaluant l'incidence de la protection pertinente offerte par la

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decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play. As LeBel J. noted in *Multani*, when a court is faced with reviewing an administrative decision that implicates *Charter* rights, "[t]he issue becomes one of proportionality" (para. 155), and calls for integrating the spirit of s. 1 into judicial review. Though this judicial review is conducted within the administrative framework, there is nonetheless conceptual harmony between a reasonableness review and the *Oakes* framework, since both contemplate giving a "margin of appreciation", or deference, to administrative and legislative bodies in balancing *Charter* values against broader objectives.

[58] If, in exercising its statutory discretion, the decision-maker has properly balanced the relevant *Charter* value with the statutory objectives, the decision will be found to be reasonable.

Application

[59] The *Charter* value at issue in this appeal is expression, and, specifically, how it should be applied in the context of a lawyer's professional duties.

[60] At the relevant time, art. 2.03 of the *Code of ethics* (now modified as art. 2.00.01, O.C. 351-2004, (2004) 136 G.O. II, 1272) stated that "[t]he conduct of an advocate must bear the stamp of objectivity, moderation and dignity". This provision, whose constitutionality is not impugned before us, sets out a series of broad standards that are open to a wide range of interpretations. The determination of whether the actions of a lawyer violate art. 2.03 in a given case is left entirely to the Disciplinary Council's discretion.

Charte et compte tenu de la nature de la décision et des contextes légal et factuel — la décision est le fruit d'une mise en balance proportionnée des droits en cause protégés par la *Charte*. Comme le juge LeBel l'a souligné dans *Multani*, lorsqu'une cour est appelée à réviser une décision administrative qui met en jeu les droits protégés par la *Charte*, « [l]a question se réduit à un problème de proportionnalité » (par. 155) et requiert d'intégrer l'esprit de l'article premier dans la révision judiciaire. Même si cette révision judiciaire est menée selon le cadre d'analyse du droit administratif, il existe néanmoins une harmonie conceptuelle entre l'examen du caractère raisonnable et le cadre d'analyse préconisé dans *Oakes* puisque les deux démarches supposent de donner une « marge d'appréciation » aux organes administratifs ou législatifs ou de faire preuve de déférence à leur égard lors de la mise en balance des valeurs consacrées par la *Charte*, d'une part, et les objectifs plus larges, d'autre part.

[58] Si, en exerçant son pouvoir discrétionnaire, le décideur a correctement mis en balance la valeur pertinente consacrée par la *Charte* et les objectifs visés par la loi, sa décision sera jugée raisonnable.

Application

[59] En l'espèce, la valeur en jeu consacrée par la *Charte* est la liberté d'expression et la question à trancher est, plus précisément, celle de savoir comment cette liberté devrait pouvoir s'exercer dans le contexte des obligations professionnelles de l'avocat.

[60] Au moment des faits, l'art. 2.03 du *Code de déontologie* (maintenant l'art. 2.00.01, décret 351-2004, (2004) 136 G.O. II, 1840) portait que « [l]a conduite de l'avocat doit être empreinte d'objectivité, de modération et de dignité ». Cette disposition, dont la constitutionnalité n'est pas attaquée devant nous, établit un ensemble de normes générales se prêtant à une multitude d'interprétations. La question de savoir si, dans un cas donné, la conduite d'un avocat contrevient à l'art. 2.03, est entièrement laissée à l'appréciation discrétionnaire du Comité de discipline.

2012 SCC 12 (CanLII)

TAB 12

Loyola High School and John Zucchi *Appellants*

v.

Attorney General of Quebec *Respondent*

and

Canadian Council of Christian Charities, Evangelical Fellowship of Canada, Christian Legal Fellowship, World Sikh Organization of Canada, Association of Christian Educators and Schools Canada, Canadian Civil Liberties Association, Catholic Civil Rights League, Association des parents catholiques du Québec, Faith and Freedom Alliance, Association de la communauté copte orthodoxe du grand Montréal, Faith, Fealty and Creed Society, Home School Legal Defence Association of Canada, Seventh-day Adventist Church in Canada, Seventh-day Adventist Church — Quebec Conference, Corporation archiépiscopale catholique romaine de Montréal and Archevêque catholique romain de Montréal *Interveners*

Indexed as: Loyola High School *v.* Quebec (Attorney General)

2015 SCC 12

File No.: 35201.

2014: March 24; 2015: March 19.

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

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Administrative law — Judicial review — Standard of Review — Ministerial discretion — Mandatory ethics and religious culture program — Private denominational

École secondaire Loyola et John Zucchi *Appelants*

c.

Procureur général du Québec *Intimé*

et

Conseil canadien des œuvres de charité chrétiennes, Alliance évangélique du Canada, Alliance des chrétiens en droit, World Sikh Organization of Canada, Association of Christian Educators and Schools Canada, Association canadienne des libertés civiles, Ligue catholique des droits de l'homme, Association des parents catholiques du Québec, Faith and Freedom Alliance, Association de la communauté copte orthodoxe du grand Montréal, Faith, Fealty and Creed Society, Home School Legal Defence Association of Canada, Église adventiste du septième jour au Canada, Église adventiste du septième jour — Fédération du Québec, Corporation archiépiscopale catholique romaine de Montréal et Archevêque catholique romain de Montréal *Intervenants*

Répertorié : École secondaire Loyola *c.* Québec (Procureur général)

2015 CSC 12

N° du greffe : 35201.

2014 : 24 mars; 2015 : 19 mars.

Présents : La juge en chef McLachlin et les juges LeBel, Abella, Rothstein, Cromwell, Moldaver et Karakatsanis.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit administratif — Contrôle judiciaire — Norme de contrôle — Pouvoir discrétionnaire du ministre — Programme obligatoire d'éthique et de culture religieuse —

school proposing alternative program — Request for exemption denied by Minister — Proper approach to judicial review of discretionary administrative decisions engaging Charter protections — Whether Minister's decision proportionately balanced religious freedom with statutory objectives of mandatory program — Regulation respecting the application of the Act respecting private education, CQLR, c. E-9.1, r. 1, s. 22.

Constitutional law — Charter of Rights — Freedom of religion — Schools — Mandatory ethics and religious culture program — Private denominational school proposing alternative program — Request for exemption denied by Minister — Whether Minister's insistence that proposed alternative program be entirely secular in its approach is reasonable given the statutory objectives of mandatory program and s. 2(a) of the Canadian Charter of Rights and Freedoms.

Human rights — Freedom of religion — Schools — Mandatory ethics and religious culture program — Private denominational school proposing alternative program — Request for exemption denied by Minister — Whether Minister's insistence that proposed alternative program be entirely secular in its approach is reasonable given the statutory objectives of mandatory program — Whether Minister's decision limits freedom of religion under s. 3 of the Charter of human rights and freedoms, CQLR, c. C-12.

Loyola High School is a private, English-speaking Catholic high school for boys. It has been administered by the Jesuit Order since the school's founding in the 1840s. Most of the students at Loyola come from Catholic families.

Since September 2008, as part of the mandatory core curriculum in schools across Quebec, the Minister of Education, Recreation and Sports has required a Program on Ethics and Religious Culture (ERC), which teaches about the beliefs and ethics of different world religions from a neutral and objective perspective.

The stated objectives of the ERC Program are the "recognition of others" and the "pursuit of the common good". They seek to inculcate in students openness to human rights, diversity and respect for others. To fulfil these objectives, the ERC Program has three components: world religions and religious culture, ethics, and

Programme de remplacement proposé par une école privée confessionnelle — Demande d'exemption refusée par la ministre — Approche correcte du contrôle judiciaire des décisions administratives de nature discrétionnaire mettant en cause les protections conférées par la Charte — La décision de la ministre a-t-elle mis en balance de manière proportionnée la liberté de religion et les objectifs du programme obligatoire visés par la loi? — Règlement d'application de la Loi sur l'enseignement privé, RLRQ, c. E-9.1, r. 1, art. 22.

Droit constitutionnel — Charte des droits — Liberté de religion — Écoles — Programme obligatoire d'éthique et de culture religieuse — Programme de remplacement proposé par une école privée confessionnelle — Demande d'exemption refusée par la ministre — L'insistance de la ministre sur la nécessité que le programme de remplacement proposé ait une approche purement laïque est-elle raisonnable compte tenu des objectifs du programme obligatoire visés par la loi et de l'art. 2a) de la Charte canadienne des droits et libertés?

Droits de la personne — Liberté de religion — Écoles — Programme obligatoire d'éthique et de culture religieuse — Programme de remplacement proposé par une école privée confessionnelle — Demande d'exemption refusée par la ministre — L'insistance de la ministre sur la nécessité que le programme de remplacement proposé ait une approche purement laïque est-elle raisonnable compte tenu des objectifs du programme obligatoire visés par la loi? — La décision de la ministre restreint-elle la liberté de religion garantie par l'art. 3 de la Charte des droits et libertés de la personne, RLRQ, c. C-12?

L'école secondaire Loyola est une école secondaire catholique privée de langue anglaise pour garçons. Elle est administrée par l'ordre des Jésuites depuis sa fondation dans les années 1840. La plupart des élèves qui fréquentent cette école sont issus de familles catholiques.

Depuis septembre 2008, le ministre de l'Éducation, du Loisir et du Sport exige que le programme Éthique et culture religieuse (ÉCR) soit intégré aux matières obligatoires pour l'ensemble des écoles du Québec. Dans le cadre de ce programme, on présente, d'un point de vue neutre et objectif, les croyances et l'éthique de diverses religions du monde.

Le programme ÉCR a pour objectifs explicites la « reconnaissance de l'autre » et la « poursuite du bien commun ». Ces objectifs visent à inculquer aux élèves un esprit d'ouverture aux droits de la personne et à la diversité ainsi que le respect de l'autre. Pour réaliser ces objectifs, le programme ÉCR comprend trois volets : les

dialogue. The three components are intended to support and reinforce one another. The orientation of the Program is strictly secular and cultural and requires teachers to be objective and impartial. They are not to advance the truth of a particular belief system or attempt to influence their students' beliefs, but to foster awareness of diverse values, beliefs and cultures. The Program provides a framework that teachers are required to use to help students develop these competencies, but leaves teachers with considerable flexibility in developing their own lessons.

religions du monde et le phénomène religieux, l'éthique et le dialogue. Ces trois volets sont censés se compléter et se renforcer l'un l'autre. Le programme a une optique strictement laïque et culturelle et il exige des enseignants qu'ils fassent preuve d'objectivité et d'impartialité. Ils doivent non pas affirmer la vérité d'un système particulier de croyances ou tenter d'influencer les convictions de leurs élèves, mais favoriser la connaissance d'une variété de valeurs, de convictions et de cultures. Bien que le programme constitue un cadre pédagogique que sont tenus de suivre les enseignants pour aider les élèves à acquérir ces compétences, il leur laisse tout de même une latitude considérable pour l'élaboration de leurs leçons.

The purpose of the religious culture component is to help students understand the main elements of religion by exploring the socio-cultural contexts in which different religions take root and develop. The purpose of the ethics component is to encourage students to think critically about their own ethical conduct and that of others, as well as about the values and norms that different religious groups adopt to guide their behaviour. The purpose of the dialogue component is to help students develop the skills to interact respectfully with people of different beliefs.

Le volet du programme relatif au phénomène religieux a pour objet d'aider les élèves à comprendre les principaux éléments de la religion par l'exploration des contextes socioculturels dans lesquels les diverses religions se sont enracinées et se développent. Le volet éthique du programme vise à encourager les élèves à porter un regard critique sur leur propre conduite éthique et sur celle d'autrui, ainsi que sur les valeurs et les normes adoptées par différents groupes religieux pour guider leur conduite. Le volet relatif au dialogue vise à aider les élèves à acquérir des habiletés leur permettant d'interagir de façon respectueuse avec des gens qui ont des convictions différentes.

Pursuant to s. 22 of the *Regulation respecting the application of the Act respecting private education*, the Minister can grant an exemption from the ERC Program if the proposed alternative program is deemed to be "equivalent". Loyola wrote to the Minister to request an exemption from the Program, proposing an alternative course to be taught from the perspective of Catholic beliefs and ethics. The Minister denied the request based on the fact that Loyola's whole proposed alternative program was to be taught from a Catholic perspective. It was not, as a result, deemed to be "equivalent" to the ERC Program.

Suivant l'art. 22 du *Règlement d'application de la Loi sur l'enseignement privé*, le ministre peut exempter une école du programme ÉCR si le programme de remplacement proposé est jugé « équivalent ». Loyola a écrit à la ministre pour demander à être exemptée du programme et proposer d'enseigner un autre cours du point de vue des convictions et de l'éthique de la religion catholique. La ministre a refusé la demande en raison du fait que l'ensemble du programme de remplacement proposé par Loyola allait être enseigné selon une perspective catholique. Le programme n'a donc pas été jugé « équivalent » au programme ÉCR.

Loyola brought an application for judicial review of the Minister's decision. The Superior Court found that the Minister's refusal of an exemption infringed Loyola's right to religious freedom and accordingly granted the application, quashed the Minister's decision, and ordered an exemption. On appeal, the Quebec Court of Appeal concluded that the Minister's decision was reasonable and did not result in any breach of religious freedom. Before this Court, Loyola modified its request to teach the whole program from a Catholic perspective, and was now prepared to teach about the doctrines and practices of other world religions neutrally. But, significantly, it still

Loyola a demandé le contrôle judiciaire de la décision de la ministre. La Cour supérieure a conclu que le refus par la ministre d'accorder une exemption portait atteinte au droit à la liberté de religion de cette institution et elle a donc accueilli la demande, annulé la décision de la ministre et ordonné qu'une exemption soit accordée. En appel, la Cour d'appel du Québec a conclu que la décision de la ministre était raisonnable et n'avait pas entraîné d'atteinte à la liberté de religion. Devant la Cour, Loyola a modifié sa demande visant à enseigner l'ensemble du programme selon une perspective catholique. Elle était maintenant disposée à enseigner de façon neutre la doctrine et les rites

wanted to teach about the *ethics* of other religions from a Catholic perspective. The Minister's position remained the same — no part of the program could be taught from a Catholic perspective, including Catholic doctrine and ethics.

d'autres religions du monde. Il importe de le souligner, Loyola souhaitait néanmoins toujours enseigner l'*éthique* d'autres religions selon une perspective catholique. La position de la ministre est demeurée la même — soit qu'aucun aspect du programme ne peut être enseigné suivant une perspective catholique, notamment la doctrine et l'éthique de cette religion.

Held: The Minister's decision requiring that *all* aspects of Loyola's proposed program be taught from a neutral perspective, including the teaching of Catholicism, limited freedom of religion more than was necessary given the statutory objectives. As a result, it did not reflect a proportionate balancing and should be set aside. The appeal is allowed and the matter remitted to the Minister for reconsideration.

Arrêt : La décision de la ministre selon laquelle *tous* les aspects du programme proposé par Loyola doivent être enseignés d'un point de vue neutre, y compris l'enseignement du catholicisme, a restreint la liberté de religion plus qu'il n'était nécessaire compte tenu des objectifs visés par la loi. Par conséquent, cette décision n'était pas le fruit d'une mise en balance proportionnée et doit être annulée. Le pourvoi est accueilli et l'affaire est renvoyée au ministre pour réexamen.

Per LeBel, Abella, Cromwell and Karakatsanis JJ.: This Court's decision in *Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395, sets out the applicable framework for reviewing discretionary administrative decisions that engage the protections of the *Charter* — both its guarantees and the foundational values they reflect. The discretionary decision-maker is required to proportionately balance the relevant *Charter* protections to ensure that they are limited no more than necessary given the applicable statutory objectives. The reasonableness of the Minister's decision in this case therefore depends on whether it reflected a proportionate balance between the objectives of promoting tolerance and respect for difference, and the religious freedom of the members of the Loyola community.

Les juges LeBel, Abella, Cromwell et Karakatsanis : Dans *Doré c. Barreau du Québec*, [2012] 1 R.C.S. 395, la Cour a établi le cadre d'analyse applicable pour contrôler les décisions administratives de nature discrétionnaire qui font intervenir les protections conférées par la *Charte* — soit tant les droits qui y sont énoncés que les valeurs dont ils sont le reflet. Le décideur qui exerce son pouvoir discrétionnaire est tenu de mettre en balance de façon proportionnée les protections pertinentes garanties par la *Charte* pour veiller à ce qu'elles ne soient pas restreintes plus qu'il n'est nécessaire compte tenu des objectifs applicables visés par la loi. Pour juger du caractère raisonnable de la décision de la ministre en l'espèce, il faut donc déterminer si cette décision est le fruit d'une mise en balance proportionnée des objectifs de promotion de la tolérance et du respect des différences, d'une part, et de la liberté de religion des membres de la communauté de Loyola, d'autre part.

Freedom of religion means that no one can be forced to adhere to or refrain from a particular set of religious beliefs. This includes both the individual *and* collective aspects of religious belief. Religious freedom under the *Charter* must therefore account for the socially embedded nature of religious belief, and the deep linkages between this belief and its manifestation through communal institutions and traditions.

La liberté de religion signifie que nul ne doit être contraint d'adhérer ou de s'abstenir d'adhérer à un certain ensemble de croyances religieuses. Cela vise *tant* les aspects individuels *que* les aspects collectifs des convictions religieuses. La liberté de religion au sens où il faut l'entendre pour l'application de la *Charte* doit donc tenir compte du fait que les convictions religieuses sont bien ancrées dans la société et qu'il existe des liens solides entre ces croyances et leur manifestation par le truchement d'institutions et de traditions collectives.

The context in this case is state regulation of religious schools. This raises the question of how to balance robust protection for the values underlying religious freedom with the values of a secular state. The state has a legitimate interest in ensuring that students in all schools are

La réglementation par l'État des écoles confessionnelles constitue le contexte de la présente affaire. Cela soulève la question de savoir comment mettre en balance une protection solide des valeurs qui sous-tendent la liberté de religion et les valeurs d'un État laïque. L'État

capable, as adults, of conducting themselves with openness and respect as they confront cultural and religious differences. A vibrant, multicultural democracy depends on the capacity of its citizens to engage in thoughtful and inclusive forms of deliberation. But a secular state does not — and cannot — interfere with the beliefs or practices of a religious group unless they conflict with or harm overriding public interests. Nor can a secular state support or prefer the practices of one group over another. The pursuit of secular values means respecting the right to hold and manifest different religious beliefs. A secular state respects religious differences, it does not seek to extinguish them.

a un intérêt légitime à s'assurer que les élèves de toutes les écoles seront en mesure, une fois devenus adultes, de se comporter avec ouverture et respect lorsqu'ils devront faire face aux différences culturelles et religieuses. Une démocratie multiculturelle dynamique doit pouvoir compter sur la capacité de ses citoyens de discuter de manière réfléchie et ouverte. Un État laïque ne s'immisce cependant pas dans les convictions et les pratiques d'un groupe religieux — et ne peut le faire — à moins qu'elles ne soient contraires ou ne portent atteinte à des intérêts publics prépondérants. Il ne peut pas non plus donner son appui ou accorder sa préférence aux pratiques d'un groupe par rapport à celles d'un autre. La poursuite de valeurs laïques implique le respect du droit d'avoir et de professer des convictions religieuses différentes. Un État laïque respecte les différences religieuses; il ne cherche pas à les faire disparaître.

Loyola is a private Catholic institution. The collective aspects of religious freedom — in this case, the collective manifestation and transmission of Catholic beliefs — are a crucial part of its claim. The Minister's decision requires Loyola to teach Catholicism, the very faith that animates its character, from a neutral perspective. Although the state's purpose is secular, this amounts to requiring a Catholic institution to speak about its own religion in terms defined by the state rather than by its own understanding. This demonstrably interferes with the manner in which the members of an institution formed for the purpose of transmitting Catholicism can teach and learn about the Catholic faith. It also undermines the liberty of the members of the community who have chosen to give effect to the collective dimension of their religious beliefs by participating in a denominational school.

Loyola est une institution catholique privée. Les aspects collectifs de la liberté de religion — dans le cas qui nous occupe, la manifestation et la transmission de la foi catholique — constituent un élément essentiel de l'argumentation de Loyola. La décision de la ministre oblige cette dernière à enseigner le catholicisme, la religion qui constitue son essence même, d'un point de vue neutre. Bien que l'objectif de l'État soit laïque, cette obligation revient à exiger d'un établissement catholique qu'il traite de sa propre religion selon des modalités définies par l'État plutôt que d'après sa propre conception. Cela empiète manifestement sur la manière dont les membres d'une institution dont l'objet même est de transmettre le catholicisme peuvent enseigner et étudier cette religion. Cela porte également atteinte à la liberté des membres de sa communauté qui ont choisi de donner effet à la dimension collective de leurs convictions religieuses en se joignant à une école confessionnelle.

In the Quebec context, where private denominational schools are legal, preventing a school like Loyola from teaching and discussing Catholicism from its own perspective does little to further the ERC Program's objectives while at the same time seriously interfering with religious freedom. The Minister's decision suggests that engagement with an individual's own religion on his or her own terms can be presumed to impair respect for others. This assumption led the Minister to a decision that does not, overall, strike a proportionate balance between the *Charter* protections and statutory objectives at stake in this case.

Dans le contexte québécois, où l'existence d'écoles confessionnelles privées est légale, empêcher une école comme Loyola d'enseigner le catholicisme et d'en parler selon sa propre perspective contribue peu à la réalisation des objectifs du programme ÉCR tout en portant gravement atteinte à la liberté de religion. La décision de la ministre laisse entendre que, dès lors qu'une personne explique sa religion selon son propre point de vue, on peut tout simplement présumer qu'il y a atteinte au principe du respect d'autrui. Cette prémisse a mené la ministre à prendre une décision qui, prise dans son ensemble, n'atteint pas un équilibre proportionné entre les protections conférées par la *Charte* et les objectifs de la loi en cause en l'espèce.

That said, the Minister is not required to permit Loyola to teach about the ethics of other religions from a

Cela dit, la ministre n'est pas tenue de permettre à Loyola d'enseigner l'éthique d'autres religions selon

Catholic perspective. The risk of such an approach would be that other religions would necessarily be seen not as differently legitimate belief systems, but as worthy of respect only to the extent that they aligned with the tenets of Catholicism. This contradicts the ERC Program's goals of ensuring respect for different religious beliefs. In a multicultural society, it is not a breach of anyone's freedom of religion to be required to learn (or teach) about the doctrines and ethics of other world religions in a neutral and respectful way. In a religious high school, where students are learning about the precepts of one particular faith throughout their education, it is arguably even more important that they learn, in as objective a way as possible, about other belief systems and the reasons underlying those beliefs.

une perspective catholique. Cette façon de faire poserait le risque que l'on considère les autres religions non pas comme des systèmes de croyances légitimes différents, mais plutôt comme n'étant dignes de respect que dans la mesure où elles correspondent aux préceptes du catholicisme. Cela contredit l'objectif du programme ÉCR qui consiste à assurer le respect de croyances religieuses différentes. Dans une société multiculturelle, le fait d'être obligé d'étudier (ou d'enseigner) la doctrine et l'éthique d'autres religions du monde d'une façon neutre et respectueuse ne saurait constituer une violation de la liberté de religion de qui que ce soit. Dans le cas d'une école secondaire confessionnelle, où les élèves acquièrent des connaissances au sujet des préceptes d'une religion particulière pendant toute la durée de leurs études, on peut prétendre qu'il est encore plus important qu'ils explorent, de façon aussi objective que possible, d'autres systèmes de croyances ainsi que leurs fondements.

Teaching the ethical frameworks of other religions in a neutral way may be a delicate exercise, but the fact that there are difficulties in implementation does not mean the state should be asked to throw up its hands and abandon its objectives by accepting a program that frames the discussion of ethics primarily through the moral lens of a school's own religion.

Le fait d'enseigner des systèmes éthiques d'autres religions de façon neutre peut constituer un exercice délicat, mais ces difficultés de mise en œuvre ne devraient pas amener l'État à être tenu de s'en laver les mains et de renoncer à ses objectifs en acceptant un programme qui aborde l'étude de l'éthique d'abord et avant tout à travers le prisme moral de la perspective religieuse de l'établissement d'enseignement.

It is the Minister's decision *as a whole* that must reflect a proportionate and therefore reasonable balancing of the *Charter* protections and statutory objectives in issue. Preventing a school like Loyola from teaching and discussing Catholicism, the core of its identity, in any part of the program from its own perspective, does little to further the ERC Program's objectives while at the same time seriously interfering with the values underlying religious freedom. The Minister's decision is, as a result, unreasonable.

C'est la décision de la ministre *dans son ensemble* qui doit être le reflet d'une mise en balance proportionnée et donc raisonnable des protections conférées par la *Charte* et des objectifs de la loi en cause. Le fait d'empêcher une école comme Loyola d'enseigner et d'étudier le catholicisme, le cœur de son identité, selon sa propre perspective dans le cadre de l'ensemble du programme contribue peu à l'atteinte des objectifs du programme ÉCR tout en portant gravement atteinte aux valeurs qui sous-tendent la liberté de religion. La décision de la ministre est donc déraisonnable.

Per McLachlin C.J. and Rothstein and Moldaver JJ.: Loyola, as a religious organization, is entitled to the constitutional protection of freedom of religion. The communal character of religion means that protecting the religious freedom of individuals requires protecting the religious freedom of religious organizations, including religious educational bodies such as Loyola.

La juge en chef McLachlin et les juges Rothstein et Moldaver : Loyola, en tant qu'organisation religieuse, bénéficie de la protection constitutionnelle relative à la liberté de religion. Étant donné le caractère collectif de la religion, la protection relative à la liberté de religion des individus commande la protection de la liberté de religion des organisations religieuses, y compris les établissements d'enseignement à caractère religieux comme Loyola.

The first issue is whether Loyola's freedom of religion was infringed by the Minister's decision. The second issue is whether the Minister's decision — that only a

Tout d'abord, il faut déterminer si la décision de la ministre a porté atteinte à cette liberté de religion de Loyola. Ensuite, il faut se demander si cette décision —

purely secular course of study may serve as an equivalent to the ERC Program — limits Loyola's freedom of religion more than reasonably necessary to achieve the goals of the program. However one describes the precise analytic approach taken, the essential question raised by this appeal is whether the Minister's decision limited Loyola's right to religious freedom proportionately — that is, no more than was reasonably necessary.

selon laquelle seul un programme d'études purement laïque peut équivaloir au programme ÉCR — porte atteinte à cette liberté plus qu'il n'est raisonnablement nécessaire de le faire pour atteindre les objectifs du programme. Quelle que soit la façon dont est décrite l'approche analytique précise adoptée, la question essentielle soulevée dans le présent pourvoi est celle de savoir si la décision de la ministre a restreint le droit à la liberté de religion de Loyola de manière proportionnée — c'est-à-dire, pas plus qu'il n'était raisonnablement nécessaire de le faire.

Loyola proposed an alternative to the ERC Program that takes the following form: (1) Loyola will teach Catholicism from the Catholic perspective, but will teach other religions objectively and respectfully; (2) Loyola will emphasize the Catholic point of view on ethical questions, but will ensure all ethical points are presented on any given issue; and (3) Loyola will encourage students to think critically and engage with their teachers and with each other in exploring the topics covered in the program. Loyola's proposal departs from the generic ERC Program in two key respects. When teaching both Catholicism and ethics, Loyola's teachers would depart from the strict neutrality that the ERC Program requires.

Le programme de remplacement proposé par Loyola se présente sous la forme suivante : (1) Loyola enseignerait le catholicisme du point de vue catholique, mais les autres religions de façon objective et avec respect; (2) Loyola insisterait sur le point de vue catholique pour ce qui est des questions d'éthique, mais veillerait à ce que tous les points de vue éthiques soient présentés sur un sujet donné; et (3) Loyola encouragerait les élèves à penser de manière critique et à échanger avec leurs enseignants et entre eux lorsqu'ils exploreraient les thèmes abordés par le programme. La proposition de Loyola s'écarterait du programme ÉCR de référence sous deux aspects essentiels. Les enseignants de Loyola s'écarteraient de la stricte neutralité exigée par le programme ÉCR dans l'enseignement tant du catholicisme que de l'éthique.

The freedom of religion protected by s. 2(*a*) of the *Charter* is not limited to religious belief, worship and the practice of religious customs. Rather, it extends to conduct more readily characterized as the propagation of, rather than the practice of, religion. Where the claimant is an organization rather than an individual, it must show that the claimed belief or practice is consistent with both its purpose and operation. While an organization itself cannot testify, the credibility of officials and representatives who give testimony on the organization's behalf will aid in evaluating this consistency. It is proper to assess the claimed belief or practice in light of objective facts such as the organization's other practices, policies and governing documents. The beliefs and practices of an organization may also reasonably be expected to be less fluid than those of an individual, therefore inquiry into past practices and consistency of position would be more relevant than in the context of a claimant who is a natural person.

La liberté de religion protégée par l'al. 2*a*) de la *Charte* ne se limite pas aux convictions religieuses, au culte et à la pratique de coutumes religieuses. En effet, elle englobe des actes qui participent davantage de la propagation de la foi que de la pratique religieuse. Lorsque le demandeur est une organisation plutôt qu'une personne physique, il doit démontrer que la croyance ou la pratique qu'il revendique s'accorde tant avec sa mission qu'avec ses activités. Bien qu'une organisation ne puisse elle-même témoigner, la crédibilité des dirigeants et des représentants qui témoigneront en son nom aidera à apprécier la conformité de cette croyance ou pratique avec sa mission et ses activités. Il convient d'évaluer la croyance ou la pratique revendiquées à la lumière de faits objectifs tels que les autres pratiques de l'organisation, ses politiques et ses documents constitutifs. On peut également raisonnablement s'attendre à ce que les croyances et les pratiques d'une organisation soient moins fluides que celles d'une personne physique. L'examen des pratiques antérieures et de la constance des positions jouerait donc un rôle plus important dans le cas d'une organisation que dans celui d'une personne physique.

This is not a case where the assessment of consistency is difficult, or where there is a reasonable concern that the expressed belief is made in bad faith or for an ulterior

Il ne s'agit pas d'une cause dans laquelle l'appréciation de la conformité pose problème ou dans laquelle il y a raisonnablement lieu de s'inquiéter de ce que la

purpose. Having found that Loyola's belief in its religious obligation to teach Catholicism and ethics from a Catholic perspective is consistent with its organizational purpose and operation, it is evident that the Minister's denial of an exemption from the ERC Program — which has the effect of requiring Loyola to teach its entire ethics and religion program from a neutral, secular perspective — infringes Loyola's freedom of religion in violation of s. 2(*a*) of the *Charter*.

croyance est exprimée de mauvaise foi ou dans un but inavoué. Comme nous avons conclu que la croyance de Loyola suivant laquelle elle est tenue, sur le plan religieux, d'enseigner le catholicisme et l'éthique selon une perspective catholique est conforme à sa mission et à ses activités, force est de constater que le refus de la ministre d'exempter cet établissement du programme ÉCR — qui a pour effet de l'obliger à enseigner l'ensemble de son programme d'éthique et de religion d'un point de vue neutre et non confessionnel — porte atteinte à sa liberté de religion en contravention de l'al. 2*a*) de la *Charte*.

The government bears the burden of showing that the Minister's insistence on a purely secular program of study to qualify for an exemption limited Loyola's religious freedom no more than reasonably necessary to achieve the ERC Program's goals. There is nothing inherent in the ERC Program's objectives (recognition of others and pursuit of the common good) or competencies (world religions, ethics, and dialogue) that requires a cultural and non-denominational approach. As the legislative and regulatory scheme demonstrates, the intention of the government was to allow religious schools to teach the ERC Program without sacrificing their own religious perspectives. This goal is entirely realistic. A program of purely denominational instruction designed primarily to indoctrinate students to the correctness of certain religious precepts would not achieve the objectives of the ERC Program; however, a balanced curriculum, taught from a religious perspective but with all viewpoints presented and respected, could serve as an equivalent to the ERC Program. To the extent Loyola's proposal meets these criteria, it should not have been rejected out of hand.

C'est au gouvernement de faire la preuve que l'insistance de la ministre sur la nécessité que le programme d'études soit purement laïque pour qu'une exemption puisse être accordée ne restreint le droit à la liberté de religion de Loyola pas plus qu'il est raisonnable de le faire pour atteindre les objectifs du programme ÉCR. Il n'y a rien d'inhérent aux objectifs du programme ÉCR (reconnaissance des autres et poursuite du bien commun) ou aux compétences qu'il vise à inculquer aux élèves (religions dans le monde, éthique et dialogue) qui exige que l'on adopte une démarche culturelle et non confessionnelle. Comme le démontre le régime législatif et réglementaire, l'intention du gouvernement était de permettre aux écoles confessionnelles d'enseigner le programme ÉCR sans sacrifier pour autant leurs propres conceptions religieuses. Cet objectif est tout à fait réaliste. Un programme d'enseignement purement confessionnel conçu d'abord et avant tout pour inculquer aux élèves le bien-fondé de certains préceptes religieux n'atteindrait pas les objectifs du programme ÉCR; toutefois, un ensemble de matières équilibré enseigné d'un point de vue religieux, mais qui présenterait et respecterait tous les points de vue pourrait constituer un cours équivalent au programme ÉCR. Dans la mesure où la proposition de Loyola satisfait à ces critères, elle n'aurait pas dû être rejetée d'emblée.

There is unquestionably a role for the Minister to examine proposed programs on a case-by-case basis to ensure that they adequately further the objectives and competencies of the ERC Program. In certain cases, the result may be that the religious freedoms of private schools are subject to justifiable limitations. Here, however, the Minister adopted a definition of equivalency that essentially read this meaningful individualized approach out of the legislative and regulatory scheme. By using as her starting point the premise that only a secular approach to teaching the ERC Program can suffice as equivalent, the protection contemplated by the exemption provision at issue was rendered illusory.

On ne peut nier que le ministre est notamment chargé d'examiner au cas par cas les programmes proposés pour s'assurer qu'ils favorisent de façon adéquate la réalisation des objectifs du programme ÉCR et l'apprentissage des compétences qu'il vise à atteindre. Dans certains cas, il se pourrait que la liberté de religion des écoles privées fasse l'objet de restrictions justifiées. En l'espèce, toutefois, la ministre a adopté une définition de l'équivalence qui a essentiellement eu pour effet de faire déborder du cadre du régime législatif et réglementaire une méthode individualisée par ailleurs valable. En utilisant comme point de départ la prémisse que seule une démarche non confessionnelle d'enseignement du programme ÉCR pouvait être considérée équivalente, la ministre a rendu illusoire la protection envisagée par la disposition d'exemption en cause.

The legislative and regulatory scheme is designed to be flexible and to permit private schools to deviate from the generic ERC Program, so long as its objectives are met. The Minister's definition of equivalency casts this intended flexibility in the narrowest of terms, and limits deviation to a degree beyond that which is necessary to ensure the objectives of the ERC Program are met. This led to a substantial infringement on Loyola's religious freedom. In short, the Minister's decision was not minimally impairing. Therefore, it cannot be justified under s. 1 of the *Charter* as a reasonable limit on Loyola's s. 2(*a*) right to religious freedom.

Le régime législatif et réglementaire est conçu pour être flexible et pour permettre aux établissements d'enseignement privés de déroger au programme ÉCR de référence à condition d'en respecter les objectifs. La définition de l'équivalence retenue par la ministre exprime la souplesse prévue par le régime réglementaire de la façon la plus restrictive possible et limite les dérogations plus qu'il n'est nécessaire de le faire pour assurer l'atteinte des objectifs du programme ÉCR. Cette façon de procéder s'est traduite par une atteinte grave à la liberté de religion de Loyola. Bref, la décision de la ministre ne constituait pas une atteinte minimale. Elle ne peut donc se justifier en application de l'article premier de la *Charte* en tant que limite raisonnable au droit à la liberté de religion garanti à Loyola par l'al. 2*a*).

Determining whether a proposed program is sufficiently equivalent to the generic ERC Program is a fact-based exercise. In the context of the present case, Loyola's teachers must be permitted to describe and explain Catholic doctrine and ethical beliefs from the Catholic perspective. Loyola's teachers must describe and explain the ethical beliefs and doctrines of other religions in an objective and respectful way. Loyola's teachers must maintain a respectful tone of debate, but where the context of the classroom discussion requires it, they may identify what Catholic beliefs are, why Catholics follow those beliefs, and the ways in which other ethical or doctrinal propositions do not accord with those beliefs.

Déterminer si un programme proposé est suffisamment équivalent au programme ÉCR de référence suppose de procéder à une analyse axée sur les faits. Dans le contexte de la présente affaire, les enseignants de Loyola seront autorisés à exposer et à expliquer la doctrine et les croyances éthiques catholiques du point de vue catholique. Les enseignants de Loyola devront exposer et expliquer les croyances et les doctrines éthiques des autres religions de manière objective et respectueuse. Les enseignants de Loyola devront s'assurer que le débat a lieu dans un climat de respect, mais, lorsque le contexte de la discussion en classe l'exigera, ils pourront préciser en quoi consistent les convictions catholiques, les raisons pour lesquelles les catholiques y adhèrent et les raisons pour lesquelles d'autres propositions éthiques ou doctrinales sont incompatibles avec ces convictions.

This Court is empowered by s. 24(1) of the *Charter* to craft an appropriate remedy in light of all of the circumstances. It is neither necessary nor just to send this matter back to the Minister for reconsideration, further delaying the relief Loyola has sought for nearly seven years. Based on the application judge's findings of fact, and considering the record and the submissions of the parties, the only constitutional response to Loyola's application for an exemption would be to grant it.

Le paragraphe 24(1) de la *Charte* habilite la Cour à déterminer la réparation appropriée compte tenu de l'ensemble des circonstances. Il n'est pas nécessaire de renvoyer l'affaire au ministre pour qu'il la réexamine et il ne serait pas juste de le faire puisque cela aurait pour effet de retarder encore plus la réparation que Loyola réclame depuis presque sept ans. Eu égard aux conclusions de fait tirées par le juge saisi de la demande et compte tenu du dossier et des observations des parties, la seule réponse à la demande d'exemption de Loyola qui soit conforme à la Constitution consiste à lui donner une suite favorable.

Cases Cited

By Abella J.

Applied: *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395; **considered:** *S.L. v. Commission scolaire des Chênes*, 2012 SCC 7, [2012] 1 S.C.R. 235; **referred to:** *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Multani v. Commission scolaire*

Jurisprudence

Citée par la juge Abella

Arrêt appliqué : *Doré c. Barreau du Québec*, 2012 CSC 12, [2012] 1 R.C.S. 395; **arrêt examiné :** *S.L. c. Commission scolaire des Chênes*, 2012 CSC 7, [2012] 1 R.C.S. 235; **arrêts mentionnés :** *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038; *Multani c.*

TAB 13

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Duncan v. Retail Wholesale Union Pension Plan,*
2017 BCSC 2375

Date: 20171222
Docket: S179454
Registry: New Westminster

2017 BCSC 2375 (CanLII)

In the Matter of *Judicial Review Procedure Act*, R.S.B.C.1996, c. 241
and the *Human Rights Code*, R.S.B.C. 1996, c. 210
and the *Constitution Act*, 1982. c. 11

Between:

John Duncan

Petitioner

And

Trustees: Retail Wholesale Union Pension Plan and
The Human Rights Tribunal

Respondents

Before: The Honourable Mr. Justice Armstrong

On judicial review from: A decision of the British Columbia Human Rights Tribunal, dated February 17, 2016 (*Duncan v. Trustees: Retail Wholesale Union Pension Plan*, 2016 BCHRT 22).

Reasons for Judgment

The Petitioner appearing in person:	John Duncan
Counsel for The Respondents:	Robert Sider
Place and Date of Trial/Hearing:	New Westminster, B.C. January 13, 2017
Place and Date of Judgment:	New Westminster, B.C. December 22, 2017

> [55] Binding authority prevents the acceptance of the appellants' submission. Slightly more than a decade after deciding *Bell ExpressVu*, the Supreme Court rejected an argument similar to the appellants' when, in *R. v. Clarke*, it stated, at para. 16:
>
> > Only in the administrative law context is ambiguity not the divining rod that attracts Charter values. Instead, administrative law decision-makers "must act consistently with the values underlying the grant of discretion, including Charter values" (*Doré*, at para. 24). The issue in the administrative context therefore, is not whether the statutory language is so ambiguous as to engage Charter values, it is whether the exercise of discretion by the administrative decision-maker unreasonably limits the Charter protections in light of the legislative objective of the statutory scheme.

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[99] The second point argued was that *Charter* values as an interpretive principle only apply in instances where an administrative decision-maker is exercising a discretionary power (such as ordering a remedy): see *Taylor-Baptiste* at paras. 54 and 56.

[100] The second argument was rejected on the basis that *Doré*, read as a whole, requires administrative tribunals to "*always*…consider fundamental values" (emphasis original): see *Doré*, at para. 35. This extended to all administrative decision making—not just that of a discretionary nature.

[101] The Court reviewed the tribunal's *Charter* value analysis and concluded the administrative body in this instance properly balanced relevant *Charter* values with the *Human Rights Code* provisions and dismissed the appeal.

Application to the Facts

[102] On review, the Tribunal's conclusion that it could not consider *Charter* values in deciding whether the Plan was *bona fide* because there was no ambiguity in the statute was incorrect. The Tribunal could have engaged in a *Charter* value analysis and taken into account consideration of how the *Charter* value at issue could be best protected in light of the statutory objectives. These objectives are laid out in s. 3 of the *Code*. It reads:

> **3** The purposes of this Code are as follows:

> (a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;
>
> (b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;
>
> (c) to prevent discrimination prohibited by this Code;
>
> (d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this Code;
>
> (e) to provide a means of redress for those persons who are discriminated against contrary to this Code.
>
> (f) and (g) [Repealed 2002-62-2.]
>
> [Emphasis added.]

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[103] Given the Supreme Court decisions of *Doré* and *Clarke* in addition to the *Ismail* decision of this Court, I conclude the Tribunal had an obligation to weigh the purpose of the *Code* against the right of the petitioner not to be discriminated against on the basis of marital status when applying s. 13(3)(b) of the *Code*. Such an analysis can occur within the *Potash* framework.

[104] While the issue in *Potash* was with respect to the statutory interpretation of the exemption provision in the *NBHRC*, in a case where the majority believed there was no ambiguity, the Court still took into account some of the policy considerations and legislative history behind New Brunswick’s rational for allowing a specific exemption on the basis of age under s. 3 of the *NBHRC*.

[105] Although the Tribunal performed an analysis of the legitimacy and genuineness of the Plan as settled by *Potash*, it did so without consideration the underlying policy rationale for the exemption for martial status in s. 13(3)(b) or the potential influence of Charter values on the question. Given the Tribunal’s insistence that a strict interpretation of the *Potash* framework was necessary, the Tribunal at the very least should have engaged in a similar exercise with respect to marital status based discrimination that the Supreme Court engaged in for age based discrimination.

[106] The Tribunal was obliged to engage in the balancing of the objectives of the statutory regime under which they operate and the *Charter* values being infringed within the *Potash* framework. This weighing of *Charter* values can be undertaken at the good faith stage of the legitimacy analysis. Given the Court's conclusions in *Zurich* that "sound and accepted business practices" can be considered in evaluating the *bona fides* of the plan, it is possible that *Charter* values could inform the Tribunal's analysis of what constitutes a "sound" business practice in balancing the objectives of the statute with the petitioner's *Charter* interests. On this analysis I conclude the Tribunal erred in its application of the *Potash* test without regard to the petitioner's *Charter* interests.

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<u>Conclusion</u>

[107] In the result, the Tribunal decision to reject Mr. Duncan's complaint at the preliminary screening stage is set aside. The Tribunal is directed to reconsider his complaint while taking into account *Charter* values.

[108] Although the petition requested a direction that a new tribunal consider his complaint, I find there is no basis or need for this matter to be heard by a new Tribunal.

"Armstrong J."

TAB 14

Her Majesty The Queen *Appellant;*

and

David Edwin Oakes *Respondent.*

File No.: 17550.

1985: March 12; 1986: February 28.

Present: Dickson C.J. and Estey, McIntyre, Chouinard, Lamer, Wilson and Le Dain JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Presumption of innocence (s. 11(d)) — Reverse onus clause — Accused presumed to be trafficker on finding of possession of illicit drug — Onus on accused to rebut presumption — Whether or not reverse onus in violation of s. 11(d) of the Charter — Whether or not reverse onus a reasonable limit to s. 11(d) and justified in a free and democratic society — Canadian Charter of Rights and Freedoms, ss. 1, 11(d) — Narcotic Control Act, R.S.C. 1970, c. N-1, ss. 3(1), (2), 4(1), (2), (3), 8.

Criminal law — Presumption of innocence — Reverse onus — Accused presumed to be trafficker on finding of possession of illicit drug — Onus on accused to rebut presumption — Whether or not constitutional guarantee of presumption of innocence (s. 11(d) of the Charter) violated.

Respondent was charged with unlawful possession of a narcotic for the purpose of trafficking, contrary to s. 4(2) of the *Narcotic Control Act*, but was convicted only of unlawful possession. After the trial judge made a finding that it was beyond a reasonable doubt that respondent was in possession of a narcotic, respondent brought a motion challenging the constitutional validity of s. 8 of the *Narcotic Control Act*. That section provides that if the Court finds the accused in possession of a narcotic, the accused is presumed to be in possession for the purpose of trafficking and that, absent the accused's establishing the contrary, he must be convicted of trafficking. The Ontario Court of Appeal, on an appeal brought by the Crown, found that this provision constituted a "reverse onus" clause and held it to be unconstitutional because it violated the presumption of innocence now entrenched in s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*. The Crown appealed and a constitutional question was stated as to whether

Sa Majesté La Reine *Appelante;*

et

David Edwin Oakes *Intimé.*

N° du greffe: 17550.

1985: 12 mars; 1986: 28 février.

Présents: Le juge en chef Dickson et les juges Estey, McIntyre, Chouinard, Lamer, Wilson et Le Dain.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit constitutionnel — Charte des droits — Présomption d'innocence (al. 11d)) — Disposition portant inversion de la charge de la preuve — L'accusé est présumé être un trafiquant dès lors qu'il est constaté qu'il était en possession d'une drogue illicite — Il incombe à l'accusé de réfuter cette présomption — L'inversion de la charge de la preuve est-elle contraire à l'al. 11d) de la Charte? — L'inversion de la charge de la preuve apporte-t-elle à l'al. 11d) une limite qui soit raisonnable et justifiée dans une société libre et démocratique? — Charte canadienne des droits et libertés, art. 1, 11d) — Loi sur les stupéfiants, S.R.C. 1970, chap. N-1, art. 3(1), (2), 4(1), (2), (3), 8.

Droit criminel — Présomption d'innocence — Inversion de la charge de la preuve — L'accusé est présumé être un trafiquant dès lors qu'il est constaté qu'il était en possession d'une drogue illicite — Il incombe à l'accusé de réfuter cette présomption — Y a-t-il eu violation du droit constitutionnel d'être présumé innocent (al. 11d) de la Charte)?

L'intimé a été accusé d'avoir eu illégalement en sa possession un stupéfiant pour en faire le trafic, contrairement au par. 4(2) de la *Loi sur les stupéfiants*. Toutefois, il a été reconnu coupable seulement de possession. Après que le juge du procès eut conclu que, hors de tout doute raisonnable, l'intimé était en possession d'un stupéfiant, ce dernier a présenté une requête en contestation de la constitutionnalité de l'art. 8 de la *Loi sur les stupéfiants*. Cet article prévoit que si la cour constate que l'accusé était en possession d'un stupéfiant, il est présumé l'avoir été pour en faire le trafic et qu'à moins qu'il ne prouve le contraire, il doit être déclaré coupable de trafic. Le ministère public a interjeté appel devant la Cour d'appel de l'Ontario qui a conclu qu'il s'agissait d'une disposition portant «inversion de la charge de la preuve» qui est inconstitutionnelle pour le motif qu'elle viole la présomption d'innocence maintenant enchâssée dans l'al. 11*d*) de la *Charte canadienne des droits et libertés*. Le ministère public a formé un

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s. 8 of the *Narcotic Control Act* violated s. 11(*d*) of the *Charter* and was therefore of no force and effect. Inherent in this question, given a finding that s. 11(*d*) of the *Charter* had been violated, was the issue of whether or not s. 8 of the *Narcotic Control Act* was a reasonable limit prescribed by law and demonstrably justified in a free and democratic society for the purpose of s. 1 of the *Charter*.

pourvoi dans le cadre duquel on a formulé la question constitutionnelle de savoir si l'art. 8 de la *Loi sur les stupéfiants* est contraire à l'al. 11*d*) de la *Charte* et, par conséquent, inopérant. À supposer que l'on conclue qu'il y a eu violation de l'al. 11*d*) de la *Charte*, cette question constitutionnelle soulève alors la question de savoir si l'art. 8 de la *Loi sur les stupéfiants* constitue une limite raisonnable imposée par une règle de droit et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique, au sens de l'article premier de la *Charte*.

Held: The appeal should be dismissed and the constitutional question answered in the affirmative.

Arrêt: Le pourvoi est rejeté et la question constitutionnelle reçoit une réponse affirmative.

Per Dickson C.J. and Chouinard, Lamer, Wilson and Le Dain JJ.: Pursuant to s. 8 of the *Narcotic Control Act*, the accused, upon a finding beyond a reasonable doubt of possession of a narcotic, has the legal burden of proving on a balance of probabilities that he was not in possession of the narcotic for the purpose of trafficking. On proof of possession, a mandatory presumption arises against the accused that he intended to traffic and the accused will be found guilty unless he can rebut this presumption on a balance of probabilities.

Le juge en chef Dickson et les juges Chouinard, Lamer, Wilson et Le Dain: Aux termes de l'art. 8 de la *Loi sur les stupéfiants*, dès qu'on conclut hors de tout doute raisonnable que l'accusé était en possession d'un stupéfiant, celui-ci a la charge ultime de prouver selon la prépondérance des probabilités qu'il n'était pas en possession de ce stupéfiant pour en faire le trafic. Une fois prouvée, la possession fait naître à l'encontre de l'accusé la présomption impérative qu'il avait l'intention de se livrer au trafic et il sera reconnu coupable, à moins qu'il ne puisse, par une preuve selon la prépondérance des probabilités, réfuter cette présomption.

The presumption of innocence lies at the very heart of the criminal law and is protected expressly by s. 11(*d*) of the *Charter* and inferentially by the s. 7 right to life, liberty and security of the person. This presumption has enjoyed longstanding recognition at common law and has gained widespread acceptance as evidenced from its inclusion in major international human rights documents. In light of these sources, the right to be presumed innocent until proven guilty requires, at a minimum, that: (1) an individual be proven guilty beyond a reasonable doubt; (2) the State must bear the burden of proof; and (3) criminal prosecutions must be carried out in accordance with lawful procedures and fairness.

La présomption d'innocence est au cœur même du droit criminel; elle est garantie expressément par l'al. 11*d*) de la *Charte* et implicitement par l'art. 7 qui garantit le droit à la vie, à la liberté et à la sécurité de la personne. Cette présomption a depuis fort longtemps droit de cité en *common law* et son acceptation générale ressort de son inclusion dans les plus importants documents internationaux relatifs aux droits de la personne. Compte tenu de ces documents, le droit d'être présumé innocent tant qu'on n'est pas déclaré coupable exige à tout le moins (1) que la culpabilité soit établie hors de tout doute raisonnable, (2) que ce soit à l'État qu'incombe la charge de la preuve et (3) que les poursuites criminelles se déroulent d'une manière conforme aux procédures légales et à l'équité.

A provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question, violates the presumption of innocence in s. 11(*d*). The fact that the standard required on rebuttal is only a balance of probabilities does not render a reverse onus clause constitutional.

Une disposition qui oblige un accusé à démontrer selon la prépondérance des probabilités l'inexistence d'un fait présumé qui constitue un élément important de l'infraction en question, porte atteinte à la présomption d'innocence de l'al. 11*d*). Ce n'est pas parce que la norme requise pour réfuter la présomption est la preuve selon la prépondérance des probabilités qu'une disposition portant inversion de la preuve est constitutionnelle.

Section 8 of the *Narcotic Control Act* infringes the presumption of innocence in s. 11(*d*) of the *Charter* by

L'article 8 de la *Loi sur les stupéfiants* porte atteinte à la présomption d'innocence de l'al. 11*d*) de la *Charte*

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requiring the accused to prove he is not guilty of trafficking once the basic fact of possession is proven.

The rational connection test — the potential for a rational connection between the basic fact and the presumed fact to justify a reverse onus provision — does not apply to the interpretation of s. 11(*d*). A basic fact may rationally tend to prove a presumed fact, but still not prove its existence beyond a reasonable doubt, which is an important aspect of the presumption of innocence. The appropriate stage for invoking the rational connection test is under s. 1 of the *Charter*.

Section 1 of the *Charter* has two functions: First, it guarantees the rights and freedoms set out in the provisions which follow it; and second, it states explicitly the exclusive justificatory criteria (outside of s. 33 of the *Constitutional Act, 1982*) against which limitations on those rights and freedoms may be measured.

The onus of proving that a limitation on any *Charter* right is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. Limits on constitutionally guaranteed rights are clearly exceptions to the general guarantee. The presumption is that *Charter* rights are guaranteed unless the party invoking s. 1 can bring itself within the exceptional criteria justifying their being limited.

The standard of proof under s. 1 is a preponderance of probabilities. Proof beyond a reasonable doubt would be unduly onerous on the party seeking to limit the right because concepts such as "reasonableness", "justifiability", and "free and democratic society" are not amenable to such a standard. Nevertheless, the preponderance of probability test must be applied rigorously.

Two central criteria must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the objective to be served by the measures limiting a *Charter* right must be sufficiently important to warrant overriding a constitutionally protected right or freedom. The standard must be high to ensure that trivial objectives or those discordant with the principles of a free and democratic society do not gain protection. At a minimum, an objective must relate to societal concerns which are pressing and substantial in a free and democratic society before it can be

en obligeant l'accusé à prouver qu'il n'est pas coupable de trafic, une fois la possession établie.

Le critère du lien rationnel—le fait qu'une disposition portant inversion de la charge de la preuve puisse se justifier par l'existence d'un lien rationnel entre le fait établi et le fait présumé—ne s'applique pas à l'interprétation de l'al. 11*d*). Un fait établi peut rationnellement tendre à prouver un fait présumé sans pour autant en prouver l'existence hors de tout doute raisonnable, un aspect important de la présomption d'innocence. C'est dans le contexte de l'article premier de la *Charte* qu'il convient d'invoquer le critère du lien rationnel.

L'article premier de la *Charte* remplit deux fonctions: premièrement, il garantit les droits et libertés énoncés dans les dispositions qui le suivent; et, deuxièmement, il établit explicitement les seuls critères justificatifs (à part ceux de l'art. 33 de la *Loi constitutionnelle de 1982*) auxquels doivent satisfaire les restrictions apportées à ces droits et libertés.

La charge de prouver qu'une restriction à un droit garanti par la *Charte* est raisonnable et que sa justification peut se démontrer dans le cadre d'une société libre et démocratique incombe à la partie qui demande le maintien de cette restriction. Les restrictions apportées à des droits garantis par la Constitution constituent nettement des exceptions à la garantie générale dont ceux-ci font l'objet. On présume que les droits énoncés dans la *Charte* sont garantis, à moins que la partie qui invoque l'article premier ne puisse satisfaire aux critères exceptionnels qui justifient leur restriction.

La norme de preuve applicable aux fins de l'article premier est la preuve selon la prépondérance des probabilités. La preuve hors de tout doute raisonnable imposerait une charge trop lourde à la partie qui cherche à apporter une restriction à un droit, puisque des concepts comme «le caractère raisonnable», «le caractère justifiable» et «une société libre et démocratique» ne se prêtent pas à l'application d'une telle norme. Néanmoins, le critère de la prépondérance des probabilités doit être appliqué rigoureusement.

Pour établir qu'une restriction est raisonnable et que sa justification peut se démontrer dans le cadre d'une société libre et démocratique, il faut satisfaire à deux critères fondamentaux. En premier lieu, l'objectif que doivent servir les mesures qui apportent une restriction à un droit garanti par la *Charte*, doit être suffisamment important pour justifier la suppression d'un droit ou d'une liberté garantis par la Constitution. La norme doit être sévère afin que les objectifs peu importants ou contraires aux principes d'une société libre et démocratique ne bénéficient pas d'une protection. Il faut à tout le

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characterized as sufficiently important. Second, the party invoking s. 1 must show the means to be reasonable and demonstrably justified. This involves a form of proportionality test involving three important components. To begin, the measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective. In addition, the means should impair the right in question as little as possible. Lastly, there must be a proportionality between the effects of the limiting measure and the objective — the more severe the deleterious effects of a measure, the more important the objective must be.

moins qu'un objectif se rapporte à des préoccupations sociales, urgentes et réelles dans une société libre et démocratique, pour qu'on puisse le qualifier de suffisamment important. En deuxième lieu, la partie qui invoque l'article premier doit démontrer que les moyens choisis sont raisonnables et que leur justification peut se démontrer. Cela nécessite l'application d'une sorte de critère de proportionnalité qui comporte trois éléments importants. D'abord, les mesures doivent être équitables et non arbitraires, être soigneusement conçues pour atteindre l'objectif en question et avoir un lien rationnel avec cet objectif. De plus, le moyen choisi doit être de nature à porter le moins possible atteinte au droit en question. Enfin, il doit y avoir proportionnalité entre les effets de la mesure restrictive et l'objectif poursuivi — plus les effets préjudiciables d'une mesure sont graves, plus l'objectif doit être important.

Parliament's concern that drug trafficking be decreased was substantial and pressing. Its objective of protecting society from the grave ills of drug trafficking was self-evident, for the purposes of s. 1, and could potentially in certain cases warrant the overriding of a constitutionally protected right. There was, however, no rational connection between the basic fact of possession and the presumed fact of possession for the purpose of trafficking. The possession of a small or negligible quantity of narcotics would not support the inference of trafficking.

Le souci du législateur de réduire le trafic des stupéfiants est réel et urgent. Son objectif, qui est de protéger la société contre les fléaux liés au trafic des stupéfiants est évident en soi aux fins de l'article premier, et peut justifier dans certains cas l'atteinte à un droit garanti par la Constitution. Il n'existe toutefois pas de lien rationnel entre le fait établi de la possession et le fait présumé de possession à des fins de trafic. La possession d'une quantité infime ou négligeable de stupéfiants ne justifie pas une conclusion de trafic.

Per Estey and McIntyre JJ.: Concurred in the reasons of Dickson C.J. with respect to the relationship between s. 11(*d*) and s. 1 of the *Charter* but the reasons of Martin J.A. in the court below were adopted for the disposition of all other issues.

Les juges Estey et McIntyre: Les motifs du juge en chef Dickson sont adoptés en ce qui concerne le lien entre l'al. 11*d*) et l'article premier de la *Charte*. Cependant, il y a adoption des motifs du juge Martin de la Cour d'appel pour ce qui est de statuer sur toutes les autres questions.

Cases Cited

R. v. Shelley, [1981] 2 S.C.R. 196; *R. v. Carroll* (1983), 147 D.L.R. (3d) 92; *R. v. Cook* (1983), 4 C.C.C. (3d) 419; *R. v. Stanger* (1983), 7 C.C.C. (3d) 337; *R. v. Appleby*, [1972] S.C.R. 303; *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462, considered; *Ong Ah Chuan v. Public Prosecutor*, [1981] A.C. 648, distinguished; *R. v. Babcock and Auld*, [1967] 2 C.C.C. 235; *R. v. O'Day* (1983), 5 C.C.C. (3d) 227; *R. v. Landry*, [1983] C.A. 408, 7 C.C.C. (3d) 555; *R. v. Therrien* (1982), 67 C.C.C. (2d) 31; *R. v. Fraser* (1982), 138 D.L.R. (3d) 488; *R. v. Kupczyniski*, Ontario County Court, unreported, June 23, 1982; *R. v. Sharpe* (1961), 131 C.C.C. 75; *R. v. Silk*, [1970] 3 C.C.C. (2d) 1; *R. v. Erdman* (1971), 24 C.R.N.S. 216; *Public Prosecutor v. Yuvaraj*, [1970] 2 W.L.R. 226; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *Manchuk v.*

Jurisprudence

Arrêts examinés: *R. c. Shelley*, [1981] 2 R.C.S. 196; *R. v. Carroll* (1983), 147 D.L.R. (3d) 92; *R. v. Cook* (1983), 4 C.C.C. (3d) 419; *R. v. Stanger* (1983), 7 C.C.C. (3d) 337; *R. c. Appleby*, [1972] R.C.S. 303; *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462; distinction faite d'avec l'arrêt: *Ong Ah Chuan v. Public Prosecutor*, [1981] A.C. 648; arrêts mentionnés: *R. v. Babcock and Auld*, [1967] 2 C.C.C. 235; *R. v. O'Day* (1983), 5 C.C.C. (3d) 227; *R. c. Landry*, [1983] C.A. 408, 7 C.C.C. (3d) 555; *R. v. Therrien* (1982), 67 C.C.C. (2d) 31; *R. v. Fraser* (1982), 138 D.L.R. (3d) 488; *R. v. Kupczyniski*, Cour de comté de l'Ontario, décision inédite en date du 23 juin 1982; *R. v. Sharpe* (1961), 131 C.C.C. 75; *R. v. Silk*, [1970] 3 C.C.C. (2d) 1; *R. v. Erdman* (1971), 24 C.R.N.S. 216; *Public Prosecutor v. Yuvaraj*, [1970] 2 W.L.R. 226; *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295; *Renvoi: Motor*

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we espouse, and is directly contrary to the presumption of innocence enshrined in s. 11(*d*). Let us turn now to s. 1 of the *Charter*.

V

Is s. 8 of the *Narcotic Control Act* a Reasonable and Demonstrably Justified Limit Pursuant to s. 1 of the *Charter*?

The Crown submits that even if s. 8 of the *Narcotic Control Act* violates s. 11(*d*) of the *Charter*, it can still be upheld as a reasonable limit under s. 1 which, as has been mentioned, provides:

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

The question whether the limit is "prescribed by law" is not contentious in the present case since s. 8 of the *Narcotic Control Act* is a duly enacted legislative provision. It is, however, necessary to determine if the limit on Mr. Oakes' right, as guaranteed by s. 11(*d*) of the *Charter*, is "reasonable" and "demonstrably justified in a free and democratic society" for the purpose of s. 1 of the *Charter*, and thereby saved from inconsistency with the Constitution.

It is important to observe at the outset that s. 1 has two functions: first, it constitutionally guarantees the rights and freedoms set out in the provisions which follow; and, second, it states explicitly the exclusive justificatory criteria (outside of s. 33 of the *Constitution Act, 1982*) against which limitations on those rights and freedoms must be measured. Accordingly, any s. 1 inquiry must be premised on an understanding that the impugned limit violates constitutional rights and freedoms—rights and freedoms which are part of the supreme law of Canada. As Wilson J. stated in *Singh v. Minister of Employment and Immigration*, *supra*, at p. 218: " ... it is important to remember that the courts are conducting this inquiry in light of a

présomption d'innocence enchâssée à l'al. 11*d*). Passons maintenant à l'article premier de la *Charte*.

a

V

L'article 8 de la *Loi sur les stupéfiants* constitue-t-il une limite raisonnable dont la justification puisse se démontrer, au sens de l'article premier de la *Charte*?

b

Le ministère public fait valoir que même à supposer que l'art. 8 de la *Loi sur les stupéfiants* contrevienne à l'al. 11*d*) de la *Charte*, il peut tout de même être déclaré valide pour le motif qu'il constitue une restriction raisonnable au sens de l'article premier qui, rappelons-le, dispose:

c

> **1.** La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

d

e

La question de savoir s'il s'agit d'une restriction apportée «par une règle de droit» ne se pose pas en l'espèce puisque l'art. 8 de la *Loi sur les stupéfiants* est une disposition législative dûment adoptée. Il est toutefois nécessaire de déterminer si, dans le cas de M. Oakes, la restriction au droit garanti par l'al. 11*d*) de la *Charte* est «raisonnable» et si sa justification peut «se démontrer dans le cadre d'une société libre et démocratique» au sens de l'art. 1 de la *Charte*, de manière à être compatible avec la Constitution.

f

g

Il importe de souligner dès l'abord que l'article premier remplit deux fonctions: premièrement, il enchâsse dans la Constitution les droits et libertés énoncés dans les dispositions qui le suivent; et, deuxièmement, il établit explicitement les seuls critères justificatifs (à part ceux de l'art. 33 de la *Loi constitutionnelle de 1982*) auxquels doivent satisfaire les restrictions apportées à ces droits et libertés. En conséquence, tout examen fondé sur l'article premier doit partir de l'idée que la restriction attaquée porte atteinte à des droits et libertés garantis par la Constitution — des droits et des libertés qui font partie de la loi suprême du Canada. Comme le fait remarquer le juge Wilson dans l'arrêt *Singh c. Ministre de l'Emploi et de*

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i

j

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commitment to uphold the rights and freedoms set out in the other sections of the *Charter*."

A second contextual element of interpretation of s. 1 is provided by the words "free and democratic society". Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the *Charter* was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

The rights and freedoms guaranteed by the *Charter* are not, however, absolute. It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance. For this reason, s. 1 provides criteria of justification for limits on the rights and freedoms guaranteed by the *Charter*. These criteria impose a stringent standard of justification, especially when understood in terms of the two contextual considerations discussed above, namely, the violation of a constitutionally guaranteed right or freedom and the fundamental principles of a free and democratic society.

The onus of proving that a limit on a right or freedom guaranteed by the *Charter* is reasonable and demonstrably justified in a free and democrat-

l'Immigration, précité, à la p. 218: « ... il est important de se rappeler que les tribunaux effectuent cette enquête tout en veillant au respect des droits et libertés énoncés dans les autres articles de la *Charte*.»

Un second élément contextuel d'interprétation de l'article premier est fourni par l'expression «société libre et démocratique». L'inclusion de ces mots à titre de norme finale de justification de la restriction des droits et libertés rappelle aux tribunaux l'objet même de l'enchâssement de la *Charte* dans la Constitution: la société canadienne doit être libre et démocratique. Les tribunaux doivent être guidés par des valeurs et des principes essentiels à une société libre et démocratique, lesquels comprennent, selon moi, le respect de la dignité inhérente de l'être humain, la promotion de la justice et de l'égalité sociales, l'acceptation d'une grande diversité de croyances, le respect de chaque culture et de chaque groupe et la foi dans les institutions sociales et politiques qui favorisent la participation des particuliers et des groupes dans la société. Les valeurs et les principes sous-jacents d'une société libre et démocratique sont à l'origine des droits et libertés garantis par la *Charte* et constituent la norme fondamentale en fonction de laquelle on doit établir qu'une restriction d'un droit ou d'une liberté constitue, malgré son effet, une limite raisonnable dont la justification peut se démontrer.

Toutefois, les droits et libertés garantis par la *Charte* ne sont pas absolus. Il peut être nécessaire de les restreindre lorsque leur exercice empêcherait d'atteindre des objectifs sociaux fondamentalement importants. C'est pourquoi l'article premier prévoit des critères de justification des limites imposées aux droits et libertés garantis par la *Charte*. Ces critères établissent une norme sévère en matière de justification, surtout lorsqu'on les rapproche des deux facteurs contextuels examinés précédemment, savoir la violation d'un droit ou d'une liberté garantis par la Constitution et les principes fondamentaux d'une société libre et démocratique.

La charge de prouver qu'une restriction apportée à un droit ou à une liberté garantis par la *Charte* est raisonnable et que sa justification peut

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ic society rests upon the party seeking to uphold the limitation. It is clear from the text of s. 1 that limits on the rights and freedoms enumerated in the *Charter* are exceptions to their general guarantee. The presumption is that the rights and freedoms are guaranteed unless the party invoking s. 1 can bring itself within the exceptional criteria which justify their being limited. This is further substantiated by the use of the word "demonstrably" which clearly indicates that the onus of justification is on the party seeking to limit: *Hunter v. Southam Inc.*, *supra*.

se démontrer dans le cadre d'une société libre et démocratique incombe à la partie qui demande le maintien de cette restriction. Il ressort nettement du texte de l'article premier que les restrictions apportées aux droits et libertés énoncés dans la *Charte* constituent des exceptions à la garantie générale dont ceux-ci font l'objet. On présume que les droits et libertés sont garantis, à moins que la partie qui invoque l'article premier ne puisse satisfaire aux critères exceptionnels qui justifient leur restriction. C'est ce que confirme l'emploi de l'expression «puisse se démontrer» qui indique clairement qu'il appartient à la partie qui cherche à apporter la restriction de démontrer qu'elle est justifiée: *Hunter c. Southam Inc.*, précité.

The standard of proof under s. 1 is the civil standard, namely, proof by a preponderance of probability. The alternative criminal standard, proof beyond a reasonable doubt, would, in my view, be unduly onerous on the party seeking to limit. Concepts such as "reasonableness", "justifiability" and "free and democratic society" are simply not amenable to such a standard. Nevertheless, the preponderance of probability test must be applied rigorously. Indeed, the phrase "demonstrably justified" in s. 1 of the *Charter* supports this conclusion. Within the broad category of the civil standard, there exist different degrees of probability depending on the nature of the case: see Sopinka and Lederman, *The Law of Evidence in Civil Cases* (Toronto: 1974), at p. 385. As Lord Denning explained in *Bater v. Bater*, [1950] 2 All E.R. 458 (C.A.), at p. 459:

The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.

La norme de preuve aux fins de l'article premier est celle qui s'applique en matière civile, savoir la preuve selon la prépondérance des probabilités. L'autre possibilité, la preuve hors de tout doute raisonnable qui s'applique en matière criminelle, imposerait selon moi une charge trop lourde à la partie qui cherche à apporter la restriction. Des concepts comme «le caractère raisonnable», «le caractère justifiable» et «une société libre et démocratique» ne se prêtent tout simplement pas à l'application d'une telle norme. Néanmoins, le critère de la prépondérance des probabilités doit être appliqué rigoureusement. En fait, l'expression «dont la justification puisse se démontrer», que l'on trouve à l'article premier de la *Charte*, étaye cette conclusion. La norme générale applicable en matière civile comporte différents degrés de probabilité qui varient en fonction de la nature de chaque espèce: voir Sopinka et Lederman, *The Law of Evidence in Civil Cases* (Toronto: 1974), à la p. 385. Comme l'explique lord Denning dans *Bater v. Bater*, [1950] 2 All E.R. 458 (C.A.), à la p. 459:

[TRADUCTION] La preuve peut être faite selon la prépondérance des probabilités, mais cette norme peut comporter des degrés de probabilité. Ce degré dépend de l'objet du litige. Une cour civile, saisie d'une accusation de fraude, exigera naturellement un degré de probabilité plus élevé que celui qu'elle exigerait en examinant si la faute a été établie. Elle n'adopte pas une norme aussi sévère que le ferait une cour criminelle, même en examinant une accusation de nature criminelle, mais il reste qu'elle exige un degré de probabilité proportionné aux circonstances.

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TAB 15

John Michael Kapp, Robert Agricola, William Anderson, Albert Armstrong, Dale Armstrong, Lloyd James Armstrong, Pasha Berlak, Kenneth Axelson, Michael Bemi, Leonard Botkin, John Brodie, Darrin Chung, Donald Connors, Bruce Crosby, Barry Dolby, Wayne Ellis, William Gaunt, George Horne, Hon van Lam, William Leslie Sr., Bob M. McDonald, Leona McDonald, Stuart McDonald, Ryan McEachern, William McIsaac, Melvin (Butch) Mitchell, Ritchie Moore, Galen Murray, Dennis Nakutsuru, Theordore Neef, David Luke Nelson, Phuoc Nguyen, Nung Duc Gia Nguyen, Richard Nomura, Vui Phan, Robert Powroznik, Bruce Probert, Larry Salmi, Andy Sasidiak, Colin R. Smith, Donna Sonnenberg, Den van Ta, Cedric Towers, Thanh S. Tra, George Tudor, Mervin Tudor, Dieu To Ve, Albert White, Gary Williamson, Jerry A. Williamson, Spencer J. Williamson, Kenny Yoshikawa, Dorothy Zilcosky and Robert Zilcosky *Appellants*

v.

Her Majesty The Queen *Respondent*

and

Attorney General of Ontario, Attorney General of Quebec, Attorney General for Saskatchewan, Attorney General of Alberta, Tsawwassen First Nation, Haisla Nation, Songhees Indian Band, Malahat First Nation, T'Sou-ke First Nation, Snaw-naw-as (Nanoose) First Nation and Beecher Bay Indian Band (collectively Te'mexw Nations), Heiltsuk Nation, Musqueam Indian Band, Cowichan Tribes, Sportfishing Defence Alliance, B.C. Seafood Alliance, Pacific Salmon Harvesters Society, Aboriginal Fishing Vessel Owners Association, United Fishermen and Allied Workers

John Michael Kapp, Robert Agricola, William Anderson, Albert Armstrong, Dale Armstrong, Lloyd James Armstrong, Pasha Berlak, Kenneth Axelson, Michael Bemi, Leonard Botkin, John Brodie, Darrin Chung, Donald Connors, Bruce Crosby, Barry Dolby, Wayne Ellis, William Gaunt, George Horne, Hon van Lam, William Leslie Sr., Bob M. McDonald, Leona McDonald, Stuart McDonald, Ryan McEachern, William McIsaac, Melvin (Butch) Mitchell, Ritchie Moore, Galen Murray, Dennis Nakutsuru, Theordore Neef, David Luke Nelson, Phuoc Nguyen, Nung Duc Gia Nguyen, Richard Nomura, Vui Phan, Robert Powroznik, Bruce Probert, Larry Salmi, Andy Sasidiak, Colin R. Smith, Donna Sonnenberg, Den van Ta, Cedric Towers, Thanh S. Tra, George Tudor, Mervin Tudor, Dieu To Ve, Albert White, Gary Williamson, Jerry A. Williamson, Spencer J. Williamson, Kenny Yoshikawa, Dorothy Zilcosky et Robert Zilcosky *Appelants*

c.

Sa Majesté la Reine *Intimée*

et

Procureur général de l'Ontario, procureur général du Québec, procureur général de la Saskatchewan, procureur général de l'Alberta, Première nation Tsawwassen, Nation Haisla, bande indienne des Songhees, Première nation Malahat, Première nation des T'Sou-ke, Première nation Snaw-naw-as (Nanoose) et bande indienne de Beecher Bay (collectivement appelées Nations Te'mexw), Nation Heiltsuk, bande indienne des Musqueams, tribus Cowichan, Sportfishing Defence Alliance, B.C. Seafood Alliance, Pacific Salmon Harvesters Society, Aboriginal Fishing Vessel Owners Association, United

2008 SCC 41 (CanLII)

Union, Japanese Canadian Fishermens Association, Atlantic Fishing Industry Alliance, Nee Tahi Buhn Indian Band, Tseshaht First Nation and Assembly of First Nations *Interveners*

Indexed as: R. *v.* Kapp

Neutral citation: 2008 SCC 41.

File No.: 31603.

2007: December 11; 2008: June 27.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Charter of Rights — Right to equality — Affirmative action programs — Relationship between s. 15(1) and s. 15(2) of Canadian Charter of Rights and Freedoms — Ambit and operation of s. 15(2) — Communal fishing licence issued under pilot sales program granting members of three aboriginal bands exclusive right to fish for salmon for period of 24 hours — Commercial, mainly non-aboriginal, fishers excluded from fishery at that time alleging a breach of their equality rights on basis of race-based discrimination — Whether program protected by s. 15(2) of Charter.

Constitutional law — Charter of Rights — Aboriginal rights and freedoms not affected by Charter — Right to equality — Communal fishing licence issued under pilot sales program granting members of three aboriginal bands exclusive right to fish for salmon for period of 24 hours — Commercial, mainly non-aboriginal, fishers excluded from fishery at that time alleging a breach of their equality rights on basis of race-based discrimination — Whether s. 25 of Canadian Charter of Rights and Freedoms applicable to insulate program from discrimination charge.

Fishermen and Allied Workers Union, Japanese Canadian Fishermens Association, Atlantic Fishing Industry Alliance, bande indienne Nee Tahi Buhn, Première nation Tseshaht et Assemblée des Premières nations *Intervenants*

Répertorié : R. *c.* Kapp

Référence neutre : 2008 CSC 41.

N° du greffe : 31603.

2007 : 11 décembre; 2008 : 27 juin.

Présents : La juge en chef McLachlin et les juges Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron et Rothstein.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit constitutionnel — Charte des droits — Droit à l'égalité — Programmes de promotion sociale — Lien entre les art. 15(1) et 15(2) de la Charte canadienne des droits et libertés — Portée et application de l'art. 15(2) — Permis de pêche communautaire délivré en vertu d'un programme pilote de vente et accordant aux membres de trois bandes autochtones le droit exclusif de pêcher le saumon pendant une période de 24 heures — Pêcheurs commerciaux, pour la plupart non autochtones, à qui il était interdit de pêcher pendant cette période, alléguant l'existence d'une atteinte à leurs droits à l'égalité en raison d'une mesure discriminatoire fondée sur la race — Le programme en cause est-il protégé par l'art. 15(2) de la Charte?

Droit constitutionnel — Charte des droits — Maintien des droits et libertés des Autochtones — Droit à l'égalité — Permis de pêche communautaire délivré en vertu d'un programme pilote de vente et accordant aux membres de trois bandes autochtones le droit exclusif de pêcher le saumon pendant une période de 24 heures — Pêcheurs commerciaux, pour la plupart non autochtones, à qui il était interdit de pêcher pendant cette période, alléguant l'existence d'une atteinte à leurs droits à l'égalité en raison d'une mesure discriminatoire fondée sur la race — L'article 25 de la Charte canadienne des droits et libertés soustrait-il le programme en cause à l'accusation de discrimination?

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Fisheries — Commercial fishery — Aboriginal Fisheries Strategy — Communal fishing licence issued under pilot sales program granting members of three aboriginal bands exclusive right to fish for salmon for period of 24 hours — Commercial, mainly non-aboriginal, fishers excluded from fishery at that time alleging a breach of their equality rights on basis of race-based discrimination — Whether licence constitutional — Canadian Charter of Rights and Freedoms, s. 15.

The federal government's decision to enhance aboriginal involvement in the commercial fishery led to the Aboriginal Fisheries Strategy. A significant part of the Strategy was the introduction of three pilot sales programs, one of which resulted in the issuance of a communal fishing licence to three aboriginal bands, permitting fishers designated by the bands to fish for salmon in the mouth of the Fraser River for a period of 24 hours and to sell their catch. The appellants, who are all commercial fishers, mainly non-aboriginal, excluded from the fishery during this 24-hour period, participated in a protest fishery and were charged with fishing at a prohibited time. At their trial, they argued that the communal fishing licence discriminated against them on the basis of race. The trial judge found that the licence granted to the three bands was a breach of the appellants' equality rights under s. 15(1) of the *Canadian Charter of Rights and Freedoms* that was not justified under s. 1 of the *Charter*. Proceedings on all the charges were stayed. A summary convictions appeal by the Crown was allowed. The stay of proceedings was lifted and convictions were entered against the appellants. The Court of Appeal upheld that decision.

Held: The appeal should be dismissed. The communal fishing licence was constitutional.

Per McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.: The communal fishing licence falls within the ambit of s. 15(2) of the *Charter*, and the appellants' claim of a violation of s. 15 cannot succeed. [3]

Section 15(1) and s. 15(2) work together to promote the vision of substantive equality that underlies s. 15 as a whole. The focus of s. 15(1) is on preventing

Pêche — Pêche commerciale — Stratégie relative aux pêches autochtones — Permis de pêche communautaire délivré en vertu d'un programme pilote de vente et accordant aux membres de trois bandes autochtones le droit exclusif de pêcher le saumon pendant une période de 24 heures — Pêcheurs commerciaux, pour la plupart non autochtones, à qui il était interdit de pêcher pendant cette période, alléguant l'existence d'une atteinte à leurs droits à l'égalité en raison d'une mesure discriminatoire fondée sur la race — Le permis était-il conforme à la Constitution? — Charte canadienne des droits et libertés, art. 15.

La décision du gouvernement fédéral de favoriser la participation des Autochtones à la pêche commerciale est à l'origine de la Stratégie relative aux pêches autochtones. Cette stratégie a, dans une large mesure, consisté à établir trois programmes pilotes de vente, dont l'un a donné lieu à la délivrance, aux trois bandes autochtones, d'un permis de pêche communautaire autorisant les pêcheurs désignés par ces bandes à pêcher le saumon à l'embouchure du fleuve Fraser pendant une période de 24 heures, de même qu'à vendre leurs prises. Les appelants, tous des pêcheurs commerciaux, pour la plupart non autochtones, qui se sont vu interdire de pêcher pendant cette période de 24 heures, ont participé à une pêche de protestation et ont été accusés d'avoir pêché pendant une période interdite. Lors de leur procès, ils ont fait valoir que le permis de pêche communautaire était discriminatoire à leur égard en raison de leur race. Le juge de première instance a conclu que le permis délivré aux trois bandes portait atteinte aux droits à l'égalité garantis aux appelants par le par. 15(1) de la *Charte canadienne des droits et libertés*, et que cette atteinte n'était pas justifiée au regard de l'article premier de la *Charte*. Il a ordonné l'arrêt des procédures relatives à toutes les accusations. L'appel de la Couronne contre les déclarations sommaires de culpabilité a été accueilli. L'arrêt des procédures a été levé et des déclarations de culpabilité ont été inscrites contre les appelants. La Cour d'appel a maintenu cette décision.

Arrêt : Le pourvoi est rejeté. Le permis de pêche communautaire était conforme à la Constitution.

La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron et Rothstein : Le permis de pêche communautaire relève du par. 15(2) de la *Charte* et l'allégation des appelants voulant qu'il y ait eu violation de l'art. 15 ne saurait être retenue. [3]

Les paragraphes 15(1) et 15(2) ont pour effet combiné de promouvoir l'idée d'égalité réelle qui sous-tend l'ensemble de l'art. 15. Le paragraphe 15(1) a pour objet

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governments from making distinctions based on enumerated or analogous grounds that have the effect of perpetuating disadvantage or prejudice or imposing disadvantage on the basis of stereotyping. The focus of s. 15(2) is on enabling governments to pro-actively combat discrimination by developing programs aimed at helping disadvantaged groups improve their situation. Through s. 15(2), the *Charter* preserves the right of governments to implement such programs without fear of challenge under s. 15(1). It is thus open to the government, when faced with a s. 15 claim, to establish that the impugned program falls under s. 15(2) and is therefore constitutional. If the government fails to do so, the program must then receive full scrutiny under s. 15(1) to determine whether its impact is discriminatory. [16] [37] [40]

A distinction based on an enumerated or analogous ground in a government program will not constitute discrimination under s. 15 if, under s. 15(2): (1) the program has an ameliorative or remedial purpose; and (2) the program targets a disadvantaged group identified by the enumerated or analogous grounds. Given the language of the provision and its purpose, legislative goal is the paramount consideration in determining whether or not a program qualifies for s. 15(2) protection. The program's ameliorative purpose need not be its sole object. [41] [44] [48] [50] [57]

The government program at issue here is protected by s. 15(2) of the *Charter*. The communal fishing licence was issued pursuant to an enabling statute and regulations and qualifies as a "law, program or activity" within the meaning of s. 15(2). The program also "has as its object the amelioration of conditions of disadvantaged individuals or groups". The Crown describes numerous objectives for the program, which include negotiating solutions to aboriginal fishing rights claims, providing economic opportunities to native bands and supporting their progress towards self-sufficiency. The means chosen to achieve the purpose (special fishing privileges for aboriginal communities, constituting a benefit) are rationally related to serving that purpose. The Crown has thus established a credible ameliorative purpose for the program. The program also targets a disadvantaged group identified by the enumerated or analogous grounds. The bands granted the benefit were disadvantaged in terms of income, education and a host of other measures. This disadvantage, rooted in history, continues to this day. The fact that some individual members of the bands may not experience personal disadvantage does not negate the group disadvantage

d'empêcher les gouvernements d'établir des distinctions fondées sur des motifs énumérés ou analogues ayant pour effet de perpétuer un désavantage ou un préjugé, ou d'imposer un désavantage fondé sur l'application de stéréotypes. Le paragraphe 15(2) vise à permettre aux gouvernements de combattre de manière proactive la discrimination au moyen de programmes destinés à aider des groupes défavorisés à améliorer leur situation. Grâce au par. 15(2), la *Charte* protège le droit des gouvernements de mettre en œuvre de tels programmes sans s'exposer à des contestations fondées sur le par. 15(1). Lorsqu'il fait face à une allégation fondée sur l'art. 15, le gouvernement peut établir que le programme contesté relève du par. 15(2) et est donc conforme à la Constitution. Si le gouvernement ne le fait pas, le programme doit alors être assujetti à un examen approfondi au regard du par. 15(1) afin de déterminer s'il a un effet discriminatoire. [16] [37] [40]

La distinction fondée sur un motif énuméré ou analogue qu'établit un programme gouvernemental n'est pas discriminatoire au sens de l'art. 15 si, au regard du par. 15(2), ce programme (1) a un objet améliorateur ou réparateur et (2) vise un groupe défavorisé caractérisé par un motif énuméré ou analogue. Compte tenu du libellé et de l'objet de la disposition, l'objectif législatif est la considération primordiale pour déterminer si un programme peut bénéficier de la protection du par. 15(2). Il n'est pas nécessaire que le programme vise uniquement un objet améliorateur. [41] [44] [48] [50] [57]

Le programme gouvernemental en cause dans la présente affaire est protégé par le par. 15(2) de la *Charte*. Le permis de pêche communautaire a été délivré conformément à une loi habilitante et à son règlement d'application, et il constitue une « lo[i], [un] programm[e] ou [une] activit[é] » au sens du par. 15(2). Le programme est aussi « destin[é] à améliorer la situation d'individus ou de groupes défavorisés ». La Couronne associe maints objectifs au programme, dont ceux consistant à parvenir à des solutions négociées relativement aux revendications de droits de pêche des peuples autochtones et à donner des possibilités de développement économique aux bandes autochtones afin de favoriser leur accession à l'autosuffisance. Les moyens choisis pour réaliser cet objectif (l'attribution aux collectivités autochtones de privilèges spéciaux en matière de pêche qui constituent un avantage) ont un lien rationnel avec la poursuite de cet objectif. La Couronne a donc prouvé que le programme avait un objet améliorateur crédible. Le programme vise également un groupe défavorisé caractérisé par un motif énuméré ou analogue. Les bandes qui se sont vu accorder l'avantage en question étaient défavorisées sur les plans du revenu et de l'éducation, et à maints autres égards.

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suffered by band members. It follows that the program does not violate the equality guarantee of s. 15 of the *Charter*. [30] [57-59] [61]

Ce désavantage historique perdure de nos jours. Le fait que certains membres des bandes ne soient pas nécessairement personnellement défavorisés n'annule pas le désavantage dont sont collectivement victimes les membres de ces bandes. Il s'ensuit que le programme ne porte pas atteinte au droit à l'égalité garanti par l'art. 15 de la *Charte*. [30] [57-59] [61]

With respect to s. 25 of the *Charter*, it is not clear that the communal fishing licence at issue lies within the provision's compass. The wording of s. 25 and the examples given therein suggest that only rights of a constitutional character are likely to benefit from s. 25. A second concern is whether, even if the fishing licence does fall under s. 25, the result would constitute an absolute bar to the appellants' s. 15 claim, as distinguished from an interpretive provision informing the construction of potentially conflicting *Charter* rights. Prudence suggests that these issues, which raise complex questions of the utmost importance to the peaceful reconciliation of aboriginal entitlements with the interests of all Canadians, are best left for resolution on a case-by-case basis as they arise. [63-65]

En ce qui concerne l'art. 25 de la *Charte*, il n'est pas certain que le permis de pêche communautaire en cause tombe sous le coup de cet article. Le libellé de l'art. 25 et les exemples qu'on y trouve indiquent que seuls les droits de nature constitutionnelle sont susceptibles de bénéficier de la protection de l'art. 25. Même dans l'hypothèse où le permis de pêche relèverait effectivement de l'art. 25, la deuxième question est de savoir si la demande des appelants fondée sur l'art. 15 serait totalement irrecevable, contrairement à ce qui se produirait dans le cas d'une disposition servant à interpréter des droits garantis par la *Charte* qui sont susceptibles d'entrer en conflit. Il serait plus prudent que ces questions — qui soulèvent des considérations complexes extrêmement importantes pour que les droits des Autochtones puissent être conciliés de manière pacifique avec les intérêts de tous les Canadiens — soient tranchées au fur et à mesure qu'elles seront soulevées dans des cas particuliers. [63-65]

Per Bastarache J.: Section 25 of the *Charter* operates to bar the appellants' constitutional challenge under s. 15. Although there is agreement with the restatement of the test for the application of s. 15 of the *Charter* set out in the main opinion, there is no need to go through a full s. 15 analysis before considering whether s. 25 applies. It is sufficient to establish the existence of a potential conflict between the pilot sales program and s. 15. [75] [77] [108]

Le juge Bastarache : L'article 25 de la *Charte* fait obstacle à la contestation constitutionnelle des appelants fondée sur l'art. 15. Bien que la réaffirmation du critère adopté dans les motifs principaux à l'égard de l'application de l'art. 15 de la *Charte* soit acceptée, il n'est pas nécessaire de procéder à une analyse complète au regard de l'art. 15 avant de se demander si l'art. 25 s'applique. Il suffit d'établir l'existence d'un conflit potentiel entre le programme pilote de vente et l'art. 15. [75] [77] [108]

Section 25 is not a mere canon of interpretation. It serves the purpose of protecting the rights of aboriginal peoples where the application of the *Charter* protections for individuals would diminish the distinctive, collective and cultural identity of an aboriginal group. This is consistent with the wording and history of the provision. The s. 25 shield against the intrusion of the *Charter* upon native rights or freedoms is restricted by s. 28 of the *Charter*, which provides for gender equality "[n]otwithstanding anything in this Charter". It is also restricted to its object, placing *Charter* rights and freedoms in juxtaposition to aboriginal rights and freedoms. This means in essence that only laws that actually impair native rights will be considered, not those that simply have incidental effects on natives. [80-81] [89] [93] [97]

L'article 25 n'est pas une simple norme d'interprétation. Il a pour objectif de protéger les droits des peuples autochtones lorsque l'application des protections établies dans la *Charte* à l'endroit des individus diminuerait l'identité distinctive, collective et culturelle d'un groupe autochtone. Cette interprétation s'accorde avec la formulation et l'historique de la disposition. L'article 25 qui sert de bouclier contre les incidences de la *Charte* sur les droits et les libertés des peuples autochtones est restreint par l'art. 28 de la *Charte*, qui établit l'égalité des sexes « [i]ndépendamment des autres dispositions de la présente charte ». Il est également limité à son objet, les droits et libertés garantis par la *Charte* étant juxtaposés aux droits et libertés des peuples autochtones. Cela signifie, pour l'essentiel, que seules les lois qui portent véritablement atteinte à des droits des peuples autochtones seront prises en considération, et non celles qui ont uniquement des effets accessoires sur les Autochtones. [80-81] [89] [93] [97]

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The reference to "aboriginal and treaty rights" in s. 25 suggests that the focus of the provision is the uniqueness of those persons or communities mentioned in the Constitution; the rights protected are those that are unique to them because of their special status. Legislation that distinguishes between aboriginal and non-aboriginal people in order to protect interests associated with aboriginal culture, territory, sovereignty or the treaty process deserves to be shielded from *Charter* scrutiny. Laws adopted under the power set out in s. 91(24) of the *Constitution Act, 1867* would normally fall into this category, the power being in relation to the aboriginal peoples as such, but not laws that fall under s. 88 of the *Indian Act*, because they are by definition laws of general application. "[O]ther rights or freedoms" in s. 25 comprise statutory rights which seek to protect interests associated with aboriginal culture, territory, self-government, and settlement agreements that are a replacement for treaty and aboriginal rights. But private rights of individual Indians held in a private capacity as ordinary Canadian citizens would not be protected. Section 25 reflects the imperative need to accommodate, recognize and reconcile aboriginal interests. [103] [105-106]

La mention à l'art. 25 des « droits ou libertés ancestraux et issus de traités » indique que la disposition est axée sur le caractère tout à fait particulier des personnes ou des collectivités mentionnées dans la Constitution; les droits protégés sont ceux qui leur sont propres en raison de leur statut spécial. Un texte législatif qui fait une distinction entre Autochtones et non-Autochtones afin de protéger des intérêts liés à la culture, au territoire ou à la souveraineté autochtones, ou au processus des traités, mérite d'être soustrait à l'examen fondé sur la *Charte*. Les lois adoptées en vertu de la compétence établie au par. 91(24) de la *Loi constitutionnelle de 1867* feraient normalement partie de cette catégorie, cette compétence concernant les peuples autochtones en tant que tels, mais pas les lois visées par l'art. 88 de la *Loi sur les Indiens*, puisqu'il s'agit par définition de lois d'application générale. Sont compris dans les droits et libertés « autres » à l'art. 25 les droits d'origine législative qui visent à protéger des intérêts liés à la culture, au territoire et à l'autonomie gouvernementale des Autochtones, ainsi que les accords de règlement qui remplacent des droits ancestraux ou issus de traités. Mais les droits privés dont jouissent les Autochtones sur le plan individuel, à titre privé, en tant que citoyens canadiens comme les autres, ne seraient pas protégés. L'article 25 traduit la nécessité impérative de trouver des accommodements aux intérêts des peuples autochtones, de les reconnaître et de les concilier. [103] [105-106]

There are three steps in the application of s. 25. The first step requires an evaluation of the claim in order to establish the nature of the substantive *Charter* right and whether the claim is made out, *prima facie*. The second step requires an evaluation of the native right to establish whether it falls under s. 25. The third step requires a determination of the existence of a true conflict between the *Charter* right and the native right. [111]

L'application de l'art. 25 comporte trois étapes. La première exige une évaluation de la revendication afin d'établir la nature du droit fondamental garanti par la *Charte* et de déterminer si le bien-fondé de la revendication a été établi à première vue. La deuxième étape consiste à évaluer le droit autochtone afin de déterminer s'il relève de l'art. 25. La troisième étape consiste à déterminer s'il existe un conflit véritable entre le droit garanti par la *Charte* et le droit autochtone. [111]

Here, there is a *prima facie* case of discrimination pursuant to s. 15(1). The right given by the pilot sales program is limited to Aboriginals and has a detrimental effect on non-aboriginal commercial fishers who operate in the same region as the beneficiaries of the program. It is also clear that the disadvantage is related to racial differences. The native right falls under s. 25. The unique relationship between British Columbia aboriginal communities and the fishery should be enough to draw a link between the right to fish given to Aboriginals pursuant to the pilot sales program and the rights contemplated by s. 25. The right to fish has consistently been the object of claims based on aboriginal rights and treaty rights, the enumerated terms in the provisions. Furthermore, the Crown itself argued that these rights to fish were a first step in establishing

En l'espèce, il existe une preuve *prima facie* de discrimination selon le par. 15(1). Le droit conféré par le programme pilote de vente est limité aux Autochtones et a un effet préjudiciable aux pêcheurs commerciaux non autochtones actifs dans la même région que les bénéficiaires du programme. Il est clair aussi que le désavantage est lié à des différences raciales. Le droit autochtone est visé par l'art. 25. Le rapport tout à fait particulier des communautés autochtones de la Colombie-Britannique avec la pêche devrait suffire à établir un lien entre le droit de pêche donné aux Autochtones en vertu du programme pilote de vente et les droits envisagés à l'art. 25. Le droit de pêche a constamment fait l'objet de revendications fondées sur les droits ancestraux et les droits issus de traités, soit les termes énumérés dans les dispositions. En outre, la Couronne elle-même a prétendu

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a treaty right and s. 25 reflects the notions of reconciliation and negotiation present in the treaty process. Finally, the right in this case is totally dependent on the exercise of powers given to Parliament under s. 91(24) of the *Constitution Act, 1867*, which deals with Indians. The *Charter* cannot be interpreted as rendering unconstitutional the exercise of powers consistent with the purposes of s. 91(24), nor is it rational to believe that every exercise of the s. 91(24) jurisdiction requires a justification under s. 1 of the *Charter*. Section 25 is a necessary partner to s. 35(1) of the *Constitution Act, 1982*; it protects s. 35(1) purposes and enlarges the reach of measures needed to fulfill the promise of reconciliation. There is also a real conflict here, since the right to equality afforded to every individual under s. 15 is not capable of application consistently with the rights of aboriginal fishers holding licences under the pilot sales program. Section 25 of the *Charter* accordingly applies in the present situation and provides a full answer to the claim. [116] [119-123]

que ces droits constituaient une première étape vers la constitution d'un droit issu d'un traité et l'art. 25 reflète les notions de réconciliation et de négociation présentes dans le processus des traités. Enfin, le droit dont il est question en l'espèce dépend entièrement de l'exercice des pouvoirs conférés au Parlement par le par. 91(24) de la *Loi constitutionnelle de 1867*, qui concerne les Indiens. On ne peut interpréter la *Charte* comme si elle rendait inconstitutionnel l'exercice de pouvoirs conformes aux objectifs du par. 91(24), et il n'est pas logique de croire que tout exercice de la compétence établie au par. 91(24) exige une justification en vertu de l'article premier de la *Charte*. L'article 25 est un compagnon indissociable du par. 35(1) de la *Loi constitutionnelle de 1982*; il protège les objectifs du par. 35(1) et accroît la portée des mesures nécessaires pour que soit remplie la promesse de réconciliation. Il existe également un conflit véritable en l'espèce puisque l'application du droit à l'égalité reconnu à tous en vertu de l'art. 15 n'est pas compatible avec les droits des pêcheurs autochtones titulaires de permis dans le cadre du programme pilote de vente. Par conséquent, l'art. 25 de la *Charte* s'applique en l'espèce et constitue une réponse complète à la revendication. [116] [119-123]

Cases Cited

By McLachlin C.J. and Abella J.

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By Bastarache J.

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Jurisprudence

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appeal by the Crown: (2004), 31 B.C.L.R. (4th) 258, 2004 BCSC 958. It held that the pilot sales program did not have a discriminatory purpose or effect because it did not perpetuate or promote the view that those who were forbidden to fish on the days when the pilot sales program fishery was open are less capable or worthy of recognition or value as human beings or as members of Canadian society. Brenner C.J.S.C. lifted the stay of proceedings and entered convictions against the appellants.

Couronne contre les déclarations sommaires de culpabilité : (2004), 31 B.C.L.R. (4th) 258, 2004 BCSC 958. Elle a conclu que le programme pilote de vente n'avait pas un objet ou un effet discriminatoire parce qu'il ne perpétuait pas ou ne favorisait pas l'opinion selon laquelle ceux à qui il était interdit de pêcher les jours où la pêche était ouverte dans le cadre du programme pilote de vente étaient moins capables ou moins dignes d'être reconnus ou valorisés en tant qu'êtres humains ou que membres de la société canadienne. Le juge en chef Brenner a levé l'arrêt des procédures et inscrit des déclarations de culpabilité contre les appelants.

[12] The British Columbia Court of Appeal, in five sets of reasons concurring in the result, dismissed the appeal: (2006), 56 B.C.L.R. (4th) 11, 2006 BCCA 277. Low J.A. concluded that the pilot sales program did not constitute denial of a benefit under s. 15 when the matter was viewed in a contextual rather than formalistic way. Mackenzie J.A. rejected the claim of discrimination on the basis that a discriminatory purpose or effect had not been established, endorsing the view of Brenner C.J.S.C. on the summary convictions appeal. Kirkpatrick J.A. dismissed the s. 15 claim on the basis that s. 25 of the *Charter*, which protects rights and freedoms pertaining to the aboriginal peoples of Canada, insulated the scheme from the discrimination charge. Finch C.J.B.C. concurred with both Low J.A. and Mackenzie J.A. on the s. 15 issue, and found that s. 25 was not engaged. Finally, Levine J.A. agreed with Finch C.J.B.C. on the s. 15 issue, but declined to express a view on whether s. 25 was engaged.

[12] Dans cinq séries de motifs concordants quant au résultat, la Cour d'appel de la Colombie-Britannique a rejeté l'appel : (2006), 56 B.C.L.R. (4th) 11, 2006 BCCA 277. Le juge Low a conclu que le programme pilote de vente ne privait pas d'un avantage visé à l'art. 15 lorsque l'affaire était envisagée d'un point de vue contextuel plutôt que formaliste. Le juge Mackenzie, souscrivant à l'opinion du juge en chef Brenner concernant l'appel contre les déclarations sommaires de culpabilité, a rejeté l'allégation de discrimination pour le motif que l'existence d'un objet ou d'un effet discriminatoire n'avait pas été établie. La juge Kirkpatrick a rejeté l'argument fondé sur l'art. 15 pour le motif que l'art. 25 de la *Charte*, qui protège les droits et libertés des peuples autochtones du Canada, soustrayait le programme à l'accusation de discrimination. Le juge en chef Finch a souscrit à l'avis des juges Low et Mackenzie relativement à la question de l'art. 15, et a conclu que l'art. 25 n'était pas en jeu. Enfin, la juge Levine s'est dite d'accord avec le juge en chef Finch concernant la question de l'art. 15, mais elle a refusé de se prononcer sur la question de savoir si l'art. 25 était en jeu.

C. Analysis

[13] Section 15 of the *Charter* provides:

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

C. Analyse

[13] L'article 15 de la *Charte* prévoit ce qui suit :

> **15.** (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

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(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

1. *The Purpose of Section 15*

[14] Nearly 20 years have passed since the Court handed down its first s. 15 decision in the case of *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143. *Andrews* set the template for this Court's commitment to substantive equality — a template which subsequent decisions have enriched but never abandoned.

[15] Substantive equality, as contrasted with formal equality, is grounded in the idea that: "The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration": *Andrews*, at p. 171, *per* McIntyre J., for the majority on the s. 15 issue. Pointing out that the concept of equality does not necessarily mean identical treatment and that the formal "like treatment" model of discrimination may in fact produce inequality, McIntyre J. stated (at p. 165):

> To approach the ideal of full equality before and under the law — and in human affairs an approach is all that can be expected — the main consideration must be the impact of the law on the individual or the group concerned. Recognizing that there will always be an infinite variety of personal characteristics, capacities, entitlements and merits among those subject to a law, there must be accorded, as nearly as may be possible, an equality of benefit and protection and no more of the restrictions, penalties or burdens imposed upon one than another. In other words, the admittedly unattainable ideal should be that a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another.

While acknowledging that equality is an inherently comparative concept (p. 164), McIntyre J. warned

(2) Le paragraphe (1) n'a pas pour effet d'interdire les lois, programmes ou activités destinés à améliorer la situation d'individus ou de groupes défavorisés, notamment du fait de leur race, de leur origine nationale ou ethnique, de leur couleur, de leur religion, de leur sexe, de leur âge ou de leurs déficiences mentales ou physiques.

1. *L'objet de l'art. 15*

[14] Près de 20 années se sont écoulées depuis l'arrêt *Andrews c. Law Society of British Columbia*, [1989] 1 R.C.S. 143, la première décision de la Cour portant sur l'art. 15. L'arrêt *Andrews* établit le modèle à suivre en ce qui concerne l'importance que notre Cour attache à l'égalité réelle — un modèle qui a été enrichi mais qui n'a jamais été abandonné par la jurisprudence ultérieure.

[15] L'égalité réelle, comparativement à l'égalité formelle, repose sur l'idée que « [f]avoriser l'égalité emporte favoriser l'existence d'une société où tous ont la certitude que la loi les reconnaît comme des êtres humains qui méritent le même respect, la même déférence et la même considération » : arrêt *Andrews*, p. 171, le juge McIntyre s'exprimant au nom des juges majoritaires au sujet de la question de l'art. 15. Soulignant que l'égalité ne signifie pas nécessairement traitement identique et que le modèle formel du « traitement analogue » peut en fait engendrer des inégalités, le juge McIntyre a ajouté (p. 165) :

> Pour s'approcher de l'idéal d'une égalité complète et entière devant la loi et dans la loi — et dans les affaires humaines une approche est tout ce à quoi on peut s'attendre — la principale considération doit être l'effet de la loi sur l'individu ou le groupe concerné. Tout en reconnaissant qu'il y aura toujours une variété infinie de caractéristiques personnelles, d'aptitudes, de droits et de mérites chez ceux qui sont assujettis à une loi, il faut atteindre le plus possible l'égalité de bénéfice et de protection et éviter d'imposer plus de restrictions, de sanctions ou de fardeaux à l'un qu'à l'autre. En d'autres termes, selon cet idéal qui est certes impossible à atteindre, une loi destinée à s'appliquer à tous ne devrait pas, en raison de différences personnelles non pertinentes, avoir un effet plus contraignant ou moins favorable sur l'un que sur l'autre.

Tout en reconnaissant que l'égalité est un concept intrinsèquement comparatif (p. 164), le juge

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against a sterile similarly situated test focussed on treating "likes" alike. An insistence on substantive equality has remained central to the Court's approach to equality claims.

McIntyre a mis en garde contre l'adoption d'un critère stérile de la situation analogue qui serait axé sur l'égalité de traitement des individus égaux. L'insistance sur l'égalité réelle est demeurée au cœur de l'approche que la Cour a adoptée à l'égard des demandes fondées sur le droit à l'égalité.

[16] Sections 15(1) and 15(2) work together to promote the vision of substantive equality that underlies s. 15 as a whole. Section 15(1) is aimed at preventing discriminatory distinctions that impact adversely on members of groups identified by the grounds enumerated in s. 15 and analogous grounds. This is one way of combatting discrimination. However, governments may also wish to combat discrimination by developing programs aimed at helping disadvantaged groups improve their situation. Through s. 15(2), the *Charter* preserves the right of governments to implement such programs, without fear of challenge under s. 15(1). This is made apparent by the existence of s. 15(2). Thus s. 15(1) and s. 15(2) work together to confirm s. 15's purpose of furthering substantive equality.

[16] Les paragraphes 15(1) et 15(2) ont pour effet combiné de promouvoir l'idée d'égalité réelle qui sous-tend l'ensemble de l'art. 15. Le paragraphe 15(1) vise à empêcher les distinctions discriminatoires ayant un effet négatif sur les membres des groupes caractérisés par les motifs énumérés à l'art. 15 ou par des motifs analogues. Il s'agit là d'une façon de combattre la discrimination. Cependant, les gouvernements peuvent également souhaiter le faire au moyen de programmes destinés à aider des groupes défavorisés à améliorer leur situation. Grâce au par. 15(2), la *Charte* protège le droit des gouvernements de mettre en œuvre de tels programmes sans s'exposer à des contestations fondées sur le par. 15(1). C'est ce qui ressort de l'existence du par. 15(2). Donc, les par. 15(1) et 15(2) ont pour effet combiné de confirmer l'objet de l'art. 15 qui est de favoriser l'égalité réelle.

[17] The template in *Andrews*, as further developed in a series of cases culminating in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, established in essence a two-part test for showing discrimination under s. 15(1): (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? These were divided, in *Law*, into three steps, but in our view the test is, in substance, the same.

[17] Le modèle établi dans l'arrêt *Andrews,* qui a été explicité dans une série de décisions ayant abouti à l'arrêt *Law c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1999] 1 R.C.S. 497, établissait essentiellement un critère à deux volets devant être utilisé pour démontrer l'existence de discrimination au sens du par. 15(1) : (1) La loi crée-t-elle une distinction fondée sur un motif énuméré ou analogue? (2) La distinction crée-t-elle un désavantage par la perpétuation d'un préjugé ou l'application de stéréotypes? Il était question de trois volets dans l'arrêt *Law*, mais nous estimons que le critère est essentiellement le même.

[18] In *Andrews*, McIntyre J. viewed discriminatory impact through the lens of two concepts: (1) the perpetuation of prejudice or disadvantage to members of a group on the basis of personal characteristics identified in the enumerated and analogous grounds; and (2) stereotyping on the basis of these grounds that results in a decision that does not correspond to a claimant's or group's actual

[18] Dans l'arrêt *Andrews*, le juge McIntyre a examiné l'effet discriminatoire en fonction de deux concepts : (1) la perpétuation d'un préjugé ou d'un désavantage dont les membres d'un groupe sont victimes en raison de caractéristiques personnelles décrites dans les motifs énumérés et analogues, et (2) l'application de stéréotypes fondés sur ces motifs qui donne lieu à une décision ne correspondant pas

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circumstances and characteristics. *Andrews*, for example, was decided on the second of these concepts; it was held that the prohibition against non-citizens practising law was based on a stereotype that non-citizens could not *properly* discharge the responsibilities of a lawyer in British Columbia — a view that denied non-citizens a privilege, not on the basis of their merits and capabilities, but on the basis of what the Royal Commission Report on *Equality in Employment* (1984), referred to as "attributed rather than actual characteristics" (p. 2). Additionally, McIntyre J. emphasized that a finding of discrimination might be grounded in the fact that the impact of a particular law or program was to perpetuate the disadvantage of a group defined by enumerated or analogous s. 15 grounds. In this context, he said (at p. 174):

> I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.

[19] A decade later, in *Law*, this Court suggested that discrimination should be defined in terms of the impact of the law or program on the "human dignity" of members of the claimant group, having regard to four contextual factors: (1) pre-existing disadvantage, if any, of the claimant group; (2) degree of correspondence between the differential treatment and the claimant group's reality; (3) whether the law or program has an ameliorative purpose or effect; and (4) the nature of the interest affected (paras. 62-75).

[20] The achievement of *Law* was its success in unifying what had become, since *Andrews*, a division in this Court's approach to s. 15. *Law* accomplished this by reiterating and confirming *Andrews*' interpretation of s. 15 as a guarantee of substantive, and not just formal, equality. Moreover, *Law* made

à la situation et aux caractéristiques réelles d'un demandeur ou d'un groupe. Par exemple, l'affaire *Andrews* a été tranchée en fonction du deuxième concept; la Cour a jugé que l'interdiction de pratiquer le droit dont faisaient l'objet les personnes n'ayant pas la citoyenneté était fondée sur un stéréotype selon lequel ces personnes ne pouvaient pas exercer *correctement* les fonctions d'un avocat en Colombie-Britannique — une conception qui privait ces gens d'un privilège non pas en raison de leurs mérites et de leurs capacités, mais en raison de ce que le rapport de la Commission royale sur l'égalité en matière d'emploi (1984) a qualifié de « caractéristiques qui leur sont prêtées à tort » (p. 2). En outre, le juge McIntyre a souligné qu'une conclusion à l'existence de discrimination pourrait reposer sur le fait qu'une loi ou un programme avait pour effet de perpétuer le désavantage dont était victime un groupe caractérisé par un motif énuméré à l'art. 15 ou par un motif analogue. Dans ce contexte, il a affirmé ceci (p. 174) :

> J'affirmerais alors que la discrimination peut se décrire comme une distinction, intentionnelle ou non, mais fondée sur des motifs relatifs à des caractéristiques personnelles d'un individu ou d'un groupe d'individus, qui a pour effet d'imposer à cet individu ou à ce groupe des fardeaux, des obligations ou des désavantages non imposés à d'autres ou d'empêcher ou de restreindre l'accès aux possibilités, aux bénéfices et aux avantages offerts à d'autres membres de la société.

[19] Dix années plus tard, dans l'arrêt *Law,* notre Cour a proposé que la discrimination soit définie en fonction de l'effet de la loi ou du programme sur la « dignité humaine » des membres du groupe demandeur, eu égard à quatre facteurs contextuels : (1) le désavantage préexistant dont peut être victime le groupe demandeur; (2) le degré de correspondance entre la différence de traitement et la situation réelle du groupe demandeur; (3) la question de savoir si la loi ou le programme a un objet ou un effet améliorateur; (4) la nature du droit touché (par. 62-75).

[20] L'arrêt *Law* a réussi à unifier ce qui, depuis l'arrêt *Andrews*, était devenu une division dans l'approche de notre Cour relative à l'art. 15. L'arrêt *Law* est parvenu à le faire en réitérant et en confirmant l'interprétation donnée dans l'arrêt *Andrews*, selon laquelle l'art. 15 garantit l'égalité réelle et

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TAB 16

Nancy Law *Appellant*

v.

Minister of Human Resources Development *Respondent*

INDEXED AS: LAW *v.* CANADA (MINISTER OF EMPLOYMENT AND IMMIGRATION)

File No.: 25374.

Hearing: January 20, 1998.

Present: Lamer C.J. and L'Heureux-Dubé, Gonthier, McLachlin, Iacobucci, Major and Bastarache JJ.

Re-hearing ordered: December 3, 1998.

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

Judgment: March 25, 1999.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Constitutional law — Charter of Rights — Equality rights — Canada Pension Plan gradually discounting survivor's benefits for able-bodied claimants without dependent children until threshold minimum age of 35 reached and delaying those benefits until retirement age — Survivors benefits delayed to retirement age — Appellant able-bodied, under 35 and without dependent children — Whether denial of benefits discrimination on basis of age — Whether denial of benefits an infringement of Charter's equality provision — Canadian Charter of Rights and Freedoms, s. 15 — Canada Pension Plan, R.S.C., 1985, c. C-8, ss. 44(1)(d), 58.

The appellant, a 30-year-old woman without dependent children or disability, was denied survivor's benefits under the Canadian Pension Plan (CPP). The CPP gradually reduces the survivor's pension for able-bodied surviving spouses without dependent children who are between the ages of 35 and 45 by 1/120th of the full rate for each month that the claimant's age is less than 45 years at the time of the contributor's death so that the threshold age to receive benefits is age 35. The appellant

Nancy Law *Appelante*

c.

Ministre du Développement des ressources humaines *Intimé*

RÉPERTORIÉ: LAW *c.* CANADA (MINISTRE DE L'EMPLOI ET DE L'IMMIGRATION)

N[o] du greffe: 25374.

Audition: 20 janvier 1998.

Présents: Le juge en chef Lamer et les juges L'Heureux-Dubé, Gonthier, McLachlin, Iacobucci, Major et Bastarache.

Nouvelle audition ordonnée: 3 décembre 1998.

Présents: Le juge en chef Lamer et les juges L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache et Binnie.

Jugement: 25 mars 1999.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit constitutionnel — Charte des droits — Droits à l'égalité — Régime de pensions du Canada réduisant de façon progressive le montant de la pension à laquelle le conjoint survivant qui n'est pas invalide et n'a pas d'enfant à charge a droit de sorte qu'il doit avoir au moins 35 ans pour toucher des prestations et reportant le versement de telles prestations à l'âge de la retraite — Versement des prestations de survivant reporté à l'âge de la retraite — Appelante de moins de 35 ans, qui n'est pas invalide et n'a pas d'enfant à charge — Son inadmissibilité aux prestations constitue-t-elle de la discrimination fondée sur l'âge? — Son inadmissibilité aux prestations viole-t-elle la disposition de la Charte en matière d'égalité? — Charte canadienne des droits et libertés, art. 15 — Régime de pensions du Canada, L.R.C. (1985), ch. C-8, art. 44(1)d), 58.

L'appelante, une femme de 30 ans qui n'a pas d'enfant à charge et qui n'est pas invalide, a été jugée inadmissible aux prestations de survivant prévues au Régime de pensions du Canada (RPC). Le RPC prévoit, pour le conjoint survivant sans enfant à charge, qui n'est pas invalide et qui a entre 35 et 45 ans, une réduction progressive du plein montant de cette pension de 1/120 par mois pour le nombre de mois restant à courir, au décès du cotisant, avant qu'il n'atteigne l'âge de 45 ans, de

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unsuccessfully appealed first to the Minister of National Health and Welfare and then to the Pension Plan Review Tribunal, arguing that these age distinctions discriminated against her on the basis of age contrary to s. 15(1) of the *Canadian Charter of Rights and Freedoms*. A further appeal was made to the Pension Appeals Board, which, in a trial *de novo*, concluded that the impugned age distinctions did not violate the appellant's equality rights. The majority of the Board also found that, even if the distinctions did infringe s. 15(1) of the *Charter*, they could be justified under s. 1. A subsequent appeal to the Federal Court of Appeal was dismissed largely for the reasons of the Pension Appeals Board. The constitutional questions here queried whether ss. 44(1)(*d*) and 58 of the *Canada Pension Plan* infringe s. 15(1) of the *Charter* on the ground that they discriminate on the basis of age against widows and widowers under the age of 45, and if so, whether this infringement is demonstrably justified in a free and democratic society under s. 1.

sorte qu'il doit avoir au moins 35 ans pour toucher des prestations. L'appelante a, sans succès, interjeté appel de cette décision devant le ministre de la Santé nationale et du Bien-être social et, par la suite, devant le tribunal de révision du Régime de pensions, alléguant que ces distinctions fondées sur l'âge la rendaient victime de discrimination fondée sur l'âge, ce qui contrevient au par. 15(1) de la *Charte canadienne des droits et libertés*. L'appelante a ensuite interjeté appel devant la Commission d'appel des pensions qui a conclu, après la tenue d'un procès *de novo*, que les distinctions contestées fondées sur l'âge ne portaient pas atteinte à ses droits à l'égalité. Les membres majoritaires de la Commission ont également conclu que, même si ces distinctions violaient effectivement le par. 15(1) de la *Charte*, elles seraient justifiées au sens de l'article premier. Un appel interjeté ultérieurement devant la Cour d'appel fédérale a été rejeté en grande partie pour les motifs exposés par la Commission d'appel des pensions. Les questions constitutionnelles à trancher dans le présent pourvoi sont de savoir si l'al. 44(1)*d*) et l'art. 58 du *Régime de pensions du Canada* violent le par. 15(1) de la *Charte* pour le motif qu'ils établissent une distinction fondée sur l'âge relativement aux veuves et aux veufs âgés de moins de 45 ans et, dans l'affirmative, si la justification de cette violation peut se démontrer dans le cadre d'une société libre et démocratique, au sens de l'article premier.

Held: The appeal should be dismissed. The first constitutional question should be answered in the negative; the second constitutional question did not need to be answered.

Arrêt: Le pourvoi est rejeté. La première question constitutionnelle reçoit une réponse négative; il n'est pas nécessaire de répondre à la seconde question constitutionnelle.

In the brief history of this Court's interpretation of s. 15(1) of the *Charter*, there have been several important substantive developments in equality law. Throughout these developments, although there have been differences of opinion among the members of this Court as to the appropriate interpretation of s. 15(1), there has been and continues to be general consensus regarding the basic principles relating to the purpose of s. 15(1) and the proper approach to equality analysis. The present case is a useful juncture at which to summarize and comment upon these basic principles, in order to provide a set of guidelines for courts that are called upon to analyze a discrimination claim under the *Charter*.

Au cours de la courte période de l'interprétation du par. 15(1) de la *Charte* par notre Cour, plusieurs changements de fond importants sont survenus en droit de l'égalité. Tout au long de ces changements, bien qu'il y ait eu des divergences d'opinions parmi les juges de notre Cour relativement à l'interprétation appropriée du par. 15(1), il y a eu, et il y a toujours, un consensus général sur les principes fondamentaux portant sur l'objet de ce paragraphe et sur la façon appropriée d'aborder l'analyse relative à l'égalité. Le présent pourvoi fournit une belle occasion de résumer et de commenter ces principes fondamentaux afin de fournir aux tribunaux un ensemble de lignes directrices qui leur servira lorsqu'ils devront analyser une allégation de discrimination fondée sur la *Charte*.

It is sensible to articulate the basic principles under s. 15(1) as guidelines for analysis, and not as a rigid test which might risk being mechanically applied. Equality analysis under the *Charter* must be purposive and con-

Il est logique de poser les principes fondamentaux qui sous-tendent le par. 15(1) en tant que lignes directrices à des fins d'analyse plutôt qu'en tant que critères stricts susceptibles d'êtres appliqués de façon automatique.

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textual. The guidelines set out here are just that — points of reference which are designed to assist a court in identifying the relevant contextual factors in a particular discrimination claim, and in evaluating the effect of those factors in light of the purpose of s. 15(1). Inevitably, the guidelines summarized here will need to be supplemented in practice by the explanation of these guidelines in these reasons and those of previous cases, and by a full appreciation of the context surrounding the specific s. 15(1) claim at issue. As s. 15 jurisprudence evolves it may well be that further elaborations and modifications will emerge.

L'analyse relative à l'égalité au sens de la *Charte* doit être faite en fonction de l'objet visé et du contexte. Les lignes directrices exposées dans les présents motifs sont précisément des points de référence conçus pour aider le tribunal à relever les facteurs contextuels pertinents dans le cadre d'une allégation de discrimination donnée et à évaluer l'effet de ces facteurs à la lumière de l'objet du par. 15(1). Il est bien entendu que les lignes directrices résumées en l'espèce devront être enrichies, en pratique, par les explications que l'on retrouve dans les présents motifs et dans les arrêts antérieurs, et par l'étude approfondie du contexte de l'allégation particulière fondée sur le par. 15(1) dont il est question. Il va sans dire qu'au fur et à mesure de l'évolution de notre jurisprudence sur l'art. 15, de nouveaux raisonnements et de nouvelles modifications peuvent fort bien se dégager.

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General Approach

(1) It is inappropriate to attempt to confine analysis under s. 15(1) of the *Charter* to a fixed and limited formula. A purposive and contextual approach to discrimination analysis is to be preferred, in order to permit the realization of the strong remedial purpose of the equality guarantee, and to avoid the pitfalls of a formalistic or mechanical approach.

(2) The approach adopted and regularly applied by this Court to the interpretation of s. 15(1) focuses upon three central issues: (A) whether a law imposes differential treatment between the claimant and others, in purpose or effect; (B) whether one or more enumerated or analogous grounds of discrimination are the basis for the differential treatment; and (C) whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee. The first issue is concerned with the question of whether the law causes differential treatment. The second and third issues are concerned with whether the differential treatment constitutes discrimination in the substantive sense intended by s. 15(1).

(3) Accordingly, a court that is called upon to determine a discrimination claim under s. 15(1) should make the following three broad inquiries:

A. Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?

La démarche générale

(1) Il est inapproprié de tenter de restreindre l'analyse relative au par. 15(1) de la *Charte* à une formule figée et limitée. Une démarche fondée sur l'objet et sur le contexte doit plutôt être utilisée en vue de l'analyse relative à la discrimination pour permettre la réalisation de l'important objet réparateur qu'est la garantie d'égalité et pour éviter les pièges d'une démarche formaliste ou automatique.

(2) La démarche que notre Cour a adoptée et qu'elle applique régulièrement relativement à l'interprétation du par. 15(1) repose sur trois questions primordiales: (A) La loi a-t-elle pour objet ou pour effet d'imposer une différence de traitement entre le demandeur et d'autres personnes? (B) La différence de traitement est-elle fondée sur un ou plusieurs des motifs énumérés ou des motifs analogues? (C) La loi en question a-t-elle un objet ou un effet discriminatoires au sens de la garantie d'égalité? La première question vise à déterminer si la loi entraîne une différence de traitement. Les deuxième et troisième questions visent à déterminer si la différence de traitement constitue de la discrimination réelle au sens du par. 15(1).

(3) Par conséquent, le tribunal ayant à se prononcer sur une allégation de discrimination fondée sur le par. 15(1) doit se poser trois grandes questions:

A. La loi contestée: a) établit-elle une distinction formelle entre le demandeur et d'autres personnes en raison d'une ou de plusieurs caractéristiques personnelles, ou b) omet-elle de tenir compte de la situation défavorisée dans laquelle le demandeur se trouve déjà dans la société canadienne, créant ainsi une différence de traitement réelle entre celui-ci et d'autres personnes en raison d'une ou de plusieurs caractéristiques personnelles?

B. Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?

and

C. Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

Purpose

(4) In general terms, the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.

(5) The existence of a conflict between the purpose or effect of an impugned law and the purpose of s. 15(1) is essential in order to found a discrimination claim. The determination of whether such a conflict exists is to be made through an analysis of the full context surrounding the claim and the claimant.

Comparative Approach

(6) The equality guarantee is a comparative concept, which ultimately requires a court to establish one or more relevant comparators. The claimant generally chooses the person, group, or groups with whom he or she wishes to be compared for the purpose of the discrimination inquiry. However, where the claimant's characterization of the comparison is insufficient, a court may, within the scope of the ground or grounds pleaded, refine the comparison presented by the claimant where warranted. Locating the relevant comparison group requires an examination of the subject-matter of the legislation and its effects, as well as a full appreciation of context.

B. Le demandeur fait-il l'objet d'une différence de traitement fondée sur un ou plusieurs des motifs énumérés ou des motifs analogues?

et

C. La différence de traitement est-elle discriminatoire en ce qu'elle impose un fardeau au demandeur ou le prive d'un avantage d'une manière qui dénote une application stéréotypée de présumées caractéristiques personnelles ou de groupe ou qui a par ailleurs pour effet de perpétuer ou de promouvoir l'opinion que l'individu touché est moins capable ou est moins digne d'être reconnu ou valorisé en tant qu'être humain ou que membre de la société canadienne, qui mérite le même intérêt, le même respect et la même considération?

L'objet

(4) En termes généraux, l'objet du par. 15(1) est d'empêcher qu'il y ait atteinte à la dignité et à la liberté humaines essentielles au moyen de l'imposition de désavantages, de stéréotypes ou de préjugés politiques ou sociaux, et de promouvoir une société dans laquelle tous sont également reconnus dans la loi en tant qu'êtres humains ou que membres de la société canadienne, tous aussi capables, et méritant le même intérêt, le même respect et la même considération.

(5) Il doit absolument y avoir un conflit entre l'objet ou les effets de la loi contestée et l'objet du par. 15(1) pour fonder une allégation de discrimination. L'existence d'un tel conflit doit être établie au moyen de l'analyse de l'ensemble du contexte entourant l'allégation et le demandeur.

La méthode comparative

(6) La garantie d'égalité est un concept relatif qui, en dernière analyse, oblige le tribunal à cerner un ou plusieurs éléments de comparaison pertinents. C'est généralement le demandeur qui choisit la personne, le groupe ou les groupes avec lesquels il désire être comparé aux fins de l'analyse relative à la discrimination. Cependant, lorsque la qualification de la comparaison par le demandeur n'est pas suffisante, le tribunal peut, dans le cadre du ou des motifs invoqués, approfondir la comparaison soumise par le demandeur lorsqu'il estime justifié de le faire. Pour déterminer quel est le groupe de comparaison pertinent, il faut examiner l'objet et les effets des dispositions législatives et tenir compte du contexte dans son ensemble.

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Context

(7) The contextual factors which determine whether legislation has the effect of demeaning a claimant's dignity must be construed and examined from the perspective of the claimant. The focus of the inquiry is both subjective and objective. The relevant point of view is that of the reasonable person, in circumstances similar to those of the claimant, who takes into account the contextual factors relevant to the claim.

(8) There is a variety of factors which may be referred to by a s. 15(1) claimant in order to demonstrate that legislation demeans his or her dignity. The list of factors is not closed. Guidance as to these factors may be found in the jurisprudence of this Court, and by analogy to recognized factors.

(9) Some important contextual factors influencing the determination of whether s. 15(1) has been infringed are, among others:

(A) Pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual or group at issue.

The effects of a law as they relate to the important purpose of s. 15(1) in protecting individuals or groups who are vulnerable, disadvantaged, or members of "discrete and insular minorities" should always be a central consideration. Although the claimant's association with a historically more advantaged or disadvantaged group or groups is not *per se* determinative of an infringement, the existence of these pre-existing factors will favour a finding that s. 15(1) has been infringed.

(B) The correspondence, or lack thereof, between the ground or grounds on which the claim is based and the actual need, capacity, or circumstances of the claimant or others.

Although the mere fact that the impugned legislation takes into account the claimant's traits or circumstances will not necessarily be sufficient to defeat a s. 15(1) claim, it will generally be more difficult to establish discrimination to the extent that the law takes into account the claimant's actual situation in a manner that respects his or her value as a human being or member of Cana-

Le contexte

(7) Les facteurs contextuels qui déterminent si les dispositions législatives ont pour effet de porter atteinte à la dignité du demandeur doivent être interprétés et analysés dans la perspective de ce dernier. Le point central de l'analyse est à la fois subjectif et objectif. Le point de vue approprié est celui de la personne raisonnable qui se trouve dans une situation semblable à celle du demandeur et qui tient compte des facteurs contextuels pertinents.

(8) La personne qui invoque le par. 15(1) peut s'appuyer sur une série de facteurs pour démontrer que les dispositions législatives portent atteinte à sa dignité. La liste de ces facteurs n'est pas restrictive. On peut trouver des indications sur la nature de ces facteurs dans la jurisprudence de notre Cour et en faisant une analogie avec des facteurs reconnus.

(9) Voici certains des facteurs contextuels servant à déterminer s'il y a eu atteinte au par. 15(1):

(A) La préexistence d'un désavantage, de stéréotypes, de préjugés ou de vulnérabilité subis par la personne ou le groupe en cause.

Les effets d'une loi par rapport à l'objectif important du par. 15(1) pour ce qui est de la protection des personnes et des groupes qui sont vulnérables, défavorisés ou qui sont membres de «minorités distinctes et isolées», doivent toujours constituer une considération majeure. Bien que l'appartenance du demandeur à un ou plusieurs groupes historiquement favorisés ou défavorisés ne signifie pas, en soi, qu'il y a ait eu atteinte à un droit, la présence de ces facteurs préexistants portera à conclure qu'il y a eu violation du par. 15(1).

(B) La correspondance, ou l'absence de correspondance, entre le ou les motifs sur lesquels l'allégation est fondée et les besoins, les capacités ou la situation propres au demandeur ou à d'autres personnes.

Bien que le simple fait que les dispositions législatives contestées tiennent compte des caractéristiques et de la situation personnelles du demandeur ne suffira pas nécessairement pour faire rejeter une allégation fondée sur le par. 15(1), il sera généralement plus difficile de démontrer l'existence de discrimination lorsque la loi prend en considération la situation véritable du demandeur d'une manière qui respecte sa valeur en tant qu'être humain ou que membre de la société canadienne, et il

dian society, and less difficult to do so where the law fails to take into account the claimant's actual situation.

(C) The ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society.

An ameliorative purpose or effect which accords with the purpose of s. 15(1) of the *Charter* will likely not violate the human dignity of more advantaged individuals where the exclusion of these more advantaged individuals largely corresponds to the greater need or the different circumstances experienced by the disadvantaged group being targeted by the legislation. This factor is more relevant where the s. 15(1) claim is brought by a more advantaged member of society.

and

(D) The nature and scope of the interest affected by the impugned law.

The more severe and localized the consequences of the legislation for the affected group, the more likely that the differential treatment responsible for these consequences is discriminatory within the meaning of s. 15(1).

(10) Although the s. 15(1) claimant bears the onus of establishing an infringement of his or her equality rights in a purposive sense through reference to one or more contextual factors, it is not necessarily the case that the claimant must adduce evidence in order to show a violation of human dignity or freedom. Frequently, where differential treatment is based on one or more enumerated or analogous grounds, this will be sufficient to found an infringement of s. 15(1) in the sense that it will be evident on the basis of judicial notice and logical reasoning that the distinction is discriminatory within the meaning of the provision.

As a result of the ages specified under the CPP, a clear distinction is drawn between the appellant and others on the basis of age. Both the delay in the receipt of benefits and the reduced entitlement to benefits constitute a denial of equal benefit of the law under the first step of the equality analysis.

Even if entitlement to a survivor's pension benefit were dependent upon the interplay of age, disability, and parental status, this interplay would not preclude the appellant from establishing that a distinction had been drawn on one or more of the grounds in s. 15(1) of the *Charter*. A claimant can articulate a discrimination

sera moins difficile de le faire lorsque la loi fait abstraction de la situation véritable du demandeur.

(C) L'objet ou l'effet d'amélioration de la loi contestée eu égard à une personne ou un groupe défavorisés dans la société.

Un objet ou un effet d'amélioration conforme à l'objet du par. 15(1) de la *Charte* ne portera vraisemblablement pas atteinte à la dignité humaine de personnes favorisées lorsque l'exclusion de ces dernières correspond en grande partie aux besoins plus grands ou à la situation différente propres au groupe défavorisé visé par les dispositions législatives. Ce facteur a une plus grande pertinence lorsque l'allégation fondée sur le par. 15(1) est faite par un membre favorisé de la société.

et

(D) La nature et l'étendue du droit touché par la loi contestée.

Plus les effets des dispositions législatives sont graves et localisés pour le groupe touché, plus il est probable que la différence de traitement à la source de ces effets soit discriminatoire au sens du par. 15(1).

(10) Bien qu'il incombe à la personne qui invoque le par. 15(1) de démontrer, en fonction de l'objet visé, qu'il y a eu atteinte à ses droits à l'égalité à la lumière d'un ou de plusieurs facteurs contextuels, le demandeur n'est pas nécessairement tenu de produire des éléments de preuve pour démontrer l'existence d'une atteinte à la dignité ou à la liberté humaines. Souvent, le simple fait que la différence de traitement soit fondée sur un ou plusieurs des motifs énumérés ou des motifs analogues sera suffisant pour établir qu'il y a eu violation du par. 15(1), puisqu'il sera évident au vu de la connaissance d'office et du raisonnement logique que la distinction est discriminatoire au sens de ce paragraphe.

En raison des âges qui y sont mentionnés, le RPC établit clairement une distinction entre l'appelante et les autres demandeurs sur le fondement de l'âge. Tant le délai écoulé avant de toucher des prestations que le droit à des prestations réduites constituent une négation du droit au même bénéfice de la loi selon le premier volet de l'analyse de l'égalité.

Même si le droit à des prestations de survivant dépendait de l'interaction de l'âge, de l'invalidité et du fait d'avoir un enfant à charge, cette interaction n'empêcherait pas l'appelante de démontrer qu'une distinction fondée sur un ou plusieurs des motifs énumérés au par. 15(1) de la *Charte* a été établie. Un demandeur peut

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claim under more than one of the enumerated and analogous grounds. Such an approach to the grounds of discrimination accords with the essential purposive and contextual nature of equality analysis under s. 15(1) of the *Charter*. Where a party brings a discrimination claim on the basis of a newly postulated analogous ground, or on the basis of a combination of different grounds, this part of the discrimination inquiry must focus upon whether and why a ground or confluence of grounds is analogous to those listed in s. 15(1). This determination is made on the basis of a complete analysis of the purpose of s. 15(1), the nature and situation of the individual or group at issue, and the social, political and legal history of Canadian society's treatment of the group. A ground or grounds will not be considered analogous under s. 15(1) unless it can be shown that differential treatment premised on the ground or grounds has the potential to bring into play human dignity. If the court determines that recognition of a ground or confluence of grounds as analogous would serve to advance the fundamental purpose of s. 15(1), the ground or grounds will then be so recognized.

rattacher son allégation de discrimination à plus d'un motif énuméré ou d'un motif analogue. Cette façon d'aborder les motifs de discrimination est compatible avec la nature de l'analyse relative à l'égalité fondée sur le par. 15(1) de la *Charte*, essentiellement fondée sur l'objet et le contexte. Lorsqu'une partie allègue la discrimination en se fondant sur ce qu'elle présente comme un nouveau motif analogue ou sur une combinaison de divers motifs, cette étape de l'examen visant à déterminer s'il y a discrimination doit être axée sur la question de savoir si un motif, ou une combinaison de motifs, est analogue à ceux énumérés au par. 15(1) et pour quelle raison. Cette détermination se fonde sur une analyse exhaustive de l'objet du par. 15(1), de la nature et de la situation de la personne ou du groupe en cause et des antécédents sociaux, politiques et juridiques du traitement réservé à ce groupe dans la société canadienne. Un ou plusieurs motifs ne seront pas jugés analogues en vertu du par. 15(1) à moins qu'il ne puisse être démontré que la différence de traitement découlant de ce ou ces motifs est susceptible d'avoir une incidence sur la dignité humaine. Si la cour considère que reconnaître le motif, ou la combinaison de motifs, comme analogue irait dans le sens de la réalisation de l'objet fondamental du par. 15(1), le motif, ou la combinaison de motifs, sera alors reconnu.

A discrimination claim positing an intersection of grounds can be understood as analogous to, or as a synthesis of, the grounds listed in s. 15(1). If the CPP had based entitlement on a combination of factors, the appellant would still have been able to establish the requisite distinction, whether on the basis of age alone, or based on a combination of grounds.

Une allégation de discrimination reposant sur une combinaison de motifs peut être considérée comme étant fondée sur un motif analogue ou sur une synthèse des motifs énumérés au par. 15(1). Si le RPC avait fondé l'admissibilité sur une combinaison de facteurs, l'appelante aurait quand même pu établir l'existence de la distinction requise, qu'elle soit fondée sur l'âge seul ou sur une combinaison de motifs.

Relatively speaking, adults under the age of 45 have not been consistently and routinely subjected to the sorts of discrimination faced by some of Canada's discrete and insular minorities. It is accordingly more difficult as a practical matter for this Court to reason, from facts of which the Court may appropriately take judicial notice, that the legislative distinction at issue violates the human dignity of the appellant.

Relativement parlant, les adultes de moins de 45 ans n'ont pas continuellement subi le genre de discrimination à laquelle ont fait face certaines minorités distinctes et isolées du Canada. Par conséquent, la Cour aura plus de difficultés à conclure en pratique, à partir des faits dont elle peut à bon droit prendre connaissance d'office, que la distinction législative en cause viole la dignité humaine de l'appelante.

Neither the purpose nor the effect of the impugned legislative provisions was demonstrated to violate the appellant's human dignity so as to constitute discrimination even though reference was made to government reports and other sources which favour extending survivor's pensions to younger spouses on the basis that they suffer immediate financial need. The purpose and function of the impugned CPP provisions is not to remedy the immediate financial need experienced by widows

Il n'a pas été démontré que l'objet ou l'effet des dispositions législatives contestées violent la dignité humaine de l'appelante au point de constituer de la discrimination, bien que cette dernière ait attiré l'attention de notre Cour sur des rapports gouvernementaux et d'autres sources favorables à l'élargissement de l'admissibilité aux prestations aux conjoints survivants plus jeunes, en raison de leurs besoins financiers immédiats. L'objet et la fonction des dispositions contestées du

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and widowers, but rather to enable older widows and widowers to meet their basic needs during the longer term. The notion that young persons experience fewer impediments to long-term labour force participation and are generally in a better position than older persons to replace independently the income of a deceased spouse over the long run as a working member of Canadian society is reflected in the survivor's pension provision of the CPP. The increasing difficulty with which one can find and maintain employment as one grows older is a matter of which a court may appropriately take judicial notice.

Although the law imposes a disadvantage on younger spouses in this class, it is unlikely to be a substantive disadvantage, viewed in the long term. The differential treatment of younger people does not reflect or promote the notion that they are less capable or less deserving of concern, respect, and consideration, when the dual perspectives of long-term security and the greater opportunity of youth are considered. Nor does the differential treatment perpetuate the view that people in this class are less capable or less worthy of recognition or value as human beings or as members of Canadian society. Given the contemporary and historical context of the differential treatment and those affected by it, the legislation does not stereotype, exclude, or devalue adults under 45. The law functions not by the device of stereotype, but by distinctions corresponding to the actual situation of individuals it affects. By being young, the appellant, *a fortiori*, has greater prospect of long-term income replacement.

The clear ameliorative purpose of the pension scheme for older surviving spouses is another factor supporting the view that the impugned CPP provisions do not violate essential human dignity. Parliament's intent in enacting a survivor's pension scheme with benefits allocated according to age appears to have been to allocate funds to those persons whose ability to overcome need was weakest. The concern was to enhance personal dignity and freedom by ensuring a basic level of long-term financial security to persons whose personal situation makes them unable to achieve this goal which is so important to life and dignity. This legislative purpose

RPC ne sont pas de pourvoir aux besoins financiers immédiats des veuves et des veufs, mais plutôt de permettre aux veuves et aux veufs plus âgés de subvenir à leurs besoins essentiels à long terme. L'idée qui se dégage des distinctions fondées sur l'âge établies par les dispositions du RPC relatives à la pension de survivant semble être que les jeunes personnes éprouvent moins de difficulté à participer au marché du travail à long terme et sont généralement plus en mesure que leurs aînés de remplacer, au fil du temps, par leurs propres moyens et en tant que membres actifs de la société canadienne, le revenu de leur conjoint décédé. Un tribunal peut à bon droit prendre connaissance d'office du fait que plus l'on vieillit, plus il est difficile de trouver et de conserver un emploi.

Bien que la loi défavorise les conjoints plus jeunes qui se trouvent dans cette catégorie, il ne s'agit vraisemblablement pas d'un désavantage réel, si on le regarde à long terme. Le fait que la loi traite différemment les personnes plus jeunes ne traduit ni n'encourage l'idée que ces personnes sont moins capables, ou moins dignes d'intérêt, de respect et de considération, s'il est analysé du double point de vue de la sécurité à long terme et des possibilités plus grandes offertes par la jeunesse. De même, la différence de traitement ne perpétue pas l'opinion que les gens de cette catégorie sont moins capables, ou moins dignes d'être reconnus ou valorisés en tant qu'êtres humains ou que membres de la société canadienne. Compte tenu du contexte contemporain et historique qui entoure la différence de traitement et les personnes qu'elle touche, les dispositions législatives en cause n'appliquent pas de stéréotypes aux adultes âgés de moins de 45 ans, ne les excluent pas et ne les dévalorisent pas. La loi ne fonctionne pas au moyen de stéréotypes mais au moyen de distinctions qui correspondent à la situation véritable des personnes qu'elle vise. Du fait de sa jeunesse, l'appelante jouit, à plus forte raison, de meilleures chances de remplacer à long terme le revenu perdu.

Le fait que le régime de pension a clairement pour objet d'améliorer la situation des conjoints survivants âgés constitue un autre facteur à l'appui de l'opinion que les dispositions contestées du RPC ne portent pas atteinte à la dignité humaine essentielle. En établissant un régime de pension qui accorde des prestations suivant l'âge du survivant, le législateur semble avoir voulu allouer les fonds aux personnes dont la capacité de subvenir à leurs besoins était la plus faible. Sa préoccupation était de promouvoir la dignité et la liberté de la personne en assurant une sécurité financière de base à long terme aux personnes dont la situation les rend inca-

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accords well with the fundamental purposes of s. 15(1) of the *Charter*.

pables d'atteindre ce but, qui revêt tant d'importance sur les plans de la vie et de la dignité. C'est là un objet législatif qui s'harmonise bien avec les objectifs fondamentaux du par. 15(1) de la *Charte*.

Legislation need not always correspond perfectly with social reality in order to comply with s. 15(1) of the *Charter*. The determination of whether a legislative provision infringes a claimant's dignity must in every case be considered in the full context of the claim. In the present case, the appellant is more advantaged by virtue of her young age. The legislation has an egalitarian purpose and function and its provisions correspond to a very large degree with the needs and circumstances of the persons whom the legislation targets. No other factors suggest that the appellant's dignity as a younger adult is demeaned by the legislation, either in its purpose or in its effects.

Il n'est pas toujours nécessaire qu'une loi corresponde parfaitement à la réalité sociale pour être conforme au par. 15(1) de la *Charte*. La question de savoir si une disposition législative porte atteinte à la dignité du demandeur doit dans chaque cas être examinée en tenant compte de l'ensemble du contexte de la demande. En l'espèce, l'appelante est favorisée en raison de son jeune âge. Le texte de loi a un objet et des fonctions égalitaires et ses dispositions correspondent dans une très large mesure aux besoins et à la situation des personnes ciblées. Aucun autre facteur ne donne à penser que ces dispositions portent atteinte à la dignité de jeune adulte de l'appelante, tant dans leur objet que dans leurs effets.

The fact that the legislation is premised upon informed statistical generalizations which may not correspond perfectly with the long-term financial need of all surviving spouses does not affect the ultimate conclusion that the legislation is consonant with the human dignity and freedom of the appellant. Parliament is entitled, under these limited circumstances at least, to premise remedial legislation upon informed generalizations without running afoul of s. 15(1) of the *Charter* and being required to justify its position under s. 1. Under other circumstances a more precise correspondence would undoubtedly be required in order to comply with s. 15(1). In particular, a more precise correspondence will likely be important where the individual or group which is excluded by the legislation is already disadvantaged or vulnerable within Canadian society. The availability of the pension to the appellant at age 65 strengthens the conclusion that the law does not reflect a view of the appellant that suggests she is undeserving or less worthy as a person, only that the distribution of the benefit to her will be delayed until she is at a different point in her life cycle, when she reaches retirement age.

Le fait que les dispositions de la loi s'appuient sur des généralisations statistiques documentées qui peuvent ne pas correspondre parfaitement aux besoins financiers à long terme de tous les conjoints survivants ne compromet pas la conclusion ultime, soit qu'elles sont compatibles avec la dignité et la liberté de l'appelante. Dans ces circonstances particulières à tout le moins, le législateur peut légitimement s'appuyer sur des généralisations documentées pour édicter des dispositions réparatrices sans contrevenir au par. 15(1) de la *Charte* et sans avoir à les justifier au sens de l'article premier. Dans d'autres circonstances, le respect du par. 15(1) exigera à n'en pas douter une correspondance plus précise. En particulier, une correspondance plus précise sera vraisemblablement importante dans le cas où la personne ou le groupe exclu de la loi est déjà défavorisé ou vulnérable dans la société canadienne. L'admissibilité de l'appelante à la pension à l'âge de 65 ans étaye la conclusion que la loi ne traduit pas une opinion voulant que l'appelante soit moins méritante ou ait moins de valeur comme personne; la loi prévoit seulement que les prestations ne lui seront versées que lorsqu'elle aura atteint une certaine étape dans son cycle de vie, soit au moment de l'âge de la retraite.

Cases Cited

Considered: *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *R. v. Turpin*, [1989] 1 S.C.R. 1296; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229; *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22; *Egan v. Canada*, [1995] 2 S.C.R. 513; *Miron v. Trudel*, [1995] 2 S.C.R. 418; *Eaton v. Brant County*

Jurisprudence

Arrêts examinés: *Andrews c. Law Society of British Columbia*, [1989] 1 R.C.S. 143; *R. c. Turpin*, [1989] 1 R.C.S. 1296; *McKinney c. Université de Guelph*, [1990] 3 R.C.S. 229; *Tétreault-Gadoury c. Canada (Commission de l'emploi et de l'immigration)*, [1991] 2 R.C.S. 22; *Egan c. Canada*, [1995] 2 R.C.S. 513; *Miron c. Trudel*, [1995] 2 R.C.S. 418; *Eaton c. Conseil scolaire du*

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tions. Following upon the analysis in *Andrews*, *supra*, and the two-step framework set out in *Egan*, *supra*, and *Miron*, *supra*, among other cases, a court that is called upon to determine a discrimination claim under s. 15(1) should make the following three broad inquiries. First, does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics? If so, there is differential treatment for the purpose of s. 15(1). Second, was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds? And third, does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15(1) of the *Charter* in remedying such ills as prejudice, stereotyping, and historical disadvantage? The second and third inquiries are concerned with whether the differential treatment constitutes discrimination in the substantive sense intended by s. 15(1).

démarches. Appliquant l'analyse énoncée dans *Andrews*, précité, et l'analyse en deux étapes décrite notamment dans *Egan* et *Miron*, précités, le tribunal appelé à décider s'il y a eu discrimination au sens du par. 15(1) devrait se poser les trois grandes questions suivantes. Premièrement, la loi contestée a) établit-elle une distinction formelle entre le demandeur et d'autres personnes en raison d'une ou de plusieurs caractéristiques personnelles, ou b) omet-elle de tenir compte de la situation défavorisée dans laquelle le demandeur se trouve déjà dans la société canadienne, créant ainsi une différence de traitement réelle entre celui-ci et d'autres personnes en raison d'une ou de plusieurs caractéristiques personnelles? Si tel est le cas, il y a différence de traitement aux fins du par. 15(1). Deuxièmement, le demandeur a-t-il subi un traitement différent en raison d'un ou de plusieurs des motifs énumérés ou des motifs analogues? Et, troisièmement, la différence de traitement était-elle réellement discriminatoire, faisant ainsi intervenir l'objet du par. 15(1) de la *Charte* pour remédier à des fléaux comme les préjugés, les stéréotypes et le désavantage historique? Les deuxième et troisième questions servent à déterminer si la différence de traitement constitue de la discrimination réelle au sens du par. 15(1).

B. *The Purpose of s. 15(1)*

40 As was emphasized in early *Charter* decisions such as *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, and *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, and reiterated by McIntyre J. in *Andrews*, *supra*, the proper approach to the definition of rights guaranteed by the *Charter* is a purposive one. The purpose of s. 15(1) is to be sought, in the words of Dickson J. (as he then was) in *Big M*, *supra*, at p. 344, "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 . . . to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*".

B. *L'objet du paragraphe 15(1)*

Comme il a été souligné dans les premiers arrêts portant sur la *Charte*, dont *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145, et *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, et comme l'a réaffirmé le juge McIntyre dans *Andrews*, précité, la façon appropriée d'aborder la définition des droits garantis par la *Charte* est de le faire en fonction de l'objet visé. Pour reprendre les termes du juge Dickson (plus tard Juge en chef) dans *Big M*, précité, à la p. 344, l'objet du par. 15(1) doit être déterminé «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, [. . .] en fonction du sens et de l'objet des autres libertés et droits particuliers qui s'y rattachent selon le texte de la *Charte*».

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Since the beginning of its s. 15(1) jurisprudence, this Court has recognized that the existence of a conflict between an impugned law and the purpose of s. 15(1) is essential in order to found a discrimination claim. This principle holds true with respect to each element of a discrimination claim. The determination of whether legislation fails to take into account existing disadvantage, or whether a claimant falls within one or more of the enumerated and analogous grounds, or whether differential treatment may be said to constitute discrimination within the meaning of s. 15(1), must all be undertaken in a purposive and contextual manner.

41 Depuis ses tout premiers arrêts portant sur le par. 15(1), notre Cour a reconnu qu'il fallait absolument qu'il y ait conflit entre la loi contestée et l'objet du par. 15(1) pour fonder une allégation de discrimination. Ce principe demeure vrai à l'égard de tous les éléments d'une allégation de discrimination. C'est en fonction de l'objet et du contexte qu'il faut déterminer si les dispositions législatives omettent de tenir compte d'un désavantage existant, si un demandeur peut se réclamer de l'un ou de plusieurs des motifs énumérés ou des motifs analogues, ou si on peut dire que la différence de traitement constitue de la discrimination au sens du par. 15(1).

What is the purpose of the s. 15(1) equality guarantee? There is great continuity in the jurisprudence of this Court on this issue. In *Andrews*, *supra*, all judges who wrote advanced largely the same view. McIntyre J. stated, at p. 171, that the purpose of s. 15 is to promote "a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration". The provision is a guarantee against the evil of oppression, he explained at pp. 180-81, designed to remedy the imposition of unfair limitations upon opportunities, particularly for those persons or groups who have been subject to historical disadvantage, prejudice, and stereotyping.

42 Quel est l'objet de la garantie d'égalité du par. 15(1)? La jurisprudence de notre Cour est d'une grande constance sur cette question. Dans *Andrews*, précité, tous les juges qui ont rédigé des motifs ont dans une large mesure émis la même opinion. À la p. 171, le juge McIntyre a dit que l'objet de l'art. 15 était de favoriser «l'existence d'une société où tous ont la certitude que la loi les reconnaît comme des êtres humains qui méritent le même respect, la même déférence et la même considération». Il a expliqué, aux pp. 180 et 181, que cette disposition était une garantie contre le fléau de l'oppression et qu'elle était conçue pour remédier à la restriction inéquitable des possibilités, particulièrement en ce qui concerne les personnes et les groupes qui ont fait l'objet, au cours de l'histoire, de désavantages, de préjugés et de stéréotypes.

Similarly, La Forest J., concurring with respect to the proper approach to s. 15(1), stated that the equality guarantee was designed to prevent the imposition of differential treatment that was likely to "inhibit the sense of those who are discriminated against that Canadian society is not free or democratic as far as they are concerned", and that was likely to decrease their "confidence that they can freely and without obstruction by the state pursue their and their families' hopes and expectations of vocational and personal development" (p. 197, quoting from *Kask v. Shimizu*, [1986] 4 W.W.R. 154 (Alta. Q.B.), at p. 161, *per* McDonald J.). As discussed above, Wilson J. focussed upon issues of

43 De la même manière, le juge La Forest, souscrivant aux motifs des juges majoritaires relativement à la façon appropriée d'aborder le par. 15(1), a dit que la garantie d'égalité visait à empêcher l'imposition d'une différence de traitement susceptible de [TRADUCTION] «laisser croire à ceux qui sont victimes de discrimination que la société canadienne n'est pas libre et démocratique» et de les pousser à ne pas [TRADUCTION] «croire qu'[ils] peuvent librement et sans entrave de la part de l'État poursuivre la réalisation de leurs aspirations et attentes, ainsi que de celles de leur famille, en matière de carrière et d'épanouissement personnel» (p. 197, tiré de *Kask c. Shimizu*, [1986] 4

powerlessness and vulnerability within Canadian society, and emphasized the importance of examining the surrounding social, political, and legal context in order to determine whether discrimination exists within the meaning of s. 15(1).

W.W.R. 154 (B.R. Alb.), à la p. 161, le juge McDonald). Comme il en a été question précédemment, le juge Wilson s'est attachée aux questions de l'impuissance et de la vulnérabilité à l'intérieur de la société canadienne, et elle a insisté sur l'importance d'analyser les contextes social, politique et juridique environnants pour déterminer s'il y a discrimination au sens du par. 15(1).

44 The principles expressed in *Andrews* were echoed in subsequent cases, dealing with all three primary elements of the discrimination analysis. For example, Wilson J., writing for a unanimous Court in *Turpin*, *supra*, engaged in a purposive analysis of s. 15(1) in order to determine whether it was appropriate to consider "province of residence" (p. 1333) as an analogous ground of discrimination in the circumstances of the particular case. The appellants in that case, both charged with murder in Ontario, argued that they were denied their right to equal treatment because, unlike persons accused of murder in Alberta, they were denied the right to elect to be tried by a judge alone, without a jury. Wilson J. stated that some of the central *indicia* of discrimination within the meaning of s. 15(1) were stereotyping, historical disadvantage, and vulnerability to political and social prejudice. Finding that no such *indicia* were present, Wilson J. dismissed the appeal, stating, at p. 1333: "Differentiating for mode of trial purposes between those accused of s. 427 offences in Alberta and those accused of the same offences elsewhere in Canada would not, in my view, advance the purposes of s. 15 in remedying or preventing discrimination against groups suffering social, political and legal disadvantage in our society."

Les principes énoncés dans *Andrews* ont été repris dans les arrêts subséquents qui portaient sur les trois éléments majeurs de l'analyse relative à la discrimination. Par exemple, le juge Wilson, s'exprimant au nom de notre Cour à l'unanimité dans *Turpin*, précité, a analysé le par. 15(1) en fonction de son objet afin de déterminer s'il convenait de considérer la «province de résidence» (p. 1333) comme un motif analogue de discrimination dans les circonstances de cette affaire. Dans cette affaire, les appelants, accusés de meurtre en Ontario, ont fait valoir que leur droit de bénéficier d'un traitement égal n'était pas respecté parce que, contrairement aux personnes accusées de meurtre en Alberta, ils n'avaient pas le droit de choisir d'être jugés par un juge seul, sans jury. Le juge Wilson a déclaré que certains des principaux indices de discrimination au sens du par. 15(1) étaient les stéréotypes, le désavantage historique et la vulnérabilité aux préjugés politiques et sociaux. Concluant à l'absence de tels indices, le juge Wilson a rejeté le pourvoi en disant, à la p. 1333: «Établir une distinction, pour les fins du mode de procès, entre les personnes accusées en Alberta d'infractions énumérées à l'art. 427 et celles qui sont accusées des mêmes infractions ailleurs au Canada ne favoriserait pas, à mon avis, les objets de l'art. 15 en remédiant à la discrimination dont sont victimes les groupes de personnes défavorisées sur les plans social, politique ou juridique dans notre société ou en les protégeant contre toute forme de discrimination.»

45 A similar purposive approach was applied by La Forest J., writing for a unanimous Court in *Weatherall*, *supra*, dealing with the question of whether a formal distinction in treatment on an enumerated ground could be said to qualify as discrimination within the meaning of the *Charter*.

Le juge La Forest, s'exprimant au nom de la Cour à l'unanimité, a adopté une démarche similaire fondée sur l'objet dans l'arrêt *Weatherall*, précité, qui portait sur la question de savoir si on pouvait qualifier de discriminatoire au sens de la *Charte* une distinction formelle dans le traitement

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Canadian society, equally deserving of concern, respect, and consideration.

en tant que membres de la société canadienne qui méritent le même intérêt, le même respect et la même considération.

50

Most recently, in *Vriend*, *supra*, at para. 67, Cory and Iacobucci JJ. stated the purpose of s. 15(1) as being to take "a further step in the recognition of the fundamental importance and the innate dignity of the individual", and in the recognition of "the intrinsic worthiness and importance of every individual . . . regardless of the age, sex, colour, origins, or other characteristics of the person".

Très récemment, dans *Vriend*, précité, au par. 67, les juges Cory et Iacobucci ont dit que le par. 15(1) avait pour objet de franchir «une autre étape dans la reconnaissance de l'importance fondamentale et de la dignité inhérente de chacun» et que devaient être reconnues «la valeur et l'importance intrinsèques de chaque individu [. . .] sans égard à l'âge, au sexe, à la couleur, aux origines ou à d'autres caractéristiques de la personne».

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51

All of these statements share several key elements. It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration. Legislation which effects differential treatment between individuals or groups will violate this fundamental purpose where those who are subject to differential treatment fall within one or more enumerated or analogous grounds, and where the differential treatment reflects the stereotypical application of presumed group or personal characteristics, or otherwise has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society. Alternatively, differential treatment will not likely constitute discrimination within the purpose of s. 15(1) where it does not violate the human dignity or freedom of a person or group in this way, and in particular where the differential treatment also assists in ameliorating the position of the disadvantaged within Canadian society.

Tous ces énoncés ont plusieurs éléments clés en commun. On pourrait affirmer que le par. 15(1) a pour objet d'empêcher toute atteinte à la dignité et à la liberté humaines essentielles par l'imposition de désavantages, de stéréotypes et de préjugés politiques ou sociaux, et de favoriser l'existence d'une société où tous sont reconnus par la loi comme des êtres humains égaux ou comme des membres égaux de la société canadienne, tous aussi capables, et méritant le même intérêt, le même respect, et la même considération. Une disposition législative qui produit une différence de traitement entre des personnes ou des groupes est contraire à cet objectif fondamental si ceux qui font l'objet de la différence de traitement sont visés par un ou plusieurs des motifs énumérés ou des motifs analogues et si la différence de traitement traduit une application stéréotypée de présumées caractéristiques personnelles ou de groupe ou que, par ailleurs, elle perpétue ou favorise l'opinion que l'individu concerné est moins capable, ou moins digne d'être reconnu ou valorisé en tant qu'être humain ou que membre de la société canadienne. Subsidiairement, une différence de traitement ne constituera vraisemblablement pas de la discrimination au sens du par. 15(1) si elle ne viole pas la dignité humaine ou la liberté d'une personne ou d'un groupe de cette façon, surtout si la différence de traitement contribue à l'amélioration de la situation des défavorisés au sein de la société canadienne.

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As noted above, one of the difficulties in defining the concepts of "equality" and "discrimination" is the abstract nature of the words and the

Comme il a été mentionné précédemment, il est difficile de définir les concepts d'«égalité» et de «discrimination» en raison notamment de la nature

similarly abstract nature of words used to explain them. No single word or phrase can fully describe the content and purpose of s. 15(1). However, in the articulation of the purpose of s. 15(1) just provided on the basis of past cases, a focus is quite properly placed upon the goal of assuring human dignity by the remedying of discriminatory treatment.

abstraite de ces termes et de la nature également abstraite des termes utilisés pour les expliquer. Aucun mot et aucune expression ne peuvent décrire avec une précision absolue le contenu et l'objet du par. 15(1). Toutefois, dans la formulation de l'objet du par. 15(1) qui ressort des arrêts antérieurs, l'accent est mis, à juste titre, sur le but de préserver la dignité humaine au moyen de l'élimination du traitement discriminatoire.

53

What is human dignity? There can be different conceptions of what human dignity means. For the purpose of analysis under s. 15(1) of the *Charter*, however, the jurisprudence of this Court reflects a specific, albeit non-exhaustive, definition. As noted by Lamer C.J. in *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at p. 554, the equality guarantee in s. 15(1) is concerned with the realization of personal autonomy and self-determination. Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?

En quoi consiste la dignité humaine? Il peut y avoir différentes conceptions de ce que la dignité humaine signifie. Pour les fins de l'analyse relative au par. 15(1) de la *Charte*, toutefois, la jurisprudence de notre Cour fait ressortir une définition précise, quoique non exhaustive. Comme le juge en chef Lamer l'a fait remarquer dans *Rodriguez c. Colombie-Britannique (Procureur général)*, [1993] 3 R.C.S. 519, à la p. 554, la garantie d'égalité prévue au par. 15(1) vise la réalisation de l'autonomie personnelle et de l'autodétermination. La dignité humaine signifie qu'une personne ou un groupe ressent du respect et de l'estime de soi. Elle relève de l'intégrité physique et psychologique et de la prise en main personnelle. La dignité humaine est bafouée par le traitement injuste fondé sur des caractéristiques ou la situation personnelles qui n'ont rien à voir avec les besoins, les capacités ou les mérites de la personne. Elle est rehaussée par des lois qui sont sensibles aux besoins, aux capacités et aux mérites de différentes personnes et qui tiennent compte du contexte sous-jacent à leurs différences. La dignité humaine est bafouée lorsque des personnes et des groupes sont marginalisés, mis de côté et dévalorisés, et elle est rehaussée lorsque les lois reconnaissent le rôle à part entière joué par tous dans la société canadienne. Au sens de la garantie d'égalité, la dignité humaine n'a rien à voir avec le statut ou la position d'une personne dans la société en soi, mais elle a plutôt trait à la façon dont il est raisonnable qu'une personne se sente face à une loi donnée. La loi traite-t-elle la personne injustement, si on tient compte de l'ensemble des circonstances concernant les personnes touchées et exclues par la loi?

54

The equality guarantee in s. 15(1) of the *Charter* must be understood and applied in light of the

La garantie d'égalité prévue au par. 15(1) de la *Charte* doit être comprise et appliquée à la lumière

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above understanding of its purpose. The overriding concern with protecting and promoting human dignity in the sense just described infuses all elements of the discrimination analysis.

de l'interprétation susmentionnée de son objet. Tous les éléments de l'analyse relative à la discrimination sont imprégnés de la volonté supérieure de préserver et de promouvoir la dignité humaine, au sens susmentionné.

55

In order to determine whether the fundamental purpose of s. 15(1) is brought into play in a particular claim, it is essential to engage in a comparative analysis which takes into consideration the surrounding context of the claim and the claimant. I now propose to comment briefly on the nature of the comparative approach, and then to examine some of the contextual factors that a court should consider in determining whether s. 15(1) has been infringed. Each factor may be more or less relevant depending upon the circumstances of the case.

Pour déterminer si l'objet fondamental du par. 15(1) intervient dans le cadre d'une allégation donnée, il est essentiel d'effectuer une analyse comparative qui prend en considération le contexte entourant l'allégation et le demandeur. Je voudrais maintenant commenter brièvement la nature de la méthode comparative et examiner ensuite certains des facteurs contextuels dont un tribunal doit tenir compte pour déterminer s'il y a eu violation du par. 15(1). La pertinence de chaque facteur peut varier selon les circonstances de l'affaire.

C. *The Comparative Approach*

C. *La méthode comparative*

56

As discussed above, McIntyre J. emphasized in *Andrews*, *supra*, that the equality guarantee is a comparative concept. Ultimately, a court must identify differential treatment as compared to one or more other persons or groups. Locating the appropriate comparator is necessary in identifying differential treatment and the grounds of the distinction. Identifying the appropriate comparator will be relevant when considering many of the contextual factors in the discrimination analysis.

Comme je l'ai mentionné plus haut, le juge McIntyre a souligné dans *Andrews*, précité, que la garantie d'égalité est un concept relatif. En dernière analyse, le tribunal doit établir la différence de traitement par comparaison avec une ou plusieurs autres personnes ou groupes. Il est nécessaire de trouver l'élément de comparaison approprié pour cerner la différence de traitement et les motifs de la distinction. Il y aura lieu de trouver l'élément de comparaison approprié au moment de l'examen des nombreux facteurs contextuels dans l'analyse de la discrimination.

57

To locate the appropriate comparator, we must consider a variety of factors, including the subject-matter of the legislation. The object of a s. 15(1) analysis is not to determine equality in the abstract; it is to determine whether the impugned legislation creates differential treatment between the claimant and others on the basis of enumerated or analogous grounds, which results in discrimination. Both the purpose and the effect of the legislation must be considered in determining the appropriate comparison group or groups. Other contextual factors may also be relevant. The biological, historical, and sociological similarities or dissimilarities may be relevant in establishing the relevant comparator in particular, and whether the legislation effects discrimination in a substantive

Pour déterminer quel est l'élément de comparaison approprié, toute une gamme de facteurs doit être prise en compte, notamment, l'objet des dispositions législatives. Une analyse relative au par. 15(1) n'a pas pour objet de juger de l'égalité dans l'abstrait. Son objet est plutôt de déterminer si les dispositions législatives contestées créent entre le demandeur et les autres, sur le fondement des motifs énumérés ou de motifs analogues, une différence de traitement qui entraîne de la discrimination. Il faut examiner à la fois l'objet et l'effet des dispositions pour faire ressortir le groupe ou les groupes de comparaison appropriés. D'autres facteurs contextuels peuvent également être pertinents. Les ressemblances ou dissemblances biologiques, historiques et sociologiques peuvent être

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TAB 17

Attorney General of Quebec *Appellant*

v.

A *Respondent*

- and -

B *Appellant*

v.

A *Respondent*

- and -

A *Appellant*

v.

B and
Attorney General of Quebec *Respondents*

and

Attorney General of New Brunswick,
Attorney General of Alberta,
Fédération des associations de familles monoparentales et recomposées du Québec and Women's Legal Education and Action Fund *Interveners*

Indexed as: Quebec (Attorney General) *v.* A

2013 SCC 5

File No.: 33990.

2012: January 18; 2013: January 25.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Constitutional law — Charter of rights — Right to equality — Discrimination based on marital status —

Procureur général du Québec *Appelant*

c.

A *Intimée*

- et -

B *Appelant*

c.

A *Intimée*

- et -

A *Appelante*

c.

B et
Procureur général du Québec *Intimés*

et

Procureur général du Nouveau-Brunswick,
Procureur général de l'Alberta,
Fédération des associations de familles monoparentales et recomposées du Québec et Fonds d'action et d'éducation juridiques pour les femmes *Intervenants*

Répertorié : Québec (Procureur général) *c.* A

2013 CSC 5

N[o] du greffe : 33990.

2012 : 18 janvier; 2013 : 25 janvier.

Présents : La juge en chef McLachlin et les juges LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver et Karakatsanis.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit constitutionnel — Charte des droits — Droit à l'égalité — Discrimination fondée sur l'état matrimonial

2013 SCC 5 (CanLII)

De facto spouses — Whether provisions of Civil Code of Québec dealing with family residence, family patrimony, compensatory allowance, partnership of acquests and obligation of spousal support infringe guaranteed right to equality because their application is limited to private legal relationships between married spouses and civil union spouses — If so, whether infringement justified — Civil Code of Québec, S.Q. 1991, c. 64, arts. 401 to 430, 432, 433, 448 to 484, 585 — Canadian Charter of Rights and Freedoms, ss. 1, 15(1).

Constitutional law — Charter of rights — Right to equality — Analytical framework applicable to claim under s. 15(1) of Canadian Charter of Rights and Freedoms — Whether prejudice and stereotyping are separate elements into which claim of discrimination must fit — Distinction between two stages of analysis on right to equality, namely stage of review under s. 15 and that of justification under s. 1 — Stage of analysis at which freedom of choice and autonomy of spouses should be considered in relation to partition of property and support.

Family law — De facto spouses — Separation — Support — Spousal support — Family assets — De facto spouses not being covered by protections granted in Civil Code of Québec to married and civil union spouses in relation to support and partition of property — Whether failure to grant same rights to de facto spouses infringes right to equality guaranteed by s. 15(1) of Canadian Charter of Rights and Freedoms — Civil Code of Québec, S.Q. 1991, c. 64, arts. 401 to 430, 432, 433, 448 to 484, 585.

A and B met in A's home country in 1992. A, who was 17 years old at the time, was living with her parents and attending school. B, who was 32, was the owner of a lucrative business. From 1992 to 1994, they travelled the world together several times a year. B provided A with financial support so that she could continue her schooling. In early 1995, the couple agreed that A would come to live in Quebec, where B lived. They broke up soon after, but saw each other during the holiday season and in early 1996. A then became pregnant with their first child. She gave birth to two other children with B, in 1999 and 2001. During the time they lived together, A attempted to start a career as a model, but she largely did not work outside of the home and often accompanied B on his travels. B provided for all of A's needs and for those of the children. A wanted to get married, but B told

— Conjoints de fait — Les dispositions du Code civil du Québec portant sur la résidence familiale, le patrimoine familial, la prestation compensatoire, la société d'acquêts et l'obligation alimentaire entre conjoints portent-elles atteinte à la garantie d'égalité parce que leur application est limitée aux rapports juridiques privés des conjoints mariés et des conjoints unis civilement? — Dans l'affirmative, cette atteinte est-elle justifiée? — Code civil du Québec, L.Q. 1991, ch. 64, art. 401 à 430, 432, 433, 448 à 484, 585 — Charte canadienne des droits et libertés, art. 1, 15(1).

Droit constitutionnel — Charte des droits — Droit à l'égalité — Cadre d'analyse applicable à une demande fondée sur l'art. 15(1) de la Charte canadienne des droits et libertés — Les préjugés et les stéréotypes représentent-ils des éléments particuliers nécessaires auxquels doit se rattacher une plainte de discrimination? — Distinction entre les deux étapes de l'analyse relative au droit à l'égalité, soit l'étape de l'examen fondé sur l'art. 15 et celle de la justification suivant l'article premier — À quelle étape de l'analyse convient-il d'examiner le libre choix et l'autonomie des conjoints en ce qui a trait au partage des biens et au soutien alimentaire?

Droit de la famille — Conjoints de fait — Séparation — Aliments — Pension alimentaire pour le conjoint — Biens familiaux — Conjoints de fait ne bénéficiant pas des mesures de protection reconnues par le Code civil du Québec aux conjoints mariés ou unis civilement en matière de soutien alimentaire et de partage des biens — L'omission de conférer les mêmes droits aux conjoints de fait porte-t-elle atteinte au droit à l'égalité garanti par l'art. 15(1) de la Charte canadienne des droits et libertés? — Code civil du Québec, L.Q. 1991, ch. 64, art. 401 à 430, 432, 433, 448 à 484, 585.

A et B se rencontrent en 1992 dans le pays d'origine de A. Cette dernière, alors âgée de 17 ans, vit chez ses parents et poursuit ses études. B, âgé de 32 ans, est propriétaire d'une entreprise prospère. De 1992 à 1994, ils voyagent ensemble autour du monde plusieurs fois par année. B soutient A financièrement pour la poursuite de ses études. Au début de 1995, le couple convient que A viendra vivre au Québec, où B demeure. Ils rompent peu de temps après, mais ils se revoient à la période des Fêtes et au début de 1996. A devient alors enceinte de leur premier enfant. Elle a par la suite deux autres enfants avec B, en 1999 et en 2001. Pendant la vie commune, A tente d'amorcer une carrière de mannequin, mais essentiellement elle ne travaille pas à l'extérieur du foyer et elle accompagne souvent B lors de ses voyages. B pourvoit à tous les besoins de A et des enfants. A

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her that he did not believe in the institution of marriage. He said that he could possibly envision getting married someday, but only to make a long-standing relationship official. The parties separated in 2002 after living together for seven years.

In February 2002, A filed a motion in court seeking custody of the children. The motion was accompanied by a notice to the Attorney General of Quebec stating that A intended to challenge the constitutionality of several provisions of the *Civil Code of Québec* ("*C.C.Q.*") in order to obtain the same legal regime for *de facto* spouses that existed for married spouses. A thus claimed support for herself, a lump sum, partition of the family patrimony and the legal matrimonial regime of partnership of acquests. She also sought to reserve her right to claim a compensatory allowance. A's claim concerning the use of the family residence was settled in an agreement between A and B. These appeals relate solely to the constitutional aspect of the case. The Quebec Superior Court rejected A's constitutional arguments and found that the impugned provisions did not violate the right to equality guaranteed by s. 15 of the *Charter*. A appealed to the Quebec Court of Appeal, which allowed A's appeal in part and declared the provision that provides for the obligation of spousal support to be of no force or effect. However, the Court of Appeal upheld the Superior Court's decision as regards the constitutionality of the provisions concerning the family residence, the family patrimony, the compensatory allowance and the partnership of acquests. The majority of the court suspended the declaration of constitutional invalidity of art. 585 *C.C.Q.* for 12 months. B and the Attorney General of Quebec are appealing the Court of Appeal's decision to strike down art. 585. A appeals the conclusion that the provisions concerning the partition of property are constitutionally valid.

Held (Deschamps, Cromwell and Karakatsanis JJ. dissenting in part in the result and Abella J. dissenting in the result): The appeals of the Attorney General of Quebec and B should be allowed, and the appeal of A should be dismissed. Articles 401 to 430, 432, 433, 448 to 484 and 585 of the *Civil Code of Québec* are constitutional.

The constitutional questions should be answered as follows:

1. Do arts. 401 to 430, 432, 433, 448 to 484 and 585 of the *Civil Code of Québec*, S.Q. 1991, c. 64, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

souhaite se marier, mais B lui répond qu'il ne croit pas à l'institution du mariage. Il dit qu'il pourrait envisager de se marier un jour, mais uniquement afin d'officialiser une longue relation. Les parties se séparent en 2002, après une cohabitation qui a duré sept ans.

En février 2002, A dépose en cour une requête sollicitant la garde des enfants. Elle joint à cette procédure un avis au procureur général du Québec de son intention de contester la constitutionnalité de plusieurs dispositions du *Code civil du Québec* (« *C.c.Q.* ») afin d'obtenir, pour les conjoints de fait, le même régime juridique que celui prévu pour les conjoints mariés. A réclame ainsi une pension alimentaire pour elle-même, une somme globale, le partage du patrimoine familial et du régime matrimonial légal de la société d'acquêts ainsi que la réserve de ses droits pour demander une prestation compensatoire. Une réclamation relativement à l'usage de la résidence familiale a été réglée par entente entre A et B. Les présents pourvois portent uniquement sur le volet constitutionnel du dossier. La Cour supérieure du Québec rejette les arguments constitutionnels de A et conclut que les dispositions contestées ne portent pas atteinte au droit à l'égalité garanti par l'art. 15 de la *Charte*. A se pourvoit devant la Cour d'appel du Québec, qui accueille en partie son appel et déclare inopérante la disposition relative à l'obligation alimentaire entre conjoints. La cour confirme toutefois la décision de première instance quant à la constitutionnalité des dispositions portant sur la résidence familiale, le patrimoine familial, la prestation compensatoire et la société d'acquêts. À la majorité, la cour suspend la déclaration d'invalidité constitutionnelle de l'art. 585 *C.c.Q.* pour une période de 12 mois. B et le procureur général du Québec interjettent appel de la décision de la Cour d'appel à l'égard de l'invalidation de l'art. 585. A pour sa part se pourvoit contre la confirmation de la validité constitutionnelle des dispositions sur le partage des biens.

Arrêt (les juges Deschamps, Cromwell et Karakatsanis sont dissidents en partie quant au résultat et la juge Abella est dissidente quant au résultat) : Les pourvois du procureur général du Québec et de B sont accueillis et le pourvoi de A est rejeté. Les articles 401 à 430, 432, 433, 448 à 484 et 585 du *Code civil du Québec* sont constitutionnels.

Les questions constitutionnelles reçoivent les réponses suivantes :

1. Les articles 401 à 430, 432, 433, 448 à 484 et 585 du *Code civil du Québec*, L.Q. 1991, ch. 64, contreviennent-ils au par. 15(1) de la *Charte canadienne des droits et libertés*?

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Answers: McLachlin C.J. and Deschamps, Abella, Cromwell and Karakatsanis JJ. would answer yes. LeBel, Fish, Rothstein and Moldaver JJ. would answer no.

2. If so, is the infringement a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answers: LeBel, Fish, Rothstein and Moldaver JJ. would answer that it is not necessary to answer this question. McLachlin C.J. would answer yes. Deschamps, Cromwell and Karakatsanis JJ. would answer that only art. 585 is not justified under s. 1. Abella J. would answer no.

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(1) Section 15(1) of the Charter

Per LeBel, Fish, Rothstein and Moldaver JJ. (minority on s. 15(1)): The *Civil Code of Québec* establishes a mandatory primary regime in a chapter that defines the fundamental effects of marriage. This regime creates mutual rights, duties and obligations and radically alters each spouse's patrimonial rights. More specifically, the primary regime results in the formation of a partial economic union between the spouses. Aside from the primary regime, where there is no marriage contract providing for separation as to property or for changes to the legal regime, the legal matrimonial regime of partnership of acquests applies to the spouses as a result of their marriage. Like the primary regime, the regime of partnership of acquests significantly changes the rights of both spouses in relation to their patrimony. The Quebec legislature has imposed these regimes only on those who, by agreement with another person, have demonstrated that they wish to adhere to them. Their consent must be explicit, and must take the form of marriage or a civil union. The *Civil Code of Québec* does not lay down the terms of the union of *de facto* spouses. Since the *de facto* union is not subject to the mandatory legislative framework that applies to marriage and the civil union, *de facto* spouses are free to shape their relationships as they wish, having proper regard for public order. They can enter into agreements to organize their patrimonial relationships while they live together and to provide for the consequences of a possible breakdown.

Réponses : La juge en chef McLachlin et les juges Deschamps, Abella, Cromwell et Karakatsanis répondraient oui. Les juges LeBel, Fish, Rothstein et Moldaver répondraient non.

2. Dans l'affirmative, s'agit-il d'une limite raisonnable prescrite par une règle de droit dont la justification peut se démontrer dans le cadre d'une société libre et démocratique au sens de l'article premier de la *Charte canadienne des droits et libertés*?

Réponses : Les juges LeBel, Fish, Rothstein et Moldaver sont d'avis qu'il n'est pas nécessaire de répondre à cette question. La juge en chef McLachlin répondrait oui. Les juges Deschamps, Cromwell et Karakatsanis répondraient que seul l'art. 585 n'est pas justifié au sens de l'article premier. La juge Abella répondrait non.

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(1) Paragraphe 15(1) de la Charte

Les juges LeBel, Fish, Rothstein et Moldaver (opinion minoritaire quant au par. 15(1)) : Le *Code civil du Québec* établit un régime primaire impératif qui définit les effets fondamentaux du mariage. Ce régime impose des droits, des devoirs et des obligations mutuels et il altère radicalement les droits patrimoniaux de chacun des époux. Spécifiquement, ce régime impose la formation d'une union économique partielle entre les époux. Outre le régime primaire, en l'absence de contrat de mariage prévoyant la séparation de biens ou des modifications au régime légal, le mariage emporte l'assujettissement des époux au régime matrimonial légal de la société d'acquêts. Comme le régime primaire, la société d'acquêts modifie significativement les droits de chacun des époux à l'égard de leur patrimoine. Le législateur québécois n'impose ces régimes qu'à ceux et celles qui, d'un commun accord avec une autre personne, ont manifesté leur volonté d'y adhérer. Ce consentement doit être explicite et prendre la forme du mariage ou de l'union civile. Le *Code civil du Québec* n'encadre pas les termes de l'union entre conjoints de fait. Puisque l'union de fait échappe au cadre législatif impératif propre au mariage et à l'union civile, les conjoints de fait demeurent libres de modeler leur relation à leur gré dans le respect de l'ordre public. À cet effet, ils peuvent conclure des ententes organisant leurs relations patrimoniales pendant la vie commune et prévoyant les conséquences d'une possible rupture.

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By arguing that arts. 401 to 430, 432, 433, 448 to 484 and 585 of the *Civil Code of Québec* are contrary to s. 15(1) of the *Charter* and not justified under s. 1, A is claiming the benefit of certain aspects of the primary regime that applies in cases of separation from bed and board, divorce, or dissolution of a civil union. She is also seeking the automatic and mandatory application of the legal matrimonial regime of partnership of acquests. In *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, and *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396, the Court reworked and provided important clarifications to the analytical framework for applying the equality guarantee provided for in s. 15(1) of the *Charter*. As can be seen from this framework, a discriminatory distinction is as a general rule an adverse distinction that perpetuates prejudice or that stereotypes. The existence of a pre-existing or historical disadvantage will make it easier to prove prejudice or a stereotype. However, the existence or perpetuation of a disadvantage cannot in itself make a distinction discriminatory. Substantive equality is not denied solely because a disadvantage is imposed. Rather, it is denied by the imposition of a disadvantage that is unfair or objectionable, which is most often the case if the disadvantage perpetuates prejudice or stereotypes. Thus, according to the established analytical framework, a court analyzing the validity of an allegation that s. 15(1) has been infringed must address the following questions: (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? The claimant can show that the impugned law creates a distinction expressly or that it creates one indirectly.

The majority of the Court would have reached the same conclusion in *Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83, [2002] 4 S.C.R. 325, if its analysis had been based on the reworked analytical framework from *Kapp* and *Withler*. Although the statute at issue in *Walsh* imposed differential treatment based on marital status by limiting the presumption of equal division of matrimonial property to married couples and excluding persons in common law relationships, that distinction did not create a disadvantage by perpetuating prejudice or stereotyping. The majority's analysis was thus based on the wish to promote substantive equality. *Walsh* was based on a principle of freedom to choose between different marital statuses that had different consequences for spouses, and that principle did not in that context infringe the constitutional equality guarantee. The principle in question continues to be valid in the circumstances of the

En plaidant que les art. 401 à 430, 432, 433, 448 à 484 et 585 du *Code civil du Québec* contreviennent au par. 15(1) de la *Charte* et ne sont pas justifiés en vertu de l'article premier, A réclame l'application de certains attributs du régime primaire applicable en cas de séparation de corps, de divorce ou de dissolution de l'union civile. Elle réclame aussi l'application automatique et obligatoire du régime matrimonial légal de la société d'acquêts. Les arrêts *R. c. Kapp*, 2008 CSC 41, [2008] 2 R.C.S. 483, et *Withler c. Canada (Procureur général)*, 2011 CSC 12, [2011] 1 R.C.S. 396, ont remanié et apporté d'importantes précisions au cadre analytique régissant la mise en œuvre de la garantie d'égalité prévue au par. 15(1) de la *Charte*. Comme le prévoit ce cadre d'analyse, en règle générale, une distinction discriminatoire est une distinction désavantageuse qui perpétue un préjugé ou applique un stéréotype. L'existence d'un désavantage préexistant ou historique facilitera la preuve éventuelle d'un préjugé ou d'un stéréotype. Cependant, l'existence ou la perpétuation d'un désavantage ne saura, à elle seule, rendre une distinction discriminatoire. L'égalité réelle n'est pas violée par la seule imposition d'un désavantage. Elle est niée par l'imposition d'un désavantage injuste ou répréhensible, ce qui se produit, le plus souvent, lorsque ce désavantage perpétue un préjugé ou applique un stéréotype. Ainsi, selon le cadre d'analyse établi, une cour analysant la validité d'une allégation d'atteinte au par. 15(1) devra traiter des questions suivantes : (1) La loi crée-t-elle une distinction fondée sur un motif énuméré ou analogue? (2) La distinction crée-t-elle un désavantage par la perpétuation d'un préjugé ou l'application de stéréotypes? Le demandeur peut démontrer que la mesure contestée crée une distinction explicite ou qu'elle crée une distinction par effet indirect.

La conclusion de la majorité de la Cour dans l'arrêt *Nouvelle-Écosse (Procureur général) c. Walsh*, 2002 CSC 83, [2002] 4 R.C.S. 325, aurait été la même si elle avait résulté d'une analyse effectuée sous le cadre juridique remanié par *Kapp* et *Withler*. En effet, bien que la loi en cause ait créé une différence de traitement fondée sur l'état matrimonial en ne réservant l'application de la présomption de partage égal des biens matrimoniaux qu'aux seuls couples mariés à l'exclusion des conjoints de fait, cette distinction n'entraînait pas de désavantage causé par la perpétuation d'un préjugé ou par l'application de stéréotypes. L'analyse de la majorité s'inscrivait ainsi dans la volonté de recherche de l'égalité réelle. L'arrêt *Walsh* repose sur un principe de libre choix entre différents statuts matrimoniaux qui ont des conséquences diverses pour les conjoints, principe qui ne viole pas dans ce contexte la garantie constitutionnelle d'égalité.

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case at bar despite the subsequent developments in the case law. Although *Walsh* concerned not the obligation of support, but the equal division of family assets, the majority's comments on the sources of the distinctions between the various forms of relationships and the consequences of those distinctions remain relevant.

To dispose of these appeals, it would be inappropriate to distinguish the partition of property from the obligation of support. Such a distinction disregards the character of an "economic partnership" that the Quebec legislature has established for marriage and the civil union. It also disregards the fact that this partnership is structured around a mandatory primary regime that has both patrimonial and extrapatrimonial aspects and that the primary regime establishes the obligation of support as an effect of marriage and of the civil union. In this sense, the obligation of support is tied to the other effects of marriage and of the civil union, such as the obligation to contribute to household expenses, rights and obligations with respect to the family residence, and the creation of a family patrimony. It forms an integral and indissociable part of the set of measures that constitute Quebec's primary regime. What must therefore be determined in these appeals is not whether the exclusion of *de facto* spouses from the obligation of support is discriminatory, but whether their exclusion from the entire statutory framework imposed on married and civil union spouses is discriminatory under s. 15(1) of the *Charter*.

To prove that she has been discriminated against, A must show on a balance of probabilities that the provisions of the *Civil Code of Québec* at issue create an adverse distinction based on an enumerated or analogous ground and that the disadvantage is discriminatory because it perpetuates prejudice or stereotypes. The provisions relating to the family patrimony, the family residence, the compensatory allowance, the partnership of acquests and the obligation of support apply only to persons who are married or in a civil union, and do not apply to *de facto* spouses. These provisions therefore have the effect of creating a distinction based on the analogous ground of marital status. That distinction may result in disadvantages for those who are excluded from the statutory framework applicable to a marriage or a civil union. Generally speaking, when *de facto* spouses separate, one of them will likely end up in a more precarious patrimonial situation than if the couple had been married or in a civil union. As a result, unless these *de facto* spouses have exactly the same earning capacity and exactly the same patrimony, one of them will be in

Ce principe conserve sa validité dans le cadre du présent litige, malgré l'évolution jurisprudentielle ultérieure. Bien que *Walsh* ne portait pas sur l'obligation alimentaire, mais sur le partage égal de biens familiaux, les réflexions de la majorité sur les sources des distinctions établies entre les différentes formes d'union et leurs conséquences demeurent pertinentes.

Pour régler le sort des présents pourvois, il n'y a pas lieu de distinguer le partage des biens de l'obligation alimentaire. Une telle distinction occulte le caractère d'« association économique » que le législateur québécois impose au mariage et à l'union civile. Elle néglige également le fait que cette association s'organise autour d'un régime primaire impératif de nature à la fois patrimoniale et extrapatrimoniale, et que ce régime institue l'obligation alimentaire à titre d'effet du mariage et de l'union civile. À ce titre, l'obligation alimentaire demeure liée aux autres effets du mariage et de l'union civile, comme l'obligation au partage des charges du ménage, le sort de la résidence familiale et la création d'un patrimoine familial. Elle constitue une partie intégrale et indissociable de l'ensemble des mesures qui forment le régime primaire québécois. Il ne s'agit donc pas de déterminer en l'espèce si l'exclusion des conjoints de fait de l'obligation alimentaire est discriminatoire, mais plutôt de déterminer si leur exclusion de l'ensemble de l'encadrement légal imposé aux époux et aux conjoints unis civilement est discriminatoire au sens du par. 15(1) de la *Charte*.

Afin d'établir l'existence d'une situation de discrimination, A doit démontrer, par prépondérance des probabilités, que les dispositions du *Code civil du Québec* en litige créent une distinction désavantageuse fondée sur un motif énuméré ou analogue, et que ce désavantage est discriminatoire parce qu'il perpétue un préjugé ou qu'il applique un stéréotype. Les dispositions portant sur le patrimoine familial, la résidence familiale, la prestation compensatoire, la société d'acquêts et l'obligation alimentaire ne s'appliquent qu'aux personnes mariées ou unies civilement, à l'exclusion des conjoints de fait. Ces dispositions comportent donc, dans leur effet, une distinction fondée sur le motif analogue qu'est l'état matrimonial. Cette distinction peut entraîner des désavantages pour les personnes se trouvant exclues de l'encadrement légal découlant du mariage ou de l'union civile. Dans la plupart des cas de séparation de conjoints de fait, un des conjoints sera vraisemblablement placé dans une situation patrimoniale plus précaire que si le couple avait été composé de personnes mariées ou unies civilement. Dès lors, à moins que les conjoints de fait ne bénéficient

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a worse position after the relationship ends than would a married or civil union spouse in a similar patrimonial situation.

d'une capacité de gain et d'un patrimoine identiques, un des conjoints se trouvera dans une situation moins favorable après la rupture que ne l'aurait été le conjoint marié ou uni civilement, placé dans une situation patrimoniale similaire.

However, the distinction is not discriminatory, because it does not create a disadvantage by expressing or perpetuating prejudice or by stereotyping. Although there was a period of Quebec history during which *de facto* spouses were subjected to both legislative hostility and social ostracism, nothing in the evidence suggests that *de facto* spouses are now subject to public opprobrium. The expert reports filed by the parties tend to show the contrary. According to them, the *de facto* union has become a respected type of conjugality and is not judged unfavourably by Quebec society as a whole. Likewise, the legislature's traditional hostility generally seems to have changed into acceptance of the *de facto* union. In this regard, Quebec social legislation no longer draws distinctions between the various types of conjugality either in granting benefits to or imposing obligations on spouses where their relations with government institutions are concerned. The distinction continues to exist in the context of relations between the spouses themselves, within their conjugal relationship, where there is still a will to preserve the possibility of choosing between various types of conjugality.

La distinction n'est cependant pas discriminatoire puisqu'elle ne crée pas de désavantage par l'expression ou la perpétuation d'un préjugé ou par l'application de stéréotypes. Bien que durant une période de l'histoire du Québec, les conjoints de fait aient été victimes d'une hostilité législative accompagnée d'ostracisme social, rien dans la preuve ne permet de conclure que l'union de fait fasse aujourd'hui l'objet de l'opprobre populaire. Les rapports d'expertise déposés par les parties tendent plutôt à démontrer le contraire. L'union de fait serait devenue un mode de conjugalité respecté n'entraînant aucun jugement péjoratif de la part de l'ensemble de la société québécoise. De même, l'hostilité législative traditionnelle semble s'être généralement muée en acceptation du phénomène de l'union de fait. À cet effet, les lois sociales québécoises n'entretiennent plus de distinctions entre les divers modes de conjugalité tant sur le plan des bénéfices accordés que sur celui des obligations imposées aux conjoints lorsqu'il s'agit de leurs rapports avec les institutions publiques. La distinction subsiste dans le cas des rapports des conjoints entre eux, au sein de leur union conjugale où subsiste une volonté de préserver une possibilité de choix entre des modes de conjugalité divers.

Nor is the exclusion of *de facto* spouses from the application of the impugned provisions discriminatory on the basis of an expression of prejudice. The legislature has not established a hierarchy between the various forms of conjugality, nor has it expressed a preference for marriage and the civil union at the expense of the *de facto* union. It has merely defined the legal content of the different forms of conjugal relationships. It has made consent the key to changing the spouses' mutual patrimonial relationship. In this way, it has preserved the freedom of those who wish to organize their patrimonial relationships outside the mandatory statutory framework. Express, and not deemed, consent is the source of the obligation of support and of that of partition of spouses' patrimonial interests. This consent is given in Quebec law by contracting marriage or a civil union, or entering into a cohabitation agreement. Participation in the protective regimes provided for by law depends necessarily on mutual consent. In this regard, the conclusion of a cohabitation agreement enables *de facto* spouses to create for themselves the legal relationship they consider necessary

L'exclusion des conjoints de fait de l'application des dispositions contestées n'est pas non plus discriminatoire par l'expression d'un préjugé. Le législateur ne crée pas une hiérarchie entre les diverses formes de conjugalité et ne manifeste pas une préférence pour le mariage et l'union civile au détriment de l'union de fait. Il ne procède qu'à la définition du contenu juridique des différentes formes d'union conjugale. Il fait du consentement la clé de la modification des rapports patrimoniaux mutuels des conjoints. Il préserve dès lors la liberté de ceux qui désirent organiser leurs rapports patrimoniaux hors du cadre impératif légal. Le consentement explicite et non présumé constitue la source des obligations de soutien alimentaire et de partage des intérêts patrimoniaux entre conjoints. Ce consentement s'exprime en droit québécois par la conclusion d'un mariage, d'une union civile ou d'une entente de vie commune. L'entrée dans les régimes de protection prévus par la loi repose, nécessairement, sur un consentement mutuel. À cet égard, la conclusion de contrats de vie commune permet aux conjoints de fait de créer entre eux les rapports juridiques qu'ils

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without having to modify the form of conjugality they have chosen for their life together. In this context in which the existence of a set of rights and obligations depends on mutual consent in one of a variety of forms, it is hard to speak of discrimination against *de facto* spouses. The resulting choice has become a key factor in the determination of the scope of the right at issue, and not only in the justification of a limit on that right. It is not imperative that there be an identical framework for each form of union in order to remain true to the purpose of s. 15(1). In the instant case, the fact that there are different frameworks for private relationships between spouses does not indicate that prejudice is being expressed or perpetuated, but, rather, connotes respect for the various conceptions of conjugality. Thus, no hierarchy of worth is established between the different types of couples.

The articles of the *Civil Code of Québec* whose constitutional validity is being challenged by A therefore do not express or perpetuate prejudice against *de facto* spouses. On the contrary, it appears that, by respecting personal autonomy and the freedom of *de facto* spouses to organize their relationships on the basis of their needs, those provisions are consistent with two of the values underlying s. 15(1) of the *Charter*. They were enacted as part of a long and complex legislative process during which the Quebec National Assembly was concerned about keeping step with changes in society and about adapting family law to new types of conjugal relationships in a manner compatible with the freedom of spouses.

Furthermore, there is no evidence in the Court's record that would justify finding that the exclusion of *de facto* spouses from the primary regime and the regime of partnership of acquests is based on a stereotypical characterization of the actual circumstances of such spouses. More specifically, none of A's evidence tends to show that the policy of freedom of choice, consensualism and autonomy of the will does not correspond to the reality of the persons in question. Nor can judicial notice be taken of the fact that the choice of type of conjugality is not a deliberate and genuine choice that should have patrimonial consequences but necessarily results from the spouses' ignorance of the consequences of their status. Such a fact is clearly controversial and not beyond reasonable dispute. It is not unreasonable to believe that, in theory, individuals sometimes make uninformed choices and that some individuals may be unaware of the consequences of their choice of conjugal lifestyle. Nevertheless, to take judicial notice of the fact

estiment nécessaires sans devoir modifier la forme de conjugalité dans laquelle ils ont situé leur vie commune. Dans ce contexte où le consentement mutuel sous différentes formes constitue la source d'un ensemble de droits et d'obligations, il devient difficile de parler de discrimination envers les époux de fait. La possibilité de choix qui s'est ainsi offerte est devenue un élément clé de l'analyse pour déterminer l'étendue du droit en cause et non uniquement pour justifier une limitation à ce droit. Pour respecter l'objet du par. 15(1), il n'est pas impératif de prescrire un encadrement identique pour chaque forme d'union. En l'espèce, un encadrement différent des rapports privés entre conjoints ne trahit pas l'expression ou la perpétuation d'un préjugé, mais implique plutôt un respect pour les manières différentes de concevoir la conjugalité. Aucune hiérarchie de valeur n'est ainsi établie entre les différents couples.

Par conséquent, les articles du *Code civil du Québec* dont A conteste la validité constitutionnelle n'expriment ni ne perpétuent un préjugé à l'égard des conjoints de fait. Il apparaît au contraire que ces dispositions, en ce qu'elles respectent l'autonomie des personnes et la liberté des conjoints de fait d'aménager leurs rapports en fonction de leurs besoins, reconnaissent deux des valeurs sous-jacentes au par. 15(1) de la *Charte*. Elles se situent dans le cadre d'une évolution législative longue et complexe, au cours de laquelle l'Assemblée nationale du Québec a eu le souci d'accompagner les mouvements de la société et d'adapter le droit de la famille à de nouveaux modes de rapports conjugaux dans le respect de la liberté des conjoints.

De plus, aucune preuve au dossier de la Cour ne permet de conclure que l'exclusion des conjoints de fait du régime primaire et de la société d'acquêts repose sur une caractérisation stéréotypée de leur situation réelle. Spécifiquement, aucun élément de preuve mis de l'avant par A ne tend à démontrer que la politique du libre choix, du consensualisme et de l'autonomie de la volonté ne correspond pas à la réalité vécue par les personnes visées. Il n'est pas possible de prendre connaissance d'office du fait que le choix du mode de conjugalité n'est pas un choix délibéré et véritable qui devrait entraîner des conséquences patrimoniales et qu'il découlerait nécessairement de l'ignorance des conjoints à l'égard des conséquences de leur statut. Un tel fait prête clairement à controverse et n'est pas à l'abri de toute contestation de la part de personnes raisonnables. Il n'est pas déraisonnable de considérer qu'en théorie, des individus font parfois des choix peu éclairés et que certaines personnes peuvent ne pas être conscientes des

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that the voluntary choice not to marry does not reflect an autonomous decision to avoid the legal regimes would be to exceed the limits of legitimate judicial notice, especially in relation to an issue at the centre of the controversy. In this case, A has not established that it is stereotypical to believe that couples in a *de facto* union have chosen not to be bound by the regimes applicable to marriage and civil unions. The Quebec scheme, the effect of which is to respect each person's freedom of choice to establish his or her own form of conjugality, and thus to participate or not to participate in the legislative regime of marriage or civil union with its distinct legal consequences, is not based on a stereotype. In this sense, recognition of the principle of autonomy of the will, which is one of the values underlying the equality guarantee in s. 15 of the *Charter*, means that the courts must respect choices made by individuals in the exercise of that autonomy. In this context, it will be up to the legislature to intervene if it believes that the consequences of such autonomous choices give rise to social problems that need to be remedied.

In conclusion, although arts. 401 to 430, 432, 433, 448 to 484 and 585 of the *Civil Code of Québec* draw a distinction based on marital status between *de facto* spouses and married or civil union spouses, they do not create a disadvantage by expressing or perpetuating prejudice or by stereotyping. These provisions accordingly do not violate the right to equality guaranteed by s. 15 of the *Charter*.

Per Abella J. (majority on s. 15(1)): The total exclusion of *de facto* spouses — the term used in Quebec for those who are neither married nor in a civil union — from the legal protections for both support and property given to spouses in formal unions is a violation of s. 15(1) of the *Canadian Charter of Rights and Freedoms*. When spouses who are married or in civil unions separate or divorce in Quebec, they are guaranteed certain legal protections. They have the right to claim support from each other and an equal division of the family property. The spousal support and family property provisions in Quebec are aimed at recognizing and compensating spouses for the roles assumed within the relationship and any resulting interdependence and vulnerability on its dissolution. Many *de facto* spouses share the characteristics that led to the protections for spouses in formal relationships. They form long-standing unions; they divide household responsibilities and develop a high

conséquences de leur choix de mode de vie conjugale. Néanmoins, prendre connaissance d'office du fait que le choix volontaire de ne pas se marier n'exprime pas une décision autonome de se soustraire aux régimes légaux pousserait les limites de la connaissance d'office au-delà de ce qui est légitime, particulièrement à l'égard d'une question située au cœur de ce litige. A n'a pas établi, en l'espèce, que c'est un stéréotype que de considérer que les couples en union de fait ont choisi de ne pas s'assujettir aux régimes du mariage ou de l'union civile. Le régime québécois, dont l'effet est de respecter la liberté de choix de chaque personne d'établir sa propre forme de conjugalité et, par le fait même, d'adhérer ou non au régime législatif du mariage ou de l'union civile avec leurs conséquences juridiques distinctes, ne repose pas sur un stéréotype. En ce sens, une fois reconnu le principe de l'autonomie de la volonté, qui par ailleurs est une des valeurs sous-tendant la garantie d'égalité prévue à l'art. 15 de la *Charte*, les choix qu'effectuent les individus en exerçant cette autonomie méritent d'être respectés par les tribunaux. Dans ce contexte, il appartiendra au législateur d'intervenir s'il considère que les conséquences de ces choix autonomes engendrent des difficultés sociales auxquelles il importe de remédier.

En conclusion, les art. 401 à 430, 432, 433, 448 à 484 et 585 du *Code civil du Québec*, bien qu'ils établissent une distinction fondée sur l'état matrimonial entre les conjoints de fait et les époux ou les conjoints unis civilement, ne créent pas de désavantage par l'expression ou la perpétuation d'un préjugé ou par l'application de stéréotypes. Ces dispositions ne portent donc pas atteinte à la garantie d'égalité prévue au par. 15(1) de la *Charte*.

La juge Abella (opinion majoritaire quant au par. 15(1)) : L'exclusion totale des conjoints de fait — expression utilisée au Québec pour désigner les personnes qui vivent en couples mais ne sont ni mariées ni unies civilement — du bénéfice des mesures de protection juridiques reconnues aux conjoints unis formellement en matière de soutien alimentaire et de partage des biens constitue une violation du par. 15(1) de la *Charte canadienne des droits et libertés*. Au Québec, les conjoints mariés ou unis civilement qui, selon le cas, divorcent ou se séparent disposent de certaines mesures de protection juridiques. Chacun des conjoints a le droit de demander à l'autre de lui verser un soutien alimentaire, et de réclamer le partage égal des biens familiaux. Les dispositions législatives québécoises régissant le soutien alimentaire en faveur du conjoint et les biens familiaux visent à reconnaître les rôles assumés par les conjoints au sein de la relation ainsi que toute situation de

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degree of interdependence; and, critically, the economically dependent, and therefore vulnerable, spouse is faced with the same disadvantages when the relationship is dissolved. Yet *de facto* dependent spouses in Quebec have no right to claim support, no right to divide the family patrimony, and are not governed by any matrimonial regime.

dépendance et de vulnérabilité qui en résulte à la dissolution de celle-ci, et à les indemniser en conséquence. Bien des conjoints de fait présentent les caractéristiques qui ont entraîné l'établissement des garanties accordées aux conjoints unis formellement. Ils forment des unions de longue durée; ils se partagent les tâches ménagères et il s'établit entre eux une grande interdépendance; et, fait crucial, le conjoint financièrement dépendant, et par conséquent vulnérable, subit, au moment de la dissolution de la relation, les mêmes inconvénients que les conjoints mariés ou unis civilement. Pourtant, au Québec, ces conjoints de fait dépendants n'ont pas le droit de demander des aliments, ils n'ont pas droit au partage du patrimoine familial et ils ne sont assujettis à aucun régime matrimonial.

As the history of modern family law demonstrates, fairness requires that we look at the content of the relationship's social package, not at how it is wrapped. In Quebec and throughout the rest of Canada, the right to support does not rest on the legal status of either husband or wife, but on the reality of the dependence or vulnerability that the spousal relationship creates. The law dealing with division of family property also rests on a protective basis rather than a contractual one. The provisions in Quebec on compensatory allowance and the family patrimony regime are part of public order, applying mandatorily to all married spouses and those in civil unions. The mandatory nature of both the compensatory allowance and family patrimony regimes highlights the preeminent significance Quebec has given to concerns for the protection of vulnerable spouses over other values such as contractual freedom or choice.

Comme le démontre l'histoire du droit de la famille actuel, l'équité requiert que nous nous attachions au contenu réel de la structure sociale de la relation. Au Québec et dans le reste du Canada, le droit au soutien ne repose pas sur le statut juridique de l'époux ou de l'épouse, mais sur l'état concret de dépendance ou de vulnérabilité que crée la relation conjugale. Le droit relatif au partage des biens familiaux repose lui aussi sur un ensemble de règles possédant une vocation protectrice plutôt qu'un caractère contractuel. Au Québec, les dispositions ayant créé le mécanisme de la prestation compensatoire et celui du patrimoine familial ont été désignées mesures d'ordre public, applicables impérativement aux conjoints mariés et aux conjoints unis civilement. Le caractère impératif du régime de la prestation compensatoire et de celui du patrimoine familial fait bien ressortir la priorité qu'a accordée le Québec aux préoccupations relatives à la protection des conjoints vulnérables par rapport à d'autres valeurs comme la liberté de choix en matière contractuelle.

Historically, unmarried spouses in Canada were stigmatized; but as social attitudes changed, so did the approaches of legislatures and courts, which came to accept conjugal relationships outside a formal marital framework. This change reflected an enhanced understanding of what constitutes a "family". As attitudes shifted and the functional similarity between many unmarried relationships and marriages was accepted, this Court expanded protection for unmarried spouses. In *Miron v. Trudel*, [1995] 2 S.C.R. 418, for example, the Court found that "marital status" was an analogous ground under s. 15(1) of the *Charter* because of the historic disadvantage of unmarried spouses. Notably too, the Court observed that while in theory an individual is free to choose whether to marry, there are, in reality, a

Au Canada, les conjoints non mariés ont longtemps été stigmatisés; cependant, à mesure que les attitudes de la société ont changé à leur égard, la façon de voir des législateurs et des tribunaux a elle aussi évolué et ils en sont venus à accepter l'existence de rapports conjugaux en dehors du cadre matrimonial formel. Ce changement reflétait une conception plus large de la notion de « famille ». À la suite du changement des attitudes et de l'acceptation de la similitude fonctionnelle entre le mariage et de nombreuses relations unissant des personnes non mariées, la Cour a étendu les mesures de protection à ces dernières. Dans *Miron c. Trudel*, [1995] 2 R.C.S. 418, par exemple, la Cour a conclu que l'« état matrimonial » était un motif analogue pour l'application du par. 15(1) de la *Charte* en raison du désavantage

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number of factors that may place the decision beyond his or her effective control. This was a recognition of the complex and mutual nature of the decision to marry and the myriad factors at play in that decision. It was also an acknowledgment that the decision to live together as unmarried spouses may, for some, not in fact be a choice at all.

The purpose of the s. 15 equality provision is to eliminate the exclusionary barriers faced by individuals in the enumerated or analogous groups in gaining meaningful access to what is generally available. In *Kapp*, this Court reaffirmed its commitment to the test that was set out in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, whereby s. 15 was seen as an anti-discrimination provision. The claimant's burden under the *Andrews* test is to show that the government has made a distinction based on an enumerated or analogous ground and that the distinction's impact on the individual or group perpetuates disadvantage. If this has been demonstrated, the burden shifts to the government to justify the reasonableness of the distinction under s. 1. *Kapp*, and later *Withler* restated these principles as follows: (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

In referring to prejudice and stereotyping in the second step of the *Kapp* reformulation of the *Andrews* test, the Court was not purporting to create a new s. 15 test. Prejudice and stereotyping are not discrete elements of the test which a claimant is obliged to demonstrate. Prejudice is the holding of pejorative attitudes based on strongly held views about the appropriate capacities or limits of individuals or the groups of which they are a member. Stereotyping, like prejudice, is a disadvantaging attitude, but one that attributes characteristics to members of a group regardless of their actual capacities. Attitudes of prejudice and stereotyping can undoubtedly lead to discriminatory conduct, and discriminatory conduct in turn can reinforce these negative attitudes. But *Kapp* and *Withler* should not be seen as establishing an additional requirement on s. 15 claimants to prove that a distinction will perpetuate prejudicial or stereotypical

historique subi par les conjoints non mariés. Fait important, la Cour a également fait remarquer que, bien qu'une personne soit en théorie libre de choisir de se marier ou non, il existe en réalité un certain nombre de facteurs, indépendants de sa volonté, qui pourraient faire en sorte que cette décision lui échappe effectivement. La Cour reconnaissait ainsi la nature complexe et réciproque de la décision de se marier, ainsi que la myriade de facteurs qui influent sur cette décision. Elle reconnaissait également que la décision de vivre ensemble en tant que conjoints non mariés, pour certains, ne constitue peut-être pas du tout un choix dans les faits.

La disposition sur l'égalité, l'art. 15, a pour objet d'éliminer les obstacles qui empêchent les membres d'un groupe énuméré ou analogue d'avoir accès concrètement à des mesures dont dispose la population en général. Dans *Kapp*, la Cour a réitéré son attachement au critère établi dans *Andrews c. Law Society of British Columbia*, [1989] 1 R.C.S. 143, où l'art. 15 avait été considéré comme une mesure antidiscrimination. Le critère élaboré dans l'arrêt *Andrews* impose au demandeur le fardeau de démontrer que le gouvernement a établi une distinction fondée sur un motif énuméré ou analogue, et que l'effet de cette distinction sur l'individu ou le groupe perpétue un désavantage. Si le demandeur fait cette démonstration, il incombe alors au gouvernement de justifier le caractère raisonnable de la distinction conformément à l'article premier. Ces principes ont été reformulés ainsi dans l'arrêt *Kapp* et, plus tard, dans *Withler* : (1) La loi crée-t-elle une distinction fondée sur un motif énuméré ou analogue? (2) Cette distinction crée-t-elle un désavantage par la perpétuation d'un préjugé ou l'application de stéréotypes?

Lorsqu'elle a mentionné les notions de préjugé et d'application de stéréotypes en reformulant, dans *Kapp*, le deuxième volet du critère de l'arrêt *Andrews*, la Cour n'entendait pas créer une nouvelle analyse pour l'application de l'art. 15. Les préjugés et l'application de stéréotypes ne sont pas des éléments distincts du critère auquel doit satisfaire le demandeur. Les préjugés sont des attitudes péjoratives reposant sur des opinions bien arrêtées quant aux capacités ou limites propres de personnes ou des groupes auxquels celles-ci appartiennent. L'application d'un stéréotype est une attitude qui, tout comme un préjugé, tend à désavantager autrui, mais c'est aussi une attitude qui attribue certaines caractéristiques aux membres d'un groupe, sans égard à leurs capacités réelles. Une attitude imbue de préjugés ou de stéréotypes peut indubitablement entraîner une conduite discriminatoire, conduite qui peut à son tour

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attitudes towards them. Such an approach improperly focuses attention on whether a discriminatory attitude exists, not a discriminatory impact, contrary to *Andrews*, *Kapp* and *Withler*. It is the discriminatory conduct that s. 15 seeks to prevent, not the underlying attitude or motive. Requiring claimants, therefore, to prove that a distinction perpetuates negative attitudes about them imposes a largely irrelevant, not to mention ineffable burden.

The root of s. 15 is our awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed. The key is whether a distinction has the effect of perpetuating arbitrary disadvantage on the claimant because of his or her membership in an enumerated or analogous group. If the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory.

Assessment of legislative purpose is an important part of a *Charter* analysis, but it is conducted under s. 1 once the burden has shifted to the state to justify the reasonableness of the infringement. To focus on the legislative purpose — freedom of choice — at the s. 15(1) stage is not only contrary to the approach in *Andrews*, it is also completely inconsistent with *Miron* and undermines the recognition of marital status as an analogous ground. Having accepted marital status as an analogous ground, it is contradictory to find not only that *de facto* spouses have a choice about their marital status, but that it is that very choice that excludes them from the protection of s. 15(1) to which *Miron* said they were entitled. Moreover, this Court has repeatedly rejected arguments that choice protects a distinction from a finding of discrimination.

Because the equality analysis under s. 15(1) of the *Charter* has evolved substantially in the decade since *Walsh* was decided, *Walsh* need not be followed. In particular, the majority in *Walsh* relied on the dignity test

renforcer cette attitude négative. Or, les arrêts *Kapp* et *Withler* n'ont pas pour effet d'imposer aux demandeurs invoquant l'art. 15 l'obligation additionnelle de prouver qu'une distinction perpétue une attitude imbue de préjugés ou de stéréotypes à leur endroit. Une telle démarche s'attache à tort à la question de savoir s'il existe une attitude, plutôt qu'un effet, discriminatoire, contrairement aux enseignements des arrêts *Andrews*, *Kapp* et *Withler*. C'est la conduite discriminatoire que cherche à prévenir l'art. 15, non pas l'attitude ou le mobile à l'origine de cette conduite. Par conséquent, exiger d'un demandeur qu'il prouve qu'une distinction perpétue une attitude négative à son endroit serait lui imposer un fardeau dans une large mesure non pertinent, pour ne pas dire indéfinissable.

À la base, l'art. 15 résulte d'une prise de conscience que certains groupes ont depuis longtemps été victimes de discrimination, et qu'il faut mettre fin à la perpétuation de cette discrimination. Ce qu'il faut, c'est déterminer si la distinction a pour effet de perpétuer un désavantage arbitraire à l'égard du demandeur, du fait de son appartenance à un groupe énuméré ou analogue. Les actes de l'État qui ont pour effet d'élargir, au lieu de rétrécir, l'écart entre le groupe historiquement défavorisé et le reste de la société sont discriminatoires.

L'évaluation de l'objectif de la loi contestée constitue certes un aspect important de l'analyse fondée sur la *Charte*, mais elle est réalisée à l'étape de l'article premier, une fois que le fardeau de la preuve est passé à l'État, qui doit établir le caractère raisonnable de la violation. Le fait de se pencher sur l'objectif de la loi — la liberté de choisir — à l'étape de l'analyse fondée sur le par. 15(1) serait non seulement contraire à l'approche établie dans *Andrews*, mais elle serait également tout à fait incompatible avec l'arrêt *Miron* et compromettrait la qualité de motif analogue reconnue à l'état matrimonial. La Cour ayant reconnu l'état matrimonial comme motif analogue, il est contradictoire de conclure non seulement que les conjoints de fait ont le choix de décider de leur état matrimonial, mais également que ce même choix a pour effet de les exclure du bénéfice de la protection du par. 15(1), à laquelle ils ont droit suivant l'arrêt *Miron*. Qui plus est, la Cour a maintes fois rejeté des arguments voulant que l'existence d'un choix empêche de conclure qu'une distinction constitue de la discrimination.

Comme l'analyse relative à l'égalité que commande le par. 15(1) de la *Charte* a évolué de manière appréciable au cours des dix années qui se sont écoulées depuis l'arrêt *Walsh*, point n'est besoin de suivre cette décision. En

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and on comparator groups, neither of which is any longer required as part of the s. 15(1) analysis.

The exclusion of *de facto* spouses from the economic protections available to formal spousal relationships is a distinction based on marital status, an analogous ground. That it imposes a disadvantage is clear: the law excludes vulnerable and economically dependent *de facto* spouses from protections considered so fundamental to the welfare of vulnerable married or civil union spouses that one of those protections is presumptive, and the rest are of public order, explicitly overriding freedom of contract or choice for those spouses. The disadvantage this exclusion perpetuates is an historic one: it continues to deny *de facto* spouses access to economic remedies of which they have always been deprived, remedies Quebec considered indispensable for the protection of married and civil union spouses. There is little doubt that some *de facto* couples are in relationships that are functionally similar to formally recognized spousal relationships. Since many spouses in *de facto* couples exhibit the same functional characteristics as spouses in formal unions, with the same potential for one partner to be left economically vulnerable or disadvantaged when the relationship ends, their exclusion from similar protections perpetuates historic disadvantage against them based on their marital status. There is no need to look for an attitude of prejudice motivating or created by the exclusion of *de facto* couples from the presumptive statutory protections. There is no doubt that attitudes have changed towards *de facto* unions in Quebec, but what is relevant is not the attitudinal progress towards them, but the continuation of their discriminatory treatment.

Per Deschamps, Cromwell and Karakatsanis JJ. (concurring with Abella J. on s. 15(1)): There is agreement with Abella J.'s analysis of s. 15 of the *Charter* and with her conclusion that the right protected by that section has been infringed. The Quebec legislature has infringed the guaranteed right to equality by excluding *de facto* spouses from all the measures adopted to protect persons who are married or in civil unions should their family relationships break down. The Court has recognized the fact of being unmarried as an analogous ground because, historically, unmarried persons were

particulier, dans cet arrêt les juges majoritaires s'étaient appuyés sur le critère de la dignité et sur des groupes de comparaison, deux éléments qui ne sont plus requis dans l'analyse fondée sur le par. 15(1).

L'exclusion des conjoints de fait du bénéfice des protections de nature économique dont jouissent les relations conjugales formelles constitue une distinction basée sur l'état matrimonial, un motif analogue. Le fait qu'elle impose un désavantage est clair : la loi exclut les conjoints de fait vulnérables et financièrement dépendants du bénéfice de mesures de protection considérées si essentielles au bien-être des conjoints vulnérables mariés ou unis civilement que l'une d'elles s'applique de manière présumée et que les autres sont d'ordre public, écartant ainsi explicitement la liberté de contracter ou de choisir de ces couples. Le désavantage perpétué par cette exclusion a un caractère historique : elle continue de nier aux conjoints de fait des mesures de soutien financier qui leur ont toujours été refusées, des mesures que le Québec a jugé indispensables pour protéger les conjoints mariés ou unis civilement. Il fait peu de doute que certaines unions de fait sont fonctionnellement similaires aux unions formellement reconnues. Comme bon nombre de conjoints vivant au sein d'unions de fait présentent les mêmes caractéristiques fonctionnelles que les conjoints vivant dans des unions formelles, y compris le même risque qu'un des conjoints se retrouve financièrement vulnérable et désavantagé en cas de rupture, l'exclusion des conjoints de fait du bénéfice de telles mesures de protection perpétue le désavantage historique dont ils sont victimes, et ce, sur la base de leur état matrimonial. Il n'est pas nécessaire de démontrer l'existence d'une attitude imbue de préjugés motivant l'exclusion des conjoints de fait du bénéfice des mesures de protection prévues par la loi et dont l'application est présumée, ou créée par cette exclusion. Les attitudes ont certes changé envers les unions de fait au Québec; mais ce qui importe n'est pas l'évolution des mentalités à leur égard, mais le fait que le traitement discriminatoire qu'on leur réserve se poursuit.

Les juges Deschamps, Cromwell et Karakatsanis (opinion concordante avec celle de la juge Abella quant au par. 15(1)) : Il y a accord avec l'analyse que fait la juge Abella de l'art. 15 de la *Charte* et avec sa conclusion qu'il y a atteinte au droit protégé par cette disposition. Le législateur québécois enfreint la garantie d'égalité en écartant les conjoints de fait de toutes les mesures de protection accordées en cas de rupture de la relation familiale aux personnes mariées ou unies civilement. La Cour a reconnu que le statut de personne non mariée constitue un motif analogue, parce que, historiquement,

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considered to have adopted a lifestyle less worthy of respect than that of married persons. For this reason, they were excluded from the social protections. Even though society's perception of *de facto* spouses has changed in recent decades and there is no indication that the Quebec legislature intended to stigmatize them, the denial of the benefits in question perpetuates the disadvantage such people have historically experienced. The Attorney General of Quebec therefore had to justify this distinction.

Per McLachlin C.J. (concurring with Abella J. on s. 15(1)): The s. 15 analysis set out in Abella J.'s reasons is agreed with, as is her conclusion that there is a breach. While the promotion or the perpetuation of prejudice, on the one hand, and false stereotyping, on the other, are useful guides, what constitutes discrimination requires a contextual analysis, taking into account matters such as pre-existing disadvantage of the claimant group, the degree of correspondence between the differential treatment and the claimant group's reality, the ameliorative impact or purpose of the law, and the nature of the interests affected. The issue of whether the law is discriminatory must be considered from the point of view of the reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the claimant.

It is important to maintain the analytical distinction between s. 15 and s. 1. *Walsh* does not bind the Court in the present case. Public policy considerations such as freedom of choice and individual autonomy, which were held in *Walsh* to negate a breach of s. 15, are better considered at the s. 1 stage of the analysis.

Here, the Quebec approach of applying mandatory protections only to married and civil union spouses limits the s. 15 equality right of *de facto* spouses. A reasonable person in A's position would conclude that the law in fact shows less concern for people in A's position than for married and civil union spouses on break-up of a relationship. As it applies to people in A's situation, the law perpetuates the effects of historical disadvantage rooted in prejudice *and* rests on a false stereotype of choice rather than on the reality of the

ces personnes étaient considérées comme ayant adopté un régime de vie moins digne de respect que celui des personnes mariées. Pour cette raison, elles étaient exclues du bénéfice des protections sociales. Bien que la perception qu'a la société du statut de conjoint de fait ait évolué au cours des dernières décennies et que rien n'indique que le législateur québécois ait eu l'intention de stigmatiser les conjoints de fait, la négation des bénéfices en question perpétue le désavantage dont ces personnes ont historiquement fait l'objet. Il était donc nécessaire pour le procureur général du Québec de justifier cette distinction.

La juge en chef McLachlin (opinion concordante avec celle de la juge Abella quant au par. 15(1)) : Il y a accord avec l'analyse de la juge Abella relative à l'art. 15 de la *Charte* ainsi qu'avec sa conclusion selon laquelle il est porté atteinte au droit garanti par cette disposition. Bien que la promotion ou la perpétuation de préjugés, d'une part, et l'application de stéréotypes erronés, d'autre part, soient des guides utiles pour déterminer ce qui constitue de la discrimination, il faut procéder à une analyse contextuelle qui tienne compte par exemple d'un désavantage préexistant pour le groupe demandeur, du degré de correspondance entre la distinction qui est faite et la situation réelle de ce groupe, de l'incidence ou de l'objet améliorateur des dispositions législatives en cause et de la nature des droits touchés. La question de savoir si la loi est discriminatoire doit être examinée du point de vue de la personne raisonnable, objective et bien informée des circonstances, dotée d'attributs semblables et se trouvant dans une situation semblable à celle du demandeur.

Il importe de garder distinctes les analyses que commandent respectivement l'art. 15 et l'article premier. *Walsh* ne lie pas la Cour dans la présente affaire. Les politiques publiques comme le libre choix et l'autonomie individuelle qui, dans *Walsh*, avaient permis de conclure à l'absence de violation de l'art. 15, sont des facteurs qu'il est préférable de prendre en compte à l'étape de l'analyse qui porte sur l'article premier.

En l'espèce, l'approche du Québec qui consiste à appliquer des mesures de protection obligatoires uniquement aux conjoints mariés ou unis civilement porte atteinte au droit à l'égalité des conjoints de fait garanti par l'art. 15. Une personne raisonnable placée dans la situation de A pourrait en conclure que, à l'occasion d'une rupture, la loi se préoccupe moins des personnes qui se trouvent dans une situation semblable à celle de A que des conjoints mariés ou unis civilement. Tel qu'elle s'applique à ceux qui se retrouvent dans la situation de

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claimant's situation. While the legislative animus against *de facto* spouses in Quebec has disappeared, the present law continues to exclude *de facto* spouses from the protective schemes of Quebec family law. Moreover, the law assumes that *de facto* partners choose to forgo the protections it offers to married and civil union partners. This assumption fails to accord to the reality of the situation of *de facto* spouses such as A.

(2) *Section 1 of the Charter*

Per LeBel, Fish, Rothstein and Moldaver JJ.: Since the exclusion of *de facto* spouses from the scope of the provisions of the *Civil Code of Québec* at issue is not discriminatory within the meaning of s. 15(1) of the *Charter* and does not violate the constitutional right to equality, it is not necessary to proceed to the s. 1 stage of the *Charter* analysis.

Per McLachlin C.J.: The limit on the equality right of *de facto* spouses is justified under s. 1 of the *Charter*. The objective of the Quebec legislature, which is to promote choice and autonomy for all Quebec spouses with respect to property division and support, was pursued in response to rapidly changing attitudes in Quebec with respect to marriage and is sufficiently important to justify an infringement to the right to equality. The distinction made by the law is rationally connected to the state objective: the Quebec approach only imposes state-mandated obligations on spouses who have made a conscious and active choice to accept those obligations. The law falls within a range of reasonable alternatives for maximizing choice and autonomy in the matter of family assets and support. While schemes adopted in other Canadian provinces impair the equality right of *de facto* spouses to a lesser degree, such approaches would be less effective in promoting Quebec's goals of maximizing choice and autonomy for couples in Quebec. The question at the minimum impairment stage is whether the legislative goal could be achieved in a way that impacts the right less, not whether the goal should be altered. Finally, the effects of the Quebec scheme on the equality rights of *de facto* spouses are proportionate to the scheme's overall benefits for the group. The scheme enhances the freedom of choice and autonomy of many spouses as well as their ability to give personal meaning to their relationship. Having regard to the need to allow legislatures a margin of appreciation on difficult social issues and the need to be sensitive to the constitutional responsibility of

A, la loi perpétue les effets d'un désavantage historique ancré dans les préjugés *et* se fonde sur des stéréotypes erronés quant à la capacité de la demanderesse d'exercer un choix plutôt que sur sa situation réelle. Même si, au Québec, l'opprobre législatif à l'endroit des conjoints de fait a disparu, la loi actuelle continue de les exclure des régimes protecteurs offerts par le droit de la famille québécois. En outre, la loi tient pour acquis que les conjoints de fait choisissent de renoncer aux mesures protectrices qu'elle offre aux conjoints mariés ou unis civilement. Cette hypothèse ne concorde pas avec la situation réelle des conjoints de fait comme A.

(2) *Article premier de la Charte*

Les juges LeBel, Fish, Rothstein et Moldaver : Puisque l'exclusion des conjoints de fait du champ d'application des dispositions du *Code civil du Québec* en litige n'est pas discriminatoire au sens du par. 15(1) de la *Charte* et ne comporte pas de violation de la garantie constitutionnelle d'égalité, il n'est pas nécessaire de passer à l'étape de l'analyse sous l'article premier de la *Charte*.

La juge en chef McLachlin : L'atteinte au droit à l'égalité garanti aux conjoints de fait est justifiée au sens où il faut l'entendre pour l'application de l'article premier de la *Charte*. L'objectif visé par le législateur québécois, soit la promotion du libre choix et de l'autonomie de tous les conjoints de la province en ce qui a trait au partage des biens et au soutien alimentaire, a été adopté en réponse aux changements rapides survenus dans les attitudes au Québec à l'égard du mariage et est suffisamment important pour justifier une atteinte au droit à l'égalité. La distinction que la loi établit a un lien rationnel avec l'objectif de l'État. L'approche du Québec n'impose des obligations prescrites par l'État qu'aux conjoints qui ont fait activement le choix délibéré d'accepter de s'y conformer. Le régime législatif québécois se situe à l'intérieur d'une gamme de mesures raisonnables pour maximiser le libre choix et l'autonomie quant aux partages des biens familiaux et au soutien alimentaire. Même si les modèles adoptés par d'autres provinces canadiennes portent moins atteinte au droit à l'égalité des conjoints de fait que ne le fait le modèle québécois, de telles solutions serviraient moins efficacement les objectifs que vise le modèle québécois, soit de favoriser au plus haut point le libre choix et l'autonomie des couples de la province. La question qu'il faut se poser au volet de la réflexion relative à l'atteinte minimale est celle de savoir si l'objectif du régime législatif pourrait être atteint en restreignant moins le droit en cause, non pas de savoir si l'objectif en cause devrait être modifié. Finalement, les effets du modèle québécois sur le droit

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each province to legislate for its population, the unfortunate dilemma faced by women such as A is not disproportionate to the benefits of the scheme to an extent that warrants a finding of unconstitutionality.

à l'égalité des conjoints de fait sont proportionnés par rapport à l'ensemble des avantages qu'il procure pour le groupe. Ce modèle accroît le libre choix et l'autonomie de nombreux conjoints de même que leur capacité à donner un sens personnel à leur relation. Compte tenu de la nécessité de laisser au législateur une certaine latitude quant aux questions sociales difficiles à trancher ainsi que de la nécessité d'être sensible à la responsabilité qui incombe à chaque province, en vertu de la Constitution, de légiférer pour sa propre population, le malheureux dilemme auquel sont confrontées les femmes comme A n'est pas disproportionné par rapport aux avantages que procure le régime québécois au point qu'il soit justifié de conclure à son inconstitutionnalité.

Per Deschamps, Cromwell and Karakatsanis JJ.: Although support and the measures relating to patrimonial property have some of the same functions and objectives, they cannot and must not be confused with one another. The needs they address and how the legislature has dealt with them in the past warrant their being considered separately. The measures that protect the patrimony of spouses are not, like support, focused on the basic needs of the vulnerable spouse. Their purpose is to ensure autonomy and fairness for couples who have been able to, or wanted to, accumulate property. The process that leads to the acquisition of a right of ownership is different from the one that causes a spouse to become economically dependent. Whereas a plan to live together takes shape gradually and can result in the creation of a relationship of interdependence over which one of the parties has little or no control, property can be acquired only as a result of a conscious act.

Les juges Deschamps, Cromwell et Karakatsanis : Bien que la pension alimentaire et les mesures touchant les biens patrimoniaux partagent plusieurs fonctions et objectifs, elles ne peuvent ni ne doivent être confondues. Les besoins auxquels elles répondent ainsi que le traitement qui leur a été réservé jusqu'ici par le législateur justifie de les analyser séparément. Les mesures de protection du patrimoine des époux ne s'attachent pas, au même titre que la pension alimentaire, aux besoins fondamentaux du conjoint vulnérable. Ces mesures de protection du patrimoine visent à assurer une autonomie et une équité chez les couples qui ont pu ou voulu accumuler des biens. L'acquisition d'un droit de propriété résulte d'un processus différent de celui qui donne lieu à l'état de dépendance économique d'un conjoint. Alors que le projet de vie commune prend forme progressivement et peut aller jusqu'à créer une relation d'interdépendance sur laquelle une des parties n'a que peu ou pas de prise, l'acquisition de biens ne peut résulter que d'un geste conscient.

This analysis leads to the conclusion that only the exclusion of *de facto* spouses from support is not justified under s. 1 of the *Charter*. The objective of promoting the autonomy of the parties is pressing and substantial. There is also a rational connection. However, the minimal impairment test is not met. The affected interest is vital to persons who have been in a relationship of interdependence. The rationale for awarding support on a non-compensatory basis applies equally to persons who are married or in a civil union and to *de facto* spouses. If the legal justification for support is based on, among other things, the satisfaction of needs resulting from the breakdown of a relationship of interdependence created while the spouses lived together, it is difficult to see why a *de facto* spouse who may not have been free to choose to have the relationship with his or her spouse made official through marriage or a civil union,

Suivant cette analyse, seule l'exclusion des conjoints de fait du bénéfice de la pension alimentaire n'est pas justifiée en vertu de l'article premier de la *Charte*. L'objectif de promotion de l'autonomie des parties est urgent et réel. L'existence d'un lien rationnel est aussi reconnue. Cependant, il n'est pas satisfait au critère de l'atteinte minimale. L'intérêt touché est vital pour les personnes ayant vécu une relation d'interdépendance. Le fondement non compensatoire de la pension alimentaire a tout autant sa raison d'être pour les personnes mariées ou unies civilement que pour les conjoints de fait. Si la justification juridique de la pension alimentaire repose, entre autres, sur la satisfaction des besoins découlant de la rupture d'une relation d'interdépendance créée pendant la vie commune, il est difficile d'imaginer pourquoi les conjoints de fait qui pourraient ne pas avoir été libres de choisir d'officialiser par un mariage

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but who otherwise lives with the latter in a "family unit", would not be entitled to support. For someone in such a position, the possibility the parties have, according to the Attorney General, of choosing to marry or to enter into a civil union does not really exist. The concept of "mutual obligation" as the non-compensatory basis for the obligation of support must guide legislators in seeking ways to promote the autonomy of the parties while interfering as little as reasonably possible with the right to support itself. A total exclusion from the right to support benefits only *de facto* spouses who want to avoid the obligation of support, and it impairs the interests of dependent and vulnerable former spouses to a disproportionate extent.

Per Abella J.: The breach of s. 15(1) is not saved under s. 1, failing the minimal impairment and proportionality steps of the *Oakes* test. The exclusion of *de facto* spouses from spousal support and property regimes in Quebec was a carefully considered policy choice. It was discussed and reaffirmed during successive family law reforms from 1980 onwards. But the degree of legislative time, consultation and effort cannot act as a justificatory shield to guard against constitutional scrutiny. What is of utmost relevance is the resulting legislative choice. Neither the deliberative policy route nor the popularity of its outcome is a sufficient answer to the requirement of constitutional compliance.

An outright exclusion of *de facto* spouses cannot be said to be minimally impairing of their equality rights. This Court has generally been reluctant to defer to the legislature in the context of total exclusions from a legislative scheme. The antipathy towards complete exclusions is not surprising, since the government is required under s. 1 to explain why a significantly less intrusive and equally effective measure was not chosen. This will be a difficult burden to meet when, as in this case, a group has been entirely left out of access to a remedial scheme. The current opt-*in* protections may well be adequate for some *de facto* spouses who enter their unions with sufficient financial security, legal information, and the intent to avoid the consequences of a more formal union. But their ability to exercise freedom of choice can be equally protected under a regime with an opt-*out* mechanism. The needs of the economically vulnerable,

ou une union civile leur relation avec leur conjoint, mais qui vivent par ailleurs avec celui-ci comme une « unité familiale », ne pourraient pas avoir droit à une pension alimentaire. Pour une telle personne, la faculté qu'ont les parties, selon le procureur général, de choisir de se marier ou de s'unir civilement, n'en est pas vraiment une. La notion d'« obligation mutuelle » comme fondement non compensatoire de l'obligation alimentaire doit inspirer les législateurs dans la recherche de moyens susceptibles de favoriser l'autonomie des parties tout en portant atteinte aussi peu que raisonnablement possible au droit aux aliments lui-même. L'exclusion totale du droit aux aliments ne profite qu'au conjoint de fait qui veut échapper à l'obligation alimentaire, et elle porte atteinte de façon disproportionnée aux intérêts des ex-conjoints de fait dépendants et vulnérables.

La juge Abella : La restriction du droit garanti par le par. 15(1) n'est pas justifiée suivant l'article premier, car elle ne respecte pas les exigences relatives à l'atteinte minimale et à la proportionnalité de l'analyse établie dans l'arrêt *Oakes*. L'exclusion des conjoints de fait du bénéfice des régimes relatifs au soutien alimentaire en faveur du conjoint et à la séparation des biens au Québec a constitué une décision de politique générale mûrement réfléchie. Cette décision a été débattue et réaffirmée à l'occasion des diverses réformes du droit de la famille qui se sont succédé depuis 1980. Cependant, l'ampleur des débats, des consultations et des efforts qui ont pu précéder l'adoption d'une mesure législative ne saurait immuniser celle-ci contre le contrôle de sa constitutionnalité. L'élément le plus important est le choix législatif qui en résulte. Ni le processus de délibération suivi ni la popularité de la mesure ne suffisent pour démontrer le respect des exigences de la Constitution.

Il est impossible d'affirmer que l'exclusion totale des conjoints de fait porte atteinte de façon minimale à leur droit à l'égalité. La Cour est généralement réticente à faire montre de déférence à l'endroit du législateur dans les cas d'exclusion totale des demandeurs du bénéfice d'un régime établi par la loi. Cette aversion pour les exclusions complètes n'est pas surprenante, car l'État est tenu, à l'étape de l'examen fondé sur l'article premier, d'expliquer pourquoi il n'a pas choisi une mesure beaucoup moins attentatoire et tout aussi efficace. Il sera difficile de se décharger d'un tel fardeau dans les cas où, comme en l'espèce, un groupe est entièrement privé de l'accès à un régime réparateur. Le système actuel d'*adhésion volontaire* aux mesures de protection peut fort bien convenir à certains conjoints de fait qui, au début de leur union, jouissent d'une sécurité financière suffisante, sont adéquatement renseignés sur le plan juridique et

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however, require presumptive protection no less in *de facto* unions than in more formal ones. The evidence discloses that many *de facto* spouses simply do not turn their minds to the eventuality of separation. This lack of awareness speaks to the relative merit of a system of presumptive protection, under which they would be protected whether aware of their legal rights or not, while leaving *de facto* spouses who wish to do so the freedom to choose not to be protected. A further weakness of the current opt-in system is its failure to recognize that the choice to formally marry is a mutual and complex decision, as *Miron* pointed out. Where one member of a couple refuses to marry or enter into a civil union, he or she thereby deprives the other of the benefit of needed economic support when the relationship ends.

Every other province has extended spousal support to unmarried spouses. They have set minimum periods of cohabitation before couples are subject to their regimes, and have preserved freedom of choice by allowing couples to opt out. Some have also extended statutory division of property to unmarried spouses. These presumptively protective schemes with a right on the part of *de facto* spouses to opt *out* are examples of alternatives that would provide economically vulnerable spouses with the protection they need, without in any way interfering with the legislative objective of giving freedom of choice to those *de facto* spouses who want to exercise it. At the end of the day, the methodology for remedying the s. 15 breach lies with the Quebec legislature, and Quebec is in no way obliged to mimic any other province's treatment of *de facto* spouses. But the fact of these other regimes can be helpful in determining that there *is* a less impairing way to fulfill the objective of preserving freedom of choice without infringing the equality rights of *de facto* spouses.

The choices for *de facto* spouses in Quebec are to enter into a contract to enshrine certain protections, to marry and receive all the protections provided by law, or to remain unbound by any mutual rights or obligations.

entendent éviter les conséquences d'une union plus formelle. Mais leur capacité de choisir librement peut être protégée de façon tout aussi efficace par un régime assorti d'un mécanisme de *retrait*. Toutefois, les besoins des personnes financièrement vulnérables vivant en unions de fait ne requièrent pas moins de mesures de protection applicables de manière présumée que ceux des personnes dans la même situation vivant au sein d'unions plus formelles. La preuve révèle que, tout simplement, bon nombre de conjoints de fait ne pensent pas à l'éventualité d'une séparation. Cette méconnaissance illustre bien le mérite relatif d'un régime établissant une présomption de protection en faveur de ces personnes, que celles-ci connaissent ou non leurs droits juridiques, tout en laissant aux conjoints de fait qui désirent s'en prévaloir la liberté de choisir de ne pas être protégés. Une autre lacune du régime actuel fondé sur l'adhésion volontaire est le fait qu'il ne reconnaît pas que la décision de se marier formellement est une décision mutuelle et complexe, suivant l'arrêt *Miron*. Lorsqu'un membre du couple refuse de se marier ou de s'unir civilement, il prive ainsi l'autre du bénéfice d'un soutien financier nécessaire lorsque la relation prend fin.

Toutes les autres provinces ont élargi aux conjoints non mariés le bénéfice du soutien alimentaire en faveur du conjoint. Chaque législateur a fixé la période minimale pendant laquelle les couples doivent cohabiter avant d'être assujettis à celui-ci, et il a préservé le libre choix des conjoints de fait en leur accordant une faculté de retrait. Certains ressorts ont étendu l'application des dispositions législatives sur le partage des biens aux conjoints non mariés. Ces régimes dont la protection s'applique de manière présumée et qui sont assortis d'un droit de *retrait* en faveur des conjoints de fait constituent des exemples de solutions de rechange propres à assurer aux conjoints financièrement vulnérables la protection dont ils ont besoin, sans compromettre l'objectif du législateur qui consiste à accorder la liberté de choisir aux conjoints de fait qui souhaitent s'en prévaloir. Ultimement, c'est au législateur québécois qu'il appartient de choisir la façon de remédier à la violation de l'art. 15, et le Québec n'est pas tenu de reproduire le traitement réservé aux conjoints de fait par une autre province. L'examen de ces autres régimes peut être utile pour déterminer s'il *existe* un moyen moins attentatoire de réaliser l'objectif consistant à préserver la liberté de choisir, qui ne violerait pas le droit à l'égalité des conjoints de fait.

Au Québec, les conjoints de fait ont le choix de conclure un contrat constatant certaines mesures de protection, de se marier et de bénéficier alors de l'ensemble des mesures de protection prévues par la loi ou encore de

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It is entirely possible for Quebec to design a regime that retains all of these choices without violating s. 15. Spouses who are aware of their legal rights, and choose not to marry so they can avoid Quebec's support and property regimes, would be free to choose to remove themselves from a presumptively protective regime. Changing the *default* situation of the couple, however, so that spousal support and division of property protection of some kind applies to them, would protect those spouses for whom the choices are illusory and who are left economically vulnerable at the end of the relationship.

The deleterious effect of excluding all *de facto* spouses, who represent over a third of Quebec couples, from the protection of the family support and division of property regimes is profound. Being excluded requires potentially vulnerable *de facto* spouses, unlike potentially vulnerable spouses in formal unions, to expend time, effort and money to try to obtain some financial assistance. If the vulnerable spouse fails to take these steps, either through a lack of knowledge or resources, or because of the limits on his or her options imposed by an uncooperative partner, he or she will remain unprotected. The outcome for such a spouse in the event of a separation can be, as it is for economically dependent spouses in formal unions, catastrophic. The difference is that economically dependent spouses in formal unions have automatic access to the possibility of financial remedies. *De facto* spouses have no such access. The salutary impact of the exclusion, on the other hand, is the preservation of *de facto* spouses' freedom to choose not to be in a formal union. Those for whom a *de facto* union is truly a chosen means to preserve economic independence would still be able to achieve this result by opting out. Since the salutary effect can be achieved without in any way compromising a *de facto* spouse's freedom of choice, it cannot be said to outweigh the serious harm for economically vulnerable *de facto* spouses that results from their exclusion from the family support and property regimes.

rester libres de quelque droit ou obligation réciproque que ce soit. Il est tout à fait possible pour le Québec de concevoir un régime qui offrirait toutes ces possibilités, sans enfreindre l'art. 15. Les conjoints qui connaissent leurs droits juridiques et qui choisiraient de ne pas se marier afin d'éviter d'être assujettis aux régimes relatifs au soutien alimentaire et au partage des biens en vigueur au Québec seraient libres de se retirer du régime de protection présumée. Cependant, le fait de modifier la situation applicable *par défaut* aux conjoints de fait, pour qu'ils aient droit à une certaine forme de protection au titre du soutien alimentaire et du partage des biens, aurait pour effet de protéger les conjoints pour qui le choix entre les solutions susmentionnées est illusoire et qui se retrouveraient dans une situation financièrement vulnérable à la fin de la relation.

L'effet préjudiciable de l'exclusion de tous les conjoints de fait, qui représentent plus du tiers des couples au Québec, du bénéfice de la protection des régimes applicables en matière de soutien alimentaire en faveur du conjoint et de biens familiaux est profond. En raison de cette exclusion, les conjoints de fait susceptibles d'être vulnérables se voient contraints, contrairement aux conjoints également susceptibles d'être vulnérables mais vivant au sein d'unions formelles, de consacrer temps, efforts et argent pour tenter d'obtenir une forme ou une autre d'assistance financière. Le conjoint vulnérable qui ne fait pas ces démarches, soit par absence de connaissances ou par manque de ressources, soit parce que les solutions qui lui sont ouvertes sont limitées par un conjoint non coopératif, demeurera sans protection. En cas de rupture, les conséquences pour un tel conjoint vulnérable peuvent s'avérer catastrophiques, comme c'est le cas pour les conjoints financièrement dépendants vivant au sein d'unions formelles. La différence tient à ce que les seconds ont d'office accès à de possibles réparations financières. Les conjoints de fait n'ont pour leur part pas accès à ces possibilités. Par contre, l'effet bénéfique de l'exclusion est qu'elle préserve la liberté des conjoints de fait de choisir ne pas vivre dans une union formelle. Ceux pour qui l'union de fait constitue véritablement un moyen de conserver leur indépendance économique pourraient toujours parvenir à ce résultat en se retirant du champ d'application du régime. Comme l'effet bénéfique de l'exclusion peut être réalisé sans qu'il soit porté atteinte d'aucune façon à la liberté de choisir des conjoints de fait, on ne saurait affirmer qu'il l'emporte sur l'effet préjudiciable grave subi par les conjoints de fait financièrement vulnérables en raison de leur exclusion du bénéfice du régime relatif au soutien alimentaire en faveur du conjoint et du régime relatif aux biens familiaux.

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of a claim that s. 15(1) has been infringed must address the following questions: (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

[186] The claimant must therefore prove on a balance of probabilities (a) that the law creates an adverse distinction based on an enumerated or analogous ground and (b) that the disadvantage is discriminatory because (i) it perpetuates prejudice or (ii) it stereotypes. Because of their fundamental importance to the application of s. 15, I will now review the key concepts of "disadvantage", "prejudice" and "stereotyping" in order to more precisely set out the legal framework applicable to their use.

(a) *Adverse Distinction Based on an Enumerated or Analogous Ground*

[187] Right away in *Andrews*, McIntyre J. adopted a broad definition of an adverse distinction based on an enumerated or analogous ground that could be characterized as discriminatory. According to him, it was

> a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. [p. 174]

[188] In *Law*, Iacobucci J. reiterated this definition and specified that limiting access to advantages may create a disadvantage where the law fails "to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics": para. 39. For example, a failure, as in *Eldridge*, to take account of the fact that some deaf persons cannot receive government health services of adequate quality without the aid of an interpreter creates an adverse

d'une allégation d'atteinte au par. 15(1) devra traiter des questions suivantes : (1) La loi crée-t-elle une distinction fondée sur un motif énuméré ou analogue? (2) La distinction crée-t-elle un désavantage par la perpétuation d'un préjugé ou l'application de stéréotypes?

[186] Il incombe ainsi au demandeur de prouver par prépondérance des probabilités que a) la loi crée une distinction désavantageuse fondée sur un motif énuméré ou analogue et que b) ce désavantage est discriminatoire parce (i) qu'il perpétue un préjugé ou (ii) qu'il applique un stéréotype. En raison de leur importance fondamentale dans la mise en œuvre de l'art. 15, j'examinerai ici les notions clés de « désavantage », de « préjugé » et de « stéréotype » afin de décrire plus précisément le cadre juridique de leur utilisation.

a) *Distinction désavantageuse fondée sur un motif énuméré ou analogue*

[187] Dans l'arrêt *Andrews*, le juge McIntyre adopte immédiatement une définition large des distinctions désavantageuses fondées sur un motif énuméré ou analogue et susceptibles d'être qualifiées de discriminatoires. Selon lui, il s'agit

> [d']une distinction, intentionnelle ou non, mais fondée sur des motifs relatifs à des caractéristiques personnelles d'un individu ou d'un groupe d'individus, qui a pour effet d'imposer à cet individu ou à ce groupe des fardeaux, des obligations ou des désavantages non imposés à d'autres ou d'empêcher ou de restreindre l'accès aux possibilités, aux bénéfices et aux avantages offerts à d'autres membres de la société. [p. 174]

[188] Le juge Iacobucci, dans *Law*, reprend cette définition en précisant qu'un désavantage découlant d'une restriction d'accès à des avantages peut exister lorsque la mesure omet « de tenir compte de la situation défavorisée dans laquelle le demandeur se trouve déjà dans la société canadienne, créant ainsi une différence de traitement réelle entre celui-ci et d'autres personnes en raison d'une ou de plusieurs caractéristiques personnelles » : par. 39. Par exemple, comme l'illustre l'arrêt *Eldridge*, omettre de tenir compte du fait que certaines personnes atteintes de surdité ne peuvent

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distinction based on an enumerated ground, namely physical disability.

[189] Thus, the claimant can show that the impugned law creates a distinction directly by imposing limitations or disadvantages on the basis of an enumerated or analogous ground: see, *inter alia*, *Miron*, at para. 131; *Lavoie v. Canada*, 2002 SCC 23, [2002] 1 S.C.R. 769, at para. 52; *Trociuk v. British Columbia (Attorney General)*, 2003 SCC 34, [2003] 1 S.C.R. 835, at para. 10. The same is true where the law restricts access to a fundamental social institution (*Law*, at para. 74) or imposes obligations that are not imposed on others (*Withler*, at para. 62). A claimant can also show that a law creates a distinction indirectly where, "although the law purports to treat everyone the same, it has a disproportionately negative impact on a group or individual that can be identified by factors relating to enumerated or analogous grounds": *Withler*, at para. 64. At this stage, comparisons, if any, can help to demonstrate the existence of an adverse distinction.

[190] Once such a distinction is established, the court must determine whether it is based on an enumerated or analogous ground. These grounds stand as "constant markers of suspect decision making or potential discrimination": *Corbiere*, at para. 8; see also *Lavoie*, at paras. 2 and 41. As I mentioned above, although a disadvantageous law will be suspect if they are present, it will not automatically be discriminatory. As this Court has pointed out, these grounds correspond to personal characteristics that cannot be changed or can be changed only at unacceptable cost to the claimant's personal identity: *Corbiere*, at para. 13; *Withler*, at para. 33.

[191] If the court finds that the government action being challenged creates an adverse distinction based on an enumerated or analogous ground, it must then consider the context and the facts of the

bénéficier de services de santé étatiques de qualité adéquate sans l'aide de services d'interprètes constitue une distinction désavantageuse fondée sur un motif énuméré, soit la déficience physique.

[189] Ainsi, le demandeur peut démontrer que la mesure contestée crée directement une distinction en imposant des restrictions ou des désavantages sur la base d'un motif énuméré ou analogue : voir notamment *Miron*, par. 131; *Lavoie c. Canada*, 2002 CSC 23, [2002] 1 R.C.S. 769, par. 52; *Trociuk c. Colombie-Britannique (Procureur général)*, 2003 CSC 34, [2003] 1 R.C.S. 835, par. 10. Il en est de même lorsque la mesure restreint l'accès à une institution sociale fondamentale (*Law*, par. 74), ou impose des obligations qui ne s'appliquent pas à d'autres (*Withler*, par. 62). Le demandeur peut également faire état d'une distinction par effet indirect lorsque la mesure, « bien qu'elle prévoie un traitement égal pour tous, [. . .] a un effet négatif disproportionné sur un groupe ou une personne identifiable par des facteurs liés à des motifs énumérés ou analogues » : *Withler*, par. 64. Les comparaisons, s'il en est, peuvent contribuer, à cette étape, à démontrer l'existence d'une distinction désavantageuse.

[190] Une fois établie l'existence d'une distinction désavantageuse, le tribunal doit déterminer si celle-ci est fondée sur un motif énuméré ou analogue. Ces motifs constituent des « indicateurs permanents de l'existence d'un processus décisionnel suspect ou de discrimination potentielle » : *Corbiere*, par. 8; voir aussi *Lavoie*, par. 2 et 41. Comme je l'ai souligné plus tôt, leur utilisation rend suspecte une mesure législative désavantageuse, mais n'établit pas automatiquement le caractère discriminatoire d'une telle mesure. La jurisprudence de notre Cour souligne que ces motifs correspondent à des caractéristiques personnelles qu'il est impossible de changer ou qui sont modifiables seulement à un prix inacceptable, à l'égard de l'identité personnelle du demandeur : *Corbiere*, par. 13; *Withler*, par. 33.

[191] Si le tribunal conclut que la mesure gouvernementale contestée établit une distinction désavantageuse fondée sur un motif énuméré ou analogue, il entreprend alors un examen du contexte

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case to determine whether the distinction is discriminatory because it violates the right to substantive equality by perpetuating prejudice or stereotyping: *Withler*, at para. 34. The presence of relevant contextual factors will make it easier to determine whether such violations have occurred. I repeat that at this second stage, comparison between the claimant and other persons, although not indispensable, may bolster the understanding of the context of the discrimination claim: *Withler*, para. 65.

(b) *Perpetuating Prejudice*

[192] The first way that substantive inequality — discrimination — may be established is by showing that the impugned disadvantageous law, in purpose or effect, perpetuates prejudice against members of a group on the basis of personal characteristics covered by s. 15(1): *Withler*, at para. 35. Such a law will be found to be discriminatory if it "has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society": *Law*, at para. 51. In my view, this inquiry is of particular importance, as it is most likely to result in a finding of the types of discrimination to which s. 15 applies. It provides a framework to enable courts to consider such discrimination without lapsing totally into subjectivism. I do not rule out the theoretical possibility that there are forms of exclusion for which this analytical framework would be ill-suited. In practice, however, I feel that it would be hard to identify them unless all that was required for s. 15 to apply was a finding of disadvantages related to prohibited grounds and unless the inquiry into discrimination *per se* was dispensed with. This is another possible conception of the right to equality guaranteed by s. 15, but it is not the one this Court has adopted since *Andrews*.

[193] An adverse distinction therefore discriminates by perpetuating prejudice if it denotes an attitude or view concerning a person that is at first glance negative and that is based on one or more of the personal characteristics enumerated in

et des faits propres à l'affaire pour déterminer si cette distinction est discriminatoire parce qu'elle porte atteinte à l'égalité réelle en perpétuant un préjugé ou en appliquant un stéréotype : *Withler*, par. 34. L'identification de facteurs contextuels pertinents permettra ici de faciliter le repérage d'atteintes de cette nature. Je rappelle qu'à cette deuxième étape, la comparaison entre le demandeur et d'autres personnes, bien qu'elle ne soit pas indispensable, pourra favoriser une meilleure compréhension du contexte de l'allégation de discrimination : *Withler*, par. 65.

b) *Perpétuation d'un préjugé*

[192] La première façon de prouver l'inégalité réelle — soit la discrimination — est de démontrer que la mesure désavantageuse contestée, dans son objet ou son effet, perpétue un préjugé à l'égard des membres d'un groupe en raison de caractéristiques personnelles visées par le par. 15(1) : *Withler*, par. 35. Une telle mesure sera jugée discriminatoire lorsqu'elle « perpétue ou favorise l'opinion que l'individu concerné est moins capable, ou moins digne d'être reconnu ou valorisé en tant qu'être humain ou que membre de la société canadienne » : *Law*, par. 51. J'attache une importance particulière à cette analyse parce qu'elle réussit le plus souvent à identifier les phénomènes de discrimination que vise l'art. 15. Elle fournit un cadre d'intervention lors de l'examen judiciaire de ces phénomènes, sans verser dans le subjectivisme total. Je n'écarte pas que, théoriquement, d'autres phénomènes d'exclusion puissent mal se situer dans ce cadre d'analyse. En pratique, ils paraissent difficiles à identifier sans restreindre l'application de l'art. 15 au simple constat de désavantages reliés à des motifs prohibés et sans écarter l'examen de la discrimination proprement dite. Ce pourrait être une autre conception du droit à l'égalité garanti par l'art. 15. Ce n'est pas celle que notre Cour a adoptée depuis l'arrêt *Andrews*.

[193] Dès lors, une distinction désavantageuse sera discriminatoire par la perpétuation d'un préjugé lorsqu'elle dénote une attitude ou une opinion a priori défavorable à l'égard d'une personne basée sur la présence d'une ou de plusieurs caractéristiques

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TAB 18

Hazel Ruth Withler and Joan Helen Fitzsimonds *Appellants*

v.

Attorney General of Canada *Respondent*

and

Attorney General of Ontario and Women's Legal Education and Action Fund *Interveners*

Indexed as: Withler *v.* Canada (Attorney General)

2011 SCC 12

File No.: 33039.

2010: March 17; 2011: March 4.

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Charter of Rights — Right to equality — Discrimination based on age — Federal pension legislation reducing supplementary death benefit by 10 percent for each year by which plan member exceeds prescribed ages — Surviving spouses receiving reduced supplementary death benefits — Whether reduction provisions discriminate against surviving spouses — Canadian Charter of Rights and Freedoms, ss. 1, 15(1) — Canadian Forces Superannuation Act, R.S.C. 1985, c. C-17, s. 60(1) — Public Service Superannuation Act, R.S.C. 1985, c. P-36, s. 47(1).

Constitutional law — Charter of Rights — Right to equality — Contextual analysis — Whether use of comparator groups is appropriate in analysis of equality rights — Canadian Charter of Rights and Freedoms, s. 15(1).

The appellants, representative plaintiffs in two class actions, are widows whose federal supplementary death benefits were reduced because of the age

Hazel Ruth Withler et Joan Helen Fitzsimonds *Appelantes*

c.

Procureur général du Canada *Intimé*

et

Procureur général de l'Ontario et Fonds d'action et d'éducation juridiques pour les femmes *Intervenants*

Répertorié : Withler *c.* Canada (Procureur général)

2011 CSC 12

N^{o} du greffe : 33039.

2010 : 17 mars; 2011 : 4 mars.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit constitutionnel — Charte des droits — Droit à l'égalité — Discrimination fondée sur l'âge — Réduction par des lois fédérales sur les pensions de la prestation supplémentaire de décès de 10 p. 100 pour chaque année de l'âge du participant ultérieure à l'âge prescrit — Versement aux conjoints survivants d'une prestation supplémentaire de décès réduite — Les dispositions imposant une réduction créent-elles une discrimination à l'endroit des conjoints survivants? — Charte canadienne des droits et libertés, art. 1, 15(1) — Loi sur la pension de retraite des Forces canadiennes, L.R.C. 1985, ch. C-17, art. 60(1) — Loi sur la pension de la fonction publique, L.R.C. 1985, ch. P-36, art. 47(1).

Droit constitutionnel — Charte des droits — Droit à l'égalité — Analyse contextuelle — Le recours à des groupes de comparaison est-il opportun dans l'analyse portant sur les droits à l'égalité? — Charte canadienne des droits et libertés, art. 15(1).

Les appelantes, qui représentent les demandeurs dans le cadre de deux recours collectifs, sont des veuves ayant touché des prestations fédérales supplémentaires

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of their husbands at the time of death. The *Public Service Superannuation Act* and the *Canadian Forces Superannuation Act* provide federal civil servants and members of the Canadian Forces, and their families, with a suite of work-related benefits, including a "supplementary death benefit", a lump sum payment made to a plan member's designated beneficiary upon the member's death. The supplementary death benefit is reduced by 10 percent for each year by which the plan member exceeded a prescribed age.

The appellants contend that those provisions are of no force and effect because they infringe s. 15(1) of the *Charter* and are not justified under s. 1. They seek a monetary judgment in the amount by which their supplementary death benefits were reduced. The trial judge dismissed both class actions and the British Columbia Court of Appeal upheld the trial decision.

Held: The appeal should be dismissed.

The central and sustained thrust of the Court's s. 15(1) jurisprudence has been the need for a substantive contextual approach and a corresponding repudiation of a formalistic "treat likes alike" approach. An analysis based on formal comparison between the claimant group and a "similarly situated" group promotes formal, not substantive equality. A "mirror comparator group" analysis may become a search for sameness, may shortcut the substantive equality analysis and may be difficult to apply. While equality is inherently comparative and comparison plays a role throughout the s. 15(1) analysis, a mirror comparator approach can fail to identify — and may, indeed, thwart the identification of — the discrimination at which s. 15 is aimed. What is required is an approach that takes account of the full context of the claimant group's situation, the actual impact of the law on that situation, and whether the impugned law perpetuates disadvantage to or negative stereotypes about that group.

The jurisprudence establishes a two-part test for assessing a s. 15(1) claim: (1) Does the law create a distinction that is based on an enumerated or analogous ground? and (2) Does the distinction create a

de décès réduites en raison de l'âge auquel leurs maris sont décédés. La *Loi sur la pension de la fonction publique* et la *Loi sur la pension de retraite des Forces canadiennes* prévoient, à l'intention des fonctionnaires fédéraux et des membres des Forces canadiennes, ainsi que de leurs familles, un ensemble d'avantages sociaux dont ils peuvent bénéficier, y compris une « prestation supplémentaire de décès », une somme globale versée au bénéficiaire désigné par le participant au régime, au décès de ce dernier. La prestation supplémentaire de décès est réduite de 10 p. 100 pour chaque année de l'âge du participant ultérieure à l'âge prescrit.

Les appelantes soutiennent que ces dispositions sont inopérantes parce qu'elles contreviennent au par. 15(1) de la *Charte* et ne peuvent se justifier au sens de l'article premier. Elles réclament une réparation pécuniaire correspondant au montant retranché de leur prestation supplémentaire de décès. La juge de première instance a rejeté les deux recours collectifs, et la Cour d'appel de la Colombie-Britannique a confirmé la décision de première instance.

Arrêt : Le pourvoi est rejeté.

Dans ses décisions sur le par. 15(1), la Cour a posé en principe fondamental, à maintes reprises, la nécessité de procéder à une analyse contextuelle au fond et de rejeter, en conséquence, l'approche formaliste d'un « traitement analogue ». Une analyse fondée sur une comparaison formelle du groupe de demandeurs à un groupe « se trouvant dans une situation semblable » mène non pas à l'égalité réelle, mais à l'égalité formelle. Une analyse fondée sur la comparaison avec un « groupe aux caractéristiques identiques » risque de se muer en recherche de la similitude, de court-circuiter l'analyse de l'égalité réelle et de se révéler difficile à appliquer. Bien que l'égalité soit un concept intrinsèquement comparatif et que la comparaison joue un rôle du début à la fin dans l'analyse que commande le par. 15(1), il se peut qu'une démarche axée sur la comparaison avec un groupe aux caractéristiques identiques ne permette pas — voire empêche — la reconnaissance de la discrimination à laquelle l'art. 15 est censé remédier. L'exercice requis est une démarche qui tienne compte du contexte global de la situation du groupe de demandeurs, de l'incidence véritable de la mesure législative sur leur situation et de la question de savoir si cette mesure perpétue un désavantage ou des stéréotypes négatifs à l'égard du groupe.

La jurisprudence a établi un test à deux volets pour l'appréciation d'une demande fondée sur le par. 15(1) : (1) La loi crée-t-elle une distinction fondée sur un motif énuméré ou analogue? (2) La distinction crée-t-elle un

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disadvantage by perpetuating prejudice or stereotyping? The claimant must establish that he or she has been denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1). It is not necessary to pinpoint a mirror comparator group. Provided that the claimant establishes a distinction based on one or more of the enumerated or analogous grounds, the claim should proceed to the second step of the analysis. This provides the flexibility required to accommodate claims based on intersecting grounds of discrimination. At the second step, the question is whether, having regard to all relevant factors, the distinction the law makes between the claimant group and others discriminates by perpetuating disadvantage or prejudice to the claimant group, or by stereotyping it.

Since the Reduction Provisions at issue in this case are age-related, they constitute an obvious distinction on an enumerated ground, but, because the age-based rules are, overall, effective in meeting the actual needs of the claimants and in achieving important goals such as ensuring that retiree benefits are meaningful, they do not violate s. 15(1). Pension benefit schemes are designed to benefit a number of groups in different circumstances and with different interests, and each element of the scheme must be considered in relation to the suite of benefits provided. As a broad-based scheme meant to cover the competing interests of various age groups, distinctions on general criteria, including age, had to be made to address the members' different needs over the course of their working lives. When the supplementary death benefit is considered in the context of the other pensions and benefits to which the surviving spouses are entitled, it is clear that its purpose corresponds to their needs. For younger employees, it acts as group life insurance by insuring against unexpected death at a time when the surviving spouse would not be protected by a pension. For older employees, whose spouses' long-term income security is guaranteed by the survivor's pension coupled with the public service's health and dental plans, it is intended to assist with the costs of last illness and death.

It is unnecessary to consider justification under s. 1.

désavantage par la perpétuation d'un préjugé ou l'application de stéréotypes? Le demandeur doit démontrer qu'il s'est vu refuser un avantage accordé à d'autres ou imposer un fardeau que d'autres n'ont pas, en raison d'une caractéristique personnelle correspondant à un motif énuméré ou analogue visé par le par. 15(1). Il n'est pas nécessaire de désigner un groupe de comparaison qui corresponde précisément au groupe de demandeurs. Dans la mesure où le demandeur établit l'existence d'une distinction fondée sur au moins un motif énuméré ou analogue, la demande devrait passer à la deuxième étape de l'analyse. Cette démarche offre la souplesse requise pour l'examen des allégations fondées sur des motifs de discrimination interreliés. À la deuxième étape, le tribunal doit se demander si, compte tenu de tous les facteurs pertinents, la distinction établie par la mesure législative entre le groupe de demandeurs et d'autres personnes crée de la discrimination en perpétuant un désavantage ou un préjugé à l'égard du groupe ou en lui appliquant des stéréotypes.

Étant donné que les dispositions imposant une réduction en litige en l'espèce sont liées à l'âge, elles constituent à l'évidence une distinction fondée sur un motif énuméré. Or, comme les règles fondées sur l'âge, dans l'ensemble, répondent bien aux besoins réels des demanderesses et à des objectifs importants, comme assurer des prestations convenables aux employés retraités, elles ne contreviennent pas au par. 15(1). Les régimes de retraite sont conçus en faveur de plusieurs groupes dont les intérêts et la situation divergent, et chaque élément du régime doit être examiné à la lumière du régime global de prestations. Un régime général conçu pour répondre aux intérêts divergents de différents groupes d'âge doit nécessairement opérer des distinctions fondées sur des critères généraux, dont l'âge, pour combler les différents besoins des employés tout au long de leur vie professionnelle. Lorsque la prestation supplémentaire de décès est examinée à la lumière des autres prestations et pensions auxquelles ont droit les conjoints survivants, il est clair que son objet correspond aux besoins de ces derniers. En ce qui concerne les jeunes employés, cette prestation agit à titre d'assurance vie collective garantissant une protection en cas de décès inattendu survenant à une époque où leur conjoint survivant ne toucherait aucune pension. Pour les employés plus âgés, dont les conjoints sont assurés d'une certaine sécurité de revenu à long terme par la pension de survivant à laquelle s'ajoutent les régimes de soins de santé et de soins dentaires de la fonction publique, cette prestation vise à contribuer aux dépenses occasionnées par la dernière maladie et le décès.

Il n'est pas nécessaire de se pencher sur la question de la justification au sens de l'article premier.

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disadvantage in our society" (p. 1333). See also *Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995, at pp. 1043-44; *Andrews*, at pp. 151-53, *per* Wilson J.; *Law*, at paras. 40-51.

[36] The second way that substantive inequality may be established is by showing that the disadvantage imposed by the law is based on a stereotype that does not correspond to the actual circumstances and characteristics of the claimant or claimant group. Typically, such stereotyping results in perpetuation of prejudice and disadvantage. However, it is conceivable that a group that has not historically experienced disadvantage may find itself the subject of conduct that, if permitted to continue, would create a discriminatory impact on members of the group. If it is shown that the impugned law imposes a disadvantage by stereotyping members of the group, s. 15 may be found to be violated even in the absence of proof of historic disadvantage.

[37] Whether the s. 15 analysis focusses on perpetuating disadvantage or stereotyping, the analysis involves looking at the circumstances of members of the group and the negative impact of the law on them. The analysis is contextual, not formalistic, grounded in the actual situation of the group and the potential of the impugned law to worsen their situation.

[38] Without attempting to limit the factors that may be useful in assessing a claim of discrimination, it can be said that where the discriminatory effect is said to be the perpetuation of disadvantage or prejudice, evidence that goes to establishing a claimant's historical position of disadvantage or to demonstrating existing prejudice against the claimant group, as well as the nature of the interest that is affected, will be considered. Where the claim is that a law is based on stereotyped views of the claimant group, the issue will be whether there is correspondence with the claimants' actual characteristics or circumstances. Where the impugned law is part of a larger benefits scheme, as it is here,

l'art. 15 : « remédi[er] à la discrimination dont sont victimes les groupes de personnes défavorisées sur les plans social, politique ou juridique dans notre société ou [. . .] les protége[r] contre toute forme de discrimination » (p. 1333). Voir également *Haig c. Canada (Directeur général des élections)*, [1993] 2 R.C.S. 995, p. 1043-1044; *Andrews*, p. 151-153, la juge Wilson; *Law*, par. 40-51.

[36] La deuxième façon d'établir l'inégalité réelle est de démontrer que le désavantage imposé par une mesure législative repose sur un stéréotype qui ne reflète pas la situation et les caractéristiques véritables du demandeur ou du groupe. En général, un tel stéréotype entraîne la perpétuation d'un préjugé et d'un désavantage. Il se peut toutefois qu'un groupe n'ayant jamais souffert d'un désavantage se trouve un jour touché par une conduite qui, si on n'y met pas fin, aura un effet discriminatoire sur ses membres. Une mesure contestée pourra ainsi être jugée contraire à l'art. 15 s'il est établi qu'elle impose un désavantage aux membres du groupe en leur appliquant un stéréotype, et ce, même s'il n'est pas prouvé qu'ils subissent un désavantage historique.

[37] Qu'elle vise à déterminer si un désavantage est perpétué ou si un stéréotype est appliqué, l'analyse requise par l'art. 15 appelle l'examen de la situation des membres du groupe et de l'incidence négative de la mesure sur eux. Il s'agit d'une analyse contextuelle, non formaliste, basée sur la situation véritable du groupe et sur le risque que la mesure contestée aggrave sa situation.

[38] Sans vouloir limiter les facteurs susceptibles d'être utiles dans l'appréciation d'une allégation de discrimination, disons que, dans les cas où l'effet discriminatoire découlerait de la perpétuation d'un désavantage ou d'un préjugé, entreront en ligne de compte les éléments tendant à prouver qu'un demandeur a été historiquement désavantagé ou fait l'objet de préjugés, ainsi que la nature de l'intérêt touché. Dans les cas où il est allégué qu'une mesure est fondée sur une vision stéréotypée du groupe, la question consiste à déterminer si cette vision correspond à la situation ou aux caractéristiques véritables des demandeurs. Lorsque la mesure contestée s'inscrit dans un vaste régime

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the ameliorative effect of the law on others and the multiplicity of interests it attempts to balance will also colour the discrimination analysis.

[39] Both the inquiries into perpetuation of disadvantage and stereotyping are directed to ascertaining whether the law violates the requirement of substantive equality. Substantive equality, unlike formal equality, rejects the mere presence or absence of difference as an answer to differential treatment. It insists on going behind the facade of similarities and differences. It asks not only what characteristics the different treatment is predicated upon, but also whether those characteristics are relevant considerations under the circumstances. The focus of the inquiry is on the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group. The result may be to reveal differential treatment as discriminatory because of prejudicial impact or negative stereotyping. Or it may reveal that differential treatment is required in order to ameliorate the actual situation of the claimant group.

[40] It follows that a formal analysis based on comparison between the claimant group and a "similarly situated" group, does not assure a result that captures the wrong to which s. 15(1) is directed — the elimination from the law of measures that impose or perpetuate substantial inequality. What is required is not formal comparison with a selected mirror comparator group, but an approach that looks at the full context, including the situation of the claimant group and whether the impact of the impugned law is to perpetuate disadvantage or negative stereotypes about that group.

(2) The Role of Comparison Under Section 15: The Jurisprudence

[41] As McIntyre J. explained in *Andrews*, equality is a comparative concept, the condition of which may "only be attained or discerned by comparison

de prestations, comme c'est le cas en l'espèce, son effet d'amélioration sur la situation des autres participants et la multiplicité des intérêts qu'elle tente de concilier joueront également dans l'analyse du caractère discriminatoire.

[39] Que l'on cherche à savoir s'il y a perpétuation d'un désavantage ou application d'un stéréotype, il faut déterminer si la mesure transgresse l'impératif d'égalité réelle. L'égalité réelle, contrairement à l'égalité formelle, n'admet pas la simple différence ou absence de différence comme justification d'un traitement différent. Elle transcende les similitudes et distinctions apparentes. Elle demande qu'on détermine non seulement sur quelles caractéristiques est fondé le traitement différent, mais également si ces caractéristiques sont pertinentes dans les circonstances. L'analyse est centrée sur l'effet réel de la mesure législative contestée, compte tenu de l'ensemble des facteurs sociaux, politiques, économiques et historiques inhérents au groupe. Cette analyse peut démontrer qu'un traitement différent est discriminatoire en raison de son effet préjudiciable ou de l'application d'un stéréotype négatif ou, au contraire, qu'il est nécessaire pour améliorer la situation véritable du groupe de demandeurs.

[40] Ainsi, une analyse formelle fondée sur une comparaison du groupe de demandeurs à un groupe « se trouvant dans une situation semblable » ne garantit pas la suppression du mal auquel le par. 15(1) vise à remédier — l'élimination des mesures législatives qui ont pour effet d'imposer ou de perpétuer une inégalité réelle. L'exercice requis n'est pas une comparaison formelle avec un groupe de comparaison donné aux caractéristiques identiques, mais une démarche qui tienne compte du contexte dans son ensemble, y compris la situation du groupe de demandeurs et la question de savoir si la mesure législative contestée a pour effet de perpétuer un désavantage ou un stéréotype négatif à l'égard du groupe.

(2) Le rôle de la comparaison sous le régime de l'art. 15 : la jurisprudence

[41] Comme l'a expliqué le juge McIntyre dans *Andrews*, l'égalité est un concept comparatif, dont la matérialisation ne peut « être atteinte ou perçue

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with the condition of others in the social and political setting in which the question arises" (p. 164). However, McIntyre J. went on to state that formal comparison based on the logic of treating likes alike is not the goal of s. 15(1). What s. 15(1) requires is substantive, not formal equality.

que par comparaison avec la situation des autres dans le contexte socio-politique où la question est soulevée » (p. 164). Le juge McIntyre a cependant précisé qu'une comparaison formelle fondée sur le principe voulant que les personnes se trouvant dans une situation analogue reçoivent un traitement analogue ne servait pas l'objet du par. 15(1). Le paragraphe 15(1) vise l'égalité réelle, et non pas une égalité formelle.

[42] Comparison, he explained, must be approached with caution; not all differences in treatment entail inequality, and identical treatment may produce "serious inequality" (p. 164). For that reason, McIntyre J. rejected a formalistic "treat likes alike" approach to equality under s. 15(1), contrasting substantive equality with formal equality.

[42] La démarche comparative, aux dires du juge, appelle la prudence, puisque toute différence de traitement ne produira pas forcément une inégalité, et qu'un traitement identique peut engendrer de « graves inégalités » (p. 164). C'est pourquoi il a rejeté l'approche formaliste du « traitement analogue » pour l'application du par. 15(1), en distinguant l'égalité réelle de l'égalité formelle.

[43] The Court's s. 15(1) jurisprudence has consistently affirmed that the s. 15(1) inquiry must focus on substantive equality and must consider all context relevant to the claim at hand. The central and sustained thrust of the Court's s. 15(1) jurisprudence has been the need for a substantive contextual approach and a corresponding repudiation of a formalistic "treat likes alike" approach. This is evident from *Andrews*, through *Law*, to *Kapp*. When the Court has made comparisons with a similarly situated group, those comparisons have generally been accompanied by insistence that a valid s. 15(1) analysis must consider the full context of the claimant group's situation and the actual impact of the law on that situation. In *Lovelace v. Ontario*, 2000 SCC 37, [2000] 1 S.C.R. 950, for example, Iacobucci J., for the Court, having found "that the whole context of the circumstances warrants a refinement in the identification of the comparator group", stated: "I find that the s. 15(1) inquiry must proceed on the basis of comparing band and non-band aboriginal communities" (para. 64). However, he emphasized that "we must ask whether the impugned law, program or activity has a purpose or effect that is substantively discriminatory" (para. 53).

[43] Dans ses décisions sur le par. 15(1), la Cour a toujours affirmé que l'analyse requise par cette disposition doit être centrée sur l'égalité réelle et tenir compte de tous les éléments contextuels pertinents relativement à l'allégation dont le tribunal est saisi. La Cour a posé en principe fondamental, à maintes reprises, la nécessité de procéder à une analyse contextuelle au fond et de rejeter, en conséquence, l'approche formaliste d'un « traitement analogue ». C'est ce qui ressort de ses décisions, depuis *Andrews* jusqu'à *Kapp*, en passant par *Law*. Lorsque la Cour a fait une comparaison avec un groupe se trouvant dans une situation semblable, elle a généralement pris soin de préciser que l'analyse requise par le par. 15(1) commande l'appréciation de tous les éléments contextuels de la situation du groupe de demandeurs et de l'effet réel de la mesure législative sur leur situation. Dans *Lovelace c. Ontario*, 2000 CSC 37, [2000] 1 R.C.S. 950, par exemple, le juge Iacobucci, au nom de la Cour, ayant conclu que « le contexte global commande de préciser davantage l'identité du groupe de comparaison », a déclaré : « [J]'estime que l'analyse fondée sur le par. 15(1) doit être faite en comparant les communautés autochtones constituées en bandes et celles qui ne le sont pas » (par. 64). Toutefois, il a insisté qu'« il faut se demander si la loi, le programme ou l'activité contesté a un objet ou un effet qui est source de discrimination réelle » (par. 53).

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TAB 19

Manitoba Court of Appeal

Citation: Manitoba Keewatinowi Okimakanak Inc. v. Manitoba Hydro-Electric Board
Date: 1992-04-30

Scott C.J.M. in Chambers

Counsel:
Arne Peltz, for applicant.
R.G. Law and *K.J. Moroz*, for respondent.
R.F. Peters, for Public Utilities Board.

1992 CanLII 8479 (MB CA)

[1] SCOTT C.J.M.:—This is an application for leave to appeal by the applicant (MKO) pursuant to s. 58 of the *Public Utilities Board Act*, R.S.M. 1987, c. P280 (the Act), from an order of the board dated March 24, 1992, approving a general rate increase for Manitoba Hydro in the average amount of 2.65%.

[2] By s. 58 of the Act the jurisdiction of this court is confined to questions of jurisdiction, law or facts expressly found by the board.

[3] The applicant, I was told, represents 11 of 13 remotely located communities in Manitoba comprising in all some 2, 650 customers who are served outside Manitoba Hydro's central grid system. The effect of this is that the electrical power they receive is locally generated by on-site diesel units which at present provide 15 amp. service as opposed to the 100/200 amp. service available in the City of Winnipeg. This results in a much reduced electrical capacity within these communities.

[4] MKO was granted intervener status before the board. In its prehearing material MKO made it clear that its primary objective was to achieve an enhanced level of service to the remote diesel-powered communities. In support of that position it relied heavily in its submission before the board, and, indeed, in its application for leave to appeal to this court, on s. 36(1)(*c*) of the *Constitution Act, 1982*, which states:

> 36(1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to
>
> (*a*) ...
>
> (*b*) ...
>
> (*c*) providing essential public services of reasonable quality to all Canadians.

[5] In argument before the board, the MKO representative (not Mr. Peltz) made it clear that with respect to the issue of the current rate application it was his position that until such time as the present situation was ameliorated (presumably by the construction of the

appropriate transmission lines and other facilities to enable these communities to receive the equivalent energy to that of the other regions of Manitoba), there should be a substantial reduction in the rates paid by the inhabitants of these remote diesel-powered communities in light of the inadequate service.

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[6] In its decision with respect to s. 36(1)(*c*) of the *Constitution Act, 1982*, the board noted:

> Section 36(1)(*c*) of the Constitution Act, 1982 evidences the objective of Canadian governments of ensuring that all Canadians are provided with essential public services of reasonable quality and while the enhancement by Hydro of its delivery of power is consistent with this objective, it is the opinion of the Board that this provision in the Constitution Act does not mandate any specific level of service by Hydro nor necessitate any specific Board action at this time.

[7] The board did not intend to issue any specific recommendations or orders regarding MKO's requests. It stated:

> Rather, the Board will monitor the ongoing meetings between Hydro officials and MKO and requests from each organization a general overview report to be delivered by the 30th of September, 1992, informing the Board of progress to date.
>
> The Board is well aware that general upgrading in seven of the diesel communities will not take place until 1996/97 due to seasonal limitations on construction in the North and environmental issues. It is clear however that direction has been given by Hydro that these communities be on the Central System as soon as possible.
>
> The Board expects that the other matters detailed by MKO in evidence, cross-examination and argument will be dealt with on the basis of the goodwill and undertakings exchanged between Mr. Brennan and Chief Bighetty. Should the parties not be able to resolve the difficulties outlined, the Board will issue such recommendations and orders that are within its jurisdiction in the future. The Board wishes to indicate to both parties that it sees room for improvement of cooperation on both sides of the discussions and concerns heard by it to date.

[8] It is alleged that the board committed errors of law and jurisdiction in failing to specifically find that, pursuant to s. 36(1)(*c*) of the *Constitution Act, 1982*, customers in diesel-powered communities were legally entitled to receive electric power services of reasonable quality, and further erred by declining jurisdiction when it failed to decide the proposition advanced by MKO, namely, the requested reduction in electric power rates, by deferring its decision as noted above.

[9] It must be emphasized at the outset that the jurisdiction of the board is expressly limited to the fixing of rates (see s. 2(5) of the Act). Section 26(1) of the *Crown Corporations Public Review and Accountability and Consequential Amendments Act*, S.M. 89-90, c. 65, s. 10, makes it clear that "rates for service" in the case of Manitoba Hydro simply means the prices charged by that corporation with respect to the provision of power. In the *Public Utilities Board v. Attorney-General of Manitoba* (unreported decision released October 3, 1989), this

court dealt with a stated case to determine whether the board had jurisdiction to approve, reject or vary Manitoba Hydro's capital projects. This question was answered in the negative. The court was not prepared to imply such an intention in the legislation as it then stood. There has been no change in the relevant provisions of the legislation since then.

[10] There have been no cases dealing with the interpretation of s. 36(1)(*c*) of the *Constitution Act, 1982*. There is considerable academic debate as to whether the section in fact creates enforceable rights and, if so, whether they are not in any event — by virtue of the preamble to the section — subordinate to the ordinary acts of Parliament and the provincial legislatures. Suffice it to say I am satisfied that in the general sense a reasonable argument might be advanced that the section could possibly have been intended to create enforceable rights. However, it is not necessary to decide this point in light of the disposition I am about to make.

[11] Counsel for Manitoba Hydro argued that there was simply no nexus between s. 36(1)(*c*) of the *Constitution Act, 1982*, and the powers of the board. In other words, even if the section does create enforceable rights, the board has no jurisdiction to order Manitoba Hydro to improve the level or quality of service because this in turn would require the expenditure of moneys for capital projects. In my opinion this submission is correct.

[12] In reply, counsel for MKO quite properly conceded that there was no direct nexus between s. 36(1)(*c*) and the setting of rates, but argued it was none the less essential to his client's ongoing concerns that the applicability of the section to Manitoba Hydro be judicially determined so as to place the matter in the proper context for this and future applications. I disagree. It is not the business of the courts to deal with academic rights. In my opinion no useful purpose would be served by making what would amount to a declaration of potential constitutional applicability in a vacuum when the board does not possess the statutory power to grant any effective relief flowing from the declaration.

[13] I also conclude that the second ground of alleged error must fail. The board did deal with the issue — it ordered a rate increase averaging 2.65%. It did not decline jurisdiction. It clearly encouraged and approbated the continuing efforts of Manitoba Hydro at the highest level to ameliorate the problems suffered by the remote and isolated diesel-powered communities. It recognized that these communities were not receiving a reasonable quality of service in comparison to other users of electrical power in Manitoba, and so stated. While not strictly within its mandate, the board has adopted the practice of making recommendations to the utility in a similar vein in the past and to good effect. It obviously rejected the submission by MKO with respect to rates, namely, that there should be a very significant reduction in the rates paid by users in these communities until such time as a reasonable quality of service was provided. It was acknowledged during argument that, if the board had dealt with the issue, there would have been little that MKO could have done about it because there would have been no error of law or jurisdiction. In my opinion, the board did deal with the issue by including the remote and isolated communities in the general rate increase.

[14] The application for leave to appeal is dismissed with costs.

[15] Application dismissed.

1992 CanLII 8479 (MB CA)

1992 CanLII 8479 (MB CA)

TAB 20

2006 SCC 14 (CanLII)

Robert Tranchemontagne and Norman Werbeski *Appellants*

v.

Director of the Ontario Disability Support Program of the Ministry of Community, Family and Children's Services *Respondent*

and

Canadian Human Rights Commission, Ontario Human Rights Commission, Advocacy Centre for Tenants Ontario, African Canadian Legal Clinic, Empowerment Council — Centre for Addiction and Mental Health, and Social Benefits Tribunal *Interveners*

Indexed as: Tranchemontagne *v.* Ontario (Director, Disability Support Program)

Neutral citation: 2006 SCC 14.

File No.: 30615.

2005: December 12; 2006: April 21.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Administrative law — Boards and tribunals — Jurisdiction — Human rights issues — Legislation prohibiting Social Benefits Tribunal from considering constitutional validity of laws and regulations — Whether tribunal has jurisdiction to consider human rights legislation in rendering its decisions — If so, whether tribunal should decline to exercise its jurisdiction in instant cases in favour of more appropriate forum — Human Rights Code, R.S.O. 1990, c. H.19, s. 47(2) — Ontario Disability Support Program Act, 1997, S.O. 1997, c. 25, Sch. B, s. 5(2) — Ontario Works Act, 1997, S.O. 1997, c. 25, Sch. A, s. 67(2).

Robert Tranchemontagne et Norman Werbeski *Appelants*

c.

Directeur du Programme ontarien de soutien aux personnes handicapées du ministère des Services à la collectivité, à la famille et à l'enfance *Intimé*

et

Commission canadienne des droits de la personne, Commission ontarienne des droits de la personne, Centre ontarien de défense des droits des locataires, African Canadian Legal Clinic, Conseil d'autonomie des clients — Centre de toxicomanie et de santé mentale, et Tribunal de l'aide sociale *Intervenants*

Répertorié : Tranchemontagne *c.* Ontario (Directeur du Programme ontarien de soutien aux personnes handicapées)

Référence neutre : 2006 CSC 14.

N^o du greffe : 30615.

2005 : 12 décembre; 2006 : 21 avril.

Présents : La juge en chef McLachlin et les juges Bastarache, Binnie, LeBel, Deschamps, Fish et Abella.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit administratif — Organismes et tribunaux administratifs — Compétence — Questions relatives aux droits de la personne — Législation interdisant au Tribunal de l'aide sociale d'examiner la constitutionnalité des lois et règlements — Un tribunal administratif a-t-il compétence pour examiner les lois relatives aux droits de la personne au moment de rendre ses décisions? — Dans l'affirmative, le tribunal administratif devrait-il décliner compétence dans les présentes affaires en faveur d'une juridiction plus appropriée? — Code des droits de la personne, L.R.O. 1990, ch. H.19, art. 47(2) — Loi de 1997 sur le Programme ontarien de soutien aux personnes handicapées, L.O. 1997, ch. 25, ann. B, art. 5(2) — Loi de 1997 sur le programme Ontario au travail, L.O. 1997, ch. 25, ann. A, art. 67(2).

2006 SCC 14 (CanLII)

T and W applied for support pursuant to the *Ontario Disability Support Program Act, 1997* ("ODSPA"). The Director of the program denied their applications and an internal review confirmed the Director's decisions. The Social Benefits Tribunal ("SBT") dismissed T's and W's appeals pursuant to s. 5(2) of the ODSPA based on its finding that they both suffered from alcoholism. In so concluding, the SBT found that it did not have jurisdiction to consider whether s. 5(2) was inapplicable by virtue of the Ontario *Human Rights Code*. The Divisional Court upheld the decision. On a further appeal, the Court of Appeal found that the SBT had the power to declare a provision of the ODSPA inapplicable on the basis that the provision was discriminatory, but that it should have declined to exercise that jurisdiction in favour of a more appropriate forum.

T et W ont présenté chacun une demande de soutien en vertu de la *Loi de 1997 sur le Programme ontarien de soutien aux personnes handicapées* (« LPOSPH »). Le directeur du programme a rejeté leurs demandes et la révision interne a confirmé sa décision. Le Tribunal de l'aide sociale (« TAS ») a rejeté les appels de T et W en application du par. 5(2) de la LPOSPH, en se fondant sur sa conclusion qu'ils souffraient tous deux d'alcoolisme. En rendant sa décision, le TAS a jugé qu'il n'avait pas compétence pour examiner la question de l'applicabilité du par. 5(2) selon le *Code des droits de la personne* de l'Ontario. La Cour divisionnaire a confirmé sa décision. Saisie à son tour, la Cour d'appel a conclu que le TAS avait le pouvoir de déclarer inapplicable une disposition de la LPOSPH en raison de son caractère discriminatoire, mais qu'il aurait dû décliner compétence en faveur d'une juridiction plus appropriée.

Held (LeBel, Deschamps and Abella JJ. dissenting): The appeal should be allowed. The case is remitted to the SBT for a ruling on the applicability of s. 5(2) of the ODSPA.

Arrêt (les juges LeBel, Deschamps et Abella sont dissidents) : Le pourvoi est accueilli. L'affaire est renvoyée au TAS pour qu'il se prononce sur la question de l'applicabilité du par. 5(2) de la LPOSPH.

Per McLachlin C.J. and Binnie, Bastarache and Fish JJ.: The SBT had jurisdiction to consider the *Human Rights Code* in determining whether T and W were eligible for support pursuant to the ODSPA. Statutory tribunals empowered to decide questions of law are presumed to have the power to look beyond their enabling statutes in order to apply the whole law to a matter properly before them. Here, the ODSPA and the *Ontario Works Act, 1997* ("OWA") confirm that the SBT can decide questions of law. As a result, when the SBT decides whether an applicant is eligible for income support, it is presumed to be able to consider any legal source that might influence its decision on eligibility, including the Code. [14] [40]

La juge en chef McLachlin et les juges Binnie, Bastarache et Fish : Le TAS avait compétence pour examiner le *Code des droits de la personne* lorsqu'il s'est agi de décider si T et W étaient admissibles au soutien prévu par la LPOSPH. Les tribunaux administratifs créés par une loi qui sont investis du pouvoir de trancher les questions de droit sont présumés avoir le pouvoir d'aller au-delà de leurs lois habilitantes pour appliquer l'ensemble du droit à une affaire dont ils sont dûment saisis. En l'espèce, la LPOSPH et la *Loi de 1997 sur le programme Ontario au travail* (« LPOT ») apportent la confirmation que le TAS a le pouvoir statuer sur des questions de droit. Par conséquent, lorsqu'il détermine si le demandeur est admissible au soutien du revenu, il est présumé être en mesure d'examiner toute source juridique susceptible d'influer sur sa décision quant à l'admissibilité, y compris le Code. [14] [40]

With respect to the Code, there is no indication that the legislature has sought to rebut this presumption. While s. 67(2) of the OWA clearly prohibits the SBT from considering the constitutional validity of laws and regulations, it is equally clear that the legislature chose not to adopt the same prohibition where the Code is concerned. The legislature envisioned constitutional and Code-related issues as being in different "categories of questions of law". It is one thing to preclude a statutory tribunal from invalidating legislation, but it is another to preclude that body from applying legislation enacted by the provincial legislature in order to resolve apparent conflicts between statutes. Two elements of the Code's scheme confirm this legislative intention

Pour ce qui est du Code, rien n'indique que le législateur a voulu réfuter cette présomption. S'il est vrai que le par. 67(2) de la LPOT clairement interdit au TAS d'examiner la constitutionnalité des lois et règlements, lé législateur a aussi clairement choisi de ne pas faire appel à la même interdiction en ce qui concerne le Code. Il a prévu que les questions constitutionnelles et les questions relatives au Code relèvent de « catégories de questions de droit différentes ». C'est une chose d'empêcher un tribunal administratif créé par une loi d'invalider une disposition législative, c'en est une autre de l'empêcher d'appliquer une loi que le législateur provincial a édictée pour résoudre des conflits apparents entre des lois. Deux éléments du régime législatif dans lequel

to differentiate the Code from the Constitution and to confer on the SBT the jurisdiction to apply the Code. First, the Code has primacy over other legislative enactments, and the legislature has given itself clear directions as to how this primacy can be eliminated in particular circumstances (s. 47(2)). Since, in the cases of the ODSPA and the OWA, the legislature did not follow the procedure it declared mandatory for overruling the primacy of the Code, it would be contrary to the legislature's intention to demand that the SBT ignore the Code. Second, in light of recent amendments that have removed exclusive jurisdiction over the interpretation and application of the Code from the Ontario Human Rights Commission and as a result of which the Commission may decline jurisdiction where an issue would best be adjudicated pursuant to another Act, it would not be appropriate to seek to restore the Commission's exclusive jurisdiction. [31-42]

Since the SBT has not been granted the authority to decline jurisdiction, it cannot avoid considering the issues relating to the Code in these cases. Moreover, although this is not determinative, the SBT is the most appropriate forum to decide those issues. The applicability of s. 5(2) of the ODSPA is best decided by the SBT because the SBT is practically unavoidable for vulnerable applicants who have been denied financial assistance under the ODSPA. Such applicants merit prompt, final and binding resolutions for their disputes. Where an issue is properly before a tribunal pursuant to a statutory appeal, and especially where a vulnerable applicant is advancing arguments in defence of his human rights, it would be rare for this tribunal not to be the one most appropriate to hear the entire dispute. [43-50]

Per LeBel, Deschamps and Abella JJ. (dissenting): While the Ontario Human Rights Commission no longer has exclusive jurisdiction to decide complaints under the *Human Rights Code*, and while the Code has primacy over other provincial enactments, not all provincial tribunals have free-standing jurisdiction, concurrent with that of the Commission, to enforce the Code in a way that nullifies a provision. Here, although the SBT is not precluded from applying the human rights values and principles found in the Code, it does not have jurisdiction to apply the Code in a way that renders a provision inoperable. By enacting s. 67(2) of the OWA, which prohibits the SBT from considering the constitutional validity of any enactment or the legislative authority for a regulation, the legislature unequivocally expressed

s'inscrit le Code confirment l'intention du législateur de différencier le Code de la Constitution et de conférer au TAS le pouvoir d'appliquer le Code. Premièrement, le Code a la primauté sur les autres textes législatifs, et le législateur a donné lui-même des indications claires quant à la façon d'écarter cette primauté dans certaines circonstances (par. 47(2)). Étant donné que, dans le cas de la LPOSPH et de la LPOT, le législateur n'a pas suivi la procédure qu'il a déclarée obligatoire pour passer outre à la primauté du Code, il serait contraire à son intention d'exiger que le TAS fasse abstraction du Code. Deuxièmement, compte tenu des modifications récentes par lesquelles le législateur a retiré à la Commission ontarienne des droits de la personne la compétence exclusive en matière d'interprétation et d'application du Code et à la suite desquelles la Commission peut décliner compétence dans les cas où la question serait mieux tranchée en vertu d'une autre loi, il ne convient pas de chercher à rétablir la compétence exclusive de la Commission. [31-42]

Le TAS n'ayant pas été investi du pouvoir de décliner compétence, il ne peut éviter d'examiner les questions relatives au Code soulevées dans les présentes affaires. Par ailleurs, même si cela n'est pas déterminant, le TAS est la juridiction la plus appropriée pour statuer sur ces questions. Il est le mieux placé pour se prononcer sur la question de l'applicabilité du par. 5(2) de la LPOSPH parce qu'il est presque impossible pour les demandeurs vulnérables qui se sont vu refuser un soutien financier en vertu de la LPOSPH de l'éviter. Ces demandeurs méritent un règlement rapide, définitif et exécutoire de leurs conflits. Lorsqu'un tribunal administratif est dûment saisi d'une question par suite de l'exercice d'un droit d'appel prévu par la loi et surtout lorsqu'un appelant vulnérable fait valoir des arguments pour défendre ses droits de la personne, il est rare que ce tribunal ne soit pas le mieux placé pour connaître de l'ensemble du différend. [43-50]

Les juges LeBel, Deschamps et Abella (dissidents) : Il est vrai que la Commission ontarienne des droits de la personne n'a plus compétence exclusive pour connaître des plaintes fondées sur le *Code des droits de la personne* et que le Code prévaut sur les autres textes législatifs provinciaux, mais ce ne sont pas tous les tribunaux administratifs provinciaux qui ont, concurremment avec la Commission, une compétence autonome pour appliquer le Code d'une manière qui annule une disposition. Ici, même s'il ne lui est pas interdit d'appliquer les valeurs et principes en matière de droits de la personne contenus dans le Code, le TAS n'a pas compétence pour appliquer le Code de manière à rendre une disposition inopérante. En édictant le par. 67(2) de la LPOT, qui interdit au

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its intent that the SBT not hear and decide legal issues that may result in the inoperability of a provision. Even though s. 67(2) refers to constitutional validity, but not to compliance with the Code, their remedial and conceptual similarities are such that the legislature has, by clear implication, withdrawn the authority to grant the remedy of inoperability under either mandate. [85] [93-97]

TAS d'examiner la constitutionnalité d'un texte de loi ou l'autorisation législative de prendre un règlement, le législateur a exprimé clairement son intention de ne pas permettre au TAS d'entendre et de trancher des questions juridiques pouvant entraîner l'inapplicabilité d'une disposition. Même si le par. 67(2) mentionne la constitutionnalité et non la conformité au Code, la ressemblance entre ces deux textes sur le plan de la réparation et du concept est telle que le législateur a, forcément, retiré le pouvoir d'accorder la réparation de l'inapplicabilité en vertu de l'un ou l'autre des mandats. [85] [93-97]

Practical considerations also indicate the legislature's intention that the SBT not consider legal questions that go to the validity of its enabling statute. In light of their institutional characteristics, it was deemed inappropriate for either the Director or the SBT to decide such complex, time-consuming legal issues as the operability of a provision. The Director does not hold hearings or receive evidence beyond that filed by an applicant, and the SBT's hearings are informal, private, and brief. The SBT is meant to be an efficient, effective, and quick process, and imposing such Code compliance hearings on it will inevitably have an impact on its ability to assist the disabled community in a timely way. [86-91]

Des considérations pratiques indiquent également l'intention du législateur de ne pas laisser le TAS examiner des questions juridiques mettant en cause l'applicabilité de sa loi habilitante. Compte tenu de leurs caractéristiques institutionnelles, ni le directeur ni le TAS n'ont été considérés comme étant compétents pour trancher des questions juridiques aussi complexes et chronophages que la question de l'applicabilité d'une disposition. Le directeur ne tient pas d'audiences et ne reçoit pas d'éléments de preuve outre ceux déposés par le demandeur, et les audiences du TAS sont informelles, privées et brèves. Le TAS se veut un processus efficient, efficace et rapide, et lui imposer la tenue d'audiences sur le respect du Code influera inévitablement sur sa capacité d'aider les personnes handicapées en temps opportun. [86-91]

Cases Cited

By Bastarache J.

Referred to: *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3; *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55; *McLeod v. Egan*, [1975] 1 S.C.R. 517; *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 S.C.R. 566; *Insurance Corp. of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145; *B v. Ontario (Human Rights Commission)*, [2002] 3 S.C.R. 403, 2002 SCC 66; *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854; *Quebec (Attorney General) v. Quebec (Human Rights Tribunal)*, [2004] 2 S.C.R. 223, 2004 SCC 40; *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157, 2003 SCC 42; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, [2004] 2 S.C.R. 185, 2004 SCC 39; *Zurich Insurance Co. v.*

Jurisprudence

Citée par le juge Bastarache

Arrêts mentionnés : *Nouvelle-Écosse (Workers' Compensation Board) c. Martin*, [2003] 2 R.C.S. 504, 2003 CSC 54; *Cuddy Chicks Ltd. c. Ontario (Commission des relations de travail)*, [1991] 2 R.C.S. 5; *Douglas/Kwantlen Faculty Assn. c. Douglas College*, [1990] 3 R.C.S. 570; *Canadien Pacifique Ltée c. Bande indienne de Matsqui*, [1995] 1 R.C.S. 3; *Paul c. Colombie-Britannique (Forest Appeals Commission)*, [2003] 2 R.C.S. 585, 2003 CSC 55; *McLeod c. Egan*, [1975] 1 R.C.S. 517; *Battlefords and District Co-operative Ltd. c. Gibbs*, [1996] 3 R.C.S. 566; *Insurance Corp. of British Columbia c. Heerspink*, [1982] 2 R.C.S. 145; *B c. Ontario (Commission des droits de la personne)*, [2002] 3 R.C.S. 403, 2002 CSC 66; *Cooper c. Canada (Commission des droits de la personne)*, [1996] 3 R.C.S. 854; *Québec (Procureur général) c. Québec (Tribunal des droits de la personne)*, [2004] 2 R.C.S. 223, 2004 CSC 40; *Parry Sound (district), Conseil d'administration des services sociaux c. S.E.E.F.P.O., section locale 324*, [2003] 2 R.C.S. 157, 2003 CSC 42; *Québec (Commission des droits*

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for the appellant Tranchemontagne. In both decisions, the SBT found that the appellants suffered from alcoholism. The SBT held alcoholism to be a "disabling condition", in the case of the appellant Tranchemontagne, and a "substantial impairment" that "substantially restricts" working ability, in the case of the appellant Werbeski. The SBT dismissed both appellants' appeals.

les deux décisions, il a conclu que les appelants souffraient d'alcoolisme. Il a qualifié l'alcoolisme d'[TRADUCTION] « affection invalidante » dans le cas de M. Tranchemontagne et de [TRADUCTION] « déficience importante » qui [TRADUCTION] « limite considérablement » la capacité de travailler dans le cas de M. Werbeski. Il a rejeté les deux appels.

6 The SBT based its decisions on s. 5(2) of the ODSPA. That section provides:

> **5.** . . .
>
> (2) A person is not eligible for income support if,
>
> (a) the person is dependent on or addicted to alcohol, a drug or some other chemically active substance;
>
> (b) the alcohol, drug or other substance has not been authorized by prescription as provided for in the regulations; and
>
> (c) the only substantial restriction in activities of daily living is attributable to the use or cessation of use of the alcohol, drug or other substance at the time of determining or reviewing eligibility.

Le TAS a fondé ses décisions sur le par. 5(2) de la LPOSPH. Cette disposition prévoit :

> **5.** . . .
>
> (2) Une personne n'est pas admissible au soutien du revenu si les conditions suivantes sont réunies :
>
> a) la personne a développé une dépendance ou une accoutumance à l'égard de l'alcool, d'une drogue ou d'une autre substance chimiquement active;
>
> b) l'alcool, la drogue ou l'autre substance n'a pas été autorisé par ordonnance, selon ce que prévoient les règlements;
>
> c) la seule limitation importante de ses activités de la vie quotidienne est attribuable à l'utilisation ou à la cessation de l'utilisation de l'alcool, de la drogue ou de l'autre substance au moment de déterminer ou de réviser l'admissibilité.

7 The appellants do not dispute that, if applicable, s. 5(2) functions to deny them support on the basis of their alcoholism. In front of the SBT, they each argued that they had impairments other than alcoholism; these arguments were rejected and the SBT's findings have not been appealed to this Court. But the appellants also argued that s. 5(2) was inapplicable by virtue of the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19 ("Code"). By purporting to refuse them support on the basis of their alcoholism, which the appellants assert is a disability within the meaning of the Code, the appellants argued that s. 5(2) of the ODSPA constituted discrimination and was therefore inapplicable because of the primacy of the Code over other legislation.

Les appelants ne contestent pas que le par. 5(2), s'il est applicable, permette de leur refuser un soutien en raison de leur alcoolisme. Devant le TAS, ils ont tous deux fait valoir qu'ils avaient d'autres déficiences que l'alcoolisme; ces arguments ont été rejetés et les conclusions du TAS n'ont pas été portées en appel devant la Cour. Mais les appelants ont également soutenu que le par. 5(2) était inapplicable en vertu du *Code des droits de la personne* de l'Ontario, L.R.O. 1990, ch. H.19 (« Code »). Ils ont affirmé qu'en visant à leur refuser un soutien du fait de leur alcoolisme, qui constitue, selon eux, un handicap au sens du Code, le par. 5(2) de la LPOSPH établissait une discrimination et était donc inapplicable en raison de la primauté du Code sur toute autre loi.

8 Instead of analyzing this argument, the SBT held that it did not have the jurisdiction to consider the applicability of s. 5(2) pursuant to the Code. The

Au lieu d'analyser cet argument, le TAS a conclu qu'il n'avait pas compétence pour examiner la question de l'applicabilité du par. 5(2) selon

appellants' appeals were therefore dismissed without the benefit of a ruling that their treatment was not discriminatory.

le Code. Les appelants ont donc vu leurs appels rejetés sans pouvoir bénéficier d'une décision portant qu'ils n'avaient pas fait l'objet d'un traitement discriminatoire.

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9

Their cases now joined, the appellants appealed to the Divisional Court. In brief oral reasons, the bench of Then, Cameron and Desotti JJ. agreed with the SBT that the authority to consider the Code could not be found in its enabling statutes ([2003] O.J. No. 1409 (QL), at para. 3). The appellants then appealed to the Ontario Court of Appeal.

Après jonction de leurs causes, les appelants ont interjeté appel devant la Cour divisionnaire. Dans de brefs motifs exposés à l'audience, la cour, alors composée des juges Then, Cameron et Desotti, a convenu avec le TAS que ses lois habilitantes ne lui conféraient pas le pouvoir d'examiner le Code ([2003] O.J. No. 1409 (QL), par. 3). Les appelants se sont ensuite pourvus en appel devant la Cour d'appel de l'Ontario.

10

On behalf of a unanimous bench, Weiler J.A. examined the ODSPA and OWA in detail. She concluded that the legislature did not remove jurisdiction to consider the Code from the SBT, and that accordingly the SBT possessed the power to declare a provision of the ODSPA inapplicable by virtue of its discriminatory nature ((2004), 72 O.R. (3d) 457, at paras. 58-59 and 62). However, Weiler J.A. then went on to consider whether the SBT should have declined to exercise its Code jurisdiction in the present appeal. She held that the SBT was not the most appropriate forum in which the Code issue could be decided, leading her to ultimately dismiss the appeal (para. 70).

Rédigeant le jugement unanime de la cour, la juge Weiler a étudié en détail la LPOSPH et la LPOT. Elle a conclu que le législateur n'avait pas retiré au TAS la compétence pour examiner le Code et que le TAS avait donc le pouvoir de déclarer inapplicable une disposition de la LPOSPH en raison de son caractère discriminatoire ((2004), 72 O.R. (3d) 457, par. 58-59 et 62). Toutefois, la juge Weiler a ensuite examiné la question de savoir si le TAS aurait dû, en l'espèce, refuser d'exercer sa compétence relative au Code. Elle a estimé qu'il n'était pas le mieux placé pour décider des questions relatives au Code, ce qui l'a finalement amenée à rejeter les appels (par. 70).

11

The substance of the appellants' argument before the SBT is not at issue before this Court. Since the appeal is allowed, this issue will be remitted to the SBT. In the event the appeal would have been dismissed, the appellants would have pursued a judicial review application, which is presently being held in abeyance before the Divisional Court. It is thus not for this Court to consider whether s. 5(2) of the ODSPA conflicts with the Code. Rather, this Court is only concerned with the SBT's decision that it could not decide these issues for itself.

L'essentiel de l'argument invoqué par les appelants devant le TAS n'est pas en cause devant la Cour. Le présent pourvoi étant accueilli, cette question sera renvoyée au TAS. S'il avait été rejeté, les appelants auraient poursuivi leur demande de contrôle judiciaire, laquelle est actuellement en suspens devant la Cour divisionnaire. Il n'appartient donc pas à la Cour de se demander si le par. 5(2) de la LPOSPH entre en conflit avec le Code. La Cour s'occupe plutôt uniquement de la décision du TAS qu'il ne pouvait lui-même trancher ces questions.

12

It has been almost five years since the appellants' applications were denied by the Director. During this time, the appellants have not received any disability support pursuant to the ODSPA. If the appellants are ultimately successful in their substantive claims, no amount of interest could negate the fact

Il s'est écoulé près de cinq ans depuis que les demandes des appelants ont été rejetées par le directeur. Pendant cette période, les appelants n'ont bénéficié d'aucun soutien prévu par la LPOSPH. S'ils obtiennent finalement gain de cause quant au fond, aucun octroi de dommages-intérêts ne

that they have lived the past five years without the assistance they were owed. Accordingly, much argument before this Court centred on concerns as to the vulnerability of the appellants and their need to have their appeals settled fully by the SBT. Nevertheless, these concerns must be tempered by the importance of the efficient operation of the SBT more generally, lest other applicants suffer needlessly while waiting for the results of their appeals. Ultimately, however, this appeal is not decided by matters of practicality for applicants or matters of expediency for administrative tribunals. It is decided by following the statutory scheme enacted by the legislature.

changera rien au fait qu'ils ont vécu les cinq dernières années sans bénéficier de l'aide à laquelle ils avaient droit. C'est ainsi que les arguments présentés devant la Cour portaient principalement sur les craintes concernant la vulnérabilité des appelants et la nécessité pour eux d'obtenir la résolution complète de leurs appels par le TAS. Il faut toutefois tempérer ces craintes par l'importance d'assurer le bon fonctionnement du TAS d'une manière plus générale, de peur que d'autres demandeurs ne souffrent inutilement en attendant l'issue de leur appel. Au bout du compte, cependant, le présent pourvoi ne doit pas être tranché en fonction de considérations pratiques du point de vue des appelants, ni en fonction de raisons de commodité pour les tribunaux administratifs. Il doit être tranché selon le système législatif mis en place par le législateur.

13 The Code is fundamental law. The Ontario legislature affirmed the primacy of the Code in the law itself, as applicable both to private citizens and public bodies. Further, the adjudication of Code issues is no longer confined to the exclusive domain of the intervener the Ontario Human Rights Commission ("OHRC"): s. 34 of the Code. The legislature has thus contemplated that this fundamental law could be applied by other administrative bodies and has amended the Code accordingly.

Le Code est une loi fondamentale. Le législateur ontarien a confirmé la primauté du Code, dans la loi elle-même, précisant qu'il s'applique tant aux simples citoyens qu'aux organismes publics. D'ailleurs, la résolution des questions relatives au Code n'est plus du ressort exclusif de l'intervenante la Commission ontarienne des droits de la personne (« CODP ») : art. 34 du Code. Le législateur a donc envisagé la possibilité que cette loi fondamentale soit appliquée par d'autres organismes administratifs et a modifié le Code en conséquence.

14 The laudatory goals of the Code are not well served by reading in limitations to its application. It is settled law that statutory tribunals empowered to decide questions of law are presumed to have the power to look beyond their enabling statutes in order to apply the whole law to a matter properly in front of them. By applying this principle to the present appeal, it becomes clear that the SBT had the jurisdiction to consider the Code in determining whether the appellants were eligible for support pursuant to the ODSPA. At that point, the SBT had the responsibility of applying the Code in order to render a decision that reflected the whole law of the province.

Ce n'est pas favoriser l'atteinte des objectifs louables du Code que d'imposer, par interprétation, des limites à son application. Il est bien établi en droit que les tribunaux administratifs créés par une loi qui sont investis du pouvoir de trancher les questions de droit sont présumés avoir le pouvoir d'aller au-delà de leurs lois habilitantes pour appliquer l'ensemble du droit à une affaire dont ils sont dûment saisis. Si on applique ce principe au présent pourvoi, le TAS avait manifestement compétence pour examiner le Code lorsqu'il s'est agi de décider si les appelants étaient admissibles au soutien prévu par la LPOSPH. À ce moment-là, le TAS était tenu d'appliquer le Code afin de rendre une décision qui reflétait l'ensemble du droit de la province.

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2. Issues

This appeal raises two issues:

(1) Does the SBT have the jurisdiction to consider the Code in rendering its decisions?

(2) If the answer to the first question is "yes", should the SBT have declined to exercise its jurisdiction in the present cases?

3. Analysis

3.1 *Does the SBT Have the Jurisdiction to Consider the Code?*

Statutory tribunals like the SBT do not enjoy any inherent jurisdiction. It is therefore necessary to examine the enabling statutes of the SBT in order to determine what powers it possesses: *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54, at para. 33; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5, at p. 14; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, at p. 595. For the SBT, the relevant statutes are the ODSPA and the OWA. In the context of the present appeal, however, the legislative scheme surrounding the Code cannot be ignored. The enabling statutes and the Code will all be considered in turn.

3.1.1 The ODSPA and the OWA

The ODSPA and the OWA are twin components of the Ontario government's scheme for delivering social assistance to deserving applicants. The ODSPA deals with disabled applicants, while the OWA provides assistance for eligible applicants who are not disabled. Reference can be made to the opening sections of each statute in order to discern the policy differences between the two. Section 1 of the ODPSA reads:

1. [Purpose of Act] The purpose of this Act is to establish a program that,

2. Questions en litige

15 Le présent pourvoi soulève deux questions :

(1) Le TAS a-t-il compétence pour examiner le Code au moment de rendre ses décisions?

(2) Dans l'affirmative, le TAS aurait-il dû décliner compétence dans les présentes affaires?

3. Analyse

3.1 *Le TAS a-t-il compétence pour examiner le Code?*

16 Les tribunaux administratifs créés par une loi, comme le TAS, ne possèdent aucune compétence inhérente. Il est donc nécessaire d'examiner les lois habilitantes du TAS pour déterminer ses pouvoirs : *Nouvelle-Écosse (Workers' Compensation Board) c. Martin*, [2003] 2 R.C.S. 504, 2003 CSC 54, par. 33; *Cuddy Chicks Ltd. c. Ontario (Commission des relations de travail)*, [1991] 2 R.C.S. 5, p. 14; *Douglas/Kwantlen Faculty Assn. c. Douglas College*, [1990] 3 R.C.S. 570, p. 595. Les lois pertinentes en ce qui concerne le TAS sont la LPOSPH et la LPOT. Dans le contexte du présent pourvoi, cependant, on ne peut faire abstraction du régime législatif dans lequel s'inscrit le Code. Les lois habilitantes et le Code seront tous examinés à tour de rôle.

3.1.1 La LPOSPH et la LPOT

17 La LPOSPH et la LPOT sont des composantes jumelles du système que le gouvernement ontarien a mis en place pour fournir une aide sociale aux demandeurs qui le méritent. La LPOSPH s'occupe des demandeurs handicapés, alors que la LPOT vient en aide aux demandeurs admissibles qui ne souffrent d'aucun handicap. Pour saisir les différences de politique qui existent entre ces deux lois, il peut être utile de citer les dispositions introductives de chacune d'elles. Voici le texte de l'art. 1 de la LPOSPH :

1. [Objet de la Loi] La présente loi a pour objet de créer un programme qui :

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(a) provides income and employment supports to eligible persons with disabilities;

(b) recognizes that government, communities, families and individuals share responsibility for providing such supports;

(c) effectively serves persons with disabilities who need assistance; and

(d) is accountable to the taxpayers of Ontario.

Section 1 of the OWA reads:

1. [Purpose of Act] The purpose of this Act is to establish a program that,

(a) recognizes individual responsibility and promotes self reliance through employment;

(b) provides temporary financial assistance to those most in need while they satisfy obligations to become and stay employed;

(c) effectively serves people needing assistance; and

(d) is accountable to the taxpayers of Ontario.

18 As mentioned above, the levels of support also vary greatly between the two regimes. For instance, the amount payable for basic needs for a single recipient with no dependents, pursuant to the OWA, is $201 per month (O. Reg. 134/98, s. 41(1)). The comparable figure for the ODSPA regime is $532 per month (O. Reg. 222/98, s. 30(1)1). The single shelter allowance under the OWA is $335 (O. Reg. 134/98, s. 42(2)2), while the comparable ODSPA figure is $427 (O. Reg. 222/98, s. 31(2)2). The provision of assistance under the OWA may also be subject to conditions, like participating in employment measures: s. 7(4)(b).

19 The ODSPA provides a detailed framework for the handling of a disability benefits application. The Director receives applications for income support:

a) fournit un soutien du revenu et un soutien de l'emploi aux personnes handicapées admissibles;

b) reconnaît que le gouvernement, les collectivités, les familles et les particuliers partagent la responsabilité de fournir de telles formes de soutien;

c) sert efficacement les personnes handicapées qui ont besoin d'aide;

d) comprend l'obligation de rendre de compte aux contribuables de l'Ontario.

Voici le texte de l'art. 1 de la LPOT :

1. [Objet de la Loi] La présente loi a pour objet de créer un programme qui :

a) reconnaît la responsabilité individuelle et favorise l'autonomie par l'emploi;

b) fournit une aide financière provisoire à ceux qui sont le plus dans le besoin pendant qu'ils satisfont des obligations en vue de se faire employer et de le rester;

c) sert efficacement les personnes qui ont besoin d'aide;

d) comprend l'obligation de rendre compte aux contribuables de l'Ontario.

Comme je l'ai déjà mentionné, l'aide accordée varie également beaucoup d'un régime à l'autre. Par exemple, selon la LPOT, la somme payable au titre des besoins essentiels pour un bénéficiaire seul qui n'a pas de personnes à charge est de 201 $ par mois (Règl. de l'Ont. 134/98, par. 41(1)). Sous le régime de la LPOSPH, cette somme est de 532 $ par mois (Règl. de l'Ont. 222/98, par. 30(1)1). Selon la LPOT, l'allocation de logement pour une personne seule est de 335 $ (Règl. de l'Ont. 134/98, par. 42(2)2), alors qu'elle est de 427 $ en vertu de la LPOSPH (Règl. de l'Ont. 222/98, par. 31(2)2). L'aide prévue par la LPOT peut aussi être assortie de conditions, comme celle de participer à des mesures d'emploi : al. 7(4)b).

La LPOSPH fournit un cadre détaillé pour le traitement des demandes de prestations d'invalidité. Le directeur reçoit les demandes de soutien du

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I should emphasize at this point that, for an applicant whose application for income support is still denied after the internal review, the SBT is a forum that cannot easily be avoided. It is the SBT that is empowered by the legislature to decide income support appeals binding on the Director: s. 26(3). Given the existence of an appeal to the SBT, it is not at all clear that an applicant could seek judicial review of the Director's decision without first arguing before the SBT: see *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, at paras. 32-38, 112 and 140-53. And while an applicant who is denied benefits for discriminatory reasons may indeed seek recourse through the OHRC, applicants will not always realize that they are victims of discrimination. For instance, in the present appeal, the letters from the Director to the appellants concerning the initial application and the internal review never mention that the appellants' alcoholism was being ignored as a potential basis for disability. The appellants were simply told that they were not found to be persons with a disability. The adjudication summaries of the cases raise the issue of alcoholism, but there is no evidence that these documents were appended to the Director's letters; it would seem they were obtained by the appellants on discovery.

Je dois souligner ici qu'il est difficile pour le demandeur dont la demande de soutien du revenu a encore été rejetée après la révision interne d'éviter le TAS. C'est le TAS que le législateur a investi du pouvoir de rendre, dans les appels en matière de soutien du revenu, des décisions auxquelles le directeur doit donner suite : par. 26(3). Compte tenu de l'existence du droit d'interjeter appel devant le TAS, il n'est pas du tout certain que le demandeur pourrait demander le contrôle judiciaire de la décision du directeur sans avoir d'abord fait valoir ses arguments devant le TAS : voir *Canadien Pacifique Ltée c. Bande indienne de Matsqui*, [1995] 1 R.C.S. 3, par. 32-38, 112 et 140-153. Et même si le demandeur qui s'est vu refuser des prestations pour des motifs discriminatoires peut effectivement tenter d'obtenir réparation par l'intermédiaire de la CODP, les demandeurs ne savent pas toujours qu'ils sont victimes de discrimination. Par exemple, dans le présent pourvoi, les lettres du directeur aux appelants concernant tant la demande initiale que la révision interne ne mentionnent nullement qu'on n'a pas tenu compte du fait que le handicap des appelants pouvait être attribuable à leur alcoolisme. On leur a dit simplement qu'ils n'étaient pas considérés comme des personnes handicapées. Les résumés de décisions font état de la question de l'alcoolisme, mais rien n'indique que ces documents ont été annexés aux lettres du directeur; il semble que les appelants les ont obtenus lors de la communication préalable.

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The ODSPA also provides for an appeal, on questions of law, from the SBT to the Divisional Court: s. 31(1). Such questions of law can routinely arise during the course of the SBT's normal operations: for example, it may need to determine the legal meaning of "substantial physical or mental impairment" under s. 4(1)(a), or even "chemically active substance" under s. 5(2)(a). There is little doubt, therefore, that the SBT is empowered to decide questions of law: see *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55, at para. 41. Important implications flow from this power.

La LPOSPH prévoit également la possibilité d'interjeter appel, sur des questions de droit, des décisions du TAS devant la Cour divisionnaire : par. 31(1). Ces questions de droit peuvent se poser régulièrement dans le cadre normal des activités du TAS : par exemple, il se peut que celui-ci ait à déterminer le sens juridique de « déficience physique ou mentale importante » à l'al. 4(1)a) ou même de « substance chimiquement active » à l'al. 5(2)a). Il fait donc peu de doute que le TAS est investi du pouvoir de trancher des questions de droit : voir *Paul c. Colombie-Britannique (Forest Appeals Commission)*, [2003] 2 R.C.S. 585, 2003 CSC 55, par. 41. Ce pouvoir comporte des implications importantes.

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24 In *Martin*, this Court repeated the principle that administrative bodies empowered to decide questions of law "may presumptively go beyond the bounds of their enabling statute and decide issues of common law or statutory interpretation that arise in the course of a case properly before them, subject to judicial review on the appropriate standard": see para. 45. I must emphasize that the presumptive power to look beyond a tribunal's enabling statute is triggered simply where a tribunal (with the authority to decide questions of law) is confronted with "issues . . . that arise in the course of a case properly before" it. This can be contrasted with the power to subject a statutory provision to *Charter* scrutiny, which will only be found where the tribunal has jurisdiction to decide questions of law *relating to that specific provision*: see *Martin*, at para. 3.

Dans *Martin*, la Cour a rappelé le principe qu'« on présume que l'organisme administratif [habilité à trancher des questions de droit] peut déborder le cadre de sa loi habilitante et, sous réserve d'un contrôle judiciaire selon la norme applicable, trancher les questions de droit commun ou d'interprétation législative soulevées dans une instance dont il est dûment saisi » : voir par. 45. Je dois souligner que le pouvoir présumé d'un tribunal administratif (investi du pouvoir de trancher des questions de droit) de déborder le cadre de sa loi habilitante entre en jeu simplement lorsque celui-ci est saisi des « questions [. . .] soulevées dans une instance dont il est dûment saisi ». On peut mettre ce pouvoir en contraste avec celui de soumettre une disposition législative à un examen fondé sur la *Charte canadienne des droits et libertés*, qui n'existe que si le tribunal administratif a compétence pour décider des questions de droit *se rapportant à cette disposition précise* : voir *Martin*, par. 3.

25 I must conclude that the contrast in the wording of *Martin* is deliberate. Where a specific provision is being declared invalid, it is necessary to ensure that the tribunal is empowered to scrutinize it. Power to scrutinize other provisions is not sufficient, because the constitutional analysis is targeting one specific provision. But the same does not hold true when a tribunal is merely being asked to consider external sources of law. In such a situation, a specific statutory provision is not necessarily placed at the heart of the analysis; for instance, the tribunal may be asked to look beyond its enabling statute because its enabling statute is silent on an issue. Although consideration of the external source in the present appeal might lead to the inapplicability of a specific provision, this does not imply that the process is analogous to that of constitutional invalidation. When a tribunal is simply asked to apply an external statute, this Court has always focused the analysis on the tribunal's jurisdiction to consider the whole issue before it:

Je dois conclure que le contraste dans le libellé de *Martin* est délibéré. Lorsqu'une disposition précise est déclarée invalide, il faut s'assurer que le tribunal administratif est habilité à l'examiner en détail. Le pouvoir d'examiner en détail d'autres dispositions ne suffit pas, car l'analyse constitutionnelle vise une disposition précise. Toutefois, il en va autrement lorsqu'on demande simplement au tribunal administratif d'examiner des sources juridiques externes. Dans ce cas, l'analyse n'est pas nécessairement centrée sur une disposition législative précise; par exemple, il se peut que le tribunal administratif soit appelé à déborder le cadre de sa loi habilitante parce qu'elle ne prévoit rien sur la question. Même si, en l'espèce, l'examen de la source juridique externe peut aboutir à l'inapplicabilité d'une disposition précise, cela ne signifie pas que le processus soit analogue à celui de l'invalidation constitutionnelle. Lorsqu'un tribunal administratif est simplement invité à appliquer une loi qui n'est pas sa loi habilitante, la Cour a toujours axé l'analyse sur la compétence du tribunal pour ce qui est d'examiner l'ensemble de la question dont il est saisi.

Although the issue before the arbitrator arose by virtue of a grievance under a collective agreement, it became

Bien que la question devant l'arbitre ait été soulevée de par un grief présenté en vertu d'une convention

necessary for him to go outside the collective agreement and to construe and apply a statute which was not a projection of the collective bargaining relations of the parties but a general public enactment of the superior provincial Legislature. [Emphasis added.]

(*McLeod v. Egan*, [1975] 1 S.C.R. 517, at pp. 518-19 (*per* Laskin C.J., concurring))

The presumption that a tribunal can go beyond its enabling statute — unlike the presumption that a tribunal can pronounce on constitutional validity — exists because it is undesirable for a tribunal to limit itself to some of the law while shutting its eyes to the rest of the law. The law is not so easily compartmentalized that all relevant sources on a given issue can be found in the provisions of a tribunal's enabling statute. Accordingly, to limit the tribunal's ability to consider the whole law is to increase the probability that a tribunal will come to a misinformed conclusion. In turn, misinformed conclusions lead to inefficient appeals or, more unfortunately, the denial of justice.

Yet the power to decide questions of law will not always imply the power to apply legal principles beyond the tribunal's enabling legislation. As noted above, statutory creatures are necessarily limited by the boundaries placed upon them by the legislature. Subject to its own constitutional constraints, a legislature may restrict the jurisdiction of its tribunals however it sees fit. The respondent points to two provisions in the ODSPA and OWA to argue that this is precisely what the legislature sought to do with respect to the SBT.

Section 29(3) of the ODSPA provides that the "Tribunal shall not make a decision in an appeal under this Act that the Director would not have authority to make". The respondent suggests that the Director, and the Director's delegates, cannot possibly have the power to use the Code to deny application of the ODSPA, and it therefore

collective, l'arbitre a dû porter son regard au-delà de la convention collective et interpréter et appliquer une loi qui n'était pas une projection des relations de négociation collective des parties mais un texte législatif général d'intérêt public émanant de la législature provinciale supérieure. [Je souligne.]

(*McLeod c. Egan*, [1975] 1 R.C.S. 517, p. 518-519 (motifs concordants du juge en chef Laskin))

26 La présomption qu'un tribunal administratif peut aller au-delà de sa loi habilitante — contrairement à celle qu'il peut se prononcer sur la constitutionnalité — découle du fait qu'il est peu souhaitable qu'un tribunal administratif se limite à l'examen d'une partie du droit et ferme les yeux sur le reste du droit. Le droit n'est pas compartimenté de manière à ce que l'on puisse facilement trouver toutes les sources pertinentes à l'égard d'une question donnée dans les dispositions de la loi habilitante d'un tribunal administratif. Par conséquent, restreindre la capacité d'un tel tribunal d'examiner l'ensemble du droit revient à accroître la probabilité qu'il tire une conclusion erronée. Les conclusions erronées entraînent à leur tour des appels inefficaces ou, pire encore, un déni de justice.

27 Cependant, le pouvoir de trancher des questions de droit ne comporte pas toujours le pouvoir d'appliquer des principes juridiques qui débordent le cadre de la loi habilitante du tribunal administratif. Comme nous l'avons vu, les pouvoirs des créatures de la loi sont forcément assujettis aux limites qui leur sont imposées par le législateur. Sous réserve de ses propres limites constitutionnelles, le législateur peut restreindre la compétence de ses tribunaux administratifs comme il l'entend. L'intimé s'appuie sur deux dispositions de la LPOSPH et de la LPOT pour affirmer que c'est précisément ce que le législateur cherchait à faire dans le cas du TAS.

28 Le paragraphe 29(3) de la LPOSPH prévoit que « [d]ans un appel interjeté en vertu de la présente loi, le Tribunal ne doit pas rendre de décision que le directeur ne serait pas habilité à prendre. » Selon l'intimé, le directeur et ses mandataires ne sauraient être investis du pouvoir de recourir au Code pour refuser d'appliquer la LPOSPH, et il s'ensuit

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follows that the SBT does not have this power either. I believe this argument can be dealt with easily.

29 Section 29(3) is not as extreme as the respondent suggests. The section merely states that the SBT cannot make a decision that the Director would not have the authority to make. Thus the SBT could not decide to award an applicant income support in an amount inconsistent with the regulations, because the Director does not have the authority to award income support in an amount inconsistent with the regulations: see s. 11. Yet allowing the Code to inform an eligibility determination can hardly be characterized as a "decision" itself; it is simply a power that the SBT may possess. And the ODSPA does not limit the SBT's *powers* to those possessed by the Director. In fact, the ODSPA itself contemplates powers that the SBT has and the Director does not. For instance, pursuant to s. 38(b), the Director must determine each applicant's eligibility for income support, but s. 28 obliges the SBT to refuse to hear frivolous or vexatious appeals. I conclude that s. 29(3) does not preclude the possibility of the SBT considering the Code.

30 The second provision to which the respondent points in suggesting that the SBT does not have the jurisdiction to consider the Code is s. 67(2) of the OWA. That section provides that the SBT cannot determine the constitutional validity of a provision or regulation and cannot determine the legislative authority for making a regulation. The respondent's argument is thus premised on the notion that scrutiny pursuant to the Code is analogous to the kind of scrutiny explicitly prohibited by s. 67(2). Once again, I cannot agree.

31 The Code emanates from the Ontario legislature. As I will elaborate below, it is one thing to preclude a statutory tribunal from *invalidating* legislation enacted by the legislature that created it. It is completely different to preclude that body from *applying* legislation enacted by that legislature in order to resolve apparent conflicts between statutes. The former power — an act of defying legislative intent — is one that is clearly more offensive to the

donc que le TAS ne possède pas non plus ce pouvoir. Il est facile, selon moi, de mesurer la valeur de cet argument.

Le paragraphe 29(3) n'est pas aussi extrême que l'intimé le laisse entendre. La disposition prévoit simplement que le TAS ne doit pas rendre de décision que le directeur ne serait pas habilité à prendre. Ainsi, le TAS ne pourrait décider d'accorder à un demandeur un soutien du revenu dont le montant n'est pas conforme aux règlements, puisque le directeur n'a pas le pouvoir de le faire : voir art. 11. Toutefois, le fait de permettre que le Code guide la détermination de l'admissibilité ne saurait guère être qualifié de « décision » en soi; il s'agit simplement d'un pouvoir que le TAS peut posséder. La LPOSPH ne limite pas non plus les *pouvoirs* du TAS à ceux que possède le directeur. En fait, la LPOSPH elle-même confère au TAS des pouvoirs que le directeur ne possède pas. Par exemple, selon l'al. 38b), le directeur doit déterminer l'admissibilité de chaque demandeur au soutien du revenu, mais selon l'art. 28, le TAS doit refuser d'entendre les appels qu'il juge frivoles ou vexatoires. J'en conclus que le par. 29(3) n'écarte pas la possibilité pour le TAS d'examiner le Code.

La deuxième disposition sur laquelle l'intimé s'appuie pour affirmer que le TAS n'a pas compétence pour examiner le Code est le par. 67(2) de la LPOT. Cette disposition prévoit que le TAS ne peut se prononcer ni sur la constitutionnalité d'une disposition d'une loi ou d'un règlement, ni sur la compétence législative nécessaire pour prendre un règlement. L'argument de l'intimé repose donc sur l'idée qu'un examen fondé sur le Code ressemble au type d'examen que le par. 67(2) interdit expressément. Encore une fois, je ne suis pas de cet avis.

Le Code émane du législateur ontarien. Comme je l'exposerai dans le détail ci-dessous, c'est une chose d'empêcher un tribunal administratif créé par une loi d'*invalider* une disposition législative adoptée par le législateur qui l'a créé, c'en est une autre de l'empêcher d'*appliquer* une loi que celui-ci a adoptée pour résoudre des conflits apparents entre des lois. Le premier pouvoir — qui passe outre à l'intention du législateur — est manifestement plus

legislature; it should not be surprising, therefore, when the legislature eliminates it. Yet the latter power represents nothing more than an instantiation of legislative intent — a legislative intent, I should note, that includes the primacy of the Code and the concurrent jurisdiction of administrative bodies to apply it.

offensant pour celui-ci; il ne faut donc pas s'étonner qu'il l'écarte. Le deuxième pouvoir, quant à lui, n'est rien de plus qu'une instanciation de l'intention du législateur — intention qui, je le rappelle, comporte la primauté du Code et la compétence concurrente d'organismes administratifs pour l'appliquer.

Thus the argument based on s. 67(2) is defeated because the legislature could not possibly have intended that the Code be denied application by analogy to the Constitution. While it clearly prohibited the SBT from considering the constitutional validity of laws and regulations, it equally clearly chose not to invoke the same prohibition with respect to the Code. In the context of this distinction, I must conclude that the legislature envisioned constitutional and Code issues as being in different "categor[ies] of questions of law", to use the language of *Martin*, at para. 42. Consistent with the human rights regime it crafted, the legislature has afforded the Code the possibility of broad application even while denying the SBT the authority to determine constitutional issues.

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L'argument fondé sur le par. 67(2) est donc rejeté parce que le législateur n'a pas pu vouloir que le Code soit privé de son application par analogie avec la Constitution. S'il est vrai que le législateur a clairement interdit au TAS d'examiner la constitutionnalité des lois et règlements, il a aussi clairement choisi de ne pas faire appel à la même interdiction en ce qui concerne le Code. Vu cette distinction, je dois conclure que le législateur a prévu que les questions constitutionnelles et les questions relatives au Code relèvent de « catégorie[s] de questions de droit » différentes, pour reprendre le terme utilisé dans *Martin*, par. 42. Respectant le régime législatif qu'il a établi en matière des droits de la personne, le législateur a permis une application large du Code, même s'il n'accorde pas au TAS le pouvoir de se prononcer sur les questions constitutionnelles.

3.1.2 The Code

The most important characteristic of the Code for the purposes of this appeal is that it is fundamental, quasi-constitutional law: see *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 S.C.R. 566, at para. 18; *Insurance Corp. of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145, at p. 158. Accordingly, it is to be interpreted in a liberal and purposive manner, with a view towards broadly protecting the human rights of those to whom it applies: see *B v. Ontario (Human Rights Commission)*, [2002] 3 S.C.R. 403, 2002 SCC 66, at para. 44. And not only must the content of the Code be understood in the context of its purpose, but like the *Canadian Charter of Rights and Freedoms*, it must be recognized as being the law of the people: see *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, at para. 70, aff'd in *Martin*, at para. 29, and *Quebec (Attorney General) v. Quebec (Human Rights Tribunal)*,

3.1.2 Le Code

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La caractéristique la plus importante du Code pour les besoins du présent pourvoi est qu'il s'agit d'une loi fondamentale, quasi constitutionnelle : voir *Battlefords and District Co-operative Ltd. c. Gibbs*, [1996] 3 R.C.S. 566, par. 18; *Insurance Corp. of British Columbia c. Heerspink*, [1982] 2 R.C.S. 145, p. 158. Il faut donc lui donner une interprétation libérale et téléologique, dans le but de protéger largement les droits des personnes visées : voir *B c. Ontario (Commission des droits de la personne)*, [2002] 3 R.C.S. 403, 2002 CSC 66, par. 44. Et non seulement le Code doit s'entendre dans le contexte de son objet, mais il doit aussi, comme la *Charte*, être reconnu comme une loi pour le peuple : voir *Cooper c. Canada (Commission des droits de la personne)*, [1996] 3 R.C.S. 854, par. 70, conf. par *Martin*, par. 29, et *Québec (Procureur général) c. Québec (Tribunal des droits de la personne)*, [2004] 2 R.C.S. 223, 2004 CSC 40 (« *Charette* »),

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[2004] 2 S.C.R. 223, 2004 SCC 40 ("*Charette*"), at para. 28. Accordingly, it must not only be given expansive meaning, but also offered accessible application.

par. 28. Par conséquent, il faut non seulement lui attribuer un sens étendu, mais aussi lui assurer une application accessible.

34 The importance of the Code is not merely an assertion of this Court. The Ontario legislature has seen fit to bind itself and all its agents through the Code: s. 47(1). Further, it has given the Code primacy over all other legislative enactments: s. 47(2). As a result of this primacy clause, where provisions of the Code conflict with provisions in another provincial law, it is the provisions of the Code that are to apply.

L'importance du Code n'est pas affirmée que par la Cour. Le législateur ontarien a jugé bon de prévoir que lui et ses mandataires sont liés par le Code : par. 47(1). En outre, il a accordé au Code la primauté sur tous les autres textes législatifs : par. 47(2). Par suite de cette clause de primauté, les dispositions du Code l'emportent sur les dispositions incompatibles d'une autre loi provinciale.

35 This primacy provision has both similarities and differences with s. 52 of the *Constitution Act, 1982*, which announces the supremacy of the Constitution. In terms of similarities, both provisions function to eliminate the effects of inconsistent legislation. At the end of the day, whether there is a conflict with the Code or the Constitution, the ultimate effect is that the other provision is not followed and, for the purposes of that particular application, it is as if the legislation was never enacted. But in my view, the differences between the two provisions are far more important. A provision declared invalid pursuant to s. 52 of the *Constitution Act, 1982* was never validly enacted to begin with. It never existed as valid law because the legislature enacting it never had the authority to pass it. But when a provision is inapplicable pursuant to s. 47 of the Code, there is no statement being made as to its validity. The legislature had the power to enact the conflicting provision; it just so happens that the legislature also enacted another law that takes precedence.

Cette clause de primauté présente des ressemblances et des différences avec l'art. 52 de la *Loi constitutionnelle de 1982*, qui proclame la suprématie de la Constitution. Au chapitre des ressemblances, les deux dispositions visent à rendre inopérantes les dispositions législatives incompatibles. Au bout du compte, s'il y a conflit avec le Code ou la Constitution, l'autre disposition n'est pas appliquée et, dans ce cas en particulier, c'est comme si la loi n'avait jamais été édictée. Mais à mon avis, les différences entre les deux dispositions sont beaucoup plus importantes. Tout d'abord, une disposition déclarée invalide sous le régime de l'art. 52 de la *Loi constitutionnelle de 1982* n'a jamais été validement adoptée. Elle n'a jamais existé en tant que disposition valide parce que le législateur qui l'a adoptée n'a jamais eu le pouvoir de le faire. Mais lorsqu'une disposition est déclarée inapplicable en vertu du par. 47 du Code, il n'est pas question de sa validité. Le législateur avait le pouvoir d'adopter la disposition incompatible; il se trouve seulement qu'il a également édicté une autre règle de droit qui prévaut.

36 Thus whether a provision is constitutionally permissible, and whether it is consistent with the Code, are two separate questions involving two different kinds of scrutiny. When a tribunal or court applies s. 47 of the Code to render another law inapplicable, it is not "going behind" that law to consider its validity, as it would be if it engaged in the two activities denied the SBT by s. 67(2) of the OWA. It is not declaring that the legislature was wrong

Ainsi, la question de savoir si une disposition est constitutionnelle et celle de savoir si elle est compatible avec le Code sont deux choses différentes mettant en jeu deux sortes d'analyse. Lorsqu'un tribunal administratif ou judiciaire se fonde sur l'art. 47 du Code pour déclarer une autre règle de droit inapplicable, il ne déborde pas le cadre de cette loi pour en examiner la validité, comme ce serait le cas s'il accomplissait les deux activités auxquelles

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to enact it in the first place. Rather, it is simply applying the tie-breaker supplied by, and amended according to the desires of, the legislature itself. The difference between s. 47 of the Code and s. 52 of the *Constitution Act, 1982* is therefore the difference between following legislative intent and overturning legislative intent.

le TAS ne peut se livrer selon le par. 67(2) de la LPOT. Il ne déclare pas que de toute façon le législateur a eu tort de l'édicter. Au contraire, il applique tout simplement la clause de primauté prévue par le législateur lui-même et modifiée à son gré. La différence entre l'art. 47 du Code et l'art. 52 de la *Loi constitutionnelle de 1982* est donc la différence entre le fait de respecter l'intention du législateur et celui d'y passer outre.

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In addition to the formal analogy between s. 47 of the Code and s. 52 of the *Constitution Act, 1982*, the respondent purports to invoke a substantive similarity between s. 1 of the Code and s. 15 of the *Charter*. Based on this second comparison, the respondent infers that an issue sufficiently complex to be carved out of the SBT's jurisdiction *qua Charter* issue should also be carved out of the SBT's jurisdiction *qua* Code issue. In my view, this argument is also flawed. Under the respondent's argument, in order for the SBT to determine whether it has jurisdiction over an issue, it must first decide whether that issue could be framed constitutionally. But one cannot deduce a legislative intention to preclude the SBT from dealing with *Charter* issues because of their complexity, yet also conclude that the SBT has been given the responsibility of determining its own jurisdiction on the basis of whether a claim could potentially be argued under the *Charter*. This "is it really a *Charter* question?" analysis would often be as complex as the substantive issue itself; it would demand that the SBT inquire first into the applicability of the *Charter*, and then inquire into the relative advantages and disadvantages of the Code versus the *Charter* in order to ensure it was not disadvantaging an applicant by compelling the applicant to make a constitutional argument. If the legislature feels the first sort of analysis is too complex for the SBT to engage in, I hardly see why it should be inferred that the legislature is inviting the SBT to engage in the second.

En plus d'établir une analogie de forme entre l'art. 47 du Code et l'art. 52 de la *Loi constitutionnelle de 1982*, l'intimé cherche à s'appuyer sur une similarité de fond entre l'art. 1 du Code et l'art. 15 de la *Charte*. En se fondant sur cette seconde comparaison, il soutient qu'une question suffisamment complexe pour être exclue de la compétence du TAS du fait qu'elle porte sur la *Charte* devrait l'être aussi du fait qu'elle est reliée au Code. À mon avis, cet argument comporte également des lacunes. Selon l'intimé, pour que le TAS puisse déterminer s'il a compétence à l'égard d'une question, il doit d'abord décider si cette question pouvait être formulée sur le plan constitutionnel. Mais on ne peut déduire une intention législative d'empêcher le TAS d'examiner des questions relatives à la *Charte* en raison de leur complexité et conclure en même temps qu'il lui incombe de déterminer sa propre compétence en se demandant si une revendication pouvait faire l'objet d'un débat fondé sur la *Charte*. L'analyse qui consiste à se demander « s'il s'agit vraiment d'une question relative à la *Charte* » se révélerait souvent aussi complexe que la question de fond elle-même; elle nécessiterait que le TAS se penche d'abord sur la question de l'applicabilité de la *Charte*, pour ensuite examiner les avantages et les désavantages relatifs du Code par rapport à la *Charte* afin de s'assurer de ne pas désavantager le demandeur en l'obligeant à présenter un argument constitutionnel. Si le législateur estime que le premier type d'analyse est trop complexe pour le TAS, je vois difficilement comment on pourrait conclure qu'il invite le TAS à se livrer au deuxième type d'analyse.

38

Rather, it is most consistent with the legislative scheme surrounding the Code to differentiate the Code from the Constitution and allow the SBT

Il est, au contraire, tout à fait compatible avec le régime législatif dans lequel s'inscrit le Code de le différencier de la Constitution et de permettre au

TAB 21

1999 CanLII 699 (SCC)

Mavis Baker *Appellant*

v.

Minister of Citizenship and Immigration *Respondent*

and

The Canadian Council of Churches, the Canadian Foundation for Children, Youth and the Law, the Defence for Children International-Canada, the Canadian Council for Refugees, and the Charter Committee on Poverty Issues *Interveners*

INDEXED AS: BAKER *v.* CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION)

File No.: 25823.

1998: November 4; 1999: July 9.

Present: L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Bastarache and Binnie JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Immigration — Humanitarian and compassionate considerations — Children's interests — Woman with Canadian-born dependent children ordered deported — Written application made on humanitarian and compassionate grounds for exemption to requirement that application for immigration be made abroad — Application denied without hearing or formal reasons — Whether procedural fairness violated — Immigration Act, R.S.C., 1985, c. I-2, ss. 82.1(1), 114(2) — Immigration Regulations, 1978, SOR/93-44, s. 2.1 — Convention on the Rights of the Child, Can. T.S. 1992 No. 3, Arts. 3, 9, 12.

Administrative law — Procedural fairness — Woman with Canadian-born dependent children ordered deported — Written application made on humanitarian and compassionate grounds for exemption to requirement that application for immigration be made abroad — Whether participatory rights accorded consistent with duty of procedural fairness — Whether failure to provide reasons violated principles of procedural fairness — Whether reasonable apprehension of bias.

Mavis Baker *Appelante*

c.

Le ministre de la Citoyenneté et de l'Immigration *Intimé*

et

Le Conseil canadien des églises, la Canadian Foundation for Children, Youth and the Law, la Défense des enfants-International-Canada, le Conseil canadien pour les réfugiés et le Comité de la Charte et des questions de pauvreté *Intervenants*

RÉPERTORIÉ: BAKER *c.* CANADA (MINISTRE DE LA CITOYENNETÉ ET DE L'IMMIGRATION)

N[o] du greffe: 25823.

1998: 4 novembre; 1999: 9 juillet.

Présents: Les juges L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Bastarache et Binnie.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Immigration — Raisons d'ordre humanitaire — Intérêts des enfants — Mesure d'expulsion contre une mère d'enfants nés au Canada — Demande écrite fondée sur des raisons d'ordre humanitaire sollicitant une dispense de l'exigence de présenter à l'extérieur du Canada une demande d'immigration — Demande rejetée sans audience ni motifs écrits — Y a-t-il eu violation de l'équité procédurale? — Loi sur l'immigration, L.R.C. (1985), ch. I-2, art. 82.1(1), 114(2) — Règlement sur l'immigration de 1978, DORS/93-44, art. 2.1 — Convention relative aux droits de l'enfant, R.T. Can. 1992 n° 3, art. 3, 9, 12.

Droit administratif – Équité procédurale — Mesure d'expulsion contre une mère d'enfants nés au Canada — Demande écrite fondée sur des raisons d'ordre humanitaire sollicitant une dispense de l'exigence de présenter à l'extérieur du Canada une demande d'immigration — Les droits de participation accordés étaient-ils compatibles avec l'obligation d'équité procédurale? — Le défaut d'exposer les motifs de décision a-t-il enfreint les principes d'équité procédurale? — Y a-t-il une crainte raisonnable de partialité?

Courts — Appellate review — Judge on judicial review certifying question for consideration of Court of Appeal — Legal effect of certified question — Immigration Act, R.S.C., 1985, c. I-2, s. 83(1).

Immigration — Humanitarian and compassionate considerations — Standard of review of humanitarian and compassionate decision — Best interests of claimant's children — Approach to be taken in reviewing humanitarian and compassionate decision where children affected.

Administrative law — Review of discretion — Approach to review of discretionary decision making.

The appellant, a woman with Canadian-born dependent children, was ordered deported. She then applied for an exemption, based on humanitarian and compassionate considerations under s. 114(2) of the *Immigration Act*, from the requirement that an application for permanent residence be made from outside Canada. This application was supported by letters indicating concern about the availability of medical treatment in her country of origin and the effect of her possible departure on her Canadian-born children. A senior immigration officer replied by letter stating that there were insufficient humanitarian and compassionate reasons to warrant processing the application in Canada. This letter contained no reasons for the decision. Counsel for the appellant, however, requested and was provided with the notes made by the investigating immigration officer and used by the senior officer in making his decision. The Federal Court — Trial Division, dismissed an application for judicial review but certified the following question pursuant to s. 83(1) of the Act: "Given that the Immigration Act does not expressly incorporate the language of Canada's international obligations with respect to the International Convention on the Rights of the Child, must federal immigration authorities treat the best interests of the Canadian child as a primary consideration in assessing an applicant under s. 114(2) of the *Immigration Act*?" The Court of Appeal limited its consideration to the question and found that the best interests of the children did not need to be given primacy in assessing such an application. The order that the appellant be removed from Canada, which was made after the immigration officer's decision, was stayed pending the result of this appeal.

Tribunaux — Contrôle en appel — Certification, par le juge siégeant en contrôle judiciaire, d'une question à soumettre à la Cour d'appel — Effet juridique d'une question certifiée — Loi sur l'immigration, L.R.C. (1985), ch. I-2, art. 83(1).

Immigration — Raisons d'ordre humanitaire — Norme de contrôle d'une décision fondée sur des raisons d'ordre humanitaire — Intérêt supérieur des enfants de la demanderesse — Approche du contrôle d'une décision fondée sur des raisons d'ordre humanitaire touchant des enfants.

Droit administratif — Contrôle du pouvoir discrétionnaire — Approche du contrôle de décisions discrétionnaires.

Une mesure d'expulsion a été prise contre l'appelante, mère d'enfants à charge nés au Canada. Elle a alors demandé d'être dispensée de faire sa demande de résidence permanente de l'extérieur du Canada, pour des raisons d'ordre humanitaire, conformément au par. 114(2) de la *Loi sur l'immigration*. Sa demande était appuyée de lettres exprimant des inquiétudes quant à la possibilité d'obtenir un traitement médical dans son pays d'origine et quant à l'effet de son départ éventuel sur ses enfants nés au Canada. Un agent d'immigration supérieur a répondu par lettre qu'il n'y avait pas suffisamment de raisons humanitaires pour justifier de traiter sa demande au Canada. Cette lettre ne donnait pas les motifs de la décision. L'avocat de l'appelante a cependant demandé et reçu les notes de l'agent investigateur, que l'agent supérieur d'immigration avait utilisées pour rendre sa décision. La Section de première instance de la Cour fédérale a rejeté une demande de contrôle judiciaire mais a certifié la question suivante en application du par. 83(1) de la Loi: «Vu que la Loi sur l'immigration n'incorpore pas expressément le langage des obligations internationales du Canada en ce qui concerne la Convention internationale relative aux droits de l'enfant, les autorités d'immigration fédérales doivent-elles considérer l'intérêt supérieur de l'enfant né au Canada comme une considération primordiale dans l'examen du cas d'un requérant sous le régime du par. 114(2) de la *Loi sur l'immigration*?» La Cour d'appel a limité son examen à cette question et a conclu qu'il n'était pas nécessaire d'accorder la primauté à l'intérêt supérieur des enfants dans l'appréciation d'une telle demande. Un sursis à la mesure d'expulsion de l'appelante prononcée après la décision de l'agent d'immigration, a été ordonné jusqu'à l'issue du présent pourvoi.

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Held: The appeal should be allowed.

Per L'Heureux-Dubé, Gonthier, McLachlin, Bastarache and Binnie JJ.: Section 83(1) of the *Immigration Act* does not require the Court of Appeal to address only the certified question. Once a question has been certified, the Court of Appeal may consider all aspects of the appeal lying within its jurisdiction.

The duty of procedural fairness is flexible and variable and depends on an appreciation of the context of the particular statute and the rights affected. The purpose of the participatory rights contained within it is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected to put forward their views and evidence fully and have them considered by the decision-maker. Several factors are relevant to determining the content of the duty of fairness: (1) the nature of the decision being made and process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; (5) the choices of procedure made by the agency itself. This list is not exhaustive.

A duty of procedural fairness applies to humanitarian and compassionate decisions. In this case, there was no legitimate expectation affecting the content of the duty of procedural fairness. Taking into account the other factors, although some suggest stricter requirements under the duty of fairness, others suggest more relaxed requirements further from the judicial model. The duty of fairness owed in these circumstances is more than minimal, and the claimant and others whose important interests are affected by the decision in a fundamental way must have a meaningful opportunity to present the various types of evidence relevant to their case and have it fully and fairly considered. Nevertheless, taking all the factors into account, the lack of an oral hearing or notice of such a hearing did not constitute a violation of the requirement of procedural fairness. The opportunity to produce full and complete written documentation was sufficient.

It is now appropriate to recognize that, in certain circumstances, including when the decision has important significance for the individual, or when there is a statutory right of appeal, the duty of procedural fairness will require a written explanation for a decision. Reasons are

Arrêt: Le pourvoi est accueilli.

Les juges L'Heureux-Dubé, Gonthier, McLachlin, Bastarache et Binnie: Le paragraphe 83(1) de la *Loi sur l'immigration* n'exige pas que la Cour d'appel traite seulement la question certifiée. Lorsqu'une question a été certifiée, la Cour d'appel peut examiner tous les aspects de l'appel qui relèvent de sa compétence.

L'obligation d'équité procédurale est souple et variable et repose sur une appréciation du contexte de la loi et des droits visés. Les droits de participation qui en font partie visent à garantir que les décisions administratives sont prises au moyen d'une procédure équitable et ouverte, adaptée au type de décision et à son contexte légal, institutionnel et social, comprenant la possibilité donnée aux personnes visées de présenter leur point de vue et des éléments de preuve qui seront dûment pris en considération par le décideur. Plusieurs facteurs sont pertinents pour déterminer le contenu de l'obligation d'équité procédurale: (1) la nature de la décision recherchée et le processus suivi pour y parvenir; (2) la nature du régime législatif et les termes de la loi régissant l'organisme; (3) l'importance de la décision pour les personnes visées; (4) les attentes légitimes de la personne qui conteste la décision; (5) les choix de procédure que l'organisme fait lui-même. Cette liste de facteurs n'est pas exhaustive.

L'obligation d'équité procédurale s'applique aux décisions d'ordre humanitaire. En l'espèce, il n'y avait pas d'attente légitime ayant une incidence sur la nature de l'obligation d'équité procédurale. Compte tenu des autres facteurs, bien que certains indiquent des exigences plus strictes en vertu de l'obligation d'équité, d'autres indiquent des exigences moins strictes et plus éloignées du modèle judiciaire. L'obligation d'équité dans ces circonstances est plus que minimale, et le demandeur et les personnes dont les intérêts sont profondément touchés par la décision doivent avoir une possibilité valable de présenter les divers types de preuves qui se rapportent à leur affaire et de les voir évalués de façon complète et équitable. Néanmoins, compte tenu de tous ces facteurs, le fait qu'il n'y ait pas eu d'audience ni d'avis d'audience ne constituait pas un manquement à l'obligation d'équité procédurale. La possibilité de produire une documentation écrite complète était suffisante.

Il est maintenant approprié de reconnaître que, dans certaines circonstances, notamment lorsque la décision revêt une grande importance pour l'individu, ou lorsqu'il existe un droit d'appel prévu par la loi, l'obligation d'équité procédurale requerra une explication écrite de

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required here given the profound importance of this decision to those affected. This requirement was fulfilled by the provision of the junior immigration officer's notes, which are to be taken to be the reasons for decision. Accepting such documentation as sufficient reasons upholds the principle that individuals are entitled to fair procedures and open decision-making, but recognizes that, in the administrative context, this transparency may take place in various ways.

la décision. Des motifs écrits sont nécessaires en l'espèce, étant donné l'importance cruciale de la décision pour les personnes visées. Cette obligation a été remplie par la production des notes de l'agent subalterne, qui doivent être considérées comme les motifs de la décision. L'admission de ces documents comme motifs de la décision confirme le principe selon lequel les individus ont droit à une procédure équitable et à la transparence de la prise de décision, mais reconnaît aussi qu'en matière administrative, cette transparence peut être atteinte de différentes façons.

Procedural fairness also requires that decisions be made free from a reasonable apprehension of bias, by an impartial decision-maker. This duty applies to all immigration officers who play a role in the making of decisions. Because they necessarily relate to people of diverse backgrounds, from different cultures, races, and continents, immigration decisions demand sensitivity and understanding by those making them. They require a recognition of diversity, an understanding of others, and an openness to difference. Statements in the immigration officer's notes gave the impression that he may have been drawing conclusions based not on the evidence before him, but on the fact that the appellant was a single mother with several children and had been diagnosed with a psychiatric illness. Here, a reasonable and well-informed member of the community would conclude that the reviewing officer had not approached this case with the impartiality appropriate to a decision made by an immigration officer. The notes therefore give rise to a reasonable apprehension of bias.

L'équité procédurale exige également que les décisions soient rendues par un décideur impartial, sans crainte raisonnable de partialité. Cette obligation s'applique à tous les agents d'immigration qui jouent un rôle significatif dans la prise de décision. Parce qu'elles visent nécessairement des personnes de provenances diverses, issues de cultures, de races et de continents différents, les décisions en matière d'immigration exigent de ceux qui les rendent sensibilité et compréhension. Elles exigent la reconnaissance de la diversité, la compréhension des autres et l'ouverture d'esprit à la différence. Les déclarations contenues dans les notes de l'agent d'immigration donnent l'impression qu'il peut avoir tiré des conclusions en se fondant non pas sur la preuve dont il disposait, mais sur le fait que l'appelante était une mère célibataire ayant plusieurs enfants, et était atteinte de troubles psychiatriques. En l'espèce, un membre raisonnable et bien informé de la communauté conclurait que l'agent n'a pas traité cette affaire avec l'impartialité requise dans une décision rendue par un agent d'immigration. Les notes donnent donc lieu à une crainte raisonnable de partialité.

The concept of discretion refers to decisions where the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries. Administrative law has traditionally approached the review of decisions classified as discretionary separately from those seen as involving the interpretation of rules of law. Review of the substantive aspects of discretionary decisions is best approached within the pragmatic and functional framework defined by this Court's decisions, especially given the difficulty in making rigid classifications between discretionary and non-discretionary decisions. Though discretionary decisions will generally be given considerable respect, that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*.

La notion de pouvoir discrétionnaire s'applique dans les cas où le droit ne dicte pas une décision précise, ou quand le décideur se trouve devant un choix d'options à l'intérieur de limites imposées par la loi. Le droit administratif a traditionnellement abordé le contrôle judiciaire des décisions discrétionnaires séparément de décisions sur l'interprétation de règles de droit. Le contrôle des éléments de fond d'une décision discrétionnaire est mieux envisagé selon la démarche pragmatique et fonctionnelle définie par la jurisprudence de notre Cour, compte tenu particulièrement de la difficulté de faire des classifications rigides entre les décisions discrétionnaires et les décisions non discrétionnaires. Même si en général il sera accordé un grand respect aux décisions discrétionnaires, il faut que le pouvoir discrétionnaire soit exercé conformément aux limites imposées dans la loi, aux principes de la primauté du droit, aux principes du droit administratif, aux valeurs fondamentales de la société canadienne, et aux principes de la *Charte*.

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In applying the applicable factors to determining the standard of review, considerable deference should be accorded to immigration officers exercising the powers conferred by the legislation, given the fact-specific nature of the inquiry, its role within the statutory scheme as an exception, and the considerable discretion evidenced by the statutory language. Yet the absence of a privative clause, the explicit contemplation of judicial review by the Federal Court — Trial Division, and the individual rather than polycentric nature of the decision also suggest that the standard should not be as deferential as "patent unreasonableness". The appropriate standard of review is, therefore, reasonableness *simpliciter*.

Dans l'application des facteurs pertinents à la détermination de la norme de contrôle appropriée, on devrait faire preuve d'une retenue considérable envers les décisions d'agents d'immigration exerçant les pouvoirs conférés par la loi, compte tenu de la nature factuelle de l'analyse, de son rôle d'exception au sein du régime législatif et de la large discrétion accordée par le libellé de la loi. Toutefois, l'absence de clause privative, la possibilité expressément prévue d'un contrôle judiciaire par la Cour fédérale — Section de première instance, ainsi que la nature individuelle plutôt que polycentrique de la décision, tendent aussi à indiquer que la norme applicable ne devrait pas en être une d'aussi grande retenue que celle du caractère «manifestement déraisonnable». La norme de contrôle appropriée est celle de la décision raisonnable *simpliciter*.

The wording of the legislation shows Parliament's intention that the decision be made in a humanitarian and compassionate manner. A reasonable exercise of the power conferred by the section requires close attention to the interests and needs of children since children's rights, and attention to their interests, are central humanitarian and compassionate values in Canadian society. Indications of these values may be found in the purposes of the Act, in international instruments, and in the Minister's guidelines for making humanitarian and compassionate decisions. Because the reasons for this decision did not indicate that it was made in a manner which was alive, attentive, or sensitive to the interests of the appellant's children, and did not consider them as an important factor in making the decision, it was an unreasonable exercise of the power conferred by the legislation. In addition, the reasons for decision failed to give sufficient weight or consideration to the hardship that a return to the appellant's country of origin might cause her.

Le libellé de la législation révèle l'intention du Parlement de faire en sorte que la décision soit fondée sur des raisons d'ordre humanitaire. L'exercice raisonnable du pouvoir conféré par l'article exige que soit prêtée une attention minutieuse aux intérêts et aux besoins des enfants puisque les droits des enfants, et la considération de leurs intérêts, sont des valeurs humanitaires centrales dans la société canadienne. Une indication de ces valeurs se trouve dans les objectifs de la Loi, dans les instruments internationaux, et dans les lignes directrices régissant les décisions d'ordre humanitaire publiées par le ministre. Étant donné que les motifs de la décision n'indiquent pas qu'elle a été rendue d'une manière réceptive, attentive ou sensible à l'intérêt des enfants de l'appelante, ni que leur intérêt a été considéré comme un facteur décisionnel important, elle constituait un exercice déraisonnable du pouvoir conféré par la loi. En outre, les motifs de la décision n'accordent pas suffisamment d'importance ou de poids aux difficultés qu'un retour de l'appelante dans son pays d'origine pouvait lui susciter.

Per Cory and Iacobucci JJ.: The reasons and disposition of L'Heureux-Dubé J. were agreed with apart from the effect of international law on the exercise of ministerial discretion under s. 114(2) of the *Immigration Act*. The certified question must be answered in the negative. The principle that an international convention ratified by the executive is of no force or effect within the Canadian legal system until incorporated into domestic law does not survive intact the adoption of a principle of law which permits reference to an unincorporated convention during the process of statutory interpretation.

Les juges Cory et Iacobucci: Les motifs du juge L'Heureux-Dubé et le dispositif qu'elle propose sont acceptés sauf pour ce qui concerne la question de l'effet du droit international sur l'exercice du pouvoir discrétionnaire conféré au ministre par le par. 114(2) de la *Loi sur l'immigration*. La question certifiée devrait recevoir une réponse négative. Le principe qu'une convention internationale ratifiée par le pouvoir exécutif n'a aucun effet en droit canadien tant qu'elle n'est pas incorporée dans le droit interne ne peut pas survivre intact après l'adoption d'un principe de droit qui autorise le recours dans le processus d'interprétation des lois, aux dispositions d'une convention qui n'a pas été intégrée dans la législation.

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supra. The officer was completely dismissive of the interests of Ms. Baker's children. As I will outline in detail in the paragraphs that follow, I believe that the failure to give serious weight and consideration to the interests of the children constitutes an unreasonable exercise of the discretion conferred by the section, notwithstanding the important deference that should be given to the decision of the immigration officer. Professor Dyzenhaus has articulated the concept of "deference as respect" as follows:

> Deference as respect requires not submission but a respectful attention to the reasons offered or which could be offered in support of a decision. . . .

(D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286.)

The reasons of the immigration officer show that his decision was inconsistent with the values underlying the grant of discretion. They therefore cannot stand up to the somewhat probing examination required by the standard of reasonableness.

66

The wording of s. 114(2) and of Regulation 2.1 requires that a decision-maker exercise the power based upon "compassionate or humanitarian considerations" (emphasis added). These words and their meaning must be central in determining whether an individual H & C decision was a reasonable exercise of the power conferred by Parliament. The legislation and regulations direct the Minister to determine whether the person's admission should be facilitated owing to the existence of such considerations. They show Parliament's intention that those exercising the discretion conferred by the statute act in a humanitarian and compassionate manner. This Court has found that it is necessary for the Minister to consider an H & C request when an application is made: *Jiminez-Perez*, *supra*. Similarly, when considering it, the request must be evaluated in a manner that is respectful of humanitarian and compassionate considerations.

prêté aucune attention à l'intérêt des enfants de Mme Baker. Comme je le démontrerai avec plus de détails dans les paragraphes qui suivent, j'estime que le défaut d'accorder de l'importance et de la considération à l'intérêt des enfants constitue un exercice déraisonnable du pouvoir discrétionnaire conféré par l'article, même s'il faut exercer un degré élevé de retenue envers la décision de l'agent d'immigration. Le professeur Dyzenhaus énonce ainsi la notion de la [TRADUCTION] «retenue au sens de respect»:

> [TRADUCTION] La retenue au sens de respect ne demande pas la soumission, mais une attention respectueuse aux motifs donnés ou qui pourraient être donnés à l'appui d'une décision . . .

(D. Dyzenhaus, «The Politics of Deference: Judicial Review and Democracy», dans M. Taggart, dir., *The Province of Administrative Law* (1997), 279, à la p. 286.)

Les motifs de l'agent d'immigration démontrent que sa décision n'était pas compatible avec les valeurs sous-jacentes à l'octroi d'un pouvoir discrétionnaire. Ils ne peuvent donc pas résister à l'examen assez poussé qu'exige la norme du caractère raisonnable.

Le libellé du par. 114(2) et de l'art. 2.1 du règlement exige que le décideur exerce le pouvoir en se fondant sur «des raisons d'ordre humanitaire» (je souligne). Ces mots et leur sens doivent se situer au cœur de la réponse à la question de savoir si une décision d'ordre humanitaire particulière constituait un exercice raisonnable du pouvoir conféré par le Parlement. La loi et le règlement demandent au ministre de décider si l'admission d'une personne devrait être facilitée pour des raisons humanitaires. Ils démontrent que l'intention du Parlement est que ceux qui exercent le pouvoir discrétionnaire conféré par la loi agissent de façon humanitaire. Notre Cour a jugé que le ministre est tenu d'examiner les demandes d'ordre humanitaire qui sont présentées: *Jiminez-Perez*, précité. De même, quand il procède à cet examen, le ministre doit évaluer la demande d'une manière qui soit respectueuse des raisons d'ordre humanitaire.

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67 Determining whether the approach taken by the immigration officer was within the boundaries set out by the words of the statute and the values of administrative law requires a contextual approach, as is taken to statutory interpretation generally: see *R. v. Gladue*, [1999] 1 S.C.R. 688; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at paras. 20-23. In my opinion, a reasonable exercise of the power conferred by the section requires close attention to the interests and needs of children. Children's rights, and attention to their interests, are central humanitarian and compassionate values in Canadian society. Indications of children's interests as important considerations governing the manner in which H & C powers should be exercised may be found, for example, in the purposes of the Act, in international instruments, and in the guidelines for making H & C decisions published by the Minister herself.

Afin de décider si la démarche de l'agent d'immigration respectait les limites imposées par le libellé de la loi et les valeurs du droit administratif, une analyse contextuelle est requise comme l'exige en général l'interprétation des lois: voir *R. c. Gladue*, [1999] 1 R.C.S. 688; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, aux par. 20 à 23. À mon avis, l'exercice raisonnable du pouvoir conféré par l'article exige que soit prêtée une attention minutieuse aux intérêts et aux besoins des enfants. Les droits des enfants, et la considération de leurs intérêts, sont des valeurs d'ordre humanitaire centrales dans la société canadienne. Une indication que l'intérêt des enfants est une considération importante dans l'exercice des pouvoirs en matière humanitaire se trouve, par exemple, dans les objectifs de la Loi, dans les instruments internationaux, et dans les lignes directrices régissant les décisions d'ordre humanitaire publiées par le ministre lui-même.

(a) *The Objectives of the Act*

a) *Les objectifs de la Loi*

68 The objectives of the Act include, in s. 3(*c*):

Un des objectifs de la Loi est notamment, selon l'al. 3*c*):

> to facilitate the reunion in Canada of Canadian citizens and permanent residents with their close relatives from abroad;

> de faciliter la réunion au Canada des citoyens canadiens et résidents permanents avec leurs proches parents de l'étranger;

Although this provision speaks of Parliament's objective of reuniting citizens and permanent residents with their close relatives from abroad, it is consistent, in my opinion, with a large and liberal interpretation of the values underlying this legislation and its purposes to presume that Parliament also placed a high value on keeping citizens and permanent residents together with their close relatives who are already in Canada. The obligation to take seriously and place important weight on keeping children in contact with both parents, if possible, and maintaining connections between close family members is suggested by the objective articulated in s. 3(*c*).

Bien que cette disposition traite de l'objectif du Parlement de réunir des citoyens et des résidents permanents avec leurs proches parents de l'étranger, elle permet, à mon avis, en utilisant une interprétation large et libérale des valeurs sous-jacentes à cette loi et à son objet, de présumer que le Parlement estime important également de garder ensemble des citoyens et des résidents permanents avec leurs proches parents qui sont déjà au Canada. L'objectif à l'al. 3*c*) énonce l'obligation d'accorder une grande importance au maintien des enfants en contact avec leurs deux parents, si cela est possible, et au maintien du lien entre les membres d'une proche famille.

(b) *International Law*

b) *Le droit international*

69 Another indicator of the importance of considering the interests of children when making a compassionate and humanitarian decision is the ratifi-

Un autre indice de l'importance de tenir compte de l'intérêt des enfants dans une décision d'ordre humanitaire est la ratification par le Canada de la

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cation by Canada of the *Convention on the Rights of the Child*, and the recognition of the importance of children's rights and the best interests of children in other international instruments ratified by Canada. International treaties and conventions are not part of Canadian law unless they have been implemented by statute: *Francis v. The Queen*, [1956] S.C.R. 618, at p. 621; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141, at pp. 172-73. I agree with the respondent and the Court of Appeal that the Convention has not been implemented by Parliament. Its provisions therefore have no direct application within Canadian law.

Nevertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review. As stated in R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 330:

> [T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred. [Emphasis added.]

The important role of international human rights law as an aid in interpreting domestic law has also been emphasized in other common law countries: see, for example, *Tavita v. Minister of Immigration*, [1994] 2 N.Z.L.R. 257 (C.A.), at p. 266; *Vishaka v. Rajasthan*, [1997] 3 L.R.C. 361 (S.C. India), at p. 367. It is also a critical influence on the interpretation of the scope of the rights included in the *Charter*: *Slaight Communications*, *supra*; *R. v. Keegstra*, [1990] 3 S.C.R. 697.

The values and principles of the Convention recognize the importance of being attentive to the rights and best interests of children when decisions are made that relate to and affect their future. In addition, the preamble, recalling the *Universal Declaration of Human Rights*, recognizes that "childhood is entitled to special care and assis-

Convention relative aux droits de l'enfant, et la reconnaissance de l'importance des droits des enfants et de l'intérêt supérieur des enfants dans d'autres instruments internationaux ratifiés par le Canada. Les conventions et les traités internationaux ne font pas partie du droit canadien à moins d'être rendus applicables par la loi: *Francis c. The Queen*, [1956] R.C.S. 618, à la p. 621; *Capital Cities Communications Inc. c. Conseil de la Radio-Télévision canadienne*, [1978] 2 R.C.S. 141, aux pp. 172 et 173. Je suis d'accord avec l'intimé et la Cour d'appel que la Convention n'a pas été mise en vigueur par le Parlement. Ses dispositions n'ont donc aucune application directe au Canada.

70

Les valeurs exprimées dans le droit international des droits de la personne peuvent, toutefois, être prises en compte dans l'approche contextuelle de l'interprétation des lois et en matière de contrôle judiciaire. Comme le dit R. Sullivan, *Driedger on the Construction of Statutes* (3e éd. 1994), à la p. 330:

> [TRADUCTION] [L]a législature est présumée respecter les valeurs et les principes contenus dans le droit international, coutumier et conventionnel. Ces principes font partie du cadre juridique au sein duquel une loi est adoptée et interprétée. Par conséquent, dans la mesure du possible, il est préférable d'adopter des interprétations qui correspondent à ces valeurs et à ces principes. [Je souligne.]

D'autres pays de common law ont aussi mis en relief le rôle important du droit international des droits de la personne dans l'interprétation du droit interne: voir, par exemple, *Tavita c. Minister of Immigration*, [1994] 2 N.Z.L.R. 257 (C.A.), à la p. 266; *Vishaka c. Rajasthan*, [1997] 3 L.R.C. 361 (C.S. Inde), à la p. 367. Il a également une incidence cruciale sur l'interprétation de l'étendue des droits garantis par la *Charte*: *Slaight Communications*, précité; *R. c. Keegstra*, [1990] 3 R.C.S. 697.

71

Les valeurs et les principes de la Convention reconnaissent l'importance d'être attentif aux droits des enfants et à leur intérêt supérieur dans les décisions qui ont une incidence sur leur avenir. En outre, le préambule, rappelant la *Déclaration universelle des droits de l'homme*, reconnaît que «l'enfance a droit à une aide et à une assistance

tance". A similar emphasis on the importance of placing considerable value on the protection of children and their needs and interests is also contained in other international instruments. The United Nations *Declaration of the Rights of the Child* (1959), in its preamble, states that the child "needs special safeguards and care". The principles of the Convention and other international instruments place special importance on protections for children and childhood, and on particular consideration of their interests, needs, and rights. They help show the values that are central in determining whether this decision was a reasonable exercise of the H & C power.

spéciales». D'autres instruments internationaux mettent également l'accent sur la grande valeur à accorder à la protection des enfants, à leurs besoins et à leurs intérêts. La *Déclaration des droits de l'enfant* (1959) de l'Organisation des Nations Unies, dans son préambule, dit que l'enfant «a besoin d'une protection spéciale et de soins spéciaux». Les principes de la Convention et d'autres instruments internationaux accordent une importance spéciale à la protection des enfants et de l'enfance, et à l'attention particulière que méritent leurs intérêts, besoins et droits. Ils aident à démontrer les valeurs qui sont essentielles pour déterminer si la décision en l'espèce constituait un exercice raisonnable du pouvoir en matière humanitaire.

(c) *The Ministerial Guidelines*

c) *Les lignes directrices ministérielles*

72 Third, the guidelines issued by the Minister to immigration officers recognize and reflect the values and approach discussed above and articulated in the Convention. As described above, immigration officers are expected to make the decision that a reasonable person would make, with special consideration of humanitarian values such as keeping connections between family members and avoiding hardship by sending people to places where they no longer have connections. The guidelines show what the Minister considers a humanitarian and compassionate decision, and they are of great assistance to the Court in determining whether the reasons of Officer Lorenz are supportable. They emphasize that the decision-maker should be alert to possible humanitarian grounds, should consider the hardship that a negative decision would impose upon the claimant or close family members, and should consider as an important factor the connections between family members. The guidelines are a useful indicator of what constitutes a reasonable interpretation of the power conferred by the section, and the fact that this decision was contrary to their directives is of great help in assessing whether the decision was an unreasonable exercise of the H & C power.

Troisièmement, les directives données par le ministre aux agents d'immigration reconnaissent et révèlent les valeurs et la démarche qui sont décrites ci-dessus et qui sont énoncées dans la Convention. Comme il est dit plus haut, les agents d'immigration sont censés rendre la décision qu'une personne raisonnable rendrait, en portant une attention particulière à des considérations humanitaires comme maintenir des liens entre les membres d'une famille et éviter de renvoyer des gens à des endroits où ils n'ont plus d'attaches. Les directives révèlent ce que le ministre considère comme une décision d'ordre humanitaire, et elles sont très utiles à notre Cour pour décider si les motifs de l'agent Lorenz sont valables. Elles soulignent que le décideur devrait être conscient des considérations humanitaires possibles, devrait tenir compte des difficultés qu'une décision défavorable imposerait au demandeur ou aux membres de sa famille proche, et devrait considérer comme un facteur important les liens entre les membres d'une famille. Les directives sont une indication utile de ce qui constitue une interprétation raisonnable du pouvoir conféré par l'article, et le fait que cette décision était contraire aux directives est d'une grande utilité pour évaluer si la décision constituait un exercice déraisonnable du pouvoir en matière humanitaire.

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TAB 22

MANITOBA

THE MANITOBA HYDRO ACT

C.C.S.M. c. H190

LOI SUR L'HYDRO-MANITOBA

c. H190 de la *C.P.L.M.*

As of 2018-02-05, this is the most current version available. It is current for the period set out in the footer below.

Le texte figurant ci-dessous constitue la codification la plus récente en date du 2018-02-05. Son contenu était à jour pendant la période indiquée en bas de page.

LEGISLATIVE HISTORY

The Manitoba Hydro Act, C.C.S.M. c. H190

Enacted by	Proclamation status (for provisions in force by proclamation)
RSM 1987, c. H190	whole Act: in force on 1 Feb 1988 (Man. Gaz.: 6 Feb 1988)
Amended by	
RSM 1987 Corr.	
SM 1987-88, c. 55, s. 38 (RSM 1987 Supp., c. 13, s. 2)	
SM 1988-89, c. 23, s. 34	s. 34(1) to (3) and (10): in force on 1 Jul 1989 (Man. Gaz.: 17 Jun 1989) s. 34(4) to (9): in force on 17 Jan 1989 (Man. Gaz.: 28 Jan 1989)
SM 1989-90, c. 24, s. 85	
SM 1992, c. 8	
SM 1993, c. 29, s. 187	in force on 4 Oct 1996 (Man. Gaz.: 5 Oct 1996)
SM 1994, c. 3, s. 12	
SM 1996, c. 59, s. 98	
SM 1997, c. 55	
SM 2001, c. 3	
SM 2001, c. 23	in force on 1 Nov 2001 (Man. Gaz.: 8 Sep 2001)
SM 2001, c. 39, s. 31	in force on 1 May 2002 (Man. Gaz.: 18 May 2002)
SM 2002, c. 41	
SM 2002, c. 45, s. 9	in force on 26 Feb 2003 (Man. Gaz.: 15 Mar 2003)
SM 2004, c. 42, s. 104	
SM 2009, c. 17, Part 1	in force on 1 Apr 2012 (Man. Gaz.: 7 Apr 2012)
SM 2011, c. 35, s. 21	
SM 2012, c. 26, s. 15	
SM 2013, c. 39, Sch. A, s. 62	in force on 1 May 2014 (Man. Gaz.: 3 May 2014)
SM 2013, c. 54, s. 44	
SM 2015, c. 17, s. 110	not yet proclaimed
SM 2017, c. 18, s. 46	not yet proclaimed
SM 2017, c. 19, s. 32	

"works" includes all roads, railroads, plant, machinery, buildings, structures, erections, constructions, installations, materials, devices, fittings, apparatus, appliances, equipment, and other property for the development, generation, transmission, distribution, or supply of power. (« ouvrages »)

S.M. 1993, c. 29, s. 187; S.M. 1997, c. 55, s. 2; S.M. 2009, c. 17, s. 2.

« site de production » Y sont assimilés les biens-fonds, lacs, rivières, ruisseaux, cours d'eau, étendues d'eau, les licences ou les privilèges relatifs à l'eau, les réservoirs, les barrages, les vannes, les canaux, les biefs, les tunnels ou les aqueducs qui servent ou peuvent être utilisés directement ou indirectement à la mise en exploitation ou à la production d'énergie. ("power site")

L.M. 1993, c. 29, art. 187; L.M. 1997, c. 55, art. 2; L.M. 2009, c. 17, art. 2.

Purposes and objects of Act

2 The purposes and objects of this Act are to provide for the continuance of a supply of power adequate for the needs of the province, and to engage in and to promote economy and efficiency in the development, generation, transmission, distribution, supply and end-use of power and, in addition, are

(a) to provide and market products, services and expertise related to the development, generation, transmission, distribution, supply and end-use of power, within and outside the province; and

(b) to market and supply power to persons outside the province on terms and conditions acceptable to the board.

S.M. 1997, c. 55, s. 3.

Objets de la présente loi

2 La présente loi a pour objets d'assurer le maintien d'une réserve d'énergie permettant de répondre aux besoins de la province, et de développer l'exploitation, la production, le transport, la distribution, la fourniture et l'utilisation finale de l'énergie et de promouvoir l'économie et l'efficacité dans ces opérations; elle a également pour objets :

a) de fournir et de commercialiser des produits, des services et des compétences ayant trait à l'exploitation, à la production, au transport, à la distribution, à la fourniture et à l'utilisation finale de l'énergie, tant à l'intérieur qu'à l'extérieur de la province;

b) de commercialiser l'énergie et d'en fournir aux personnes de l'extérieur de la province à des conditions que juge acceptables le conseil.

L.M. 1997, c. 55, art. 3.

TAB 23

M A N I T O B A

THE PUBLIC UTILITIES BOARD ACT

C.C.S.M. c. P280

LOI SUR LA RÉGIE DES SERVICES PUBLICS

c. P280 de la *C.P.L.M.*

As of 2018-02-05, this is the most current version available. It is current for the period set out in the footer below.

Le texte figurant ci-dessous constitue la codification la plus récente en date du 2018-02-05. Son contenu était à jour pendant la période indiquée en bas de page.

LEGISLATIVE HISTORY

The Public Utilities Board Act, C.C.S.M. c. P280

Enacted by	**Proclamation status (for provisions in force by proclamation)**
RSM 1987, c. P280	whole Act: in force on 1 Feb 1988 (Man. Gaz.: 6 Feb 1988)
Amended by	
RSM 1987 Corr.	
SM 1987-88, c. 65	s. 31: not proclaimed, but repealed by SM 2000, c. 35, s. 18 s. 32: in force on 12 Aug 1987 (Man. Gaz.: 22 Aug 1987)
SM 1988-89, c. 11, s. 19	
SM 1988-89, c. 23, s. 38	in force on 17 Jan 1989 (Man. Gaz.: 28 Jan 1989)
SM 1989-90, c. 90, s. 36	
SM 1991-92, c. 6	
SM 1992, c. 58, s. 28	
SM 1993, c. 4, s. 235 (am. by SM 1995, c. 33, s. 17)	in force on 1 Jul 1994 (Man. Gaz.: 25 Jun 1994)
SM 1993, c. 32, s. 53	in force on 1 Jul 1994 (Man. Gaz.: 2 Jul 1994)
SM 1993, c. 48, s. 93	
SM 1996, c. 48, s. 9	
SM 1996, c. 58, s. 469	in force on 1 Jan 1997 (Man. Gaz.: 21 Dec 1996)
SM 1997, c. 8, Part 2	
SM 1997, c. 11	in force on 1 Sep 1997 (Man. Gaz.: 6 Sep 1997)
SM 1998, c. 9	
SM 2001, c. 39, s. 31	in force on 1 May 2002 (Man. Gaz.: 18 May 2002)
SM 2002, c. 39, s. 532	
SM 2002, c. 45, s. 10	
SM 2005, c. 27, s. 163	
SM 2005, c. 42, s. 33	
SM 2006, c. 34, s. 265	in force on 1 Jan 2007 (Man. Gaz.: 6 Jan 2007)
SM 2009, c. 17, Part 2	in force on 1 Apr 2012 (Man. Gaz.: 7 Apr 2012)
SM 2013, c. 39, Sch. A, s. 82	in force on 1 May 2014 (Man. Gaz.: 3 May 2014)
SM 2013, c. 54, s. 61	
SM 2017, c. 19, s. 36	

Deposit before certain inquiries made

57(2) The board may also require that, before beginning any investigation on the complaint of any person, the person complaining shall deposit with the board such sum as may be deemed necessary to make the investigation, and the deposit shall be returned in whole or in part to the person complaining if, upon investigation, the complaint is found justified or partly justified, or to be less costly to investigate than was deemed necessary when the deposit was made, as the case may be; otherwise the deposit is forfeited to the board.

Dépôt avant enquête

57(2) La Régie peut également exiger que l'auteur d'une plainte dépose auprès d'elle, pour les frais de l'enquête, la somme qu'elle estime nécessaire avant de commencer une enquête sur la plainte. Tout ou partie du dépôt est retourné au plaignant, si la plainte, après enquête, se trouve entièrement ou partiellement fondée ou si le coût de l'enquête se révèle moins onéreux qu'il n'avait été estimé au moment du dépôt. Dans les autres cas, le dépôt revient à la Régie.

Audit

57(3) The accounts of the board are subject to audit by the Auditor General, and all moneys to the credit of the board in the accounts shall be paid into the Consolidated Fund at the end of each fiscal year of the province or at such time or times as the Lieutenant Governor in Council may order.

S.M. 2001, c. 39, s. 31.

Vérification

57(3) Les comptes de la Régie sont soumis à la vérification du vérificateur général et toutes les sommes portées au crédit de la Régie sont versées au Trésor à la fin de chaque exercice de la province ou aux dates fixées par le lieutenant-gouverneur en conseil.

L.M. 2001, c. 39, art. 31.

APPEAL

APPEL

Grounds of appeal

58(1) An appeal lies from any final order or decision of the board to The Court of Appeal upon

(a) any question involving the jurisdiction of the board; or

(b) any point of law; or

(c) any facts expressly found by the board relating to a matter before the board.

Moyens d'appel

58(1) Les ordonnances ou les décisions définitives de la Régie sont susceptibles d'appel à la Cour d'appel, si elles portent sur :

a) une question relative à la compétence de la Régie;

b) une question de droit;

c) les faits que la Régie a expressément déclarés se rapporter à l'affaire dont elle était saisie.

Permission d'appeler

58(2) L'appel ne peut être interjeté que dans les cas suivants :

a) sur permission d'appeler accordée par un juge de la Cour d'appel;

(b) within one month after the making of the order or decision sought to be appealed from, or within such further time as the judge under special circumstances shall allow; and

(c) after notice to the other parties stating the grounds of appeal.

b) dans un délai d'un mois après qu'a été rendue l'ordonnance ou la décision qui sera frappée d'appel ou dans le délai plus long fixé par le juge dans des circonstances spéciales;

c) après avis aux autres parties, énonçant les moyens d'appel.

Setting down for hearing and notice
58(3) Upon the leave being obtained, the registrar of The Court of Appeal shall set the appeal down for hearing at the next sitting of the court; and the party appealing shall, within 10 days, give to the parties affected by the appeal or the solicitors, if any, by whom the parties were represented before the board, and to the secretary of the board, notice in writing that the case has been so set down.

Audience et avis
58(3) Une fois la permission d'appeler obtenue, le registraire de la Cour d'appel met l'appel au rôle pour audience à la session suivante du tribunal. Dans un délai de 10 jours, l'appelant doit donner un avis écrit de l'inscription au rôle aux parties visées par l'appel ou, le cas échéant, aux avocats qui les représentaient devant la Régie, de même qu'au secrétaire de la Régie.

Transmission of material to court
58(4) The secretary of the board, forthwith upon receipt of the notice, shall transmit to the registrar of The Court of Appeal all documents and material from the files of the office of the board that were before the board upon the making of the order or decision from which appeal is made and that have any bearing upon the question in the appeal.

Transmission des documents à la Cour d'appel
58(4) Sur réception de l'avis, le secrétaire de la Régie transmet au registraire de la Cour d'appel tous les documents et le matériel contenus dans les dossiers du bureau de la Régie dont celle-ci disposait lorsqu'elle a rendu l'ordonnance ou pris la décision frappée d'appel et qui se rapportent de quelque manière à la question soumise à l'appel.

Inferences by court
58(5) On the hearing of the appeal, the court may draw inferences that are not inconsistent with the facts expressly found by the board and that are necessary for determining the question, and shall certify its opinion to the board; and the board shall thereupon make an order in accordance with that opinion.

Inférences par le tribunal
58(5) Lors de l'audition de l'appel, la cour peut tirer toutes les inférences qui ne sont pas incompatibles avec les faits expressément relevés par la Régie et qui sont nécessaires pour trancher la question et doit transmettre son opinion certifiée à la Régie, qui doit alors rendre une ordonnance conforme à cette opinion.

Board to be heard
58(6) The board is entitled to be heard, by counsel or otherwise, upon the argument of any appeal.

Droit de la Régie d'être entendue
58(6) La Régie a le droit d'être entendue par procureur ou autrement lors de la plaidoirie sur un appel.

General powers
76 The board may

(a) investigate, upon its own initiative, upon a request of the minister or the Lieutenant Governor in Council, or upon complaint in writing, any matter concerning any public utility;

(b) appraise and value the property of any public utility wherever in the judgment of the board it is necessary so to do, for the purpose of carrying out any provision of this Act, and in making the valuation, may have access to and use any books, documents, or records in the possession of any department of the executive government of the province or of any board, commission, or association that reports to the government or of any municipality in the province;

(c) require every owner of a public utility to file with it complete schedules of every classification employed and of every individual or joint rate, toll, fare, or charge made, charged, or enacted by it for any product supplied or service rendered within the province as specified in the requirement.

Orders as to utilities
77 The board may, by order in writing after notice to, and hearing of, the parties interested,

(a) fix just and reasonable individual rates, joint rates, tolls, charges, or schedules thereof, as well as commutation, mileage, and other special rates that shall be imposed, observed, and followed thereafter, by any owner of a public utility wherever the board determines that any existing individual rate, joint rate, roll, charge or schedule thereof or commutation, mileage, or other special rate is unjust, unreasonable, insufficient, or unjustly discriminatory or preferential;

(b) fix just and reasonable standards, classifications, regulations, practices, measurements, or service to be furnished, imposed, observed, and followed thereafter by any such owner;

(c) direct any railway, street railway, or traction company, to establish and maintain at any junction or point of connection or intersection with any other line of the road, or with any line of any other

Pouvoirs généraux
76 La Régie peut :

a) faire enquête sur toute affaire concernant un service public, de sa propre initiative, à la demande du ministre ou du lieutenant-gouverneur en conseil, ou à la suite d'une plainte écrite;

b) faire expertiser et évaluer les biens de tout service public lorsqu'à son avis, il est nécessaire de le faire pour l'application d'une disposition de la présente loi et, à cette fin, consulter et utiliser les livres, documents ou registres en possession des ministères du gouvernement de la province, d'une Régie, d'une commission ou d'une association qui fait rapport au gouvernement, ou d'une municipalité dans la province;

c) exiger du propriétaire d'un service public qu'il dépose ses barèmes détaillés de toutes les classifications utilisées et de tous les taux individuels ou conjoints, tarifs, prix de billets ou charges, demandés, imposés ou adoptés pour tout produit fourni ou service rendu dans la province, de la façon spécifiée dans l'exigence.

Ordonnances concernant les services publics
77 La Régie peut, par ordonnance écrite et après avis aux parties intéressées et audition de celles-ci :

a) fixer des tarifs individuels ou conjoints, des taux, des charges justes et raisonnables ou leurs barèmes, ainsi que des tarifs d'abonnement, des tarifs kilométriques et d'autres tarifs spéciaux qui seront imposés, observés et suivis par la suite par le propriétaire d'un service public, lorsque la Régie estime que ces tarifs, taux, charges et barèmes existants sont injustes, déraisonnables, insuffisants, injustement discriminatoires ou préférentiels;

b) établir des normes, classifications, règlements, pratiques, mesures justes et raisonnables à adopter, à imposer, à observer et à suivre par le propriétaire ou des services justes et raisonnables à fournir par celui-ci;

c) ordonner à toute compagnie de chemins de fer, de chemins de fer vicinaux ou de locomobile d'établir et d'entretenir, à toute intersection, tout point de raccordement ou de croisement avec une autre voie

railway, street railway, or traction company, such just and reasonable connections as may be necessary to promote the convenience of shippers of property, or of passengers, and in like manner may direct any railway, street railway, or traction company engaged in carrying merchandise to construct, maintain, and operate, upon reasonable terms a switch connection with any private side-track that may be constructed by any private shipper to connect with the railway or street railway where, in the judgment of the board, the connection is reasonable and practicable and can be put in with safety, and will furnish sufficient business to justify the construction and maintenance thereof.

de la route ou avec une ligne d'une autre compagnie de chemins de fer, de chemins de fer vicinaux ou d'une compagnie de locomobile, les raccordements justes et raisonnables, nécessaires pour promouvoir la commodité des expéditeurs de marchandises ou des passagers et, de la même façon, ordonner à une compagnie de chemins de fer, de chemins de fer vicinaux ou de locomobile qui transporte des marchandises de construire, entretenir et exploiter à des conditions raisonnables un aiguillage de raccordement avec une voie privée susceptible d'être construite par un expéditeur privé pour le raccorder avec le chemin de fer ou le chemin de fer vicinal lorsque, de l'avis de la Régie, le raccordement est raisonnable et pratique, peut être installé en toute sûreté et fournira des revenus suffisants pour en justifier la construction et l'entretien.

Orders as to owners

78(1) The board may, by order in writing and notice to, and hearing of, the parties interested, require every owner of a public utility

(a) to comply with the laws of the province and any municipal by-law affecting the public utility or its owner, and to conform to the duties imposed thereby, or by the provisions of its own charter, or by any agreement with any municipality or other owner;

(b) to furnish safe, adequate, and proper service, and to keep and maintain its property and equipment in such condition as to enable it to do so;

(c) to establish, construct, maintain, and operate any reasonable extension of its existing facilities where, in the judgment of the board, the extension is reasonable and practicable and will furnish sufficient business to justify the construction and maintenance thereof, and when the financial condition of the owner reasonably warrants the original expenditure required in making and operating the extension;

(d) to keep its books, records, and accounts so as to afford an intelligent understanding of the conduct of its business, and to that end, in the case of owners of public utilities of the same class, to adopt a uniform system of accounting, which system may be prescribed by the board;

Ordonnances relatives aux propriétaires

78(1) La Régie peut, par ordonnance écrite et après avis aux parties intéressées et audition de celles-ci, obliger un propriétaire de service public :

a) à se conformer aux lois de la province et aux arrêtés municipaux visant le service public ou son propriétaire ainsi qu'aux devoirs imposés par eux, par les dispositions de sa propre charte ou par un accord avec une municipalité ou un autre propriétaire;

b) à fournir un service sûr, adéquat et approprié et à conserver et entretenir ses biens et ses équipements dans des conditions lui permettant de le faire;

c) à établir, à construire, à entretenir et à exploiter toute extension raisonnable de ses installations existantes, si l'extension est, à son avis, raisonnable et pratique, sera suffisamment rentable pour en justifier la construction et l'entretien, et si la situation financière du propriétaire justifie raisonnablement les dépenses originales nécessaires pour créer et exploiter l'extension;

d) à tenir ses livres, registres et comptes de façon à permettre une compréhension intelligente de la conduite de ses affaires et, à cette fin, dans le cas des propriétaires de services publics de la même catégorie, à adopter un système de comptabilité uniforme qu'elle prescrit;

TAB 24

MANITOBA

THE CROWN CORPORATIONS GOVERNANCE AND ACCOUNTABILITY ACT

C.C.S.M. c. C336

LOI SUR LA GOUVERNANCE ET L'OBLIGATION REDDITIONNELLE DES CORPORATIONS DE LA COURONNE

c. C336 de la *C.P.L.M.*

As of 2018-02-05, this is the most current version available. It is current for the period set out in the footer below.

It is the first version.

In force but not yet included: S.M. 2017, c. 18, s. 45

Le texte figurant ci-dessous constitue la codification la plus récente en date du 2018-02-05. Son contenu était à jour pendant la période indiquée en bas de page.

Il s'agit de la première version.

Modifications en vigueur n'ayant pas encore été intégrées : L.M. 2017, c. 18, art. 45

LEGISLATIVE HISTORY

The Crown Corporations Governance and Accountability Act, C.C.S.M. c. C336

Enacted by	**Proclamation status (for provisions in force by proclamation)**
SM 2017, c. 19	

HISTORIQUE

Loi sur la gouvernance et l'obligation redditionnelle des corporations de la Couronne, c. C336 de la C.P.L.M.

Édictée par	**État des dispositions qui entrent en vigueur par proclamation**
L.M. 2017, c. 19	

PART 4

PUBLIC UTILITIES BOARD REVIEW OF RATES

Hydro and MPIC rates review
25(1) Despite any other Act or law, rates for services provided by Manitoba Hydro and the Manitoba Public Insurance Corporation shall be reviewed by The Public Utilities Board under *The Public Utilities Board Act* and no change in rates for services shall be made and no new rates for services shall be introduced without the approval of The Public Utilities Board.

Definition: "rates for services"
25(2) For the purposes of this Part, **"rates for services"** means

(a) in the case of Manitoba Hydro, prices charged by that corporation with respect to the provision of power as defined in *The Manitoba Hydro Act*; and

(b) in the case of The Manitoba Public Insurance Corporation, rate bases and premiums charged with respect to compulsory driver and vehicle insurance provided by that corporation.

Application of Public Utilities Board Act
25(3) *The Public Utilities Board Act* applies with any necessary changes to a review pursuant to this Part of rates for services.

Factors to be considered, hearings
25(4) In reaching a decision pursuant to this Part, The Public Utilities Board may

(a) take into consideration

(i) the amount required to provide sufficient funds to cover operating, maintenance and administration expenses of the corporation,

PARTIE 4

EXAMEN DES TARIFS PAR LA RÉGIE DES SERVICES PUBLICS

Examen des tarifs
25(1) Malgré toute autre loi ou règle de droit, les tarifs afférents aux services fournis par l'Hydro-Manitoba et la Société d'assurance publique du Manitoba sont examinés en vertu de la *Loi sur la Régie des services publics* par la Régie des services publics et aucun changement dans ces tarifs ne peut être effectué de même qu'aucun nouveau tarif ne peut être introduit sans l'approbation de celle-ci.

Sens de « tarif »
25(2) Pour l'application de la présente partie, le terme « **tarif** » s'entend :

a) dans le cas de l'Hydro-Manitoba, des prix fixés par cette corporation relativement à la fourniture d'énergie au sens de la *Loi sur l'Hydro-Manitoba*;

b) dans le cas de la Société d'assurance publique du Manitoba, des bases de taux utilisées ainsi que des primes exigées à l'égard de l'assurance-automobile obligatoire fournie par cette corporation.

Application de certaines dispositions
25(3) La *Loi sur la Régie des services publics* s'applique, avec les adaptations nécessaires, à tout examen que vise la présente partie et qui porte sur des tarifs.

Éléments à considérer
25(4) Afin de prendre une décision en vertu de la présente partie, la Régie des services publics peut :

a) tenir compte :

(i) des besoins financiers de la corporation pour qu'elle puisse assumer ses dépenses de fonctionnement, d'entretien et d'administration,

(ii) interest and expenses on debt incurred for the purposes of the corporation by the government,

(iii) interest on debt incurred by the corporation,

(iv) reserves for replacement, renewal and obsolescence of works of the corporation,

(v) any other reserves that are necessary for the maintenance, operation, and replacement of works of the corporation,

(vi) liabilities of the corporation for pension benefits and other employee benefit programs,

(vii) any other payments that are required to be made out of the revenue of the corporation,

(viii) any compelling policy considerations that the board considers relevant to the matter, and

(ix) any other factors that the Board considers relevant to the matter; and

(ii) des intérêts et des frais relatifs aux dettes que le gouvernement contracte pour les besoins de la corporation,

(iii) des intérêts sur les dettes de la corporation,

(iv) des sommes à mettre en réserve pour le remplacement, la rénovation et l'obsolescence des ouvrages de la corporation,

(v) des autres sommes à mettre en réserve qui sont nécessaires à l'entretien, à l'exploitation et au remplacement des ouvrages de la corporation,

(vi) des obligations de la corporation relativement aux programmes d'avantages destinés aux employés, y compris les prestations de pension,

(vii) des autres paiements qui doivent être faits sur les revenus de la corporation,

(viii) des considérations de principe importantes qu'elle estime pertinentes à l'affaire,

(ix) des autres éléments qu'elle estime pertinents à l'affaire;

b) entendre les présentations des personnes, des groupes ou des catégories de personnes ou de groupes qui, à son avis, ont un intérêt dans l'affaire.

MPIC

25(5) In the case of a review pursuant to this Part of rates for services of the Manitoba Public Insurance Corporation, The Public Utilities Board may take into consideration, in addition to factors described in subsection (4), all elements of insurance coverage affecting insurance rates.

Société d'assurance publique du Manitoba

25(5) Dans le cas d'un examen visé à la présente partie et portant sur les tarifs de la Société d'assurance publique du Manitoba, la Régie des services publics peut prendre en considération, en plus des éléments mentionnés au paragraphe (4), tous les éléments de la garantie d'assurance qui touchent les taux d'assurance.

TAB 25

CANADA

A Consolidation of

THE CONSTITUTION ACTS 1867 to 1982

DEPARTMENT OF JUSTICE
CANADA

Consolidated as of January 1, 2013

CONSTITUTION ACT, 1982 [80]

PART I

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

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

Guarantee of Rights and Freedoms

Rights and freedoms in Canada

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

Fundamental Freedoms

Fundamental freedoms

2. Everyone has the following fundamental freedoms:

(*a*) freedom of conscience and religion;

(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(*c*) freedom of peaceful assembly; and

(*d*) freedom of association.

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[80] **Enacted as Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.), which came into force on April 17, 1982. The *Canada Act 1982*, other than Schedules A and B thereto, reads as follows:**

An Act to give effect to a request by the Senate and House of Commons of Canada

Whereas Canada has requested and consented to the enactment of an Act of the Parliament of the United Kingdom to give effect to the provisions hereinafter set forth and the Senate and the House of Commons of Canada in Parliament assembled have submitted an address to Her Majesty requesting that Her Majesty may graciously be pleased to cause a Bill to be laid before the Parliament of the United Kingdom for that purpose.

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. The *Constitution Act, 1982* set out in Schedule B to this Act is hereby enacted for and shall have the force of law in Canada and shall come into force as provided in that Act.

2. No Act of the Parliament of the United Kingdom passed after the *Constitution Act, 1982* comes into force shall extend to Canada as part of its law.

3. So far as it is not contained in Schedule B, the French version of this Act is set out in Schedule A to this Act and has the same authority in Canada as the English version thereof.

4. This Act may be cited as the *Canada Act 1982*.

Democratic Rights

Democratic rights of citizens

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

Maximum duration of legislative bodies

4. (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs at a general election of its members. [(81)]

Continuation in special circumstances

(2) In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be. [(82)]

Annual sitting of legislative bodies

5. There shall be a sitting of Parliament and of each legislature at least once every twelve months. [(83)]

Mobility Rights

Mobility of citizens

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

Rights to move and gain livelihood

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

(*a*) to move to and take up residence in any province; and

(*b*) to pursue the gaining of a livelihood in any province.

[(81)] **See section 50, and footnotes (40) and (42) to sections 85 and 88, of the *Constitution Act, 1867*.**

[(82)] **Replaces part of Class 1 of section 91 of the *Constitution Act, 1867*, which was repealed as set out in subitem 1(3) of the schedule to the *Constitution Act, 1982*.**

[(83)] ***Constitution Act, 1867*.**

Limitation

(3) The rights specified in subsection (2) are subject to

(*a*) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and

(*b*) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

Affirmative action programs

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

Legal Rights

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Search or seizure

8. Everyone has the right to be secure against unreasonable search or seizure.

Detention or imprisonment

9. Everyone has the right not to be arbitrarily detained or imprisoned.

Arrest or detention

10. Everyone has the right on arrest or detention

(*a*) to be informed promptly of the reasons therefor;

(*b*) to retain and instruct counsel without delay and to be informed of that right; and

(*c*) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

Proceedings in criminal and penal matters

11. Any person charged with an offence has the right

(*a*) to be informed without unreasonable delay of the specific offence;

(*b*) to be tried within a reasonable time;

(*c*) not to be compelled to be a witness in proceedings against that person in respect of the offence;

(*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(*e*) not to be denied reasonable bail without just cause;

(*f*) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

(*g*) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

(*h*) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and

(*i*) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

Treatment or punishment

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Self-crimination

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

Interpreter

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Equality Rights

Equality before and under law and equal protection and benefit of law

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

Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. [84]

Official Languages of Canada

Official languages of Canada

16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

Official languages of New Brunswick

(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

Advancement of status and use

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

English and French linguistic communities in New Brunswick

16.1 (1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.

Role of the legislature and government of New Brunswick

(2) The role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed. [85]

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[84] **three years af-
ter section 32 comes into force. Section 32 came into force on April 17, 1982; therefore, section 15 had effect on April 17, 1985.**

[85] **Section 16.1 was added by the *Constitution Amendment, 1993 (New Brunswick)* (*see* SI/93-54).**

Proceedings of Parliament

17. (1) Everyone has the right to use English or French in any debates and other proceedings of Parliament. [86]

Proceedings of New Brunswick legislature

(2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick. [87]

Parliamentary statutes and records

18. (1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative. [88]

New Brunswick statutes and records

(2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative. [89]

Proceedings in courts established by Parliament

19. (1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament. [90]

Proceedings in New Brunswick courts

(2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick. [91]

Communications by public with federal institutions

20. (1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where

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[86] **See section 133 of the *Constitution Act, 1867* and footnote (67).**

[87] ***Ibid*.**

[88] ***Ibid*.**

[89] ***Ibid*.**

[90] ***Ibid*.**

[91] ***Ibid*.**

(*a*) there is a significant demand for communications with and services from that office in such language; or

(*b*) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

Communications by public with New Brunswick institutions

(2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.

Continuation of existing constitutional provisions

21. Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada. [92]

Rights and privileges preserved

22. Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.

MINORITY LANGUAGE EDUCATIONAL RIGHTS

Language of instruction

23. (1) Citizens of Canada

(*a*) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

(*b*) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

have the right to have their children receive primary and secondary school instruction in that language in that province. [93]

Continuity of language instruction

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have

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[92] **See, for example, section 133 of the *Constitution Act, 1867* and the reference to the *Manitoba Act, 1870* in footnote (67) to that section.**

[93] **Paragraph 23(1)(*a*) is not in force in respect of Quebec. See section 59, below.**

all their children receive primary and secondary school instruction in the same language.

Application where numbers warrant

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

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

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

Enforcement

Enforcement of guaranteed rights and freedoms

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Exclusion of evidence bringing administration of justice into disrepute

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

General

Aboriginal rights and freedoms not affected by Charter

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

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

(*b*) any rights or freedoms that now exist by way of land claims agreements or may be so acquired. [(94)]

Other rights and freedoms not affected by Charter

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

Multicultural heritage

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

Rights guaranteed equally to both sexes

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

Rights respecting certain schools preserved

29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools. [(95)]

Application to territories and territorial authorities

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

[(94)] **Paragraph 25(*b*) was repealed and re-enacted by the *Constitution Amendment Proclamation, 1983* (*see* SI/84-102). Paragraph 25(*b*) originally read as follows:**

(*b*) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.

[(95)] **See section 93 of the *Constitution Act, 1867* and footnote (50).**

Legislative powers not extended

31. Nothing in this Charter extends the legislative powers of any body or authority.

Application of Charter

Application of Charter

32. (1) This Charter applies

(*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Exception

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

Exception where express declaration

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

Operation of exception

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

Five year limitation

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

Re-enactment

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

Five year limitation

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

Citation

Citation

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

PART II

RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA

Recognition of existing aboriginal and treaty rights

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

Definition of "aboriginal peoples of Canada"

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

Land claims agreements

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

Aboriginal and treaty rights are guaranteed equally to both sexes

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons. [(96)]

Commitment to participation in constitutional conference

35.1 The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the "*Constitution Act, 1867*", to section 25 of this Act or to this Part,

(*a*) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and

(*b*) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item. [(97)]

[(96)] **Subsections 35(3) and (4) were added by the *Constitution Amendment Proclamation, 1983* (*see* SI/84-102).**

[(97)] **Section 35.1 was added by the *Constitution Amendment Proclamation, 1983* (*see* SI/84-102).**

PART III

EQUALIZATION AND REGIONAL DISPARITIES

Commitment to promote equal opportunities

(*a*) promoting equal opportunities for the well-being of Canadians;

(*b*) furthering economic development to reduce disparity in opportunities; and

Commitment respecting public services

(2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation. [98]

PART IV

CONSTITUTIONAL CONFERENCE

37. Repealed. [99]

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[98] **See footnotes (58) and (59) to sections 114 and 118 of the *Constitution Act, 1867*.**

[99] **Section 54 of the *Constitution Act, 1982* provided for the repeal of Part IV (section 37) one year after Part VII came into force. Part VII came into force on April 17, 1982 repealing Part IV on April 17, 1983. Section 37 read as follows:**

> **37.** (1) A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada within one year after this Part comes into force.
>
> (2) The conference convened under subsection (1) 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.
>
> (3) The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participate in the discussions on any item on the agenda of the conference convened under subsection (1) that, in the opinion of the Prime Minister, directly affects the Yukon Territory and the Northwest Territories.

TAB 26

MANITOBA

THE HUMAN RIGHTS CODE

C.C.S.M. c. H175

CODE DES DROITS DE LA PERSONNE

c. H175 de la *C.P.L.M.*

As of 2017-12-19, this is the most current version available. It is current for the period set out in the footer below.

Le texte figurant ci-dessous constitue la codification la plus récente en date du 2017-12-19. Son contenu était à jour pendant la période indiquée en bas de page.

LEGISLATIVE HISTORY

The Human Rights Code, C.C.S.M. c. H175

Enacted by	**Proclamation status (for provisions in force by proclamation)**
SM 1987-88, c. 45	whole Act: in force on 10 Dec 1987 (Man. Gaz.: 19 Dec 1987)
Amended by	
SM 1997, c. 20	
SM 2005, c. 2, s. 36	in force on 31 May 2010 (Man. Gaz.: 10 Apr 2010)
SM 2006, c. 34, s. 260	in force on 1 Jan 2007 (Man. Gaz.: 6 Jan 2007)
SM 2012, c. 38	
SM 2013, c. 54, s. 43	
SM 2015, c. 43, s. 54	
SM 2017, c. 34, s. 19	

HISTORIQUE

Code des droits de la personne, c. H175 de la C.P.L.M.

Édictée par	**État des dispositions qui entrent en vigueur par proclamation**
L.M. 1987-88, c. 45	l'ensemble de la Loi : en vigueur le 10 déc. 1987 (Gaz. du Man. : 19 déc. 1987)
Modifiée par	
L.M. 1997, c. 20	
L.M. 2005, c. 2, art. 36	en vigueur le 31 mai 2010 (Gaz. du Man. : 10 avr. 2010)
L.M. 2006, c. 34, art. 260	en vigueur le 1er janv. 2007 (Gaz. du Man. : 6 janv. 2007)
L.M. 2012, c. 38	
L.M. 2013, c. 54, art. 43	
L.M. 2015, c. 43, art. 54	
L.M. 2017, c. 34, art. 19	

"service animal" means an animal that has been trained to provide assistance to a person with a disability that relates to that person's disability; (« animal d'assistance »)

"social disadvantage" means diminished social standing or social regard due to

(a) homelessness or inadequate housing;

(b) low levels of education;

(c) chronic low income; or

(d) chronic unemployment or underemployment; (« désavantage social »)

"trade union" means an organization of employees formed for purposes that include the regulation of relations between employees and employers. (« syndicat ouvrier »)

S.M. 2006, c. 34, s. 260; S.M. 2012, c. 38, s. 2; S.M. 2017, c. 34, s. 19.

b) d'une autorité locale. ("person")

« **plaignant** » Personne qui dépose une plainte, à l'exception de la Commission ou du directeur général quant à une plainte déposée en vertu du paragraphe 22(3). ("complainant")

« **plainte** » Plainte déposée en vertu de l'article 22, selon laquelle une violation aux dispositions du présent code aurait été commise. ("complaint")

« **réponse** » Réponse déposée en vertu de l'article 25, suite à une plainte. ("reply")

« **syndicat ouvrier** » Association d'employés formée notamment pour régir les relations entre employés et employeurs. ("trade union")

« **tribunal** » La Cour du Banc de la Reine. ("court")

« **tribunal d'arbitrage** » Tribunal d'arbitrage constitué en vertu de l'article 8. ("adjudication panel")

L.M. 2006, c. 34, art. 260; L.M. 2012, c. 38, art. 2; L.M. 2017, c. 34, art. 19.

PART II

PROHIBITED CONDUCT AND SPECIAL PROGRAMS

"Discrimination" defined
9(1) In this Code, **"discrimination"** means

(a) differential treatment of an individual on the basis of the individual's actual or presumed membership in or association with some class or group of persons, rather than on the basis of personal merit; or

(b) differential treatment of an individual or group on the basis of any characteristic referred to in subsection (2); or

(c) differential treatment of an individual or group on the basis of the individual's or group's actual or presumed association with another individual or group whose identity or membership is determined by any characteristic referred to in subsection (2); or

(d) failure to make reasonable accommodation for the special needs of any individual or group, if those special needs are based upon any characteristic referred to in subsection (2).

Interpretation
9(1.1) In this Code, "discrimination" includes any act or omission that results in discrimination within the meaning of subsection (1), regardless of

(a) the form of the act or omission; and

(b) whether the person responsible for the act or omission intended to discriminate.

PARTIE II

CONDUITE PROHIBÉE ET PROGRAMMES SPÉCIAUX

Définition du terme « discrimination »
9(1) Dans le présent code, le terme **« discrimination »** désigne, selon le cas :

a) un traitement différent que reçoit un particulier, en raison de son adhésion réelle ou présumée à une catégorie ou à un groupe de personnes ou de son association réelle ou présumée avec cette catégorie ou ce groupe, plutôt qu'en fonction de ses mérites personnels;

b) un traitement différent que reçoit un particulier ou un groupe, en raison de caractéristiques mentionnées au paragraphe (2);

c) un traitement différent que reçoit un particulier ou un groupe en raison de son association réelle ou présumée avec un autre particulier ou un autre groupe dont les traits distinctifs sont déterminés par les caractéristiques mentionnées au paragraphe (2) ou dont l'adhésion découle de ces caractéristiques;

d) un manquement qui consiste à ne pas répondre de façon raisonnable aux besoins spéciaux de particuliers ou de groupes, fondés sur les caractéristiques mentionnées au paragraphe (2).

Interprétation
9(1.1) Pour l'application du présent code, sont assimilés à de la discrimination les actes et les omissions qui entraînent une discrimination au sens du paragraphe (1), quelle que soit leur forme et quelle que soit l'intention de leur auteur.

Applicable characteristics
9(2) The applicable characteristics for the purposes of clauses (1)(b) to (d) are

(a) ancestry, including colour and perceived race;

(b) nationality or national origin;

(c) ethnic background or origin;

(d) religion or creed, or religious belief, religious association or religious activity;

(e) age;

(f) sex, including sex-determined characteristics or circumstances, such as pregnancy, the possibility of pregnancy, or circumstances related to pregnancy;

(g) gender identity;

(h) sexual orientation;

(i) marital or family status;

(j) source of income;

(k) political belief, political association or political activity;

(l) physical or mental disability or related characteristics or circumstances, including reliance on a service animal, a wheelchair, or any other remedial appliance or device;

.

Caractéristiques appropriées
9(2) Les caractéristiques appropriées aux fins des alinéas (1)b) à d) sont les suivantes :

a) l'ascendance, y compris la couleur et les races identifiables;

b) la nationalité ou l'origine nationale;

c) le milieu ou l'origine ethnique;

d) la religion ou la croyance ou les croyances religieuses, les associations religieuses ou les activités religieuses;

e) l'âge;

f) le sexe, y compris les caractéristiques ou les situations fondées sur le sexe d'une personne telles que la grossesse, la possibilité de grossesse ou les circonstances se rapportant à la grossesse;

g) l'identité sexuelle;

h) l'orientation sexuelle;

i) l'état matrimonial ou le statut familial;

j) la source de revenu;

k) les convictions politiques, associations politiques ou activités politiques;

l) les incapacités physiques ou mentales ou les caractéristiques ou les situations connexes, y compris le besoin d'un animal d'assistance, une chaise roulante ou tout autre appareil, orthèse ou prothèse;

m) les désavantages sociaux.

Discrimination on basis of social disadvantage
9(2.1) It is not discrimination on the basis of social disadvantage unless the discrimination is based on a negative bias or stereotype related to that social disadvantage.

Discrimination fondée sur un désavantage social
9(2.1) Ne constitue pas de la discrimination fondée sur un désavantage social la discrimination qui ne repose pas sur un préjugé défavorable ou un stéréotype ayant trait au désavantage social.

Systemic discrimination
9(3) Interrelated actions, policies or procedures of a person that do not have a discriminatory effect when considered individually can constitute discrimination under this Code if the combined operation of those actions, policies or procedures results in discrimination within the meaning of subsection (1).

Criminal conduct excluded
9(4) For the purpose of dealing with any case of alleged discrimination under this Code, no characteristic referred to in subsection (2) shall be interpreted to extend to any conduct prohibited by the *Criminal Code* of Canada.

No condoning or condemning of beliefs, etc.
9(5) Nothing in this Code shall be interpreted as condoning or condemning any beliefs, values, or lifestyles based upon any characteristic referred to in subsection (2).

S.M. 2012, c. 38, s. 5.

Acts of officers and employees
10 For the purposes of this Code, where an officer, employee, director or agent of a person contravenes this Code while acting in the course of employment or the scope of actual or apparent authority, the person is also responsible for the contravention unless the person

(a) did not consent to the contravention and took all reasonable steps to prevent it; and

(b) subsequently took all reasonable steps to mitigate or avoid the effect of the contravention.

S.M. 2012, c. 38, s. 6.

Discrimination systémique
9(3) Des mesures ou des règles interdépendantes qui sont prises par une personne et qui ne sont pas discriminatoires lorsqu'elles sont considérées séparément peuvent constituer de la discrimination sous le régime du présent code si leur effet cumulatif entraîne une discrimination au sens du paragraphe (1).

Conduite criminelle exclue
9(4) Aux fins du règlement de tout cas de discrimination visée au présent code et qui aurait été exercée, aucune caractéristique mentionnée au paragraphe (2) n'a pour effet de s'appliquer à une conduite interdite par le *Code criminel* du Canada.

Pas de condamnation des croyances
9(5) Le présent code n'a pas pour effet de tolérer ou de condamner des croyances, des valeurs ou des modes de vie fondés sur les caractéristiques mentionnées au paragraphe (2).

L.M. 2012, c. 38, art. 5.

Actes des cadres et des demployés
10 Pour l'application du présent code, si un cadre, un employé, un administrateur ou un mandataire d'une personne contrevient aux dispositions du présent code dans le cadre de son emploi ou du champ d'application de ses pouvoirs réels ou apparents, cette personne est aussi responsable de la contravention, sauf dans les cas suivants :

a) si elle n'a pas consenti à la contravention et si elle a pris toutes les mesures raisonnables afin de l'empêcher;

b) si elle a pris, par la suite, toutes les mesures raisonnables afin d'atténuer ou d'éviter les effets de la contravention.

L.M. 2012, c. 38, art. 6.

TAB 27

International Covenant on Economic, Social and Cultural Rights

Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966

entry into force 3 January 1976, in accordance with article 27

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 freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political 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

3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

Article 11

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

Article 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(b) The improvement of all aspects of environmental and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

Article 13

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

(a) Primary education shall be compulsory and available free to all;

TAB 28

United Nations

United Nations DECLARATION on the RIGHTS of INDIGENOUS PEOPLES

Published by the United Nations

07-58681—March 2008—4,000

United Nations

United Nations Declaration on the Rights of Indigenous Peoples

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.

TAB 29

Convention on the Rights of Persons with Disabilities and Optional Protocol

UNITED NATIONS

Article 3
General principles

The principles of the present Convention shall be:

(*a*) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;

(*b*) Non-discrimination;

(*c*) Full and effective participation and inclusion in society;

(*d*) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;

(*e*) Equality of opportunity;

(*f*) Accessibility;

(*g*) Equality between men and women;

(*h*) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

Article 4
General obligations

1. States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake:

(*a*) To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention;

(*b*) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities;

(*c*) To take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes;

(*d*) To refrain from engaging in any act or practice that is inconsistent with the present Convention and to ensure that public authorities and institutions act in conformity with the present Convention;

(*e*) To take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise;

(*f*) To undertake or promote research and development of universally designed goods, services, equipment and facilities, as defined in article 2 of the present Convention, which should require the minimum possible adaptation and the least cost to meet the specific needs of a person with disabilities, to promote their availability and use, and to promote universal design in the development of standards and guidelines;

(*g*) To undertake or promote research and development of, and to promote the availability and use of new technologies, including information and communications technologies, mobility aids, devices and assistive technologies, suitable for persons with disabilities, giving priority to technologies at an affordable cost;

(*h*) To provide accessible information to persons with disabilities about mobility aids, devices and assistive technologies, including new technologies, as well as other forms of assistance, support services and facilities;

(*i*) To promote the training of professionals and staff working with persons with disabilities in the rights recognized in the present Convention so as to better provide the assistance and services guaranteed by those rights.

2. With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law.

3. In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.

4. Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of persons with disabilities and which may be contained in the law of a State Party or international law in force for that State. There shall be no restriction upon or derogation from any of the

TAB 30

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

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.

TAB 31

MANITOBA

THE EFFICIENCY MANITOBA ACT

C.C.S.M. c. E15

LOI SUR LA SOCIÉTÉ POUR L'EFFICACITÉ ÉNERGÉTIQUE AU MANITOBA

c. E15 de la *C.P.L.M.*

As of 2018-02-05, this is the most current version available. It is current for the period set out in the footer below.

It is the first version and has not been amended.

Le texte figurant ci-dessous constitue la codification la plus récente en date du 2018-02-05. Son contenu était à jour pendant la période indiquée en bas de page.

Il s'agit de la première version; elle n'a fait l'objet d'aucune modification.

LEGISLATIVE HISTORY

The Efficiency Manitoba Act, C.C.S.M. c. E15

Enacted by	**Proclamation status (for provisions in force by proclamation)**
SM 2017, c. 18	whole Act except s. 37, 44 and 49: in force on 25 Jan 2018 (proc: 24 Jan 2018)
	s. 37, 44 and 49: not yet proclaimed

HISTORIQUE

Loi sur la Société pour l'efficacité énergétique au Manitoba, c. E15 de la C.P.L.M.

Édictée par	**État des dispositions qui entrent en vigueur par proclamation**
L.M. 2017, c. 18	l'ensemble de la Loi à l'exception des art. 37, 44 et 49 : en vigueur le 25 janv. 2018 (proclamation : 24 janv. 2018)
	art. 37, 44 et 49 : non proclamé

Targets are cumulative
7(2) Shortfalls or surpluses in annual net savings carry forward during the 15-year period under subsection (1) such that at the end of the period Efficiency Manitoba must demonstrate that the cumulative total of the annual percentage savings in the consumption of

(a) electrical energy is 22.5%; and

(b) natural gas is 11.25%.

Caractère cumulatif des objectifs d'économies
7(2) Les déficits ou les surplus au chapitre des économies nettes annuelles sont reportés sur la période de 15 ans visée au paragraphe (1) de sorte que la Société démontre à la fin de cette période qu'elle a enregistré cumulativement les taux d'économie annuelle suivants :

a) 22,5 % pour l'énergie électrique;

b) 11,25 % pour le gaz naturel.

Calculating net savings
7(3) Net savings for the consumption of electrical energy or natural gas are to be determined in accordance with the regulations.

Calcul des économies nettes
7(3) Les économies nettes pour la consommation d'énergie électrique ou de gaz naturel sont fixées en conformité avec les règlements.

Savings targets after first 15 years
8 For each 15-year period after the initial 15-year period referred to in subsection 7(1), the Lieutenant Governor in Council must, by regulation, establish annual and cumulative savings targets in respect of the consumption of electrical energy and natural gas.

Objectifs d'économies après les 15 premières années
8 Pour chaque période de 15 ans suivant la période initiale visée au paragraphe 7(1), le lieutenant-gouverneur en conseil fixe, par règlement, les objectifs d'économies annuelles et cumulatives en matière de consommation d'énergie électrique et de gaz naturel.

EFFICIENCY PLANS

Efficiency plans
9 For the three-year period following the commencement date, and for each three-year period after that, Efficiency Manitoba must prepare an efficiency plan that includes the following information:

(a) a description of the demand-side management initiatives it proposes to meet the savings targets that apply to the period;

(b) a description of the educational initiatives it proposes to undertake and the support it proposes to provide for encouraging innovations in areas related to its mandate;

PLANS D'EFFICACITÉ ÉNERGÉTIQUE

Plans d'efficacité énergétique
9 Pour la période de trois ans suivant la date de mise en œuvre et pour chaque période de trois ans suivante, la Société établit un plan d'efficacité énergétique qui contient les renseignements suivants :

a) une mention des initiatives d'effacement de consommation qu'elle propose de mettre en œuvre pour atteindre les objectifs d'économies applicables à cette période;

b) une mention des initiatives de sensibilisation du public qu'elle propose de mettre en œuvre et du soutien qu'elle propose d'accorder pour stimuler les innovations dans des secteurs liés à son mandat;

(c) a description of any initiatives proposed in addition to those proposed to meet the savings targets;

(d) if the cumulative net savings secured to date have fallen short of the sum of the applicable annual savings targets, a description of the initiatives planned to address the shortfall;

(e) an analysis of the reductions in greenhouse gas emissions in Manitoba expected to result from the initiatives proposed under clauses (a) to (d);

(f) an analysis of the amount and cost-effectiveness of the net savings to be achieved by

(i) each of the initiatives proposed under clauses (a) to (d), and

(ii) the plan as a whole;

(g) an assessment of the benefits to be attained if the initiatives proposed under clauses (a) to (d) are implemented during the three-year period, including the benefits to be experienced by

(i) those who participate in any of the proposed initiatives,

(ii) Manitoba Hydro, and

(iii) Manitobans generally, including any environmental benefits, economic development opportunities and enhancements to energy security;

(h) a description of the input that Efficiency Manitoba received from stakeholders — including the stakeholder committee established under section 27 — and the public in preparing the plan, and the process established for receiving the input;

(i) a description of how the initiatives proposed under clauses (a) to (d) will assist Efficiency Manitoba in positioning itself to secure the net savings that are reasonably anticipated to be required over the next 15 years;

c) une mention des initiatives qui devraient s'ajouter à celles qui sont proposées pour que soient atteints les objectifs d'économies;

d) si les économies nettes cumulatives annuelles réalisées à cette date sont inférieures à la somme des objectifs d'économies annuelles applicables, une mention des initiatives prévues pour compenser le déficit;

e) une analyse des réductions de gaz à effet de serre au Manitoba qui devraient résulter des initiatives proposées en vertu des alinéas a) à d);

f) une analyse des économies nettes devant être réalisées grâce aux initiatives visées aux alinéas a) à d) et grâce au plan dans son ensemble ainsi qu'une analyse coût-efficacité de ces économies;

g) une évaluation des bénéfices à retirer si les initiatives proposées en vertu des alinéas a) à d) sont mises en œuvre au cours de la période de trois ans, notamment les bénéfices pour :

(i) ceux qui participent aux initiatives proposées,

(ii) Hydro-Manitoba,

(iii) les Manitobains en général, notamment les bénéfices environnementaux, les possibilités de développement économique et les améliorations de la sécurité énergétique;

h) une indication des observations formulées par des intéressés à l'intention de la Société, y compris par le comité des intéressés constitué en vertu de l'article 27, et par le public dans le cadre de l'élaboration du plan et une mention du processus mis en place pour que soient recueillies les observations;

i) une mention de la façon dont les initiatives proposées aux alinéas a) à d) aideront la Société à être en mesure de réaliser les économies nettes qui sont raisonnablement prévues être nécessaires au cours des 15 prochaines années;

(j) a description of how the plan addresses the prescribed factors the PUB must consider under subsection 11(4);

(k) for any ongoing or proposed energy efficiency or energy conservation loan or financing program, including a program that is delivered in conjunction with Manitoba Hydro, a description of

(i) the interest rate charged or to be charged under the program, or the manner in which the interest rate is or will be determined,

(ii) the eligibility and assessment criteria to be used to determine participation in the program, and

(iii) the amounts reasonably anticipated to be loaned or financed by Manitoba Hydro under the program, including any amount to be financed by Manitoba Hydro;

(l) a budget that sets out, for the three-year period,

(i) the projected costs of designing and implementing each of the initiatives proposed under clauses (a) to (d), and when those costs are anticipated to be incurred,

(ii) the projected administrative and overhead costs — including evaluation costs — to be incurred in delivering the initiatives proposed under clauses (a) to (d) and in carrying out its related activities under subsection 4(2),

(iii) the amount reasonably required as a contingency fund to enable Efficiency Manitoba to take advantage of emerging opportunities that are not otherwise addressed in the plan,

(iv) the proposed sources of any required funds and the amount from each source, and

(v) a schedule of when the funds will be required over the course of the three-year period;

j) une mention de la manière dont le plan tient compte des facteurs prévus par règlement que la Régie doit prendre en considération en vertu du paragraphe 11(4);

k) à l'égard d'un programme de prêt ou de financement en matière d'efficacité énergétique ou d'économie d'énergie, qu'il soit en vigueur ou proposé, notamment un programme offert conjointement avec Hydro-Manitoba :

(i) le taux d'intérêt exigé ou qui doit l'être en vertu du programme ou la façon dont le taux d'intérêt est ou doit être fixé,

(ii) les critères d'admissibilité et d'évaluation qui doivent être utilisés pour la participation au programme,

(iii) les montants d'argent prévus qui seront affectés à des prêts ou à du financement au titre du programme, y compris toute somme dont le financement est assuré par Hydro-Manitoba;

l) un budget établissant, pour la période de trois ans :

(i) les coûts prévus d'élaboration et de mise en œuvre de chacune des initiatives proposées en vertu des alinéas a) à d) et le moment où il est prévu que ces coûts seront engagés,

(ii) les frais administratifs ou les coûts indirects prévus, y compris les coûts d'évaluation, qui devront être engagés pour que soient mises en œuvre les initiatives proposées en vertu des alinéas a) à d) et menées à bien les activités connexes visées au paragraphe 4(2),

(iii) les montants d'argent raisonnablement nécessaires à titre de fonds de prévoyance pour permettre à la Société de tirer avantage de possibilités imminentes qui ne sont pas autrement prévues dans le plan,

(iv) les sources prévues des fonds nécessaires et le montant d'argent provenant de chaque source,

(m) a description of the manner in which the outcomes achieved under the plan are to be assessed, including the proposed performance measures to be used.

(v) un échéancier du moment où les fonds seront nécessaires au cours de la période de trois ans;

m) une mention de la façon dont les résultats obtenus en vertu du plan doivent être évalués, y compris les indicatifs de rendement qu'il faut utiliser.

Plans to be submitted to PUB

10 Subject to the regulations, Efficiency Manitoba must submit each of its efficiency plans to the PUB at the time and in the manner specified by the PUB.

Plans soumis à la Régie

10 Sous réserve des règlements, la Société soumet chacun de ses plans d'efficacité énergétique à la Régie au moment et de la façon que fixe celle-ci.

Examen et recommandation de la Régie

11(1) La Régie examine tout plan d'efficacité énergétique et présente un rapport au ministre comportant ses recommandations quant à l'approbation, à l'approbation sous réserve de modifications ou au rejet du plan.

Droit d'Hydro-Manitoba de se faire entendre

11(2) Hydro-Manitoba a le droit de se faire entendre ou de présenter des observations, notamment par l'entremise d'un avocat, dans le cadre de l'examen par la Régie d'un plan d'efficacité énergétique.

Timing of PUB review

11(3) The PUB must make its report and recommendations to the minister within the time specified by the minister.

Échéancier pour l'examen

11(3) La Régie présente son rapport et ses recommandations au ministre dans le délai qu'il fixe.

Considérations obligatoires

11(4) Lorsqu'elle examine un plan d'efficacité énergétique et fait des recommandations au ministre, la Régie tient compte de ce qui suit :

a) les économies nettes requises pour que soient atteints les objectifs d'économie et les plans pour remédier à tout déficit existant;

(b) the benefits and cost-effectiveness of the initiatives proposed in the plan;

(c) whether Efficiency Manitoba is reasonably achieving the aim of providing initiatives that are accessible to all Manitobans; and

(d) any additional factors prescribed by the regulations.

b) les avantages et le rapport coût-efficacité des initiatives proposées dans le plan;

c) la question de savoir si la Société atteint de façon raisonnable l'objectif de mettre en œuvre des initiatives accessibles à tous les Manitobains;

d) les facteurs supplémentaires prévus par règlement.

Recommandations optionnelles
11(5) La Régie peut recommander au ministre :

a) soit une augmentation d'un objectif d'économies, si elle est raisonnablement convaincue qu'il est dans l'intérêt public que la Société réalise des économies nettes supplémentaires;

b) soit une réduction d'un objectif d'économies, si elle est raisonnablement convaincue que l'objectif d'économies actuel ne sert pas l'intérêt public.

Ministerial approval
12(1) After receiving an efficiency plan and the PUB's recommendations respecting the plan, the minister must

(a) approve the plan as submitted; or

(b) refer the plan back to Efficiency Manitoba for further action, with any directions the minister considers appropriate.

Approbation du ministre
12(1) Après avoir reçu un plan d'efficacité énergétique et les recommandations de la Régie concernant le plan, le ministre :

a) soit approuve le plan présenté;

b) soit le renvoie à la Société, accompagné des directives qu'il juge indiquées, pour que d'autres mesures soient prises.

Actions if plan referred back to Efficiency Manitoba
12(2) A plan that is referred back to Efficiency Manitoba under this section must be resubmitted as directed by the minister.

Mesures exigées en cas de renvoi du plan
12(2) Un plan qui est renvoyé en vertu du présent article est soumis de nouveau par la Société comme l'exige le ministre.

Directions to be made public
12(3) Efficiency Manitoba must publish on its website or through other public means, any direction it receives under this section.

Directives publiques
12(3) La Société diffuse publiquement, notamment sur son site Web, toute directive reçue en vertu du présent article.

Approved plan must be implemented
12(4) Efficiency Manitoba must implement an efficiency plan as approved by the minister.

Mise en œuvre du plan approuvé
12(4) La Société met en œuvre le plan d'efficacité énergétique approuvé par le ministre.

Notice of agreement to be registered in L.T.O.
15 After entering into an agreement referred to in clause 14(2)(a) in respect of a building, part of a building or a structure related to a building, Manitoba Hydro must, if there is a title, register a notice of the agreement against the applicable title in the appropriate land titles office. The notice must be in the form approved by the Registrar-General.

Enregistrement d'un avis concernant l'accord au bureau des titres fonciers
15 Après avoir conclu l'accord visé à l'alinéa 14(2)a) à l'égard du bâtiment, de la partie du bâtiment ou de l'ouvrage connexe, Hydro-Manitoba enregistre, le cas échéant, un avis concernant l'accord à l'égard du titre de propriété approprié au bureau des titres fonciers compétent. L'avis revêt la forme qu'approuve le registraire général.

ASSESSMENT OF RESULTS

ÉVALUATION DES RÉSULTATS

Independent assessment
16(1) Efficiency Manitoba must appoint an independent assessor to assess the following and prepare a report on the assessment:

(a) the results obtained by Efficiency Manitoba under an approved efficiency plan;

(b) the cost-effectiveness of obtaining those results;

(c) any other matter prescribed by regulation.

Évaluation indépendante
16(1) La Société nomme un évaluateur indépendant chargé d'examiner les questions suivantes et d'établir un rapport :

a) les résultats qu'elle a obtenus au titre d'un plan d'efficacité énergétique approuvé;

b) le rendement coût-efficacité se rattachant à l'obtention de ces résultats;

c) toute autre question prévue par règlement.

Access to information
16(2) Efficiency Manitoba and Manitoba Hydro must provide the assessor with the information, records and other assistance that the assessor requires to complete an assessment under this section.

Accès aux renseignements
16(2) La Société et Hydro-Manitoba fournissent à l'évaluateur l'aide dont il a besoin pour terminer une évaluation en vertu du présent article et lui communiquent notamment les renseignements et dossiers pertinents.

Report to be given to PUB and made public
16(3) Efficiency Manitoba must, within the prescribed time,

(a) submit the assessment report to the PUB; and

(b) publish the report on its website, or through other public means.

Remise et diffusion du rapport
16(3) Dans le délai réglementaire, la Société :

a) soumet le rapport d'évaluation à la Régie;

b) le diffuse publiquement, notamment sur son site Web.

Fees and expenses
16(4) The costs of an assessment are to be paid by Efficiency Manitoba.

Droits et frais
16(4) La Société assume les frais d'évaluation.

Quorum
25 A majority of the directors on the board, or any greater number determined by by-law, constitute a quorum at any meeting of the directors.

Quorum
25 Aux réunions du conseil, le quorum est constitué par la majorité des administrateurs y siégeant ou par le nombre supérieur d'administrateurs fixé par règlement administratif.

By-laws
26(1) The board may make by-laws respecting the conduct and management of Efficiency Manitoba's business and affairs, including, without limitation,

(a) by-laws establishing a code of conduct policy for Efficiency Manitoba's directors, officers and employees; and

(b) by-laws providing for the indemnification of Efficiency Manitoba's directors and officers.

Règlements administratifs
26(1) Le conseil peut adopter des règlements administratifs pour régir la conduite et la gestion de l'entreprise et des affaires internes de la Société, notamment :

a) des règlements administratifs établissant une politique sur un code de déontologie pour les administrateurs, les dirigeants et les employés de la Société;

b) des règlements administratifs sur l'indemnisation des administrateurs et des dirigeants de la Société.

Policies for procurement and contracts for services
26(2) Efficiency Manitoba must establish policies and procedures for procurement and contracts for services that promote transparency, openness, fairness and value for money in purchasing.

Lignes directrices régissant l'approvisionnement et les contrats de service
26(2) La Société établit des lignes directrices régissant l'approvisionnement et les contrats de service et favorisant la transparence, l'ouverture, l'équité et l'optimisation des ressources au moment des achats.

STAKEHOLDER COMMITTEE

COMITÉ DES INTÉRESSÉS

Stakeholder committee
27(1) The board must establish a stakeholder committee as an advisory body to Efficiency Manitoba.

Comité des intéressés
27(1) Le conseil constitue un comité des intéressés à titre d'organe consultatif pour la Société.

Membres du comité — champs d'expertise
27(2) Lors de la nomination des membres du comité des intéressés, le conseil tient compte du bien-fondé de nommer des personnes qui possèdent une expertise et de l'expérience dans le secteur de l'efficacité énergétique et qui comprennent bien le rôle de la Régie en matière d'efficacité énergétique.

Role of the committee
27(3) The role of the stakeholder committee is to

(a) provide advice to Efficiency Manitoba about the development and implementation of efficiency plans;

(b) provide advice to Efficiency Manitoba on the selection of the assessor and terms of reference for the independent assessment required under section 16 and assist the board to review the assessment results; and

(c) perform other advisory responsibilities as determined by the board.

Rôle du comité
27(3) Le comité des intéressés a pour rôle :

a) de conseiller la Société sur l'élaboration et la mise en œuvre de plans d'efficacité énergétique;

b) de conseiller la Société sur la sélection de l'évaluateur et le mandat en vue de l'évaluation indépendante visée à l'article 16 et d'apporter son aide au conseil en vue de l'examen des résultats de l'évaluation;

c) de s'acquitter de toute autre fonction consultative que fixe le conseil.

Administration
27(4) Efficiency Manitoba is responsible for the administration of the stakeholder committee and for any administrative costs.

Administration
27(4) La Société est responsable de l'administration du comité des intéressés et des frais administratifs.

FINANCIAL AND BUSINESS MATTERS

QUESTIONS FINANCIÈRES ET BUDGET

Financial records and systems
28 Efficiency Manitoba must establish financial management and information systems that will enable it to prepare financial statements in accordance with generally accepted accounting principles that reflect the public interest.

Registres et systèmes financiers
28 La Société met sur pied des systèmes de gestion financière et d'information lui permettant d'établir ses états financiers conformément aux principes comptables généralement reconnus qui tiennent compte de l'intérêt public.

Annual budget
29 For each fiscal year, the board must adopt a budget for the year that includes

(a) all revenue that Efficiency Manitoba anticipates receiving for the year and any accumulated surplus from previous years; and

(b) all operating expenses that it anticipates incurring for the year and any accumulated deficit from the previous years.

Budget annuel
29 Le conseil adopte pour chaque exercice un budget indiquant :

a) l'ensemble des recettes que la Société anticipe pour l'exercice et tout excédent accumulé découlant des exercices précédents;

b) l'ensemble des frais de fonctionnement qu'elle prévoit pour l'exercice et tout déficit accumulé découlant des exercices précédents.

Minister's recommendations
38(2) In making a recommendation under this section, the minister is to consult with Efficiency Manitoba and is to have regard for the recommendations of the PUB, if any.

Regulations — general
39 The Lieutenant Governor in Council may make regulations

(a) prescribing the commencement date;

(b) prescribing measures, actions, programs, or services or rates that are included or excluded from the definition "demand-side management initiative" in section 2;

(c) respecting Efficiency Manitoba administering or undertaking initiatives on behalf of others, including prescribing terms and conditions on Efficiency Manitoba's becoming engaged in these activities, which Efficiency Manitoba must comply with;

(d) prescribing activities Efficiency Manitoba must undertake relating to efficiency, conservation or the reduction of greenhouse gas emissions in Manitoba;

(e) authorizing Efficiency Manitoba to provide services outside of Manitoba, including imposing restrictions on the authorization;

(f) prescribing a formula for or the manner in which net savings are to be determined, including limiting or excluding the net savings from particular measures, actions, programs, services or rates that may be included in the determinations;

(g) governing the submission of an efficiency plan to the PUB;

(h) prescribing factors which the PUB must consider when it reviews an efficiency plan, including the value or weight to be given to

(i) reductions in greenhouse gas emissions in Manitoba, and

Recommandations du ministre
38(2) Avant de faire une recommandation en vertu du présent article, le ministre consulte la Société et tient compte des recommandations de la Régie, le cas échéant.

Règlements — dispositions générales
39 Le lieutenant-gouverneur en conseil peut, par règlement :

a) fixer la date de mise en œuvre;

b) prévoir les mesures, les actions, les programmes, les services ou les tarifs que vise ou exclut la définition d'« initiative d'effacement de consommation » figurant à l'article 2;

c) régir la gestion ou la mise en œuvre d'initiatives par la Société pour le compte d'autrui, notamment fixer les modalités applicables qu'elle se doit de respecter lorsqu'elle s'engage dans ces activités;

d) prévoir les activités que la Société doit entreprendre concernant l'efficacité, la conservation et la réduction d'émissions de gaz à effet de serre au Manitoba;

e) autoriser la Société à fournir des services à l'extérieur du Manitoba et, notamment, assortir cette autorisation de restrictions;

f) fixer une formule en vue du calcul des économies nettes ou la façon de les calculer, y compris limiter ou exclure les économies nettes résultant de mesures, d'actions, de programmes, de services ou de tarifs précis qui pourraient être comprises dans le calcul;

g) régir la présentation d'un plan d'efficacité énergétique à la Régie;

h) fixer les facteurs dont la Régie doit tenir compte lorsqu'elle examine un plan d'efficacité énergétique, y compris la valeur ou le poids à donner :

(i) aux réductions de gaz à effet de serre au Manitoba,

(ii) the societal benefits to be achieved by all or a portion of Efficiency Manitoba's initiatives;

(i) prescribing rules for determining if the initiatives included in a proposed three-year plan are adequate, cost-effective or both;

(j) prescribing rules for determining costs that are to be considered administrative or overhead costs for the purpose of Efficiency Manitoba's three-year or annual budget;

(k) respecting matters to be addressed in an assessment conducted under section 16 and the timing for any assessment report to be filed or published under that section;

(l) respecting billing and collection services to be provided to Efficiency Manitoba by Manitoba Hydro;

(m) respecting energy efficiency or energy conservation loan or financing programs that, as part of an approved efficiency plan, are to be delivered by Manitoba Hydro in conjunction with Efficiency Manitoba;

(n) establishing requirements Manitoba Hydro must comply with in respect of energy efficiency or energy conservation loan or financing programs that are, or are to be, implemented by Efficiency Manitoba;

(o) respecting on-meter efficiency programs;

(p) for the purpose of section 6, specifying additional powers for Efficiency Manitoba or restricting the powers of Efficiency Manitoba, and imposing terms and conditions on those additions or restrictions;

(q) specifying types of information that must not be requested under section 34 or that are not subject to section 35;

(r) respecting the extent to which *The Corporations Act* applies to Efficiency Manitoba;

(ii) aux bienfaits sociaux que procurerait la totalité ou une partie des initiatives de la Société;

i) fixer des règles servant à établir si des initiatives comprises dans un plan triennal proposé sont adéquates, rentables ou les deux;

j) fixer des règles servant à établir quels frais doivent être considérés comme des frais administratifs ou des coûts indirects dans le cadre du budget annuel ou triennal de la Société;

k) régir les questions qui doivent être examinées dans le cadre d'une évaluation effectuée en vertu de l'article 16 et les délais de dépôt ou de diffusion des rapports d'évaluation en vertu de cet article;

l) régir les services de facturation et de perception que doit fournir Hydro-Manitoba à la Société;

m) régir les programmes de prêt ou de financement en matière d'efficacité énergétique ou d'économie d'énergie qui, dans le cadre d'un plan d'efficacité énergétique approuvé, doivent être offerts par Hydro-Manitoba conjointement avec la Société;

n) fixer les exigences qu'Hydro-Manitoba doit respecter relativement aux programmes de prêt ou de financement en matière d'efficacité énergétique ou d'économie d'énergie qui sont mis en œuvre par la Société ou qui doivent l'être;

o) régir les programmes d'aide à l'efficacité énergétique;

p) pour l'application de l'article 6, accroître ou restreindre les pouvoirs de la Société et fixer des modalités à cet égard;

q) prévoir les types de renseignements qui ne peuvent être demandés en vertu de l'article 34 ou qui ne sont pas assujettis à l'article 35;

r) prévoir dans quelle mesure la *Loi sur les corporations* s'applique à la Société;

(s) for the purpose of section 34 or 35, prescribing a public utility or a municipality, and prescribing the types of information, including personal information, that Efficiency Manitoba may collect concerning the supply and consumption of potable water;

(t) defining a word or phrase used but not defined in this Act;

(u) respecting any other matter the Lieutenant Governor in Council considers necessary or advisable for the administration of this Act.

Regulations — demand-side management of other resources

40(1) The Lieutenant Governor in Council may make regulations requiring any of the following to be subject to demand-side management under this Act:

(a) electrical power in Manitoba;

(b) potable water that is consumed in Manitoba;

(c) fossil fuels that are consumed within the transportation sector in Manitoba.

Content of regulation under this section

40(3) A regulation under this section may

(a) require Efficiency Manitoba to establish three-year plans for meeting savings targets in respect of a resource for which a savings target is established under subsection (2), and include provisions governing

(i) the contents of a plan,

(ii) the timing and manner in which a plan is to be prepared, submitted, reviewed, approved and implemented,

s) pour l'application de l'article 34 ou 35, désigner un service public ou une municipalité et fixer les types de renseignements, y compris les renseignements personnels, que la Société peut recueillir concernant la fourniture et la consommation d'eau potable;

t) définir des termes ou des expressions qui sont utilisés dans la présente loi mais qui n'y sont pas définis;

u) prendre toute autre mesure qu'il estime nécessaire ou utile à l'application de la présente loi.

Règlements — effacement de consommation pour d'autres ressources

40(1) Le lieutenant-gouverneur en conseil peut, par règlement, prévoir que sont soumis à l'effacement de consommation en vertu de la présente loi :

a) la puissance électrique au Manitoba;

b) l'eau potable consommée au Manitoba;

c) les combustibles fossiles consommés par le secteur des transports au Manitoba.

Règlements — objectifs d'économies pour d'autres ressources

40(2) Le lieutenant-gouverneur en conseil peut, par règlement, fixer les objectifs d'économies que la Société a la responsabilité d'atteindre relativement aux ressources énumérées aux alinéas (1)a) à c).

Contenu des règlements

40(3) Tout règlement pris en vertu du présent article peut :

a) exiger que la Société adopte des plans triennaux pour atteindre les objectifs d'économies relativement à une ressource pour laquelle un objectif d'économies est fixé en vertu du paragraphe (2), et comporter notamment des dispositions sur ce qui suit :

(i) le contenu d'un plan,

TAB 32

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Charter Values and Administrative Justice

Working Paper

Lorne Sossin and Mark Friedman

Abstract:
What would the *Charter of Rights and Freedoms* have looked like if it had been designed for administrative justice? This is a question underlying this study. Ever since the Canadian Supreme Court made clear in *Slaight Communications* that discretionary decisions of public officials were to be subject to the *Charter of Rights and Freedoms*, and expanded the reach of the *Charter*he coherence of
the relationship between the *Charter* and administrative justice. The Court attempted to raditional application of the
Charter to incorporate a potentially broader but inchoate set of "*Charter* values" in its 2012 decision *Doré*laborate a new
framework for the development and application of *Charter* values in the distinct sphere of administrative justice.

Keywords:
Charter of Rights and Freedoms, *Charter* values, administrative justice, administrative law, constitutional law, public law, *Slaight Communications*, *Doré*

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Personal autonomy is a *Charter* value that has been used as an interpretive guide in common law settings.[75] Here again, while captured in specific rights such as the right to be free from unreasonable search and seizure in s.8 of the *Charter*, autonomy extends beyond this and any other specific *Charter* right as well. For example, the Supreme Court in *R v Salituro* suggested that the common law rule invalidating the competence of a spousal witness in the context where the spouses are irreconcilably separated was inconsistent with *Charter* values, specifically that "individual choices [should] not be restricted unnecessarily."[76]

Iacobucci J., writing for the Court, explained the relevance of *Charter* values as follows:

> Where the principles underlying a common law rule are out of step with the values enshrined in the *Charter,* the courts should scrutinize the rule closely. If it is possible to change the common law rule so as to make it consistent with *Charter* values, without upsetting the proper balance between judicial and legislative action that I have referred to above, then the rule ought to be changed. The common law rule making an irreconcilably separated spouse an incompetent witness for the prosecution against the other spouse is inconsistent with the values in the *Charter*. Subject to consideration of the limits on the judicial role, the rule ought therefore to be changed. Society can have no interest in preserving marital harmony where spouses are irreconcilably separated because there is no marital harmony to be preserved.[77]

Mayo Moran has used *Salituro* to explain the importance of *Charter* values as a guide to the interpretation and application of the common law. For example, in addition to Iacobucci's concerns over autonomy, the common law rule was premised on an anachronistic view of women and an exaggerated emphasis placed on the promotion of marital harmony.[78] In this respect, the common law rule clashed with the equality values enshrined in the *Charter*.[79] Moran uses this example to stress the need to look beyond specific guarantees in the *Charter* when interpreting the common law, in favour of a reading that is in accordance with the "basic underlying theory of the *Charter"*.[80] From this standpoint, autonomy and equality values speak to the broader, more fundamental values of the *Charter;* it is against these underlying values that the common law develops.[81]

This connection is not unique to autonomy and equality. While specific *Charter* rights are distinct, many *Charter* values should be seen as mutually reinforcing and interlocking. This adds both the coherence of *Charter* values in administrative justice, but also to their complexity and variability.

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[75] *MacCabe v Board of Education of Westlock Roman Catholic Separate School District*, 2001 ABCA 257 at para 106.-7 < http://www.albertacourts.ca/jdb/1998-2003/ca/Civil/2001/2001abca0257.pdf>.
[76] *R v Salitburo,* [1991] 3 SCR 654 < http://www.canlii.org/en/ca/scc/doc/1991/1991canlii17/1991canlii17.html>.
[77] Ibid.
[78] Mayo Moran, "Authority, Influence, and Persuasion: *Baker*, *Charter* values and the Puzzle of Method" in *The Unity of Public Law*, David Dyzenhaus, ed (Toronto: Hart, 2004) at 417.
[79] *Ibid* at 418.
[80] *Ibid.*
[81] *Ibid.*

Fairness

In addition to the *Charter* values expressed above, numerous courts and commentators have noted values stemming from common law rules concerning process. The *Charter* value of fairness is particularly applicable to the sphere of administrative justice, where procedural fairness has universal relevance.

Robert Currie notes that the *Charter* values of procedural fairness and a fair trial, embodied within sections 7 and 11(d), inform the common law rules of evidence.[82] Currie goes on to demonstrate that other common law rules of defence, such as confession rules and the ability to make a full answer of defense, have been "constitutionalized" through their intersection with "*Charter* standards."[83] Kent Roach expands upon this point by demonstrating that the common law rules relating to admissibility of evidence were modified in *R v Seaboyer* in order to be consistent with *Charter* values.[84] He notes that other common law presumptions such as fairness and respect for international commitments to human rights reflect *Charter* values, whereas common law presumptions such as the right to property have lost their resonance in the *Charter* era.[85]

The decisions in *Hennessy v Horse Racing Alberta* and *Gonzalez v Alberta Driver Control Board* affirm Roach and Currie's findings that procedural fairness and common law rules of evidence arguably are informed by *Charter* values as well.[86] In *Hennessy*, the Queen's Bench reviewed an appeal from the Tribunal of Horse Racing Alberta. The court found that the claimant was denied procedural fairness and fundamental justice because he was unable to make a full answer and defence, which the court considered a *Charter* value.[87]

Finally, the Quebec Court of Appeal recently described "natural justice" as a *Charter* value emanating from s 7 of the *Charter.* In *Syndicat des travailleuses et travailleurs de ADF - CSN v Syndicat des employés de Au Dragon Forgé Inc*, the Quebec Court of Appeal applied *Doré* to balance the objective of a law that sought to maintain confidentiality in disciplinary boards with the value of natural justice.[88]

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[82] Robert J Currie, "The Evolution of the Law of Evidence: Plus Ça change ...?" (2011) 15 Can Crim L Rev 213 at 222.

[83] *Ibid.*

[84] Kent Roach, *Constitutional Remedies in Canada 2 ed, Release No 19, December 2012*. Toronto: Canada Law Book, 2012 at para 14.780.

[85] Kent Roach "Common Law Bills of Rights as Dialogue between Courts and Legislatures" (2005) 55 UTOR L J 733 at 747-8.

[86] See also *A (LL) v B (A)* or *R v O'Connor.*

[87] *Hennessy v Horse Racing Alberta*, 2006 ABQB 903 at para 28 <http://www.canlii.org/en/ab/abqb/doc/2006/2006abqb903/2006abqb903.html>.

[88] *Syndicat des travailleuses et travailleurs de ADF - CSN v Syndicat des employés de Au Dragon forgé Inc,* 2013 QCCA 793 at para 45.

Expressive Freedom

The Supreme Court has identified "freedom of expression" as a *Charter* value. In its decisions concerning defamation,[89] journalist-sourced privilege,[90] and picketing[91] the Court has used the *Charter* value of freedom of expression in order to rule on the validity of the common law in the *Charter* era. The use of the value was most recently applied by the Ontario Court of Appeal. In *Jones v Tsige,* the Court of Appeal balanced the right to privacy with the *Charter* value of freedom of expression.[92]

Expressive freedom has also been applied in the context of administrative justice. In *Goldberg v Law Society (British Columbia)*, the British Colombia Court of Appeal discussed whether the *Charter* value of "freedom of expression" was engaged in a disciplinary hearing case. The court highlighted the *Charter* value of freedom of expression, opposed to the *Charter* right of 2(b), because "we [the court] do not have a *Charter* issue squarely before us."[93] Freedom of expression as a *Charter* value was confirmed in *Pridgen v University of Calgary*, where the court rejected the findings of the Review Committee and Board of Governors on the basis that it made no attempt to balance the statutory mandate with the right of freedom of expression.[94] While the court discussed freedom of expression in light of *Charter* rights and statute, its discussion of *Charter* values and application of *Doré* support the contention that freedom of expression constitutes a *Charter* value.

This value has been applied even more clearly by the Ontario Human Rights Tribunal in *Taylor-Baptiste v. Ontario Public Service Employees Union*,[95] and *Marceau v. Brock University*.[96] In these cases, the Tribunal used reference to *Charter* value of expressive freedom as a tool in interpreting the *Code*.

Most significantly, of course, expressive freedom was at issue in the *Doré* decision itself. Abella J. recognized that, "in dealing with the appropriate boundaries of civility, the severity of the conduct must be interpreted in light of the expressive rights guaranteed by the Charter, and, in particular, the public benefit in ensuring the right of lawyers to express themselves about the

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[89] *Hill v Church of Scientology of Toronto,* [1995] 2 SCR 1130 < http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/1285/index.do>; *Grant v Torstar Corp,* 2009 SCC 61< http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/7837/index.do>.[89]

[90] *R v National Post*, 2010 SCC 16 < http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/7856/index.do>.

[91] *RWDSU v Pepsi-Cola Canada Beverages,* [2002] 1 SCR 156 at paras 106-7 <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/1945/index.do>.

[93] *Goldberg v Law Society (British Columbia),* 2009 BCCA 147 at para 57.

[93] *Goldberg v Law Society (British Columbia),* 2009 BCCA 147 at para 57.

Pridgen v University of Calgary, 2012 ABCA 139 at paras 126, 176 <http://www.canlii.org/en/ab/abca/doc/2012/2012abca139/2012abca139.html>.

[95] 2013 HRTO 180 at paras. 31-35.

[96] 2013 HRTO 569 at para. 13-15. See also *R.C. v. District School Board of Niagara*, 2013 HRTO 1382 (CanLII), <http://canlii.ca/t/g034z>

justice system in general and judges in particular."[97] The Court concluded that in light of the egregious content and tone of the lawyer's complaint about the Judge, the Court's balancing of expressive freedom with the statutory objectives of the Barreau's Code of Ethics "cannot be said to represent an unreasonable balance..."[98]

Privacy

Privacy represents yet another *Charter* value which is likely to find application in administrative justice contexts and which exists outside of the context of a specific *Charter* right. In *M. (A.) v. Ryan*,[99] the Supreme Court employs Charter values to extend the scope of common law privilege to reflect changing "social and legal realities of our time," and in particular the privacy of victims of sexual violence who seek psychiatric counselling.[100]

In *Gore v College of Physicians & Surgeons (Ontario)*, for example, the appellant physicians disputed an investigation by the Registrar of the College of Physicians and Surgeons pursuant to the *Regulated Health Professions Act*. The appellants argued that the regulation (and presumably, decisions made pursuant to the regulation) should be interpreted in light of the *Charter* values of protection of patient privacy and protection against self-incrimination. The court ultimately chose not to invoke *Charter* values in deciding the case since the regulation was not ambiguous and a *Charter* values approach was thus unnecessary.[101] However, the court neither confirmed nor disputed the existence of the *Charter* values raised.

Conclusion

The list above is not exhaustive, and should be seen as dynamic rather than static aspect of the *Charter*'s application to administrative justice. We recognize that the scope of *Charter* values set out above is a somewhat subjective account of an ill-defined category. Other possible *Charter* values could be added, including, for example, mobility, mentioned in the context of *Khadr v Canada*. In that case, the Federal Court [FC] reviewed the Government's decision to refuse Omar Khadr's request for a passport. The FC ruled that the "right to leave Canada is a sufficiently important aspect of an individual's freedom" and constituted a *Charter* value.[102] The Court also argued that the issuance of a passport reflects the *Charter* value expressed by mobility rights.[103] We viewed this value as simply overlapping the mobility right as opposed to a distinct value that could constrain discretion or guide statutory interpretation.

[97] *Doré* supra note , at para. 63.
[98] Ibid. at para. 71.
[99] [1997] 1 S.C.R. 157.
[100] Ibid at para. 21.
[101] *Gore v College of Physicians & Surgeons (Ontario),* 2009 OCA 546 at para 30 <http://www.canlii.org/en/on/onca/doc/2009/2009onca546/2009onca546.html>.
[102] *Khadr v Canada (Attorney General)* 2006 FC 727 at para 69 <http://www.canlii.org/en/ca/fct/doc/2006/2006fc727/2006fc727.html>.
[103] *Ibid* at para 113.

Similarly, the Supreme Court in *Multani* highlighted the promotion of multiculturalism and diversity as consistent with the *Charter* although it did not characterize them as *Charter* values *per se*.[104] Even if not elevated to the status of a *Charter* value, in *Lalonde*, as noted above, the Ontario Court of Appeal held that respect for and protection of minorities constituted an unwritten constitutional principle.[105] Similarly, democracy was recognized as an unwritten constitutional principle in the *Secession Reference*,[106] and invoked as a *Charter* value in *Wilson Colony* as set out above. While mobility is arguably too narrow to constitute a *Charter* value, multiculturalism and the enhancement of democracy may be overly broad to fulfill this function. Alternatively, it may be that values such as mobility and multiculturalism are still inchoate and through further refinement and development may be recognized as within the scope of *Charter* values delineated above.

Notwithstanding its tentative nature, we believe the scope of *Charter* values discussed above in *Charter* jurisprudence represents an important point of departure for the development of *Charter* values for administrative justice. While *Charter* values may be seen as limited simply to the text of *Charter* rights differently applied in administrative justice settings, this does not appear to be how the courts themselves have conceived of *Charter* values, nor would such a formalist approach be in keeping with the robust and adaptive administrative law framework invoked in *Doré*. That said, many of the values set out lack an important contextual dimension.

Administrative justice, unlike courts, must also take into consideration the policy mandate of a particular decision-making body and the purposive nature of statutory or prerogative authority. As the Supreme Court recognized in the context of *Charter* remedies in *Conway*, while a court may do anything that is "just and appropriate" pursuant to section 24(1) remedies, a tribunal could only remedy *Charter* breaches by recourse to their statutorily mandated powers. The *Charter* cannot, in other words, be used by a tribunal to frustrate or usurp the role of the legislature in demarcating the boundaries of that tribunal's authority or its reasons for being. A similar conceptual framework, we suggest, applies in the context of *Charter* values. While the *Charter* jurisprudence can shed light on the scope of *Charter* values, it remains for each tribunal to determine which *Charter* values will be relevant to its mandate, and how to balance those values against its policy mandate. For example, while personal autonomy may be a broadly recognized *Charter* value, it will necessarily mean something different in the context of a

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[104] *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 at para 78 < http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/15/index.do>. For discussion, see Vaughan Black, "Cultural Thin Skulls" 60 UNB LJ 186 at 203-4.

[105] *Lalonde, supra* note 11 at 187-8. See also Chief Justice Dickson's reference to "Canada's commitment to the values of equality and multiculturalism enshrined in ss 15 and 27 of the *Charter*" in *Canada (Human rights commission) v Taylor*, [1990] 3 SCR 892 and "respect for cultural and group identity" as a *Charter* value mentioned in *Ross, supra* note 13. On the implications of unwritten constitutional principles more generally, see Jean Leclair, "Canada's Unfathomable Unwritten Constitutional Principles" (2002) 27 Queen's LJ 389.

[106] [1997] 3 SCR 3.

TAB 33

THE "SUPREMACY OF GOD", HUMAN DIGNITY AND THE *CHARTER OF RIGHTS AND FREEDOMS*

Lorne Sossin*

> "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:"[1]

I. Introduction

While the *Canadian Charter of Rights and Freedoms* is now two decades old, and past its natural adolescence, we have yet to grapple with some of the most fundamental precepts, premises and principles which animate it. This essay is intended to explore two of these: the concept of human dignity, which does not appear in the *Charter*, and the concept of the supremacy of God, which are the first words to appear in the *Charter*.

Is human dignity a judicially cognizable concept? No evidence can prove or disprove its existence and no doctrinal test can precisely define its boundaries. It is a construction of personal conviction, individual belief, culture and social relations. As Oscar Schachter once observed,

> references to human dignity are to be found in various resoultions and declarations of international bodies. National constitutions and proclamations, especially those recently adopted, include the ideal or goal of human dignity in their references to human rights. Political leaders, jurists and philosophers have increasingly alluded to the dignity of the human person as a basic ideal so generally recognized so as to require no independant support. It has acquired a resonance that leads it to be invoked widely as a legal and moral ground for protest against degrading and abusive treatment. No other ideal seems so clearly accepted as a universal social good.[2]

It reflects, in short, a leap of faith. The Supreme Court has stated on several

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

[2] Oscar Schachter, "Human Dignity as a Normative Concept" (1983) 77 A.J.I.L. 848 at 848-849.

> For many reasons, there is overwhelming public interest in protecting a pregnant woman in our community from being destitute.[42]

The implications of this approach to human dignity are far reaching. If our collective dignity is undermined by members of our community being "deprived of basic sustenance" by the failure of the state to provide sufficient support through welfare benefits, then the *Charter* may require of the state proactive obligations to care for its most vulnerable citizens. As Oscar Schachter has asserted,

> [f]ew will dispute that a person in abject condition, deprived of adequate means of subsistence, or denied the opportunity to work, suffers s profound affront to his sense of dignity and intrinsic worth. Economic and social arrangments can not therefore be excluded from a consideration of the demands of dignity. At the least, it requires recognisiton of a minimal concept of distributive justice that would require satisfaction of the essential needs of everyone.[43]

What could justify this judicial intrusion into the sovereignty of Parliament to decide how it wishes to allocate resources? The answer likely would not be the rule of law, which restrains government action rather than compelling it. In my view, the supremacy of God provides a basis for subsuming the will of Parliament to certain, higher constitutional obligations – obligations of the kind Epstein alludes to in *Rogers*, and Justice Arbour emphasizes in *Gosselin*. While recourse to the Preamble and the supremacy of God is not necessary to achieve this interpretation of s. 7 or of the *Charter* generally, it serves to focus the debate on the universal aspirations contained in the concept of human dignity. It provides the moral architecture of the *Charter* with a series of possible blueprints.

Finally, while I have strong convictions about the relationship between the "supremacy of God", human dignity and the obligations which ought to be imposed on the state by virtue of the *Charter*, it is important to reiterate that such interpretive conclusions always will remain a leap of faith. The blueprint is not complete and waiting to be uncovered – rather, it is a collaborative work in progress. My advocacy for a rejuvenated role for the supremacy of God in constitutional jurisprudence does not depend on a court adopting my own version of its content – rather, my position depends on courts acknowledging that *all* interpretive conclusions regarding the content and meaning of the *Charter* embody moral claims which, to be accepted, must derive from conviction and be susceptible to justification. While personal, spiritual convictions may rest on faith alone, constitutional principles require justification and can only be sustained, in the long run, by social consensus. A leap of faith regarding the moral content of human dignity requires reasons. The leap of faith which I find most compelling, for example, is that human dignity as a *Charter* norm ought to encompass and elaborate the claim that all human beings merit equal moral worth and recognition by the

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[42] *Rogers v. Sudbury (Administrator of Ontario Works)* (2001), 57 O.R. (3d) 460 at para. 19.

[43] *Supra* note 2 at 851.

state, and that this imposes positive obligations on governments to meet the basic needs of those dependant on state assistance (whether this conviction springs from secular or spiritual sources seems to me to be beside the point). What the Supreme Court of Canada has failed to do, in my view, is precisely this – subject its faith in, and claims regarding, the content of human dignity to the test of reason and justification. What I have suggested in this essay is that until the Court does so, the purposes of human dignity will remain unrevealed, and the edifice of the *Charter* will remain a façade.