PUBLIC UTILITIES BOARD OF MANITOBA

MANITOBA HYDRO 2019/2020 GENERAL RATE APPLICATION

BOOK OF AUTHORITIES OF THE INTERVENOR

ASSEMBLY OF MANITOBA CHIEFS

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TAB 1

Order No. 59/18

FINAL ORDER WITH RESPECT TO MANITOBA HYDRO'S 2017/18 AND 2018/19 GENERAL RATE APPLICATION

May 1, 2018

BEFORE: Robert Gabor, Q.C., Chair
Marilyn Kapitany, B.Sc., (Hon), M.Sc., Vice Chair
Hugh Grant, Ph.D., Member
Shawn McCutcheon, Member
Sharon McKay, BGS, Member
Larry Ring, Q.C., Member

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1.0 Overview

Under Manitoba law, the Public Utilities Board ("Board") must set electricity rates for Manitoba Hydro's customers that are just and reasonable. In so doing, as confirmed by the Manitoba Court of Appeal, the Board balances two concerns: the interests of Manitoba Hydro's ratepayers and the financial health of Manitoba Hydro. Together and in the broadest interpretation these interests represent the general public interest.

1.1 The Manitoba Public Utilities Board

The Board is an administrative tribunal created by provincial legislation to act as an independent decision-maker in the regulation of public utilities in Manitoba. To carry out this mandate, the Board is empowered by legislation with many of the same powers, rights, and privileges as the Manitoba Court of Queen's Bench. As such, the Board is court-like and transparent in its processes. Those processes include the receipt of evidence under oath from utilities, interested or affected groups (also known as "Interveners"), and members of the public.

In order to make decisions on the applications before it, the Board deliberates on the evidence obtained in accordance with fair processes pursuant to principles of administrative law. For example, in the present Application before the Board, the Board received written and oral evidence from witnesses on behalf of Manitoba Hydro, expert witnesses retained by Interveners, Independent Expert Consultants, and members of the public. All of the documents filed in the proceeding, as well as transcripts of oral evidence and submissions, are available on the Board's website at www.pubmanitoba.ca.

The Board's Rate Review Mandate

The Board's mandate with respect to the regulation of Manitoba Hydro (or "the Utility") is derived from *The Public Utilities Board Act*, CCSM c P280 ("Board Act"), *The Crown Corporations Governance and Accountability Act*, CCSM c C336 ("Crown Act"), and *The Manitoba Hydro Act*, CCSM c H190 ("Hydro Act").

Pursuant to subsection 25(1) of the Crown Act, the prices charged by Manitoba Hydro with respect to the provision of power ("rates for services") are reviewed by the Board under the Board Act. No change in rates for services can be made and no new rates for services can be introduced without the approval of the Board. Manitoba Hydro is required to submit proposals regarding rates to the Board for approval.

The Board's jurisdiction over Manitoba Hydro is limited by subsection 2(5) of the Board Act, such that the Board's primary authority over Manitoba Hydro is the review and approval of rates as set out in the Crown Act. As a result, unlike all other rate-setting jurisdictions in Canada, the Board does not have statutory authority to approve Manitoba Hydro's capital project plans or expenditures; however, the Board Act provides that the Board may perform duties assigned to it by Order in Council of the Lieutenant Governor in Council.

1.2 Manitoba Hydro

Manitoba Hydro is a Crown Corporation established pursuant to provincial legislation in order to provide for the supply of power adequate for the needs of the province, and to engage in and promote economy and efficiency in the development, generation, transmission, distribution, supply and end-use of power. Further to this mandate,

Manitoba Hydro provides safe and reliable electricity service to Manitobans at rates that are among the lowest in North America.

When Manitoba Hydro applies to the Board for rate increases, Manitoba Hydro bears the statutory onus of demonstrating that the increases sought are just and reasonable. While the focus of Manitoba Hydro may be on the financial risks faced by the Utility, the Board's role is broader. As noted above, to set rates in the public interest, the Board considers not only the financial health of Manitoba Hydro. Rather, the Board must balance the financial health of Manitoba Hydro with the interests of ratepayers.

In addressing these two concerns, any application by Manitoba Hydro for a rate increase cannot be divorced from the context in which Manitoba Hydro operates. As a monopoly Crown utility that generates, transmits, and distributes electricity (also known as vertically integrated), Manitoba Hydro is different from many other electric utilities operating in Canada, and in particular, from privately owned for-profit corporations. Unlike private corporations, Manitoba Hydro does not have private shareholders in the traditional sense. While owned by the Province of Manitoba for the benefit of Manitobans, Manitoba Hydro is a non-share capital corporation. This means that Manitoba Hydro does not have investors or shareholders that contribute equity to the Utility and it is not required to make payments to any equity investors. Any equity acquired by Manitoba Hydro is obtained from domestic ratepayers or export power sale customers. Rather, as a Crown utility, Manitoba Hydro has a public policy purpose.

In addition, Manitoba Hydro is a pure cost recovery utility. Unlike many other government-created utilities in Canada, Manitoba Hydro is not required to pay dividends to the provincial government. As a cost recovery utility, Manitoba Hydro is within a subset of types of utilities; it is further within a subset of cost recovery utilities because Manitoba Hydro's debt is borrowed by the Province of Manitoba. The government raises

debt capital from the capital markets, and provides the funds to Manitoba Hydro with the addition of a debt guarantee fee.

1.3 The General Rate Application

In 2017, Manitoba Hydro applied to the Board for changes to its consumer rates. Specifically, Manitoba Hydro is seeking in the present General Rate Application ("GRA"), approval of three rate increases: (1) finalization of the 3.36% interim rate increase that was effective August 1, 2016, (2) finalization of the 3.36% interim rate increase that was effective August 1, 2017, and (3) a 7.9% rate increase to all components of all consumer rates, effective April 1, 2018.

While only the three rate increases listed above are before the Board for approval, the 7.9% increase sought by Manitoba Hydro for the 2018/19 fiscal year is part of a new 10-year financial plan that replaces the Utility's previous 20-year plans that were predicated on projected 3.95% annual rate increases. Under Manitoba Hydro's new 10-year financial plan, following the August 1, 2017 3.36% interim rate increase, Manitoba Hydro projects a rate path of six years of 7.9% annual rate increases, followed by a one-year rate increase of 4.54% and then two years of rate increases at 2%.

The new 10-year financial plan includes six years of rate increases at a level twice the previously requested annual rate increases and four times the rate of inflation. The new plan is designed to have Manitoba Hydro reach a 25% equity level, from the current 15%, in 10 years by 2027, while generating additional cash flow and enabling repayment of a portion of Manitoba Hydro debt. This differs from the previously projected 20-year timeframe for achieving a 25% equity level.

The Utility sees the fundamental underlying problem with its financial health as being the major capital expansion and the amount of the debt required to pay for the simultaneous construction of the $8.7 billion Keeyask Generating Station project ("Keeyask") and the $5.0 billion Bipole III Transmission Line project ("Bipole III"). Manitoba Hydro seeks a prospective level of income and cash flow that, in the Utility's view, would restore its financial strength while also being capable of enduring drought or material negative deviations from export price and interest rate forecasts without requiring emergency relief from ratepayers. While the change in risk tolerance of the Manitoba Hydro-Electric Board is a significant factor underpinning the new financial plan, Manitoba Hydro also cites lower revenue growth and increased debt as contributing factors.

The 7.9% rate increase requested for the 2018/19 fiscal year is part of Manitoba Hydro's new financial plan. While the 10-year plan is part of the circumstances before the Board in this GRA, rate increases for years beyond 2018/19 are not before the Board for approval. The Board cannot bind itself to future rate increases that are not the subject of the immediate request before the Board. Similarly, and as indicated by Manitoba Hydro, the Utility may alter its plans based on circumstances as they arise. Currently, Manitoba Hydro's Retained Earnings are at record levels and already twice the level that would be required to deal with the negative financial impacts of a five-year drought; however, should unforeseen or negative risks occur, this Board will consider the evidence of the specific circumstances and the options, including rate increases, to address such circumstances as the Board has done when warranted in the past. For example, when a drought occurred in the early 2000s, this Board approved rate increases in excess of what Manitoba Hydro requested to address the financial health of the Utility.

In its Letter of Application filed on May 5, 2017, Manitoba Hydro sought the following specific approvals in the current GRA:

1. Final approval of Order 59/16 which approved, on an interim basis, an across-the-board rate increase of 3.36% effective August 1, 2016, and final approval of any other interim rate Orders issued subsequent to the filing of the Application and prior to the conclusion of this proceeding;

2. Approval, on an interim basis, of rate schedules incorporating an across-the-board rate increase of 7.9% to all components of the rates for all customer classes to be effective August 1, 2017.

   After the Board's Order approving a 3.36% interim rate increase effective August 1, 2017, Manitoba Hydro revised its request for the 2017/18 fiscal year and sought only finalization of the 3.36% interim rate increase;

3. Approval of an across-the-board rate increase of 7.9% to all components of the rates for all customer classes to be effective April 1, 2018;

4. Final approval of the Light Emitting Diode ("LED") rates for the Area and Roadway Lighting class (Outdoor Lighting) approved on an interim basis in Order 79/14, and approval of new LED rates for the Area and Roadway Lighting class (Sentinel Lighting) as discussed in Tab 9 of Manitoba Hydro's Application;

5. Approval to remove the Area and Roadway Lighting (Festoon Lighting) and the Area & Roadway Lighting (Christmas Lighting) from Manitoba Hydro's rate schedule, as discussed in Tab 9 of its Application;

6. Endorsement of modifications to the Terms and Conditions of Option 1 of the Surplus Energy Program ("SEP") that were accepted on an interim basis in Order 43/13, as outlined in Tab 9 of its Application;

7. Final approval of all SEP interim *ex parte* rate Orders as set forth in Tab 10 of this Application, as well as any additional SEP *ex parte* Orders issued subsequent to the filing of its Application and prior to the Board's Order in this matter;

8. Final approval of Curtailable Rate Program ("CRP") *ex parte* Order 54/16 as well as any additional *ex parte* Orders in respect of the CRP issued subsequent to the filing of its Application and prior to the Board's Order in this matter;

9. Final approval of Orders 116/12 and 117/12 that approved, on an interim basis, a 6.5% rate increase to the full cost portion of the General Service and Government rates in the four remote communities serviced by diesel generation ("diesel zone") effective September 1, 2012, and final approval of diesel zone Orders 17/04, 46/04, 176/06, 1/10, 134/10, 1/11, and 148/11, subject to confirmation that Manitoba Keewatinowi Okimakanak has provided the parties to the agreement with the required affidavits from representatives of signatories to the agreement.

   In this proceeding, Manitoba Hydro's request for final approval of the diesel zone interim rates was predicated on receipt of the executed Settlement Agreement documents. In the course of the hearing, Manitoba Hydro advised that it was no longer seeking final approval of diesel zone interim rates in this proceeding as the final executed Settlement Agreement documents had not yet been provided to the Utility;

10. Endorsement of the proposed deferral and subsequent amortization of costs incurred with respect to the Conawapa Generating Station project, as discussed in Tab 4 of its Application; and

11. Endorsement of the proposed amortization period for disposition of the regulatory deferral accounts established to capture the differences between Depreciation Expense and Operating & Administrative Expense calculated for financial reporting purposes based on International Financial Reporting Standards, and Depreciation Expense and Operating & Administrative Expense calculated for rate-setting purposes reflecting Board directives in Order 73/15, as discussed in Tab 4 of its Application.

1.4 The Board's Hearing into the General Rate Application

The process for the Board's consideration of this GRA formally commenced when Manitoba Hydro filed its Letter of Application. On May 12, 2017 and May 26, 2017, respectively, Manitoba Hydro filed copies of the Revenue Requirement information with its Integrated Financial Forecast MH16 ("MH16") and the Rate Design and Cost of Service Study information in support of its GRA. On July 11, 2017, Manitoba Hydro filed an update to MH16 ("MH16 Update"), which maintained the same increases as in the new 10-year financial plan contained in MH16.

Manitoba Hydro's Application garnered significant public attention, including over 2,300 public comments on the Board's website, increased numbers of public presenters, and a greater number of applications for Intervener status than filed in prior proceedings – 12 in total, including from groups that had not previously participated in electricity regulatory matters before the Board.

Following a Pre-Hearing Conference held on June 12, 2018, the Board issued its procedural Order 70/17, in which the Board approved the following Interveners:

- Assembly of Manitoba Chiefs
- Business Council of Manitoba
- Consumers Coalition (Consumers' Association of Canada (Manitoba) / Winnipeg Harvest)
- Representatives of the General Service Small and General Service Medium Customer Classes
- Green Action Centre
- Keystone Agricultural Producers
- Manitoba Industrial Power Users Group
- Manitoba Keewatinowi Okimakanak

The Board also subsequently approved the intervention of the City of Winnipeg, as well as a request by Representatives of the General Service Small and General Service Medium Customer Classes and Keystone Agricultural Producers to combine their intervention.

An oral public hearing into Manitoba Hydro's request for a 7.9% interim rate increase effective August 1, 2017 was held on July 18 and 19, 2017, at which the Board heard oral submissions from approved Interveners and Manitoba Hydro. In Order 80/17, dated July 31, 2017, a majority of the Board denied an interim rate increase for Manitoba Hydro's general operations, and approved an interim rate increase of 3.36% effective August 1, 2017, with all revenues flowing to the previously established Bipole III Deferral Account to be utilized to pay the additional costs once Bipole III enters service.

The Board member who dissented in Order 80/17, Sharon McKay, would not have granted any interim rate increase.

After release of the Board's interim rate decision, Manitoba Hydro filed a revised financial plan, Integrated Financial Forecast "MH16 Update with Interim". MH16 Update with Interim incorporated the 3.36% interim rate granted by the Board for 2017/18 and revised Manitoba Hydro's 10-year financial plan to now forecast six consecutive years of 7.9% rate increases, through fiscal year ending 2024, followed by one year of a 4.54% increase in fiscal year ending 2025, and then two years of 2.0% increases. The revision to the financial plan maintains Manitoba Hydro's target of achieving a 75:25 debt-to-equity ratio in 10 years, rather than 20 years as the Utility projected previously. The cumulative rate increase in the MH16 Update with Interim 10-year plan is 77%.

The process for the Board's consideration of Manitoba Hydro's GRA also included a review of Manitoba Hydro's capital expenditures. This duty was assigned to the Board for the GRA filed in 2017 in Order in Council 92/2017 as a factor in setting rates for services in a manner that balances the interests of ratepayers and the financial health of Manitoba Hydro. In addition to a review of the reasonableness of current budgets and schedules for ongoing major capital projects, Order in Council 92/2017 gave rise to the Board's assessment of the economics of the Manitoba-Saskatchewan Transmission Line in this GRA proceeding. While the Order in Council expanded the Board's scope of review compared to previous GRA proceedings, the paragraph assigning the Board the duty of considering Manitoba Hydro's capital expenditures as a factor in setting rates reflects the Board's existing jurisdiction under its governing legislation. Beyond this, the Order in Council gave the Board greater procedural powers with respect to Manitoba Hydro's provision of information and documents related to capital expenditures, project

justifications, and revenues and income records. The text of Order in Council 92/2017 is contained at Appendix B to this Order.

Along with the filing by Manitoba Hydro of its written pre-filed evidence in its Application and written responses to Minimum Filing Requirements from the Board, the Consumers Coalition, and the Manitoba Industrial Power Users Group, the process for this GRA included:

- a post-filing workshop,
- a technical conference on Business Operations Capital expenditures,
- a workshop on bill affordability and rate design,
- written responses by Manitoba Hydro to two rounds of Information Requests from the Board and Interveners,
- the filing of written pre-filed evidence by Intervener-retained expert witnesses,
- written responses by Intervener-retained expert witnesses to Information Requests from the Board and all parties, and
- Manitoba Hydro's written rebuttal evidence.

In addition, to assist in the Board's consideration of issues in the GRA, especially in light of the Order-in-Council, the Board retained the following Independent Expert Consultants to test commercially sensitive and voluminous information provided by Manitoba Hydro to the Board:

- MGF Project Services ("MGF") – construction management experts retained as the project lead to conduct a review Manitoba Hydro's major capital expenditures;
- Amplitude Consultants Ply Ltd - to assist MGF with the review of Manitoba Hydro's high voltage direct current transmission assets;

- Klohn Crippen Berger – to assist MGF with the review of Manitoba Hydro's hydroelectric generation projects;

- Daymark Energy Advisors - to review and provide an expert opinion on Manitoba Hydro's export price and revenue forecasts, electricity load forecasts, and to conduct an economic analysis of the Manitoba-Saskatchewan Transmission Project; and

- Dr. Adonis Yatchew - to examine the impacts of proposed electricity rate increases on the Manitoba economy.

The Independent Expert Consultants were independent of all parties and the Board, and were represented by independent counsel. The written and oral evidence of the Independent Expert Consultants was tested by all parties and the Board. The Independent Exert Consultants filed written evidentiary reports. One round of Information Requests was directed to the Independent Expert Consultants and Manitoba Hydro provided written rebuttal evidence to the written reports of the Independent Expert Consultants. All parties and the Board had the opportunity to conduct oral cross-examination of the Independent Expert Consultants.

The Board also adjudicated a number of process matters, including the aforementioned Intervener applications and related budget submissions, a procedural Motion regarding the process for the receipt of confidential information, multiple Motions by Manitoba Hydro for confidential treatment of information filed in the proceeding, and requests for extensions of time.

The oral evidentiary hearing of the GRA commenced on December 4, 2017. The Board heard 31 days of oral evidence, including four Manitoba Hydro witness panels, nine Intervener-retained expert witness panels, five Independent Expert Consultant witness panels, a ratepayer panel sponsored by the Consumers Coalition, Manitoba Hydro's

oral rebuttal evidence, and three oral public presentation sessions along with three written public presentations. A summary of the evidence given by presenters in the proceeding is contained in Appendix C to this Order.

Following the conclusion of the oral evidentiary portion of the hearing, the Board heard closing submissions from Manitoba Hydro and Interveners and Reply argument from Manitoba Hydro on February 5, 7, 8, and 14, 2018.

A Glossary of Terms for technical terminology used in this Order is included as Appendix A.

2.0 Summary of the Board's Findings

By this Order, the Board denies Manitoba Hydro's request for a rate increase of 7.9% effective April 1, 2018. The Board approves a 3.6% average revenue increase to be recovered in Manitoba Hydro consumers' rates effective June 1, 2018. The recovery of these additional revenues is to be through rate increases at a different level for each customer class to address past and current under- and over-payment of costs by the customer classes.

Manitoba Hydro is to calculate the required rates to achieve the approved revenue increase of 3.6%, based on gradually adjusting the rates of all customer classes such that the revenues from each class will approximately align with the allocated costs to serve each class within a 10-year period. The Board anticipates that General Service Small Non-Demand, General Service Large 30-100 kV, and General Service Large >100 kV will experience a rate increase slightly less than the approved revenue increase of 3.6%, while other classes, including the Residential class, will experience rate increases slightly greater than 3.6%. The exception to this is First Nations on-reserve residential customers. The Board directs the creation of a First Nations On-Reserve Residential class and approves a 0% rate increase for this class for 2018/19. The customers in this class will therefore not experience any change to their rates as a result of this Order.

The Board further finalizes the previously approved interim rate increases of 3.36% effective August 1, 2016 and 3.36% effective August 1, 2017. Because these increases were previously granted and are already being collected, there will be no additional impact on ratepayers.

The Board directs Manitoba Hydro to provide a compliance filing pursuant to the directives in this Order. The compliance filing shall be provided by May 15, 2018 in order for Manitoba Hydro to receive consumer rate increases effective June 1, 2018.

Further to Order in Council 92/2017, in reaching its decision regarding rates, the Board considered capital expenditures by the Manitoba Hydro as a factor to support setting rates for services in a manner that balances the interests of ratepayers and the financial health of Manitoba Hydro.

2.1 Rate Increases for 2016/17, 2017/18, and 2018/19

Approval of August 1, 2016 and August 1, 2017 Interim Rate Increases

In this Order the Board approves, as final, the 3.36% interim rate increase effective August 1, 2016 (granted as interim in Order 59/16) and the 3.36% interim rate increase effective August 1, 2017 (granted as interim in Order 80/17). The dissenting member in Order 80/17, Sharon McKay, is in agreement with the decision to finalize the interim rate that was effective August 1, 2017 based on the review of the full record in the GRA hearing. Because these interim rates are already incorporated into existing rates, the Board's final approval now does not result in any additional bill impacts to ratepayers. While no party opposed the interim rates being finalized, the lack of testing by Interveners and lack of focus by Manitoba Hydro underscores the problems associated with interim rate processes. Interim rates are set without the benefit of a full evidentiary record, involve an abbreviated process, and are adjudicated against a less onerous legal standard than are final rates.

Interim rate processes are not to be used for purposes of convenience or as substitutes for the proper planning of GRAs. Both the ratepayers and the Utility benefit from a robust process that results in final rates that are just and reasonable. Future GRAs by Manitoba Hydro are not expected to be of this magnitude or duration as process improvements have and will continue to be implemented to focus the scope and expedite proceedings. In the absence of unforeseen or emergency circumstances, the Board will not consider future interim rate applications.

The Board appreciates Manitoba Hydro's desire to establish a regulatory timetable that does not require the use of interim rates. The Board is prepared to work with Manitoba Hydro and other parties towards the development of that regulatory timetable.

Denial of 7.9% Rate Increase Requested for 2018/19

Having considered all of the evidence in this GRA, the interests of Manitoba Hydro's ratepayers, and the financial health of Manitoba Hydro, this Board has determined that for the fiscal year April 1, 2018 to March 31, 2019 (also referred to as the "Test Year"), an average rate increase of 3.6% effective June 1, 2018 is just and reasonable. The Board further directs that rate increases are to be differentiated by customer class. To accurately quantify the expected bill impacts, for all customer classes at various consumption levels, Manitoba Hydro is directed to provide by May 15, 2018 a compliance filing containing the new rates, the bill impacts by customer class, and a proof of revenue. The results of the compliance filing will be included in the Board's Order approving the specific rates for 2018/19.

Manitoba Hydro did not provide evidence as to the economic impacts on customers in various sectors - such as residential, commercial, and industrial - or macroeconomic impacts of its proposed rate plan. However, expert witnesses retained by Interveners

and the Board provided evidence that Manitoba Hydro's projected rate path may lead to short-term job losses and negative impacts for some industries that are more economically vulnerable, based on the electricity intensity of their production and the competitive nature of the markets into which they sell their products. Industry representatives similarly gave evidence that the projected rate path will make Manitoba businesses less competitive, will lead to corporate decisions to not make investments in Manitoba locations, and may lead to plant closures.

Residential ratepayers also voiced concerns about their ability to pay projected Manitoba Hydro rate increases and regarding the impact such increases would have on their standard of living.

Manitoba Hydro's Financial Plan

In reaching its decision, the Board finds that a particular equity level or pace to achieve such a target should not determine the rate increases approved in this GRA, particularly when Manitoba Hydro is undergoing record expansion in the value of its capital assets. There was no expert evidence independent of Manitoba Hydro before the Board that Manitoba Hydro's debt is leading to higher interest rates for the debt borrowings of the province. With rate increases in line with prior approved levels, Manitoba Hydro's financial metrics related to cash flow will be improved from those forecast following the NFAT for the 2018/19 Test Year. The Board also does not accept that rate increases should be higher in order to allow Manitoba Hydro to retire debt according to their new proposed debt management plan, which envisions using cash flow from the 7.9% projected rate increases to retire $3.1 billion in debt by 2027. While there are benefits to a shorter-term debt retirement plan, such a plan imposes a short-term cost on ratepayers that is not justified.

Reduction in Expenditures

In addition, while the Board appreciates that Manitoba Hydro has, in good faith, brought forward its concerns respecting financial risks and unforeseen events, the circumstances of this GRA for a 2018/19 rate increase do not require a rate increase of the magnitude proposed by the Utility. Rather, by this Order, the Board sets out its expectation that Manitoba Hydro will continue to reduce its costs, including capital and Operating & Administrative costs, and will also continue to maximize its export revenues.

For the 2018/19 Test Year, in advance of the analytical data-driven approaches to managing capital assets being developed by Manitoba Hydro, the Utility identified $160 million of Business Operations Capital expenditures that can be safely deferred. Business Operations Capital includes expenditures to renew failing assets, increase capacity to address load growth, and to connect new customers but does not include Major New Generation & Transmission capital expenditures. The Board does not accept that all Test Year Business Operations Capital investments are condition-driven and reasonably required for the safe and reliable operation of the system. The Board recommends that Manitoba Hydro defer $160 million of this capital spending, thus improving the Utility's cash flow. Manitoba Hydro should continue to find reductions in Business Operations Capital spending during the current period of record spending on major capital projects such as Keeyask and Bipole III.

Manitoba Hydro forecasts its Voluntary Departure Program will provide annual cost savings of $92 million once the one-time $53 million of restructuring costs have been incurred. Manitoba Hydro's additional reduction of operational positions and Supply Chain Management initiatives are further steps taken by the Utility in its continuous cost reduction efforts. The Board expects that Manitoba Hydro will continue to find savings

as it assesses its operations following the conclusion of the Voluntary Departure Program.

Accounting Issues

There were several accounting-related issues that affect consumer rates and were the subject of evidence and adjudication during Manitoba Hydro's GRA.

- The Board directs that depreciation expense is to continue to be recorded using the Average Service Life methodology for rate setting purposes, without reversion to Equal Life Group in the financial forecast. The Board orders Manitoba Hydro to not amortize the difference between Average Service Life and Equal Life Group for rate setting.

- The Board accepts Manitoba Hydro's proposed treatment of the $380 million of past costs incurred with respect to the Conawapa Generating Station that is not proceeding. Manitoba Hydro proposes that the costs pertaining to the construction of Conawapa be recorded in a regulatory deferral account effective March 2018, with amortization of the costs to income on a straight line basis over a period of 30 years beginning on April 1, 2018. This treatment is appropriate because the decision to discontinue Conawapa construction was part of the NFAT review of the Utility's long-term system planning for long-lived assets. Further, this approach smooths out the impact of this one-time cost on consumers.

- The Board directs that the $20 million in annual ineligible overhead should continue to be deferred, consistent with the Board's direction in Order 73/15. With respect to the amortization period, the deferral account balance should be amortized over 34 years to match the average service life of the assets. This recognizes that the balance relates to a deferral of capital costs that are linked to services that will be provided by capital assets in the future.

- The Board directs that the Bipole III Deferral Account should begin to be recognized in domestic revenues once Bipole III enters service (which is expected in 2018/19) and amortized over a five-year period. This amortization will contribute $80 million annually to further smooth the rate increases necessitated with Bipole III entering service. Additionally, once Bipole III enters service, the approximately $180 million of annual revenues currently being deferred should no longer be deferred and instead accrue to Manitoba Hydro's general revenue.

Demand Side Management Spending

In addition, the Board finds that Manitoba Hydro's revenue requirement should be reduced to reflect lower demand side management spending. These expenditures should be reduced for rate-setting purposes from the level of spending currently incorporated in the Utility's Integrated Financial Forecast. The Board's approved rate increase directionally takes into consideration a reduction in demand side management spending as well as an increase in domestic load that will result from fewer demand side management programs.

Demand side management is a common utility strategy for reducing consumer demand for energy in order to defer the need for new generation assets. Manitoba Hydro seeks to pursue all cost-effective demand side management opportunities which are assessed against the Utility's marginal value of electricity. For 2018/19, Manitoba Hydro forecasts demand side management spending of $101.1 million. This amount was determined using a now-outdated marginal value of electricity. In light of the new lower levelized marginal value of electricity introduced in this hearing, and as acknowledged by the Utility, some of Manitoba Hydro's demand side management programming will no longer be cost-effective. Consumer rates should not, at this time, recover the costs of demand side management programs that are no longer economic, unless justified by a lower-income target market.

The Board also recommends that Manitoba Hydro reduce its demand side management spending, based on an assessment by Manitoba Hydro of the cost effectiveness of each of its demand side management programs. However, given the evidence adduced in this proceeding about energy poverty and bill affordability, it is reasonable for Manitoba Hydro to continue spending on lower-income demand side management programs.

In addition to continued Utility investment in lower-income demand side management programs, the Board recommends that the provincial government amend Efficiency Manitoba's mandate to explicitly include considerations of lower-income consumers and energy poverty.

Export Revenues and Load Forecasting

The Board finds that Manitoba Hydro's export revenue forecast is conservative. An export revenue forecast with a probabilistic goal of P50 (that is a 50% chance of being higher and a 50% chance of being lower) would reduce Manitoba Hydro's level of requested and projected rate increases.

In addition, the Board's finding in this Order that Manitoba Hydro's demand side management spending should be reduced for rate-setting purposes and recommendation that the Utility reduce its demand side management expenditures, along with the price elasticity impacts of the decrease in the overall rate increase, all else being equal, will result in a higher load forecast and higher domestic revenue.

Differentiated Rates

Manitoba Hydro's Cost of Service Study methodology was extensively reviewed and refined in the public hearing process that led to Order 164/16. The Cost of Service Study and the resultant Revenue to Cost Coverage ratios are tools available to be used

by the Board when setting rates as the costs to serve a particular customer class can be compared to the revenues that are paid by that customer class.

Many utilities do not set rates in order to achieve class Revenue to Cost Coverage ratios of exact unity (i.e. revenues received by each customer class exactly recover the allocated cost to serve each customer class). Instead of unity, a 'zone of reasonableness' is used to target the Revenue to Cost Coverage ratios of the customer classes. Revenues that are within this range are deemed to represent full cost recovery. Since 1996, Manitoba Hydro has used a zone of reasonableness of 95-105%.

The General Service Small Non-Demand, General Service Large 30-100kV, and General Service Large >100kV customer classes have Revenue to Cost Coverage ratios in excess of 105% and thus are all overpaying their allocated costs to a significant degree. The two General Service Large customer classes have been overpaying in almost every year since 1996. The Residential customer class is currently below the zone of reasonableness, and therefore underpaying its allocated costs.

Manitoba Hydro is directed to begin to implement differentiated rates for its customer classes. The differentiated rates mean customers in the General Service Small Non-Demand, General Service Large 30-100kV, and General Service Large >100kV customer classes will experience a slightly lower rate increase than the average rate increase approved by the Board. Customers in the Residential, General Service Small Demand, General Service Medium, and Area & Roadway Lighting classes will experience a slightly higher rate increase in order for Manitoba Hydro to collect the approved revenue requirement based on the average rate increase approved by the Board. For the 2018/19 Test Year rates, Manitoba Hydro is to assume a 10-year timeframe to move all classes within the zone of reasonableness, using the alternative methodology to calculate the Revenue to Cost Coverage ratios by treating export

revenues as a reduction to allocated costs. This approach to the implementation of differentiated rates is consistent with the principle of gradualism and limits the revenue recovery responsibility of the other customer classes, while maintaining overall revenue neutrality.

Manitoba Hydro is directed to include in its compliance filing for 2018/19 rates differentiated rates by customer class consistent with the Board's direction in this Order. The compliance filing is to be provided by May 15, 2018. The results of that compliance filing will be published in the Board's Order approving the specific customer class rates.

Bill Affordability

Although Manitoba Hydro's rates are among the lowest in North America, this does not mean that all Manitoba ratepayers can equally afford to pay their electricity bills. The Board has long been concerned with utility bill affordability issues. Evidence with respect to energy poverty in the province of Manitoba has been brought before the Board for at least a decade. The Board recognizes that Manitoba Hydro has, over time, developed programs to assist customers in managing their energy consumption, thereby reducing individual customer bills, and such programs include targeted support for lower-income customers. However, the Board has consistently expressed concern that measures focused on energy efficiency implemented by Manitoba Hydro to date, while commendable, have been insufficient to address the energy burden faced by lower-income customers. This is particularly the case in a time of major capital construction by the Utility, which has and is forecast to continue to put upward pressure on electricity rates at a level greater than the rate of inflation.

The Board finds that it has legal jurisdiction under its governing statutory framework to order a bill affordability program such as a lower-income rate, and to take into account affordability as a factor in setting just and reasonable rates.

The Board agrees with Manitoba Hydro's President and Chief Executive Officer that there is an important role for governments in this area. The Board recommends that the provincial government introduce a comprehensive bill affordability program run by a government department to address energy poverty issues faced by Manitobans throughout the province. The Board heard evidence that there is a long-standing need to address this issue and the provincial government is best situated to do so in a comprehensive fashion, given its social program infrastructure that is already in place.

The Board reiterates the recommendation in the NFAT Report that the provincial government should use some of the revenues it receives from Keeyask to fund a comprehensive bill affordability program.

First Nations on Reserve Residential Customer Class

A majority of the Board directs Manitoba Hydro to establish a First Nations On-Reserve Residential customer class for existing First Nations reserves and that this customer class will receive a 0% rate increase for the 2018/19 Test Year, such that the rate for this customer class will be maintained at the August 1, 2017 approved residential rate. The 0% rate increase for 2018/19 is also to apply to First Nations diesel zone residential customers. This decision by the Board to create a new customer class is not unanimous and there is a dissenting decision from Board member Larry Ring in this Order.

In this Order, the Board concurs with Manitoba Hydro's President and Chief Executive Officer that electricity rates and the resulting bills place a particularly heavy burden on First Nations communities due to inadequate housing infrastructure and the absolute

levels of poverty. As noted by Manitoba Hydro's President and Chief Executive Officer, there may not be a single solution to this multifaceted bill affordability problem. While government has a role to play in addressing the issue of affordability, so too does Manitoba Hydro and rate design can assist the Utility in fulfilling its role.

The Board concludes that, under its mandate to set rates in the public interest, the Board can and should play a part in addressing bill affordability.

An appropriate starting point for bill affordability in Manitoba is a program targeted at on-reserve ratepayers, specifically through the creation of a First Nations On-Reserve Residential customer class with a differentiated rate to address energy poverty.

The creation of this new customer class is justified by the need to address energy poverty on-reserve, supported by evidence that 96% of First Nations people on-reserve live in poverty and that reserves in Manitoba have the highest rates of child poverty in Canada. In addition, the poor housing stock on reserves in Manitoba and the fact that the vast majority of on-reserve First Nations residential customers (61 out of 63 First Nations communities) have no access to the more economical option of natural gas for heating exacerbate the issue of energy poverty.

The new customer class and related affordability measure of a 0% rate increase are also consistent with the principle of reconciliation. As defined in *The Path to Reconciliation Act*, reconciliation is the ongoing process of establishing and maintaining mutually respectful relationships between Indigenous and non-Indigenous peoples in order to build trust, affirm historical agreements, address healing, and create a more equitable and inclusive society.

Manitoba Hydro is kept whole because the cost of the 0% rate increase for this new customer class has been factored into the level of the average general rate increase granted for the Test Year to all other customer classes. The Board is fully aware that there will be some obvious anomalies created where one household on-reserve will receive a lower rate than a nearby off-reserve household living in similar circumstances. This new customer class is a limited measure designed to reach a targeted group experiencing a high degree of poverty. The anomalies that result from this measure are best addressed by a more wide-reaching government bill affordability program. The Board envisions that, with the introduction of a comprehensive government bill affordability program, the new First Nations On-Reserve Residential customer class and lower rate built into the 2018/19 Test Year may no longer be required.

2.2 Payments to Government

Manitoba Hydro makes payments to the Province of Manitoba for water and land rentals, debt guarantees, and capital and other taxes. Manitoba Hydro also pays grants in lieu of taxes to municipalities. For the fiscal year that ends March 31, 2019, Manitoba Hydro forecasts that it will pay $433 million to governments, with $406 million to be paid to the Province of Manitoba. The evidence in the public hearing demonstrated that, excluding payments made to municipal governments, approximately 17 to 18 cents of each dollar of gross revenue is directed by Manitoba Hydro to the Province of Manitoba.

Manitoba Hydro's major capital expansion places upward pressure on rates, including due to the Utility's increased obligations to the provincial government. With respect to Keeyask, after it is fully in-service Manitoba Hydro will pay an approximate $140 million per year to the Province of Manitoba on account of water rentals, debt guarantee fees, and capital and other taxes. As noted by the Board in its 2014 NFAT Report:

> *While ratepayers will shoulder a significant rate burden over the next 20 years, the Province of Manitoba will reap substantial incremental revenues through capital tax and water rental payments from Manitoba Hydro as a result of the Keeyask Project. The Province should give serious consideration to using some of these incremental revenues to fund energy affordability programs targeted to vulnerable consumers, particularly lower income consumers and customers residing in northern and First Nations communities. This could involve rate relief programs as well as targeted DSM programs.*

Previously, the provincial government indicated it would consider this recommendation from the NFAT Report. The Board continues to be of the view that the provincial government should use some of the revenues that would otherwise accrue as a result of Keeyask in order to fund a comprehensive a bill affordability program.

With respect to Bipole III, the project was initially scoped, designed, and engineered by Manitoba Hydro using the most cost effective route. While the majority of Manitobans are both taxpayers and ratepayers, there is an important distinction. Domestic ratepayers are ultimately responsible for the costs of operating Manitoba Hydro's system, including recovering the costs of Manitoba Hydro's major capital projects once the assets are in service. As a result of a policy decision by the provincial government, the routing of Bipole III was changed to a western route at an additional cost of approximately $900 million. This decision created a $900 million burden for ratepayers with no apparent technical benefit for the new route. The Board considers that this was a policy decision of government that should be a cost to taxpayers, not Manitoba Hydro's ratepayers.

The Board therefore recommends that the provincial government suspend payment of the annual Bipole III debt guarantee fee and capital taxes made by Manitoba Hydro to the provincial government starting with the 2019 fiscal year. Manitoba Hydro – and ultimately the ratepayer - should be reimbursed through suspension of such payments

until the $900 million burden of a policy decision made by government is satisfied, estimated at this time to be in 13 years.

Finally, the inter-relationship between Manitoba Hydro and the provincial government will be enhanced with provincial carbon pricing. In the transition to a low-carbon economy, the Province of Manitoba does and will benefit from the strength of its clean hydroelectric resources. As the provincial government will receive revenue from the planned carbon tax, the Board further recommends that the provincial government transfer a portion of the carbon tax revenues to Manitoba Hydro to strengthen Manitoba Hydro's financial health, which may allow for lower consumer rate increases.

2.3 Capital Project Review per Order in Council 92/2017

On April 5, 2017, by Order in Council 92/2017, for the GRA anticipated to be filed by Manitoba Hydro in 2017, the Board was assigned the duty of considering capital expenditures made by the Manitoba Hydro-Electric Board as a factor in the Board reaching a decision regarding setting Manitoba Hydro's rates for services in a manner that balances the interests of ratepayers and the financial health of the Utility.

The Board's review of Manitoba Hydro's capital expenditures included the following projects:

- Keeyask, with a focus on the reasonableness of Manitoba Hydro's capital cost estimates filed in support of the Utility's financial forecasts. The timeframe for the review began with the cost estimates presented at the NFAT;
- Bipole III, also focused on the reasonableness of the capital cost estimates beginning with the initial western routing control budget for Bipole III;

- The Manitoba-Minnesota Transmission Project ("MMTP") and the Great Northern Transmission Line ("GNTL"), also focused on the reasonableness of the capital cost estimates; and.

- The Manitoba-Saskatchewan Transmission Project and related SaskPower export sale, focused on whether the project is economic.

The Board's goal in its review was to gain an understanding of the reasons for past cost increases in order to better understand the forecasts of future costs. The importance of obtaining an accurate forecast of capital costs for these large projects was highlighted by evidence from Manitoba Hydro that a $1 billion increase in capital costs over its current projections would require 0.43% annual consumer rate increases for 10 years, over and above any other rate increase required for the Utility's operations, to achieve the same retained earnings level.

Major Capital Projects and Rate Setting

For rate setting purposes in this GRA, the Board accepts, as incorporated by Manitoba Hydro into its Integrated Financial Forecast, the major capital project budget amounts and construction schedules for Keeyask, Bipole III, the Manitoba-Minnesota Transmission Project, the Great Northern Transmission Line, and the Manitoba-Saskatchewan Transmission Project.

In this Order, the Board reaches several conclusions related to Manitoba Hydro's major capital projects that may assist in future capital projects.

Manitoba Hydro has been approving projects too early in the process, without sufficient development of scope, design, and engineering. The Board recognizes that, with additional scope and engineering development prior to advancing the capital project for financial and economic analysis and subsequent executive approval, there will be

additional front-end costs. In the Board's view, that would be money well spent as it will allow a more informed decision by Manitoba Hydro's Executive.

The Board finds there is merit in Manitoba Hydro considering the "stage gate" approach put forward by MGF, in order to improve its past performance on cost estimating and completing projects on budget. The 'stage gate' concept is that a project does not move from one stage to the next – that is, receive approval to go to the next stage – until a set of criteria is satisfied. The Board recommends that Manitoba Hydro engage an external consultant to assist in studying this matter.

Review of Major Capital Project Planning and Construction

Keeyask

The primary reasons for the Keeyask cost increase from $6.5 billion to $8.7 billion are due to: unachievable productivity levels in the general civil contractor's bid, slow start up in the 2016 construction season when the first permanent concrete was poured, and geotechnical issues with the river bed. The Board finds the root cause for the cost overrun relates to the nature of the cost reimbursable payment structure in the Keeyask general civil contract ("GCC"), which was not sufficient to drive the general civil contractor to achieve the productivity levels contained in its original bid for the Keeyask work. Manitoba Hydro expected that tying the contractor's profit to the target price in the general civil contract would provide sufficient motivation to the contractor to meet the productivity levels in its bid, but that did not occur. It further appears that Manitoba Hydro never contemplated that the contractor's profit could erode to zero so early in the project. Once the profit eroded to zero, with no chance of re-establishing profit, the contractor had little or zero motivation to progress the project expediently. In the Board's view, this was a principal failing of the original GCC. Underpinning the reason for the

profit eroding to zero so early in the project was the fact that the general civil contractor bid unachievable productivity levels. Those unachievable productivity levels formed the basis for an unrealistic target price and an unrealistic original cost estimate.

Manitoba Hydro requires a 10% improvement in productivity by the general civil contractor to meet its $8.7 billion control budget. The Independent Expert Consultants retained in this hearing evaluated Manitoba Hydro's progress to date on Keeyask and in their opinion the final cost of Keeyask will be in the range of $9.5 billion to $10.5 billion. According to the Independent Expert Consultants, unless Manitoba Hydro takes control of the Keeyask project and works with the general civil contractor to improve productivity, the final cost of Keeyask will approach $10.5 billion due in part to the cost reimbursable pricing structure in the general civil contract. The Independent Expert Consultants also made useful recommendations that Manitoba Hydro should consider implementing, and indeed, in part already has implemented. Manitoba Hydro gave evidence that the 10% improvement required is attainable and that the $8.7 billion control budget remains reasonable.

Manitoba Hydro explained that it has taken steps to mitigate schedule and productivity issues, including through retaining external consultants. The Board's expectation is that Manitoba Hydro will closely monitor and take steps to improve productivity in order to achieve the 10% improvement in productivity required to meet the $8.7 billion control budget and construction schedule. There was evidence in the GRA that Manitoba Hydro has achieved milestones in the construction of Keeyask, including that the project is on track to divert the river through the spillway in July 2018 to permit work to begin on the south dam.

For future projects, if the cost reimbursable payment structure of a contract is used, effective oversight of the contractor must be exercised. The results for Keeyask indicate there was not effective oversight under the cost reimbursable contract arrangement.

Bipole III

With respect to Bipole III, Manitoba Hydro undertook unreasonable risk when it developed its $3.28 billion Bipole III cost estimate in 2011. It appears that Manitoba Hydro had rejected its 2009 internal cost estimate of $3.95 billion, based on what was referred to as the "classic" line commutated conversion technology for the HVDC converter stations, in order to try to take advantage of new, unproven voltage source conversion technology. Manitoba Hydro compounded this risk by significantly reducing the contingency amounts.

The provincial government excluded Bipole III from the scope of the NFAT review; however, all of the development plans considered at the NFAT included Bipole III at a projected cost of $3.28 billion. The Board finds that, had a more realistic cost of Bipole III been used in the financial analyses, Manitoba Hydro's debt under all development plans would have been higher and would be closer to the current projections of debt, as discussed in other sections of this Order.

Manitoba-Minnesota Transmission Project and the Great Northern Transmission Line

The Board accepts the forecasts of costs and construction schedules by Manitoba Hydro and Minnesota Power are acceptable for the purpose setting the approved rates for the 2018/19 Test Year.

Manitoba-Saskatchewan Transmission Line

The Board finds that the Manitoba-Saskatchewan Transmission Line project remains economic at this point in time. This transmission line from Birtle, Manitoba to the Saskatchewan border facilitates a 100 MW power sale agreement with SaskPower. The Board supports Manitoba Hydro's decision to develop firm export sales to other Canadian jurisdictions including to the west.

The Board's review of the Manitoba-Saskatchewan Transmission Line project in this proceeding is a precedent for how independent reviews can be conducted of Manitoba Hydro's capital projects. The Board continues to be of the view that in addition to its rate setting approval it should have statutory authority to approve Manitoba Hydro's capital expenditures, which is jurisdiction the Board now lacks.

3.0 Background

3.1 Previous Rate Increases

In Order 43/13, the Board established a deferral account to assist in funding Bipole III in-service costs and to assist in smoothing the rate impacts of Bipole III. The Bipole III Deferral Account is a means by which to gradually increase rates and to partially fund the depreciation, interest, and operating costs of Bipole III to avoid rate shock at the time the asset enters service. In subsequent Orders, the Board directed additional rate increases to the Deferral Account. To date, the cumulative compounded total of the rate increases directed by the Board to the Bipole III Deferral Account is 11.6%. The amounts directed to the Deferral Account have increased and have now reached approximately $180 million on an annual basis. The Bipole III Deferral Account is projected to reach approximately $400 million by the time Bipole III enters service

Payment of the costs associated with the Utility's new major capital projects (excluding Bipole III) was considered at the Board's 2014 NFAT review of Manitoba Hydro's development plans, during the 2014/15 & 2015/16 GRA, as well in the August 1, 2016 and August 1, 2017 interim rate proceedings initiated by Manitoba Hydro.

In Order 73/15, the Board finalized the interim 2.75% rate increase effective May 1, 2014 and granted a final 3.95% rate increase effective August 1, 2015. The total 3.95% rate increase was separated into a 2.15% increase for Manitoba Hydro's general operations and a 1.8% increase, the revenues from which were to be placed into the Bipole III Deferral Account.

In November of 2015, Manitoba Hydro filed an interim rate Application, seeking an interim rate increase of 3.95% effective April 1, 2016. In Order 59/16, the Board granted a 3.36% interim rate increase effective August 1, 2016 for the purpose of collecting additional revenue in the Bipole III Deferral Account. The Board found that, since Order 73/15, Manitoba Hydro's long-term financial projections had significantly improved and the Utility did not require additional revenues from a rate increase to obtain a positive net income for 2016/17. The Board concluded that the public interest would be best served if the entirety of the interim rate increase were to flow into the Bipole III Deferral Account to reduce expected rate shock when Bipole III and Keeyask enter service. The Board further directed Manitoba Hydro to file a GRA for the 2016/17 and 2017/18 years by no later than December 1, 2016, in recognition of the importance of GRAs being heard on a regular basis. The Board stated that interim rate applications ought not be the norm for Manitoba Hydro as such applications do not offer the same level of public review as a GRA.

In Order 80/17, as part of the current GRA process, the Board denied Manitoba Hydro's Application for a 7.9% interim rate increase to be effective August 1, 2017. A majority of the Board approved a 3.36% interim rate increase, with all additional revenue generated from the interim rate increase to flow into the Bipole III Deferral Account. In dissent, Board member Sharon McKay rejected any rate increase.

3.2 Manitoba Hydro's Previous Financial Plans

Manitoba Hydro's 2014 Integrated Financial Forecast MH14, which underpinned the 2014/15 & 2015/16 GRA, consisted of a 20-year rate plan of annual rate increases of 3.95% through 2031 and 2% thereafter, achieving a 25% equity level at the end of the 20-year period. The MH14 forecast projected that Manitoba Hydro would incur losses of $980 million from 2019 to 2026, the time period when Bipole III and Keeyask were

forecast to enter into service. As noted above, in Order 73/15, the Board ordered a 3.95% rate increase for 2015/16, including a 2.15% increase for Manitoba Hydro's general operations and an additional 1.8% increase that was not required for operations but which the Board determined would flow into the Bipole III Deferral Account.

Similarly, the 2015 Integrated Financial Forecast MH15 also projected equal annual rate increases of 3.95% through 2029, followed by 2% annual increases thereafter, and achievement of a 25% equity level in the year 2032. The MH15 forecast reflected an improved financial position with losses incurred in only three years, totalling $58 million. As noted above, in Order 59/16, the Board concluded that Manitoba Hydro's financial projections had significantly improved and directed that the entirety of the 3.36% rate increase would flow into the Bipole III Deferral Account as it was not required for the Utility's operations.

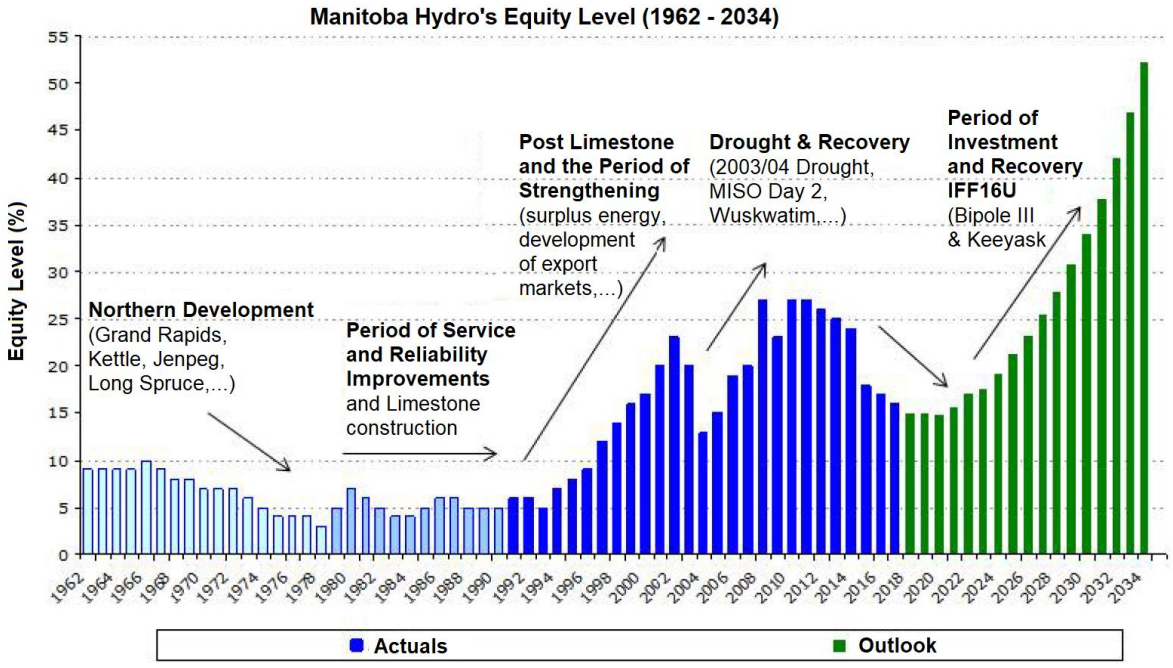
These previous plans followed rate projections used by Manitoba Hydro in the NFAT review of equal annual rate increases of approximately 4%.

Projected rate increases and the level of Retained Earnings since the NFAT have evolved over time. The chart below sets out the Retained Earnings achieved as a result of projected rate increases over 20 years from Integrated Financial Forecasts dating back to 2012, as well as in the forecast underpinning the current GRA. The previous Integrated Financial Forecasts projected rate increases predominately at the 3.95% level, while the projections in MH16 Update with Interim include six years of annual rate increases of 7.9%, one year of a 4.54% rate increase, and 2% rate increases thereafter. The table shows the earlier achievement of a 25% equity level and increased Retained Earnings as a result of Manitoba Hydro's new financial plan as compared to previous plans.

	Integrated Financial Forecast ("IFF") MH12		IFF MH13		IFF MH14		IFF MH15		IFF MH16 Update with Interim (20 year)	
	Equity %	Retained Earnings ($Millions)	Equity %	Retained Earnings ($Millions)	Equity %	Retained Earnings ($Millions)	Equity %	Retained Earnings ($Millions)	Equity %	Retained Earnings ($Millions)
2013	25%	2,442								
2014	22%	2,502	24%	2,584						
2015	17%	2,295	22%	2,638	22%	2,717				
2016	15%	2,368	18%	2,592	18%	2,778	15%	2,612		
2017	14%	2,425	16%	2,611	16%	2,837	14%	2,641	16%	2,749
2018	13%	2,444	15%	2,599	15%	2,902	14%	2,703	15%	2,842
2019	12%	2,376	14%	2,533	14%	2,812	13%	2,663	14%	3,053
2020	11%	2,368	13%	2,502	13%	2,696	13%	2,684	14%	3,258
2021	10%	2,361	12%	2,427	12%	2,518	13%	2,671	15%	3,606
2022	10%	2,413	11%	2,366	11%	2,312	12%	2,677	17%	4,124
2023	10%	2,576	11%	2,372	10%	2,126	12%	2,673	17%	4,557
2024	10%	2,804	11%	2,440	10%	2,001	12%	2,729	19%	4,969
2025	11%	3,105	11%	2,572	10%	1,948	13%	2,858	21%	5,498
2026	12%	3,463	11%	2,741	10%	1,924	13%	2,987	23%	5,987
2027	13%	3,881	11%	3,022	10%	2,007	14%	3,219	25%	6,564
2028	14%	4,251	12%	3,299	11%	2,161	16%	3,538	27%	7,214
2029	16%	4,785	13%	3,558	12%	2,427	17%	3,977	30%	7,969
2030	18%	5,495	15%	3,967	14%	2,826	20%	4,497	33%	8,842
2031	20%	6,330	16%	4,499	16%	3,361	22%	5,089	37%	9,831
2032	24%	7,384	18%	5,241	19%	4,008	25%	5,784	41%	10,977
2033			22%	6,193	22%	4,732	28%	6,553	46%	12,257
2034					25%	5,557	31%	7,402	52%	13,680
2035							35%	8,348	57%	15,259
2036									64%	16,927

Manitoba Hydro explained in this GRA that the rate strategy contained in the filed financial projections "essentially compresses the previously projected 3.95% annual rate increases which were planned until 2028/29, into the next five-year period". As can be seen in the graph that follows, Manitoba Hydro was last at a 25% equity level in the years before construction on the $8.7 billion Keeyask and $5 billion Bipole III projects began. This is similar to the situation experienced by Manitoba Hydro at other times of major capital construction, although the equity levels have not dipped to those experienced at the time the 1350 MW Limestone Generating Station entered service in the early 1990s.

The graph below includes both the actual equity levels achieved since 1962 (shown in blue) and the projected outlook arising from Manitoba Hydro's MH16 Update with Interim projected rates (shown in green).



Source: MIPUG/MH I-2(h-i); MIPUG-26 pg 10

Since Limestone entered service, Manitoba Hydro's retained earnings (also considered as 'equity') have grown to a record level, as shown in the table below. In addition, the Utility's DBRS credit rating has improved to and been maintained at "A(high)". At the same time, Manitoba Hydro's debt financing has increased to meet the construction costs of Keeyask and Bipole III, causing the equity level to decline.

Year	Equity %	Total MH Assets ($Million)	Total MH Net Debt ($Million)	MH Retained Earnings ($Million)	DBRS Bond Rating
1992	6	6,505	4,972	183	A
1993	5	6,025	4,533	159	A
1994	7	6,543	4,948	228	A
1995	8	6,449	4,507	284	A
1996	9	6,737	4,685	354	A
1997	12	7,133	4,493	455	A
1998	14	7,617	4,559	566	A
1999	16	7,866	4,772	666	A
2000	17	8,692	5,488	818	A
2001	20	9,966	6,114	1,088	A
2002	23	10,405	6,146	1,302	A
2003	20	10,234	6,320	1,170	A (high)
2004	13	9,903	6,675	734	A (high)
2005	15	9,952	6,642	870	A (high)
2006	19	10,482	6,614	1,285	A (high)
2007	20	10,922	6,597	1,407	A (high)
2008	27	11,766	6,853	1,822	A (high)
2009	23	11,547	7,521	2,076	A (high)
2010	27	12,437	8,155	2,239	A (high)
2011	27	12,882	8,365	2,389	A (high)
2012	26	13,791	9,010	2,450	A (high)
2013	25	14,542	9,633	2,542	A (high)
2014	24	15,639	10,757	2,716	A (high)
2015	18	17,567	12,566	2,779	A (high)
2016	17	19,780	14,527	2,828	A (high)
2017	16	22,338	16,438	2,899	A (high)

Source: MFR14 and Manitoba Hydro Annual Report

The Board learned in this proceeding that the Utility's rate requests in those previous hearings before this Board were capped at 3.95% by the Manitoba Hydro-Electric Board. In its rate increase request for the Test Year, Manitoba Hydro's new management now seeks rate increases of 7.9% for all customer classes.

4.0 Manitoba Hydro's New Financial Plan

The two concerns that must be balanced by the Board in setting just and reasonable rates are the interests of the Utility's ratepayers and the financial health of Manitoba Hydro. Regarding the latter, central to the Application and the rate requests by Manitoba Hydro in this GRA is the Utility's assertion that the "old financial plan has now failed" as it was not adequate and was far too risky. This assertion underpins the new financial plan presented by Manitoba Hydro in this GRA, which features:

- a 10-year trajectory to achieve a 25% equity level,
- achievement of $6.5 billion in retained earnings in a 10-year period to safeguard against the risks faced by Manitoba Hydro,
- improved cash flow from operations,
- higher net income, and
- a proposed debt management strategy aimed at removing approximately $4 billion of debt from the Utility's balance sheet.

The requested 7.9% rate increase for the 2018/19 Test Year is Manitoba Hydro's first step in its new financial plan.

In Manitoba Hydro's view, this new financial plan will allow for rate stability with the potential for lower rates for consumer bills in the long run (as opposed to up to 20 years of the previously projected approximately annual 4% increases). According to the Utility, its new financial plan will also avoid unfairly placing an unsustainable debt burden on future ratepayers, while managing the risk of rate shock to consumers in the event of adverse conditions such as drought and/or rising interest rates.

Manitoba Hydro acknowledged that its new financial plan and increased rates in the plan will result in a transfer of money from ratepayers to the Utility at a greater level than previous plans. Further, Morrison Park Advisors, an expert witness jointly retained by the Consumers Coalition and the Manitoba Industrial Power Users Group, gave evidence that, because Manitoba Hydro does not have shareholders to contribute equity, ratepayers are ultimately responsible for all the costs of building Manitoba Hydro's level of equity through rates. Morrison Park Advisors' view is that customer contributions – in the form of bills paid by customers - have a cost of capital for individual ratepayers, and for some customers, that cost of capital can be quite high. Morrison Park Advisors' evidence was that, from the perspective of the ratepayers who are the ultimate funders of all of the Utility's operations, equity is essentially "dead money": it earns no return, but nevertheless has been taken out of the hands of the ratepayers who could otherwise use it. Moreover, Morrison Park Advisors stated that, because Manitoba Hydro is a Crown Utility that does not have equity investors at risk for its performance, Manitoba Hydro could theoretically be 100% debt financed.

In response to Manitoba Hydro's presentation of its new financial plan in this GRA, residential ratepayers, organizations, and representatives of business and industry gave evidence that lower rate increases over a longer period of time are preferred to maintain the financial health of Manitoba Hydro while providing predictability and stability for ratepayers. As Ms. Emily Mayham testified in her oral presentation, "I would prefer the lower rate increases for a longer period of time because it's predictable. I'm able to adjust and adapt as needed." Similarly, Mr. Dan Mazier, President of Keystone Agricultural Producers, gave evidence that he does not hold much weight in the suggestion that there will be a reduction in electricity rates in 10 years, and therefore prefers a more stable approach to rate increases over a longer period of time. The Chair of the Manitoba Industrial Power Users Group testified that industrial companies "seek

predictable energy rates that allow us to manage our business and plan for our future" and that Manitoba Hydro's projected 10-year rate plan will impact industrial companies' "decision-making regarding future investment in these operations and, for some, it threatens their very future."

Against this backdrop, evaluating Manitoba Hydro's assertion that a new financial plan is needed requires consideration by the Board of the issues identified by Manitoba Hydro of:

- the Utility's equity level as measured by the debt-to-equity ratio;
- the Utility's financial reserves;
- the Utility's cash flow as measured by Manitoba Hydro's new cash flow analysis as well as the traditional financial metrics of interest coverage and capital coverage;
- the Utility's debt management strategy; and
- the credit ratings of the Province of Manitoba and Manitoba Hydro.

4.1 Manitoba Hydro's Position

Manitoba Hydro's new 10-year financial plan seeks to reduce debt and increase equity through the revenues generated from six successive annual 7.9% consumer rate increases, followed by a 4.54% rate increase, followed by two years of inflationary rate increases of 2% each, in order to return Manitoba Hydro to a 25% equity level in 10 years. The Utility believes this to be the appropriate balance between addressing its financial risks and managing the impact of proposed rate increases on customers.

The new financial plan presented by Manitoba Hydro is a 10-year plan, with a 25% equity level being achieved in 2026/27. However, in response to Minimum Filing Requirements and Information Requests, Manitoba Hydro filed 20-year forecasts. The 20-year forecast included in the MH16 Update with Interim reflects an equity level exceeding 25% and achieving 64% by 2036, but Manitoba Hydro believes that limited value should be placed on forecasts that extend beyond a 10-year period. Manitoba Hydro states that it is focused on a 10-year financial plan and does not intend to achieve an equity level of that size over 20 years.

Manitoba Hydro's position is that the rates that will be appropriate after the tenth year of its plan will be a function of events between today and 2027, but a rate reduction may be one option that could be considered among others. One forecast scenario filed by Manitoba Hydro at the request of the Board was designed to maintain 25% equity following achievement of that level in 2026/27 and includes a forecast rate decrease of 19.75% for 2027/28. An alternative scenario requested by the Board incorporated equal annual rate decreases of 5.76% in the three years from 2027/28 to 2029/30 in order to reduce forecast net income to the range of $200 million per year, while yet another scenario modeled 0% rate increases beginning in 2027/28 and every year after.

In its new financial plan, Manitoba Hydro seeks a prospective level of income and cash flow that, in the Utility's view, would restore its financial strength while also being capable of enduring drought or material negative deviations from export price and interest forecasts without requiring emergency relief from ratepayers. Recognizing that the requested Test Year rate increases and projected future rate increases in its 10-year financial plan are materially greater than in previous GRAs, Manitoba Hydro included in its key reasons for the rate increases that:

- its current and projected financial situation, absent the proposed rate increases, represents an untenable risk to both the financial sustainability of the Utility and the overall economic health of the Province of Manitoba. The credit rating of the Province has been downgraded by both major international rating agencies and the Province has diminished capacity to absorb inclusion of Manitoba Hydro's debt in its consolidated credit profile without risking further erosion of the Province's credit standing;

- previous financial plans and requested rate increases did not adequately prepare Manitoba Hydro to absorb the significant increase in operating and borrowing costs that result from the completion of Keeyask and Bipole III. The cost overruns for Keeyask and Bipole III have increased by $2.2 billion and $400 million respectively, necessitating further increases in gross borrowing under the financial plan;

- inclusive of cash interest on reliability projects and Business Operations Capital expenditures, Manitoba Hydro has been and, without substantial rate increases, will continue to be cash flow negative on its core operations;

- since the last GRA, the financial outlook of Manitoba Hydro has deteriorated because of a reduced outlook for domestic load growth, lessening the opportunity for Manitoba Hydro to look to growth to cure its financial challenges; and

- since the last GRA, there has been continued delay in the recovery of opportunity export prices. Export price growth expectations have been tempered from past forecasts as the outlook for sustained low fossil fuel costs perpetuates.

Manitoba Hydro's financial plan involves its three self-imposed key financial targets that provide a measure of the Utility's overall financial strength. Those financial targets may also be useful to guide proposed rate increases, although consumer rates are not set to produce a target return on equity for the Crown-owned public utility. The financial ratio targets approved by the Manitoba Hydro-Electric Board are:

- A minimum debt-to-equity ratio of a 75% debt level to a 25% equity level. This ratio measures the portion of assets that are financed by internally generated funds (referred to as equity) rather than being financed by debt;

- The cash flow financial metric of an interest coverage ratio of earnings before interest, taxes, depreciation, and amortization ("EBITDA") greater than 1.80. This ratio measures the Utility's ability to meet interest payment obligations with cash flow as reported in Manitoba Hydro's cash based financial statements; and

- The cash flow financial metric of a capital coverage ratio of greater than 1.20. This ratio, which is unique to Manitoba Hydro, is a measure of the ability of cash flow from Manitoba Hydro's operations to fund Business Operations Capital expenditures, excluding consideration of spending and capitalized interest on major capital projects. Where the ratio falls below 1.0, Manitoba Hydro will have to borrow to fund Business Operations Capital spending. Manitoba Hydro notes that, as the Utility continues through a phase of unprecedented investment, the exclusion of the capitalized interest on major capital expenditures from the metric overstates the capital coverage ratio.

Debt-to-Equity Ratio

The debt-to-equity ratio is a measure of the portion of assets that are financed by Manitoba Hydro's internally generated funds, rather than debt. The measurement evaluates the relationship of debt (comprised of long-term debt, sinking fund investment, short-term debt, and short-term investments) to equity (comprised of Retained Earnings, customer contributions, Accumulated Other Comprehensive Income, and Non-Controlling Interest) through a comparison of Manitoba Hydro's net debt to total capital. The debt-to-equity ratio identifies the capital structure of the Utility.

Specifically, and as noted in the Board's 2014 NFAT Report:

> *The debt-to-equity ratio is a long-term target, which serves as a financial guideline only, not an annual requirement. In 2013 it stood at 75/25. Manitoba*

Hydro expects a significant deterioration in this ratio over the next 20 years to about 90/10 in the 2020s as debt levels increase because of Bipole III and the Preferred Development Plan.

In this GRA, Manitoba Hydro acknowledges that past applications and testimony indicated a willingness by the Utility to tolerate a relaxation to below a15% equity level during the current phase of debt-funded capital investment (primarily for Keeyask and Bipole III). In past applications, Manitoba Hydro also proposed a financial plan that would have seen an approximate 15-year to 20-year time frame for restoring a 25% equity level. According to Manitoba Hydro, conditions and outlook have changed significantly since the last GRA, including with respect to the Utility's governance with the appointments of a new President and Chief Executive Officer ("CEO") in December 2015, a new Board of Directors in early May 2016, and a new Chief Finance and Strategy Officer in September 2016.

Manitoba Hydro's evidence is that the applications previously filed by the Utility were "wrong" and that the Manitoba Hydro-Electric Board and the Utility's senior management were required to chart a new financial plan for the Utility. The Manitoba Hydro-Electric Board's tolerance for risk has changed. It is now Manitoba Hydro's view that a path back to a 25% equity level of longer than 10 years is too risky.

Financial Reserves

Manitoba Hydro's financial reserves, or Retained Earnings, are the sum of all profits received by Manitoba Hydro through customer revenues since the Utility's inception, primarily from domestic ratepayers but also from export sales. Manitoba Hydro's financial reserves are not cash and are not retained in a bank account, but rather have been reinvested back into the Utility, including through reducing the amount of new borrowing requirements. Put another way, equity and Retained Earnings are debt that is

avoided. Manitoba Hydro's Retained Earnings are included in the Utility's measurement of its total equity level.

The requested and projected 7.9% annual rate increases included in Manitoba Hydro's 10-year financial plan are to provide the Utility with cash flow to ensure that it is capable of enduring drought or material negative deviations from forecast without requiring emergency rate increases from ratepayers. Under its cost of service regulatory regime, Manitoba Hydro considers its non-cash Retained Earnings as a temporary reserve to allow for cost recoveries and rates to be smoothed out over time.

In Integrated Financial Forecast MH16 Update with Interim, Manitoba Hydro's Retained Earnings are at a record-high level of $2.75 billion. By 2027, the end of Manitoba Hydro's 10-year financial plan, Retained Earnings are forecast to more than double to $6.56 billion. Under the 20-year MH16 Update with Interim forecast, following 2027 a decade of 2% rate increases results in a forecast of $16.93 billion of Retained Earnings and a 64% equity level in 2036.

Manitoba Hydro identifies that drought, rising interest rates, and export prices are the largest risk items that could negatively affect Manitoba Hydro's Retained Earnings. Manitoba Hydro estimates that the Retained Earnings impact of a five-year drought beginning in 2019/20 is approximately $1.4 billion. Due to the quantum of Manitoba Hydro's planned debt, the Utility sees rising interest rates as a greater risk than drought.

Cash Flow from Operations

Manitoba Hydro constructed a new analysis of the cash flow metric to demonstrate that, without the proposed rate increases in Manitoba Hydro's 10-year financial plan, the Utility will be unable to cover both its Business Operations Capital expenditures and its newly defined capital requirements.

According to Manitoba Hydro, capital spending to maintain normal operation and growth of the system (excluding major projects such as Keeyask and Bipole III) is in excess of what is presently being recovered annually in the depreciation expense portion of customer rates. This is because depreciation expense is based on historical costs which, given the age and long useful life of the underlying assets, is not indicative of the actual ongoing costs of maintaining and replacing the system. This situation is expected to reverse in approximately 2023 at which time depreciation expense will be greater than annual capital spending.

Manitoba Hydro argues for the first time that actual Business Operations Capital needs of the Utility have historically been understated in debt service and capital coverage financial metrics. This is because capital projects ascribed "Major New Generation & Transmission" status, due to their individual size based on dollar amounts, are excluded from the financial metrics. Manitoba Hydro now maintains that most of these Major New Generation & Transmission projects are essentially for system renewal or reliability and are not, once finished, contributing to any material increase in revenue. As such Manitoba Hydro now includes these capital expenditure requirements for the purposes of its new cash flow analysis. Major New Generation & Transmission projects continue to be excluded from Manitoba Hydro's long-standing interest coverage and capital coverage metrics.

Additionally, Manitoba Hydro suggests that the capitalization of interest effectively delays the recognition of increased carrying costs associated with new plant as that capitalized interest is not recognized on the Income Statement for rate-setting purposes until the underlying capital asset enters service. As an example, capitalized interest on funds borrowed to finance reliability and sustainment projects like Bipole III is deferred

and excluded from the determination of revenue requirement and net income until that capital asset enters service for ratepayers.

Manitoba Hydro uses a new cash flow analysis that it developed to illustrate the difference between net income under International Financial Reporting Standards (as reported in Manitoba Hydro's audited financial statements) and the Utility's new perspective on its actual cash flow requirements.

Debt Management and Borrowing Strategy

Unlike privately owned utilities, Manitoba Hydro does not have access to share capital as a source of funds and must rely on a combination of internally generated funds from operations (referred to as equity) and debt financing in order to fund its capital investment program. Manitoba Hydro is forecasting that, in the next four years, it will fund the vast majority of new major generation and transmission capital expenditures, including the sums remaining on the $8.7 billion Keeyask and $5.0 billion Bipole III projects, primarily through debt financing.

Manitoba Hydro maintains that its requested and projected rate increases in its 10-year financial plan will allow the Utility to reduce its borrowing requirements in the future, retire debt, and serve to mitigate future rate increases that may be required should interest rates rise. The risk identified by Manitoba Hydro is that interest rates will rise over and above the increases already embedded into Manitoba Hydro's Integrated Financial Forecast. Manitoba Hydro derives its long-term (10+ year) interest rate forecast from a consensus of external forecast views from the average of 10- and 30-year forecasts Canadian debt interest rate forecasts. The long-term interest rates are projected to increase over the forecast period: from 3.15% (excluding the one percent

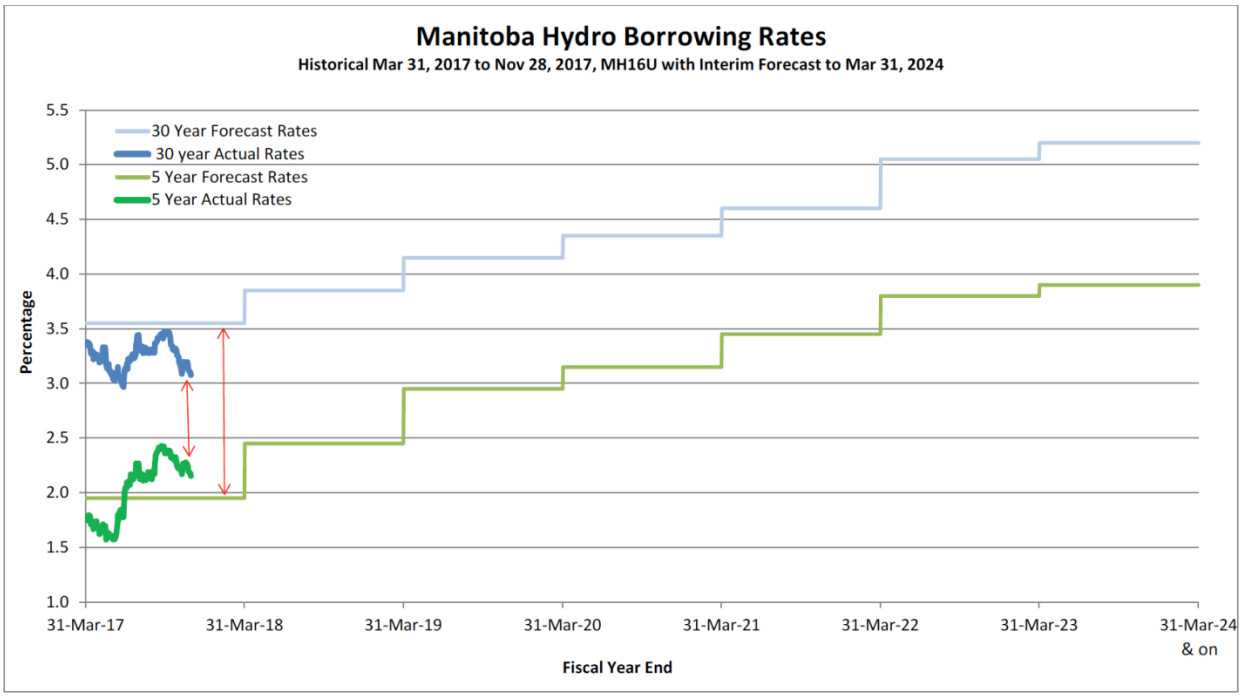
provincial debt guarantee fee) in 2017/18 to 3.90% in 2019/20 and to 4.95% in 2023/24 and thereafter.

Manitoba Hydro states that actual interest rates in the Canadian capital markets have been on a downward trajectory over the past two decades and are currently at the lowest levels in Canadian history. The implications from this record low interest rate environment are such that, should interest rates rise, and with the increasing level of debt financing required by Manitoba Hydro, the Utility is at risk of experiencing escalating debt servicing costs on its maturing and new debt issuances.

In order to reduce refinancing risk, Manitoba Hydro adopted a 'leapfrogging' strategy in 2008 that favoured longer-dated debt maturities that largely skipped over the future period of large borrowings for new cash requirements. This strategy enhanced debt stability by extending the debt portfolio's weighted average term to maturity by over five years. Manitoba Hydro also took advantage of the low interest rate environment to decrease the debt portfolio's weighted average interest rate by over 2%.

Manitoba Hydro indicates that, combined with its projected rate increase plan, the leapfrogging approach undertaken has provided the opportunity for Manitoba Hydro to now shorten the weighted average term to maturity of new debt issuance from approximately 20 to 12 years so as to retire debt permanently. The financial benefit associated with this opportunity has the potential to provide a reduction in debt servicing costs of $500 million, based on an assumed 1.6% difference between the five-year borrowing rate and 30-year borrowing rate in MH16 Update with Interim. However, Manitoba Hydro revised its estimate of the reduction of debt servicing costs during the GRA hearing down to under $250 million as a result of the recent flattening of the yield curve between shorter-term (five year) and longer-term (30 year) debt.

The forecast of 30-year and five-year interest rates and recent actual rates, including the 1% debt guarantee fee paid by Manitoba Hydro to the provincial government, is reflected in the following table and the narrowing of the differential is depicted with the arrows in the table:



Source: MH-68

Manitoba Hydro indicated that its last two debt issuances were 30-year issues and that the weighted average term to maturity of the debt portfolio is currently 18 years, not the 12-year weighted average term to maturity envisioned in Manitoba Hydro's new financial plan.

Manitoba Hydro states that, when spending on Keeyask and Bipole III is complete, and with the forecast improvement in operating cash flow stemming from the proposed rate increases and cost reductions, it sees an opportunity to use this future cash to

permanently retire significant levels of debt. This debt retirement plan is a key factor in the forecast reduction in finance expense and is predicated on the successive annual 7.9% rate increases in Manitoba Hydro's 10-year financial plan. Manitoba Hydro submits that, should there be no reasonable prospect for the cash flow from its proposed rate plan, it would be unable to retire as much debt as forecast. Prudence would then dictate that the debt strategy shift to longer-dated maturities in order to protect ratepayers from interest rate refinancing risk.

Credit Ratings of Manitoba Hydro and the Province of Manitoba

Manitoba Hydro's long-term debt is provided by the Province of Manitoba. The Province raises debt capital from the capital markets, advances the funds to Manitoba Hydro, and charges Manitoba Hydro a debt guarantee fee. As a result, Manitoba Hydro's long- and short-term credit ratings are the same as the Province's credit ratings.

According to Manitoba Hydro, the Province's credit rating should be of concern to the Utility's customers as it affects the cost of borrowing that Manitoba Hydro must recover in its rates. Debt advances to Manitoba Hydro form a significant and growing portion of the total provincial debt and the Utility's financial performance is considered by credit rating agencies as a contributing factor toward the financial strength and assessment of the Province's credit rating. Manitoba Hydro maintains the proposed rate increases in its 10-year financial plan are necessary to demonstrate to the credit rating agencies that Manitoba Hydro is on a path to maintain its self-supporting financial status as it is able to support the cost of its borrowings.

Manitoba Hydro states that each credit rating agency independently evaluates Manitoba Hydro by considering the Utility's financial risk profile, including financial performance, ratios, and forecasts as well as the business risk profile in assessing whether or not

Manitoba Hydro is “self-supporting”. The status of self-supporting means that Manitoba Hydro is able to adequately support its borrowing costs through its operations without seeking assistance from the province. Provided that the rating agency views Manitoba Hydro as self-supporting, the credit rating agencies do not include Manitoba Hydro’s debt levels in the net tax-supported provincial debt. Should Manitoba Hydro lose its self-supporting status and the contingent liability represented by Manitoba Hydro’s debt to the Province of Manitoba materializes, the implication to the Province is a heightened risk of further credit rating downgrades.

The different credit rating agencies use different methodologies and scales to measure ratings. Standard & Poor’s now defines “self-supporting” as maintaining stand-alone investment grade credit metrics. Since Manitoba Hydro does not meet this standard nor intends to meet this standard, Manitoba Hydro’s debt is now included by this rating agency in the tax-supported debt of the province. However, the credit rating and outlook from both the Moody’s Investor Services and DBRS rating agencies have remained unchanged since 2015.

4.2 Intervener Positions

The Consumers Coalition submits the financial outlook consistent with Integrated Financial Forecasts IFF14 and IFF15 should be retained for rate setting purposes. In adopting the evidence of its expert witness, Morrison Park Advisors, the Consumers Coalition states that Manitoba Hydro’s new cash flow analysis is not shared with credit rating agencies and should not be used for rate setting purposes. That the Utility has cash flows less than its annual spending on property, plant and equipment at least until 2023 is entirely consistent with Manitoba Hydro’s major capital expenditure plan in the construction of the $8.7 billion Keeyask and $5 billion Bipole III projects.

The Consumers Coalition emphasizes that capital markets are not credit rating agencies and credit rating agencies are not capital markets. While both are important, they are not the same thing. This Intervener reminds the Board that, following the NFAT review, the markets did not react negatively when Keeyask was approved to be constructed with a plan of achieving a 25% equity level after approximately 20 years. Two rating agencies have long taken the position that, as long as Manitoba Hydro is paying its costs through ratepayer bills, there is no practical impact on the provincial credit rating or on the cost of the Utility's debt. In addition, the Consumers Coalition adopts the evidence of Morrison Park Advisors that Manitoba Hydro's focus on capital structure does not appear to be shared by capital markets observers, who instead are more focused on measures of cash flow sufficiency to meet debt obligations, in keeping with their primary interest of protecting their debt investments.

The Consumers Coalition maintains the 7.9% rate increase path by Manitoba Hydro is not warranted when rate increases at approximately half of that amount still allow the Utility to reach a 25% equity level by 2033/34. Rate increases at or below 3.95% are consistent with the rate path outlined in the 2014 NFAT hearing and subsequent Board rate increase decisions and ought to be the maximum rate increase allowed for 2018. In any event, as stated by Morrison Park Advisors, as Manitoba Hydro is a pure cost recovery, government-owned utility, it is not clear why "equity" should be a priority *per se*.

The Consumers Coalition submits that financial reserves should be used to manage drought risk, but not interest rate risk or export price risk, the latter two of which can be addressed through rate increase requests at future GRAs. The Consumers Coalition questions the need to have increased reserves to withstand a drought when, under Manitoba Hydro's 7.9% rate increase trajectory, Retained Earnings are growing during a

drought due to excessively high consumer electricity rates. This Intervener supports the researching and developing of a probabilistic analysis to assist the Board in determining the appropriate levels of reserves for Manitoba Hydro, including through technical conferences.

The Manitoba Industrial Power Users Group advocates progressing towards a 725% equity level target over approximately twenty years (i.e. 2035/36) while maintaining rate stability and predictability. Consistent with the long life of the Keeyask and Bipole III major capital assets under construction, the recovery of the costs ought to be spread to the customers that will benefit from the assets. To proceed at the rate path projected by Manitoba Hydro would result in Retained Earnings exceeding $6.5 billion by 2026/27, while there have been no scenarios provided to suggest ratepayers face risks commensurate with this level of reserves. Additionally, it states that Manitoba Hydro has not provided a credible scenario for what happens after 10 years. Currently, the Manitoba Industrial Power Users Group sees Manitoba Hydro's approximate $3 billion of Retained Earnings as sufficient to manage a five- or seven-year drought, even without further rate increases.

Manitoba Hydro uses an uncertainty analysis to assess risk. The Manitoba Industrial Power Users Group indicates the recently developed uncertainty analysis capability of Manitoba Hydro is a significant enhancement but it is not ready to be used as a rule-based methodology in the rate-setting process. An improved uncertainty analysis will need to incorporate a rate response where rates would be expected to increase while the event (such as drought) is being experienced. An uncertainty analysis can be used as a signal to capital markets that rates are sufficient to address most future conditions without default. It can also help customers understand how rates are building reserves that yield rate stability.

In assessing the responses of capital markets and the credit rating agencies to annual 3.95% increases, the Manitoba Industrial Power Users Group indicates that there appears to be no prospect that the test used by KPMG, the Utility's external consultant, for self-supporting status (zero retained earnings combined with uncompetitive rates) would fail to be met over the near term or the long term as currently projected. Further, there is no sign that any updated information on the Utility's debt is leading to a higher cost of credit for the province. Considering that the debt guarantee is a kind of backstop or insurance, no evidence has been provided that the Province is being exposed to risks or costs that exceed the payments it has received over the period. As noted in the evidence, the Province's cost of borrowing, measured as a spread over both the federal government and the Ontario government, improved after the Standard & Poor's downgrade.

The Manitoba Industrial Power Users Group sees Manitoba Hydro's interest coverage ratio as reasonable, recognizing it will rise and fall depending on performance. For example, this target was not met under Integrated Financial Forecast MH14 for 10 years. However, there are some issues with the capital coverage ratio due to the arbitrariness of definitions of what is and is not included. According to this Intervener, the capital coverage target is met under the 3.95% rate increase trajectory in all years except 2019/20, 2025/25, and 2026/27 but the Utility's external consultant would consider the target met in each of these years as the results are within 10% of the target. This is an improvement from MH14.

The Manitoba Industrial Power Users Group maintains that, on a normal basis, rate setting for a regulated utility such as Manitoba Hydro should be performed with the primary focus being on the income statement and net income sufficiency, not capital coverage which is a cash flow test.

The 7.9% per year rate trajectory in Manitoba Hydro's new 10-year financial plan drives rates to high levels (81% above 2017's level by 2027/28), net income to record levels of $650 million per year and more, with Manitoba Hydro's financial targets (interest coverage and capital coverage) being far exceeded. The Manitoba Industrial Power Users Group maintains the analyses demonstrate that there is no overall financial deterioration compared to the NFAT or the previous GRA and there is therefore no need to deviate from the prior rate trajectory.

Representatives of General Service Small and General Service Medium Customer Classes and the Keystone Agricultural Producers adopt the Morrison Park Advisors' expert evidence, as well as the general positions as to rate increases of the Consumers Coalition and Manitoba Industrial Power Users Group.

The City of Winnipeg maintains that Manitoba Hydro's position as to financial metrics is without sufficient justification and is arbitrary. Most importantly, it states that Manitoba Hydro completely fails to take into consideration the interests of ratepayers. As such, the City of Winnipeg argues that the Utility has failed to demonstrate its proposal results in just and reasonable rates as it considered only half of the legal test the Board must apply – that test being the balancing of the interests of ratepayers and the financial health of the utility.

Simply put, the City of Winnipeg submits the Utility has not established that circumstances have so drastically changed that the conclusions of the NFAT Report are no longer are valid. On this point, this Intervener reminds the Board that Manitoba Hydro does not expect to meet all of its financial targets during periods of major capital expansion. Additionally, the uncertainty analysis from the NFAT modelling shows that rate increases of approximately 3.95% are sufficient to maintain the long-term viability of the Utility.

The Business Council of Manitoba recommends the Board deviate from the historical rate path in favour of a short-term rate path increase along the lines proposed by Manitoba Hydro. This Intervener calculates the difference between the 3.95% rate path and the MH16 Update with Interim rate path as being an incremental revenue increase of about $70 million in the next year. Interest rates going higher than forecast by 1.5% would result in $350 million in additional interest costs that would have to be borne by Manitoba Hydro in 2021 if the Utility's debt is $23.3 billion, as is currently forecasted.

The Business Council of Manitoba sees increases in interest rates and Manitoba Hydro being found to be a non-self-supporting entity as virtual certainties. This Intervener submits that, based on the current credit rating reports, the risk of a credit downgrade of Manitoba Hydro or the Province is extremely high. This Intervener concludes that the risk that any of these factors will negatively affect Manitoba Hydro and the Province in the short and long term is very high.

4.3 Board Findings

Having considered the interests of the Utility's ratepayers and the financial health of Manitoba Hydro, the Board finds that a particular equity level target and pace to achieve that target should not determine the rate increases approved in this GRA. Although the Board finds that the rate increase should not be driven by achievement of a particular equity level, the Board's assessment must include consideration of the circumstances of Manitoba Hydro's operations. Because of Manitoba Hydro's use of hydraulic resources to meet the electricity needs of the province, it has historically undertaken large investments such as generating stations and transmission lines that have initial large surpluses of capacity for the needs of Manitobans. These assets have large upfront construction costs but relatively low annual operating costs that extend through a very long expected useful life – which, in some cases, can be as much as one hundred

years. With Manitoba Hydro's investments currently underway in Keeyask and Bipole III, the situation today is no different.

An important question from a rate-setting perspective is how these large investments should be funded. On the one hand, if they are to be paid for exclusively by revenues from new rates charged to domestic ratepayers, this would result in a "saw tooth" pattern of rates featuring sharp spikes when new facilities are under construction, and a return to lower rates once the desired equity portion of the project has been funded. On the other hand, if projects are funded through borrowing, rate increases may be "smoothed" over time but the cost of servicing the debt becomes an issue. The concern is to find the right balance between rate increases and the level of debt to fund large capital projects.

In making this determination, the Board is guided by two considerations. The first is: what "reserves" should Manitoba Hydro hold to manage risk and which risks should it take into account? As an example, as per the question posed in the evidence of Morrison Park Advisors, what is the level of retained earnings needed in the event of a five-year drought? The second is to place concerns about the amount of debt and retained earnings in a different perspective by also considering cash flow, using two long-standing financial metrics used by Manitoba Hydro: interest coverage ratio and the capital coverage ratio.

As detailed below, on assessment of these considerations, the Board finds that raising consumer rates by an amount equivalent to four times the rate of inflation is not required to support Manitoba Hydro's current operations. The Board recognizes the sincerity of Manitoba Hydro's concerns about potential future risks materializing. However, as the Board has demonstrated in past decisions – including in years of drought where the Board awarded rates in excess of those sought by the Utility – it will consider all of the

facts and circumstances which confront Manitoba Hydro at that point in time in determining the appropriate rate relief. The Board is prepared to take regulatory action – whether through a rate rider, an interim rate increase, or a general rate increase – as required in times when emergent situations face Manitoba Hydro. At this time, however, the Board finds the circumstances confronting Manitoba Hydro, including those raised in the hearing about credit rating agencies and debt management, do not justify the 7.9% rate increase sought by Manitoba Hydro.

Any benefits of Manitoba Hydro's financial plan must be balanced against the interests of ratepayers. Funds taken out of the pockets of ratepayers through higher rate increases have a cost. In balancing this against the benefits of Manitoba Hydro's plan, the Board finds that the cost to ratepayers is not justified. The Board further notes that, while one financial scenario filed by Manitoba Hydro at the request of the Board showed rate reductions in its 20-year rate forecast, including a significant rate reduction in 2027/28, the Utility did not commit to those reductions. Instead, Manitoba Hydro acknowledged that requests for rate increases or reductions in future years will be dependent on the circumstances at the time.

Debt-to-Equity Ratio

The Board accepts Morrison Park Advisors' evidence that debt-to-equity is a questionable metric for a vertically integrated monopoly Crown utility with a debt guarantee from the provincial government. The equity level target does not have the prominence suggested by Manitoba Hydro given the context in which the Utility operates. The concern regarding the value of the equity level target is compounded when Manitoba Hydro is going through an unprecedented major investment period to more than double the value of its assets in the next four years. As noted by Manitoba Hydro's external consultant KPMG, there is a "practical recognition that this target will

not be met during a period of large capital expenditures when newly constructed assets are placed in service. Accordingly, the 75/25 could remain the long-term objective." The Board supports this view. The Board agrees with the evidence that there is a cost associated with equity as equity is provided by ratepayers who could otherwise use those funds. As such, the Board is not prepared to look at the issue of pacing to achieve a particular equity level target at least until the current phase of major capital construction is completed, now projected by Manitoba Hydro to be in 2024.

The current 25% equity level target was established by the Manitoba Hydro-Electric Board in 1995 when the Utility had 8% equity and less than $300 million of Retained Earnings. Except for approximately five years during the last 20 years, immediately prior to the start of Keeyask construction, this target has not been achieved.

The 25% equity level target is "self-imposed" by Manitoba Hydro. While Manitoba Hydro may determine that the 25% target remains relevant, the Board does not accept that consumer rate increases should be granted at the level proposed by Manitoba Hydro so that the Utility can achieve its target within a 10-year time frame. As stated by the Board in the NFAT report:

> *The Panel supports a relaxation of Manitoba Hydro's 75/25 debt-to-equity ratio to smooth out rate increases and the Panel concludes that Manitoba Hydro would still be left with sufficient retained earnings if the equity level was decreased.*

Financial Reserves

The Board finds that Manitoba Hydro's forecast achievement of $6.56 billion of Retained Earnings by 2027 is too aggressive considering that the two major capital projects contributing most to the doubling of the Utility's assets are still under construction. This increase in Retained Earnings would be funded by ratepayers, with a resulting

opportunity cost. In assessing this cost to ratepayers against the benefits to Manitoba Hydro, the Board finds that under the Utility's MH16 Update with Interim rate path, and as illustrated in Manitoba Hydro's sensitivity analysis and as confirmed by Manitoba Hydro in its testimony, Manitoba Hydro's Retained Earnings would continue to increase even during a five-year drought. Even though a five or seven-year drought would result in Manitoba Hydro not accumulating the same Retained Earnings as it otherwise would have, such a drought would also not result in a reduction in the Utility's Retained Earnings. The Board agrees with the evidence of Morrison Park Advisors, that this raises a question: if a primary purpose of having Retained Earnings is to withstand a drought, why does Manitoba Hydro need rates at a level that would allow it to build Retained Earnings during a drought? The Board concludes this supports the determination that a 7.9% rate increase for 2018/19 is not required.

In addition, the Board accepts the evidence of Morrison Park Advisors that Retained Earnings should be used to manage drought risk in combination with regulatory action by the Board. The Board further agrees that interest rate and export price risks over the long term should be addressed with rate increases as and when those risks materialize. Rates should not be set to increase Retained Earnings to manage those longer-term risks. As discussed elsewhere in this Order, the Board is prepared to consider regulatory action when required to address emerging risks facing Manitoba Hydro. In this context, and having considered Manitoba Hydro's new financial plan and the opportunity costs to ratepayers, the Board finds that the 7.9% requested and projected rate plan is not the appropriate balanced plan for meeting the risks and challenges that confront the Utility.

However, the Board concludes that there is merit to gaining better understanding of the financial reserves required for Manitoba Hydro under various circumstances. This would include consideration of risk tolerances, what risks should be protected by reserves, and the circumstances which would guide the need for more aggressive rate increases to continue full cost recovery for Manitoba Hydro. The Board is mindful that the financing and depreciation expenses related to these new major capital assets entering service already require additional revenues from rate increases. Consideration of the appropriate level of financial reserves, for example a minimum retained earnings test, is best done through a collaborative approach with stakeholders.

The Board directs Manitoba Hydro to participate in a technical conference hosted by Board Staff or an external consultant appointed by the Board for the consideration of the establishment of a minimum retained earnings or similar test to provide guidance in the setting of consumer rates for use in rule-based regulation. The test or rule is to be based on maintaining appropriate or minimum levels of retained earnings and meeting other financial metrics in the face of potential risks to the Utility. The Board will develop the terms of reference for the technical conference. Parties will be invited to contribute to the scope and terms of reference for this initiative.

Cash Flow from Operations

The Board finds that, in assessing whether Manitoba Hydro is meeting its ongoing financial obligations, the focus should be on the accrual accounting methodology used in the Utility's audited financial statements and the financial forecasts used for rate setting. This methodology was also previously used by Manitoba Hydro for rate setting purposes and continues to be used by Manitoba Hydro for its financial forecasting and reporting. Accrual accounting used by Manitoba Hydro includes capitalizing interest to capital projects until those new assets enter service for ratepayers. Once in service, the

financing and depreciation costs are recorded on the Income Statement to be recovered in consumer rates.

Manitoba Hydro's new cash flow analysis does not appear, from the evidence, to be a typical part of financial analysis, and its value is somewhat obscure. The newly presented cash flow analysis is a "new view" created by Manitoba Hydro that the Board does not accept for rate-setting purposes. The new view treats Bipole III inconsistently, departs from the prior treatment of certain Major New Generation and Transmission projects, and deviates from accrual accounting principles. However, the Board accepts that Manitoba Hydro's payments to the City of Winnipeg and mitigation payments should be included in a cash flow analysis of the Utility's operations for rate-setting purposes. The Board notes that insufficient information was provided about the items included in Other Cash Payments in its Integrated Financial Forecast and directs Manitoba Hydro to provide that information in the next GRA filing.

With respect to the traditional financial metrics of interest coverage and capital coverage, the Board finds that the question of financial targets must be assessed in the context of a Crown Utility that is currently in the midst of a major capital expansion, doubling its asset base. With rate increases in line with prior levels, Manitoba Hydro's interest coverage and capital coverage ratios will be improved from those forecast at the time of the NFAT. These metrics therefore do not support rates at a level higher than prior rate increases. The forecast of financial measures, such as the interest coverage ratio and capital coverage ratio, even with the inclusion of City of Winnipeg and mitigation payments, do not support Manitoba Hydro's arguments that a 7.9% increase is justified solely by Bipole III entering service in 2018/19. As well, due to the Bipole III Deferral Account established by the Board and as directed by the Board in prior Orders, 11.6% is already embedded in current compounded consumer rates, despite not

previously being required for the Utility's operations, in order to smooth the rate effect of Bipole III entering service.

Debt Management and Borrowing Strategy

The Board does not accept that rate increases should be higher in order to allow Manitoba Hydro to retire debt according to their new debt management plan. The refinancing risk identified by Manitoba Hydro is linked to the Utility's shorter-term debt retirement plan. Longer-term issuances at current low interest rates mitigate this risk as identified by Manitoba Hydro's Treasury Department. Manitoba Hydro's recently amended approach to the debt management plan, whereby it placed longer-term debt issues to take advantage of a flattening yield curve, demonstrates that Manitoba Hydro's treasury function is well exercised.

While there are benefits to a shorter-term debt retirement plan, such a plan imposes a cost on ratepayers that is not justified by the evidence.

Credit Ratings of the Province of Manitoba and Manitoba Hydro

The Board finds that, while important, care must be taken to avoid placing too much weight on reports by credit rating agencies. The Board accepts that credit ratings and capital markets are related, but are not the same thing.

The Board does not accept that Manitoba Hydro's debt is leading to a higher cost of credit for the province. Neither Manitoba Hydro nor the Business Council of Manitoba chose to call any witnesses from the credit rating agencies, financial markets, or the provincial government to testify as to the impact of Manitoba Hydro's debt on provincial credit ratings. In so doing, the Utility and the Business Council of Manitoba appeared to take the position that it was self-evident that higher levels of debt would damage the

provincial credit rating. There was no expert evidence independent of Manitoba Hydro presented to that effect. More specifically, as submitted by the Manitoba Industrial Power Users Group, there was no evidence that “even if Hydro acted prudently, yet adversely affected the province’s rating, that it would be a net short-term or long-term negative effect on the province compared to not having Hydro’s debt on the books”. The Board accepts the evidence of Morrison Park Advisors that the capital markets will be reassured by a long-term rate plan that acceptably manages Manitoba Hydro’s risks and by this Board’s regulatory action where required to address circumstances as they arise.

5.0 Major Capital Revenue Requirement

On April 5, 2017, by Order in Council 92/2017, for the GRA then-anticipated to be filed in 2017, the Board was assigned the duty of considering capital expenditures made by the Manitoba Hydro-Electric Board as a factor in reaching a decision regarding setting rates for services in a manner that balances the interests of ratepayers and the financial health of Manitoba Hydro. To facilitate the Board's review of Manitoba Hydro's capital expenditures, Order in Council 92/2017 directed the Utility to provide extensive capital expenditure, explanatory, and revenue information.

As such, this GRA proceeding included review of Manitoba Hydro's current major capital projects, specifically Keeyask, Bipole III, the United States interconnection project made up of the Manitoba-Minnesota Transmission Project ("MMTP") in Manitoba and the Great Northern Transmission Line ("GNTL") in Minnesota, and the Manitoba-Saskatchewan Transmission Project. This review included consideration of the budget estimates for these projects incorporated into the Utility's Integrated Financial Forecast, and therefore its revenue requirement.

The Board's review of Manitoba Hydro's capital expenditures included the following:

- A review of Keeyask, with a focus on the reasonableness of Manitoba Hydro's capital cost estimates filed in support of the Utility's financial forecasts. The timeframe for the review began with the cost estimates presented at the NFAT;
- A review of Bipole III, also focused on the reasonableness of the capital cost estimates beginning with the initial western routing cost estimate for Bipole III;
- A review of the MMTP and GNTL, also focused on the reasonableness of the capital cost estimates. The timeframe for the review began with the cost estimates presented at the NFAT; and

- An economic review of the Manitoba-Saskatchewan Transmission Project and related SaskPower export power sale, to determine whether the project was economic.

In order to exercise its authority and responsibility under the Order in Council in this GRA, the Board engaged the services of the following Independent Expert Consultants:

- MGF, construction management experts in the profession of Quantity Surveyors. Quantity Surveyors have construction, contract, and project management expertise. MGF was the lead Independent Expert Consultant for the review of the capital costs of Keeyask, Bipole III, MMTP, and GNTL;

- Klohn Crippen Berger ("KCB"), which has expertise in hydroelectric generating station design and engineering, including the civil, electrical, and mechanical engineering aspects. KCB assisted MGF with the review of Keeyask;

- Amplitude Consultants, which has expertise with high voltage direct current ("HVDC") transmission systems including HVDC converter stations. Amplitude Consultants assisted MGF with the review of the Bipole III converter stations;

- Stanley Consultants, which has expertise with transmission line design, engineering, and construction. Stanley Consultants assisted MGF with the review of the Bipole III, MMTP, and GNTL transmission line reviews; and

- Daymark Energy Advisors ("Daymark"), which has expertise in resource planning and utility economics. Daymark reviewed the economics of the 100 MW SaskPower power sale agreement and the Manitoba-Saskatchewan Transmission Project.

The Board developed scopes of work for each Independent Expert Consultant with input from Manitoba Hydro and Interveners in the GRA. In the case of Bipole III, the focus of the Independent Expert Consultants was on the pre-construction budget of $4.65 billion and whether the current forecast of $5.04 billion can be relied upon by the Board. The Independent Expert Consultants did not investigate the prior Bipole III cost estimates,

nor did they investigate the change in routing of Bipole III from east of Lake Winnipeg to west of Lake Manitoba.

5.1 Keeyask

Keeyask is a 695 MW hydroelectric generating station located in northern Manitoba at Gull Rapids. The Keeyask project also includes infrastructure, such as the access road and accommodation camp, as well as the transmission lines to connect Keeyask to Manitoba Hydro's HVDC Bipole facilities in order that the power may be transmitted to southern Manitoba.

Keeyask is being developed through the Keeyask Hydropower Limited Partnership ("KHLP"), a partnership between Manitoba Hydro and four First Nations: Tataskweyak Cree Nation and War Lake First Nation (acting as the Cree Nation Partners), Fox Lake Cree Nation, and York Factory First Nation. The commercial terms of the arrangement are set out in the Joint Keeyask Development Agreement. The four First Nations together currently own 17.5% of the Partnership and have the right to increase their investment and own up to 25%. Manitoba Hydro will own at least 75%. The Partnership has delegated project management responsibility to Manitoba Hydro. Consequently, Manitoba Hydro is the sole entity responsible for planning, design, engineering, procurement, construction, and operation of Keeyask.

At the commencement of the NFAT review in 2014, the anticipated cost for Keeyask was $6.2 billion and the target in-service date for the first of seven generating units was November 2019.

Prior to the completion of the NFAT, the General Civil Contract ("GCC") for Keeyask was awarded to a consortium of Bechtel Canada Co., Barnard Construction of Canada Ltd., and EllisDon Civil Ltd ("BBE"). Following awarding of the GCC, the Keeyask cost

estimate was updated to $6.5 billion. The GCC is the largest contract related to Keeyask and includes river management, earthworks to build the dykes, concrete structures such as the powerhouse and spillway, and electrical and mechanical work to complete Keeyask. Construction commenced in July 2014 with the building of the powerhouse cofferdam.

The pricing structure in the GCC is that of a “cost reimbursable nature with a target price” contract. The “cost reimbursable” aspect means the contractor is paid for its costs for materials and direct labour, plus profit and general administration and overheads. The “target price” aspect means that the contractor’s profit erodes if the target price is exceeded and the contractor’s profit increases if the actual cost is less than the target price. The target price and this so-called ‘pain/gain’ pricing mechanism are intended to incent the contractor to perform well.

In a cost reimbursable contract, the owner (Manitoba Hydro) is at risk for quantities, productivity, and inefficiency of the contractor. As an example, under a cost reimbursable payment structure, the contractor would be paid in full for 10 hours of work even if the contractor’s successful bid was based on the contractor taking only six hours to perform the specific work task.

Other types of payment structures are ‘fixed price’ or ‘unit price’ structures. In a fixed price contract (also known as a lump sum contract), a contractor is paid a fixed price regardless of the costs it incurs or the duration of the project. In this type of payment structure, the contractor is at risk for quantities and productivity. In a unit price contract, the contractor is paid a pre-defined unit rate (or rate per quantity) multiplied by the quantity of work. For a hydroelectric project such as Keeyask, a common unit would be a cubic metre of earth excavation or a cubic metre of concrete placement. In this type of

payment structure, the contractor is at risk for productivity but the owner (Manitoba Hydro) is at risk for variation in quantity from the initial estimates provided by the owner.

For Keeyask, Manitoba Hydro attempted to address and mitigate the issues and concerns that resulted in the Wuskwatim generating station exceeding its initial cost projections. At the NFAT, Manitoba Hydro identified the availability and productivity of craft labour as a major issue with Wuskwatim. To address this issue, Manitoba Hydro designed and built premier camp accommodations for Keeyask in order to attract and retain labour. Manitoba Hydro also implemented a retention bonus for craft labour which raised the remuneration under the Burntwood-Nelson Agreement to be more competitive with other remote northern construction projects. Manitoba Hydro also implemented an early contractor involvement process with the general civil contractor. Early contractor involvement is a process whereby the contractor is involved early in the project and afforded time to plan the work for its craft labour teams. One objective of early contractor involvement is to maximize productivity of the workforce.

Manitoba Hydro expected greater productivity – that is, fewer person-hours per unit of work – on Keeyask than it experienced with Wuskwatim. The productivity in the BBE bid was similar to the productivity that was achieved during construction of the Limestone generating station in the early 1990s. When evaluating the bids for the GCC, Manitoba Hydro described BBE's productivity bid as a "red flag" as it was higher than Manitoba Hydro had achieved on Wuskwatim. Manitoba Hydro further investigated BBE's bid and its productivity forecast, but Manitoba Hydro ultimately accepted the productivity rates in BBE's bid and used them to calculate the target price of the GCC and the overall Keeyask cost estimate. The optimistic productivity of the BBE bid was one reason Manitoba Hydro included a labour reserve in the Keeyask cost estimate. Manitoba Hydro characterized the amount in the labour reserve as significant, to address, in part,

its concern over the productivity contained in BBE's bid. A labour reserve was not carried for Wuskwatim.

At the NFAT, the risk of cost overruns was known and the Board commented on this risk in its report:

> *The Keeyask general civil contract is a costs-reimbursable contract rather than a fixed price contract. This means that if volumes of materials increase, Manitoba Hydro is responsible for that increase. The Panel had the opportunity to consider the contract in camera as Commercially Sensitive Information, and has concluded that Manitoba Hydro bears a significant cost risk.*

And:

> *Manitoba Hydro submitted that the risk associated with the Keeyask construction is somewhat addressed given that 80% of the construction contracts have now been negotiated. However, this only partially mitigates cost risk. The Keeyask general civil contract is a cost-reimbursable contract, not a fixed price contract. This leaves the contract vulnerable to cost escalations as a result of: quantity risk, especially in areas where quantities may have been underestimated; escalation to the contractor's cost factors due to labour productivity or labour costs; escalation in the cost of supply and equipment; and challenges related to adverse weather conditions.*

The 2016 construction season was the first where significant amounts of permanent concrete were poured, beginning in May 2016. By June of 2016, BBE was falling behind on its targets for concrete placement. Manitoba Hydro requested a recovery plan from BBE in order to get the project back on schedule. The plan was implemented in June 2016, but did not achieve the desired results in terms of concrete placement or productivity. By the end of the 2016 construction season, only 65% of the earthworks target and 41% of the concrete target were met.

Manitoba Hydro investigated the root causes of the lower-than-expected concrete and earthworks productivity and completion rates. The primary root causes identified by Manitoba Hydro were: 1) unachievable productivity rates for earthworks and concrete as contained in BBE's original bid, 2) slow ramp-up by BBE to full production in the early part of 2016, and 3) geotechnical and geological challenges. These difficulties led to a potential two-year delay. Manitoba Hydro explained that the difference between the productivity bid by BBE and the actual productivity achieved is the largest driver of the cost increase from $6.5 billion to $8.7 billion. The actual number of person-hours per unit of work was much higher than the BBE bid.

Concurrently in the summer of 2016, Boston Consulting Group was retained by the Manitoba Hydro-Electric Board to investigate options related to stopping or rerouting Bipole III. Boston Consulting Group's review was expanded to include a review of Keeyask. Boston Consulting Group identified the potential cost and schedule overruns for Keeyask related to the performance under the GCC as an increase from $6.5 billion to $7.8 billion and a 32-month delay if no mitigation actions were taken. In Boston Consulting Group's opinion, mitigation measures could reduce the delay to 21 months and limit the cost overrun to $7.2 billion. Mitigation measures included extending the steel columns deeper in the powerhouse to allow concurrent construction of concrete below and steel structures above, use of auxiliary power to operate the spillway gates instead of waiting to complete the spillway ancillary building, and improving concrete and earthworks productivity.

In September 2016, Manitoba Hydro initiated development of its own recovery plan. Manitoba Hydro determined that, of the recovery options available, amending the scope of the GCC or terminating BBE were higher cost, higher risk options and that amending the existing contract with BBE was the lowest cost, lowest risk option. In January 2017,

Manitoba Hydro negotiated a revision to the GCC with BBE, referred to as Amending Agreement 7.

Amending Agreement 7 also has a cost reimbursable-target price payment structure. Manitoba Hydro advises that, in order to renegotiate the contract with BBE, there were 'gives and takes' involved as well as limits to how much risk related to labour productivity, weather, geotechnical, northern logistics, and other risks that Manitoba Hydro could transfer to BBE. Amending Agreement 7 re-established the possibility for BBE to earn profit by setting a new target price based on revised productivity factors and a new schedule with the first generating unit expected to enter service in August 2021.

The schedule delay has a consequential impact on other contracts, triggering compensation related to delays on fixed price contracts as well as increased costs related to extended performance of other contracts, such as camp services. The schedule delay also increases the period over which interest charges accrue to the project. The cost increase for the GCC combined with increased interest charges due to the higher amounts borrowed and the delay result in the revised Keeyask control budget of $8.7 billion with a schedule delay of 21 months, which Manitoba Hydro made public in March 2017. A control budget is a formal project budget developed by the project team and approved by management. The revised control budget constitutes a 34% cost increase for Keeyask over the cost forecast by Manitoba Hydro in the 2014 NFAT.

The Keeyask cost estimate includes a contingency amount that is determined by probabilistic modeling of the probability and consequence of various risks. The $8.7 billion estimate with a 21-month delay incorporates a P50 contingency, such that the contingency is expected to address 50% of the risk outcomes. The Keeyask P90 cost estimate, which addresses 90% of the risk outcomes, escalates to $9.6 billion and

factors in an additional eight-month delay for a total delay of 29 months from the in-service date forecasted at the NFAT.

	Pre-Construction	Revised Estimate	
	P50 Contingency	**P50 Contingency**	**P90 Contingency**
Total In-service Cost	$6.5 billion	$8.7 billion	$9.6 billion
Unit 1 In-service Date	November 2019	August 2021	April 2022
Unit 7 In-service Date	April 2020	August 2022	April 2023

Amending Agreement 7 was in place prior to the start of the main construction season in 2017. Despite revised target productivity factors (i.e. person-hours per cubic metre of concrete placed) and other changes in the GCC that were made to get the project back on budget and back on schedule, BBE still fell short of end-of-year targets for concrete placement and earthworks by 20% and 25%, respectively.

Manitoba Hydro stated that the productivity to date on Keeyask has been worse than for Wuskwatim. Manitoba Hydro explained that there are different craft labour attraction and retention issues with Keeyask than with Wuskwatim. However, the approaches put in place by Manitoba Hydro – a premier camp, retention bonuses in excess of Burntwood-Nelson Agreement wages, more favourable shift rotations – did not address the underlying labour productivity issues experienced at Wuskwatim, and the low labour productivity has been repeated at Keeyask. The actual productivity rates achieved on Wuskwatim and Keeyask to-date, as well as the productivity bid by BBE, are commercially sensitive and confidential and were heard by the Board *in camera*.

Independent Expert Consultant Evidence

MGF reviewed the Keeyask project and agreed with Manitoba Hydro that the GCC was the single largest driver of the cost increase from $6.5 billion to $8.7 billion. MGF developed its own cost estimate for Keeyask based on the productivity factors achieved by BBE in the October 2016 to October 2017 timeframe. MGF's cost estimate for Keeyask is $9.9 billion with an additional 410-day delay over the currently anticipated 21 month delay, although MGF also provided a range of likely Keeyask costs of $9.5 billion to $10.5 billion. In MGF's view, the root cause of the billions of dollars of cost overruns is that the cost reimbursable payment structure of the GCC fails to provide sufficient incentive for BBE to be responsible for productivity. According to MGF, BBE struggles to plan, manage, and execute the work. MGF further states that it has not seen Manitoba Hydro address the root causes of the poor productivity by BBE.

Similarly, KCB found that the principal reason for the cost increase in the GCC and overall Keeyask budget is the nature of the payment structure in the GCC. Specifically, BBE is being paid in full for its actual costs for labour and materials rather than for quantities of work performed against fixed or unit prices. Put another way, BBE is paid for any reasonable costs to pour a cubic metre of concrete, irrespective of the price it bid to do so. KCB also identified an unusual payment arrangement between Manitoba Hydro and BBE, whereby BBE is paid for planned work two months in advance of completing the work. KCB stated that it had never seen a contract that required such a payment condition; in KCB's experience, the way a contractor ensures its cash flow remains positive is through a mobilization payment, followed by performing the work and earning revenue based on quantities times unit prices.

KCB found that geotechnical issues were not a major driver of the GCC increase as the actual quantities of earthworks and concrete required closely aligned with the original estimates that Manitoba Hydro provided to BBE. KCB also found that the production of construction drawings by the engineering contractor has been timely, that overall design was substantially complete prior to the award of the GCC, and that design changes and extra work orders have been minimal. As such, these are not the major factors that have driven the increase in the Keeyask cost estimate.

A further serious problem MGF identified was that Manitoba Hydro, while competent at administering the payment of the construction project costs and project accounting, is not managing the GCC in a manner that is required to exert control over a contract with a cost reimbursable pricing mechanism. In MGF's view, Manitoba Hydro is managing the project and GCC as if it were a lump sum or unit rate contract.

According to MGF, Manitoba Hydro needs to take back control of the project by enforcing its rights under the GCC and holding BBE accountable for its performance, hiring experienced trades supervisors to work with and assist BBE with planning the work in a more efficient manner, understanding why planned progress is consistently not achieved, and recasting forecast at completion costs based on a realistic and achievable schedule. MGF further opines that, if Manitoba Hydro continues to stand back and watch the project unfold as if it were a lump sum contract, then the final cost will be closer to $10.5 billion, rather than $9.5 billion, which MGF views as the lowest final cost that Manitoba Hydro can achieve. Unless changes are made, MGF is of the view that BBE's poor performance will continue.

MGF also recommends that Manitoba Hydro initiate periodic contract compliance reviews. According to MGF, BBE is not complying with certain terms of the GCC. For example, BBE is consistently late in providing Manitoba Hydro with monthly progress

reports. Another example is BBE's schedule has over one thousand activities with 'negative float' (i.e. activities that have not or will not meet a scheduled or specifically identified date) while the GCC requires the schedule to have no negative float.

Manitoba Hydro's Position

Manitoba Hydro states that due to the state of the competitive market across North America for major project construction work in the 2012 to 2013 timeframe, and after meeting with several contractors prior to release of the tender, it decided to tender the GCC as a cost reimbursable-target price contract instead of as a unit price or fixed price contract. There were dozens of major construction projects underway at the time across North America, including oil sands and liquefied natural gas projects. Manitoba Hydro's assessment of the marketplace was that major project general contractors would not be receptive to "hard money" contracts - that is, contracts that transferred significant risks to the contractor by requiring a firm price, either through a fixed price or unit prices. Manitoba Hydro points to its experience with the Wuskwatim generating station where it attempted to tender a unit price contract but received only one bid which was nearly double the price Manitoba Hydro expected. Manitoba Hydro further stated that the unit price bid for the Wuskwatim general civil contract was higher than the final actual costs under the cost reimbursable-target price contract.

Manitoba Hydro has a current control budget for Keeyask of $8.7 billion. Manitoba Hydro argues that it has a strong plan in place to meet this control budget, and is working cooperatively with BBE to do so.

Manitoba Hydro indicates that, to meet or be under its $8.7 billion control budget, it requires a 10% improvement in productivity in each aspect of the GCC starting in 2018, as well as for no major negative risks to materialize. Those major risks include

unseasonable weather, unexpected geotechnical or geological conditions (including as the geotechnical conditions in the area of the south dam have not yet been ascertained), and work stoppages. If Manitoba Hydro does not achieve a 10% improvement in productivity starting in 2018, the final cost of Keeyask will exceed $9 billion and will approach $9.5 billion. In order to drive a 10% improvement in productivity, Manitoba Hydro states that it continues to work with BBE to develop work plans for the 2018 construction season. Manitoba Hydro has also retained former contractors to review and test the work plans developed by Manitoba Hydro and BBE, a process known as a "cold eyes" review.

Manitoba Hydro states that BBE has not performed to the original plan or the plan under Amending Agreement 7. Manitoba Hydro further states that, if it were to do the Keeyask GCC all over again with hindsight, it would take a hard look at the marketplace and decide whether a cost reimbursable-target price contract was the appropriate pricing structure for the GCC.

Amending Agreement 7 is also a cost reimbursable-target price contract, so there is the possibility that after another construction season Manitoba Hydro and BBE may be in the same position as after 2016 where there is no longer any profit for BBE. If that happens, there would be no incentive or motivation for BBE to perform under the contract, leaving Manitoba Hydro in the same position as after the 2016 construction season and contemplating whether to renegotiate the contract. Such an eventuality was contemplated by Manitoba Hydro during negotiation of Amending Agreement 7, so Manitoba Hydro attempted to narrow the possibility of this occurring. The details of how Manitoba Hydro attempted to do this are commercially sensitive and confidential and were disclosed to the Board in camera.

Intervener Positions

The control budget amounts for revenue requirement purposes were not contentious in the proceeding, although the Consumers Coalition and the Manitoba Industrial Power Users Group recommend further review of the Keeyask budget following the 2018 construction season. With respect to the Keeyask budget, the Manitoba Industrial Power Users Group argues that it is premature at this time to conclude that further cost overruns, compared to the estimates used in MH16 Update with Interim, are sufficiently likely for the purpose of inclusion in Integrated Financial Forecast projections.

Board Findings

The Board finds that the $8.7 billion control budget amount incorporated by Manitoba Hydro into MH16 Update with Interim for Keeyask is to be used for Integrated Financial Forecast modeling and rate setting in this GRA.

The control budget for Keeyask will be reviewed at the next and future GRAs in the Board's consideration of Manitoba Hydro's revenue requirement. There are four more years of construction for Keeyask and there are opportunities for unforeseen issues to arise. One potential issue is the geotechnical condition of the south channel of the Nelson River, which will not be ascertained until the river is diverted through the spillway and the south channel cofferdam is completed. To achieve the $8.7 billion control budget no major geotechnical issues can be encountered in the area of the south dam.

The Board acknowledges that Manitoba Hydro has taken steps to mitigate schedule issues and productivity, including through retaining Boston Consulting Group, KPMG, Revay, Validation Estimating, and Borden, Ladner, Gervais LLP for recommendations. There was evidence in the GRA that Manitoba Hydro has achieved milestones in the

construction of Keeyask, including that the project is on track to meet the schedule for diverting the river through the spillway to permit work to be done on the south dam. The Board's expectation is that Manitoba Hydro will closely monitor and take steps to improve productivity in order to achieve the 10% improvement in productivity on all aspects of the GCC required to meet the $8.7 billion control budget. The Independent Expert Consultants, MGF and KCB, made useful recommendations that Manitoba Hydro should consider implementing, and indeed, in part already has implemented. This will help Manitoba Hydro use the four years left remaining on the Keeyask project to stay on track with the schedule and budget. Manitoba Hydro is directed to report to the Board, at the next GRA, the extent to which it has implemented these recommendations and the results.

The Board expects Manitoba Hydro to take the actions it identified in its evidence at the GRA Hearing, namely to work with BBE to plan the work in 2018 to drive productivity improvements and to bring in external expertise for a "cold eyes" review of the project to test the proposed work plans.

The Board concurs with MGF and KCB that the primary root cause of the cost overrun of the GCC, and the whole Keeyask project, relates to the nature of the cost reimbursable payment structure in the GCC. Manitoba Hydro appears to have assumed that tying the contractor's profit to the target price, with the possibility that the profit could erode to zero, would provide sufficient motivation to the contractor to meet the productivity levels in its GCC bid. It further appears that Manitoba Hydro never contemplated that the contractor's profit could erode to zero so early in the project. However, underpinning the reason for the profit eroding to zero so early in the project was the fact that BBE bid productivity levels that proved to be unachievable. While Manitoba Hydro performed an evaluation of the productivity levels bid by BBE, the Utility

accepted the bid, which was ultimately unachievable and formed the basis for an unrealistic target price. Once the profit eroded to zero, with no chance of re-establishing profit, the contractor had little or zero motivation to advance the project expediently. This was a principal failing of the original GCC.

The evidence of Manitoba Hydro, MGF, and KCB was to the effect that in the planning for Keeyask and the preparation of the contract tendering documents, Manitoba Hydro was able to determine with remarkably high precision the quantities of concrete and earthworks (i.e. dams and dykes) that needed to be supplied and constructed. With hindsight, a unit price contract would have been more appropriate as it would have shifted the risk of labour productivity to the contractor while Manitoba Hydro retained the quantity risk. The Board recognizes that Manitoba Hydro had a negative experience when trying to tender the Wuskwatim GCC. Understandably, contractors are not willing to assume the risk for geological conditions and unknown quantities of excavation when bidding on construction projects.

The Board concludes that, had Manitoba Hydro exercised more effective oversight of BBE from the beginning, the current cost overruns may have been mitigated. As MGF observed, Manitoba Hydro is not a construction manager and it appears that it did not have the expertise or the awareness of how to manage a cost reimbursable contract.

5.2 Bipole III

The Bipole III Transmission Line is a reliability project that consists of:

- five 230 kV alternating current power lines, which are the outlets for the power from the northern generating stations,
- the Keewatinohk converter station, located approximately 80 km northeast of Gillam, Manitoba, which converts the alternating current into direct current,

- the Bipole III high voltage direct current ("HVDC") transmission line, a 500 kV line that is approximately 1,385 km in length,

- the Riel converter station, located east of Winnipeg, which converts the direct current power back to alternating current power for use in the domestic system or for further transmission south to be exported.

Manitoba Hydro had been considering the need for Bipole III since at least the 1980s. A wind event in September 1996 damaged 19 Bipole I and II towers and interrupted the delivery of power from its Lower Nelson River generating stations. Following that event, Manitoba Hydro began planning in earnest additional high voltage direct current transmission options to provide redundancy and increase the reliability of power supply. Initially, only a separate Bipole III transmission line was considered by Manitoba Hydro, routed down the east side of Lake Winnipeg in order to provide physical separation between the existing Bipoles I and II and the new Bipole III. As discussed elsewhere in this Order, the routing was changed to west of Lake Manitoba which necessitated the inclusion of converter stations at the northern and southern terminuses due to the longer length of the transmission line and the resulting inability of the existing HVDC converter stations to operate with the longer line. With the construction of Keeyask and any other future northern generation, additional HVDC converters are required to bring the full power of the new generation to southern Manitoba. Therefore, a transmission line-only option was no longer feasible.

Bipole III is nearing completion, with a scheduled in-service date of July 2018, at a final cost of $5.04 billion. The cost estimates for Bipole III have dramatically increased over the years since the western routing for the line was established. The following table shows the escalation of the western route Bipole III costs – including converter stations – through the years as specified in Manitoba Hydro's capital expenditures forecasts ("CEF").

Western Route Bipole III In-Service Cost Estimates - Capital Expenditure Forecast ("CEF") ($millions)					
CEF06	CEF07 to CEF10	CEF11 to CEF12	CEF13	CEF14 to CEF15	CEF16
1,880	2,248	3,280	3,341	4,653	5,042

The $1.88 billion estimate in 2006 was described in the capital project justification by Manitoba Hydro as a "placeholder". The revision to the capital project justification by Addendum 05 in CEF07 increased the cost by $368 million to $2.25 billion due to:

- an increase in the line length of 45 km in addition to the increase in line length arising from the western routing,
- increased transmission line material costs due to market price increases,
- increased transmission line construction costs as experienced by Manitoba Hydro on recent transmission line projects, such as the Wuskwatim-Birchtree line, and
- increases in interest and escalation charges.

Notably, capital expenditure forecasts CEF06 through CEF10 appear to use HVDC converter equipment estimates developed by an external consultant in 2001, meaning the largest component of the project did not have a current cost estimate. In the current control budget, the converter stations are approximately 55% of the total cost. These capital expenditure forecasts also did not include any amounts for contingency and assumed many of the converter station site development costs were included in other projects such as the Conawapa generating station and the Riel 500 kV sectionalization project.

In 2009, Manitoba Hydro prepared a revised Bipole III cost estimate of $3.95 billion, an increase of $1.71 billion. The increase was due to re-estimates of the transmission line and converter station costs, the inclusion of contingency at 15% of the base costs, the

inclusion of costs previously assumed to be included in other projects, and changes in interest and escalation charges. This estimate assumed line-commutated converter ("LCC") technology, which in turn required four synchronous condensers at Riel station. This estimate, while approved by the Vice Presidents of Transmission and Power Supply, was not approved by the Manitoba Hydro Executive.

After Manitoba Hydro commissioned an estimate by an external consultant in 2010, Manitoba Hydro projected a Bipole III cost of $3.28 billion, which was reflected in CEF11 and approved by the Executive. The most significant changes were the inclusion of voltage source conversion technology instead of LCC technology and the elimination of synchronous condensers at Riel station, as well as substantial reductions in the contingency for the transmission line and converter stations. This estimate included a contingency of $205 million, representing 6% of transmission line base costs and 11% of converter station base costs, compared to the previous $525 million contingency.

The next revision to the Bipole III project cost estimate occurred in October 2014, with an increase to $4.65 billion due to:

- receipt of the HVDC converter station bids in March 2014 which provided firm, fixed pricing to refine Manitoba Hydro's internal estimates. Other contracts were finalized and incorporated into the revised estimate;
- HVDC converter station suppliers were only willing to provide LCC technology converters, necessitating the need for synchronous condensers. Manitoba Hydro had assumed that HVDC suppliers would bid the newer voltage source conversion technology which did not require synchronous condensers;
- finalization of the transmission line route according to Clean Environment Commission recommendations;

- an increase in the capacity of the HVDC converters to 2300 MW, in case additional generation is added in the future;
- a delay in the in-service date from October 2017 to July 2018;
- updated land acquisition costs;
- inclusion of the Community Development Initiative; and
- an increase to the transmission line contingency and the inclusion of a management reserve.

As explained by the Board in Order 73/15:

> *Manitoba Hydro was initially optimistic that it could utilize lower-cost voltage-source conversion (VSC) technology in the Bipole III converter stations. However, while vendors initially indicated that the use of this technology was feasible, they ultimately were not prepared to design and provide VSC technology, resulting in a requirement for line-commutated converter (LCC) technology and synchronous condensers to meet performance requirements.*
>
> *Manitoba Hydro advised that the three bids for High Voltage Direct Current (HVDC) conversion equipment closed on March 20, 2014. All bids were based on LCC technology. Manitoba Hydro completed its technical review of the proposals by June 20, 2014. The revised control budget was prepared in August of 2014 and approved by Manitoba Hydro's executive committee in August 2014. Manitoba Hydro indicated that it did not advise the Board of cost increases during the NFAT since it took several months to prepare the control budget.*

The $4.65 billion estimate was the final pre-construction estimate prepared by Manitoba Hydro. It is comprised of contracts with varying payment structures, including fixed price (HVDC converter equipment), unit price (transmission line tower foundations, towers, and conductor stringing), and cost reimbursable (camp operations) arrangements.

Of the cost increase from $4.65 billion to $5.04 billion, $106 million is due to increased HVDC converter station costs and $302 million is due to increased transmission line costs, partially offset by decreases in the Bipole III collector transmission lines and Community Development Initiative. The main reasons for these increases are as follows:

- Increased contingency to address a greater number or consequence of risks;
- Costs related to highway upgrades and the access road to the Keewatinohk converter station which were transferred from the canceled Conawapa project to Bipole III;
- Additional payments to a reserve as specified by a letter of agreement amendment to the Burntwood-Nelson Agreement;
- An increase to the HVDC converter station costs due to commodity (copper, steel, concrete) price escalation;
- Increased transmission line construction costs due to higher actual costs for anchors and foundations than anticipated, delay claims due to weather and material shortages, schedule compression using helicopters to assemble towers and string conductors, and increased costs related to biosecurity;
- Increased transmission line property acquisition costs; and
- Increased vehicle costs.

Independent Expert Consultant Evidence

Amplitude found the costs of the HVDC converter stations and the synchronous condensers to be reasonable. On a cost per megawatt basis, the Bipole III converter stations are within the range of the costs of other converter stations in Canada and internationally, although at the high end of the range. Amplitude explained that this is

reasonable given the remote location of the Keewatinohk converter station, that there are two valve groups per pole compared to one for the comparison stations, and the extreme weather and environmental conditions experienced during construction. Amplitude similarly determined that the Riel synchronous condensers are within the range of other recent projects but at the high end of the range.

MGF found Manitoba Hydro's cost estimating methodologies (with respect to the $4.65 billion and $5.04 billion estimates) are consistent with industry standard and best practices. Manitoba Hydro prepared a Basis of Estimate which, in MGF's view, was extremely well done. MGF found Manitoba Hydro's approach to market, tendering of contracts, and contracting methodologies were appropriate.

MGF found the potential for a cost overrun on the HVDC converter stations to be low, due to the fact that most of the remaining work is being performed under fixed price contracts. MGF expects Manitoba Hydro will deliver the transmission line within the estimated cost.

MGF found that Manitoba Hydro has managed the project well. MGF's view is that the project is on schedule but some critical path activities are slipping, specifically work to complete tower erection and conductor stringing. Manitoba Hydro advises that it has addressed this schedule slippage by removing this scope of work from the under-performing contractor and contracting with another construction company to complete this work prior to the end of the 2017/18 winter construction season.

MGF recommends improvements for Manitoba Hydro's estimating processes on future projects, such as having the estimate team prepare the estimate with input from each department and providing supporting back-up and more detailed explanation outlining the structure and relationship between the physical scope of work and resources. MGF

also suggested that a higher contingency, such as a P95 contingency, be used when evaluating the business cases of future projects.

Manitoba Hydro's Position

Manitoba Hydro submits that Bipole III is on schedule for a July 2018 in-service date and is on target to be completed within the $5.04 billion control budget.

Manitoba Hydro states that the remaining risks to Bipole III relate to schedule and not cost, as the remaining work is predominantly under fixed price or unit price contracts. As such, while the in-service date may slip from July 2018, the cost should not exceed $5.04 billion. The remaining risks include weather, transmission line contractor performance in erecting towers and stringing conductors, delays in delivery of the final synchronous condenser transformer, and commissioning of the system.

Intervener Positions

The Consumers Coalition states that Manitoba Hydro's proposed use of voltage source conversion technology for the HVDC converters, as was anticipated in the $3.28 billion cost estimate prepared in 2011, represented a high-risk decision based on new technology that had not been executed at that time. The Consumers Coalition notes that all three HVDC converter equipment vendors rejected voltage source conversion technology in their bids.

Bipole III Western Versus Eastern Routing

In 2005, Manitoba Hydro was instructed by the provincial government to consider a western routing of Bipole III. In the capital project justification prepared by Manitoba Hydro's Transmission business unit and approved by the Manitoba Hydro Executive, Manitoba Hydro identified several reasons why a western routing was inferior:

- Technically inferior solution to the eastern-routed Bipole III line with converters; less load served on average in situations for which the line is to be built.
- Less reliable solution since the west side scheme would still only provide an outlet of 2000 MW of northern generation in the event of another Bipole I & II corridor outage, while an east side Bipole III line would allow the paralleling of Bipole I & II converters on the Bipole III line providing the outlet of 3300 MW of northern generation. Also, the longer line length associated with a western route increases exposure to outages on Bipole III.
- A delayed ISD [in-service date] over an eastern routed line, placing Manitoba customers at greater risk for a longer period of time. A western line will likely take longer for conducting environmental assessment/public work consultation and will take more time to build. The earliest date for initiation of environmental work is after the October 2006 recommendation of an alternative to the east of Lake Winnipeg Bipole III line.
- Justification at a public hearing by Manitoba Hydro of the westerly routing concept vs. an easterly route concept will be problematic.
- Although 1265 km is used as a proxy minimum for the line length, it is likely the actually built line will be considerably longer with more cost and losses, due to efforts to maximize separation from the existing HVDC right of way.
- The siting of Bipole III in a western corridor would make the placement of the next north/south transmission line very problematic with the east of Lake

> Winnipeg routing being blocked and the Interlake routing presenting significant risk of a common mode outage.

In 2007, the provincial government finalized its policy decision to build Bipole III with a western routing, rather than the previously planned eastern routing. In its September 20, 2007 letter to the Manitoba Hydro Electric Board, the Government explained as follows:

> *The Manitoba Government does not regard an east side Bipole III as being consistent with these commitments and initiatives. We recognize the importance of the Bipole III initiative to improving system reliability and accommodating future northern generation. We would encourage the corporation to move ahead with required consultations and planning for an alternative Bipole Ill route.*

With this letter, the provincial government eliminated the eastern route from consideration and mandated that Manitoba Hydro consider alternate routings. Manitoba Hydro had already eliminated the Interlake route because of its proximity to Bipoles I and II. Consequently, the western route was the only route considered by Manitoba Hydro to be feasible. The resulting change to the western routing gave rise to the consequent increase in capital cost associated with the longer western route, although the western routing is technically inferior and leaves Manitoba Hydro customers at greater risk of power outages.

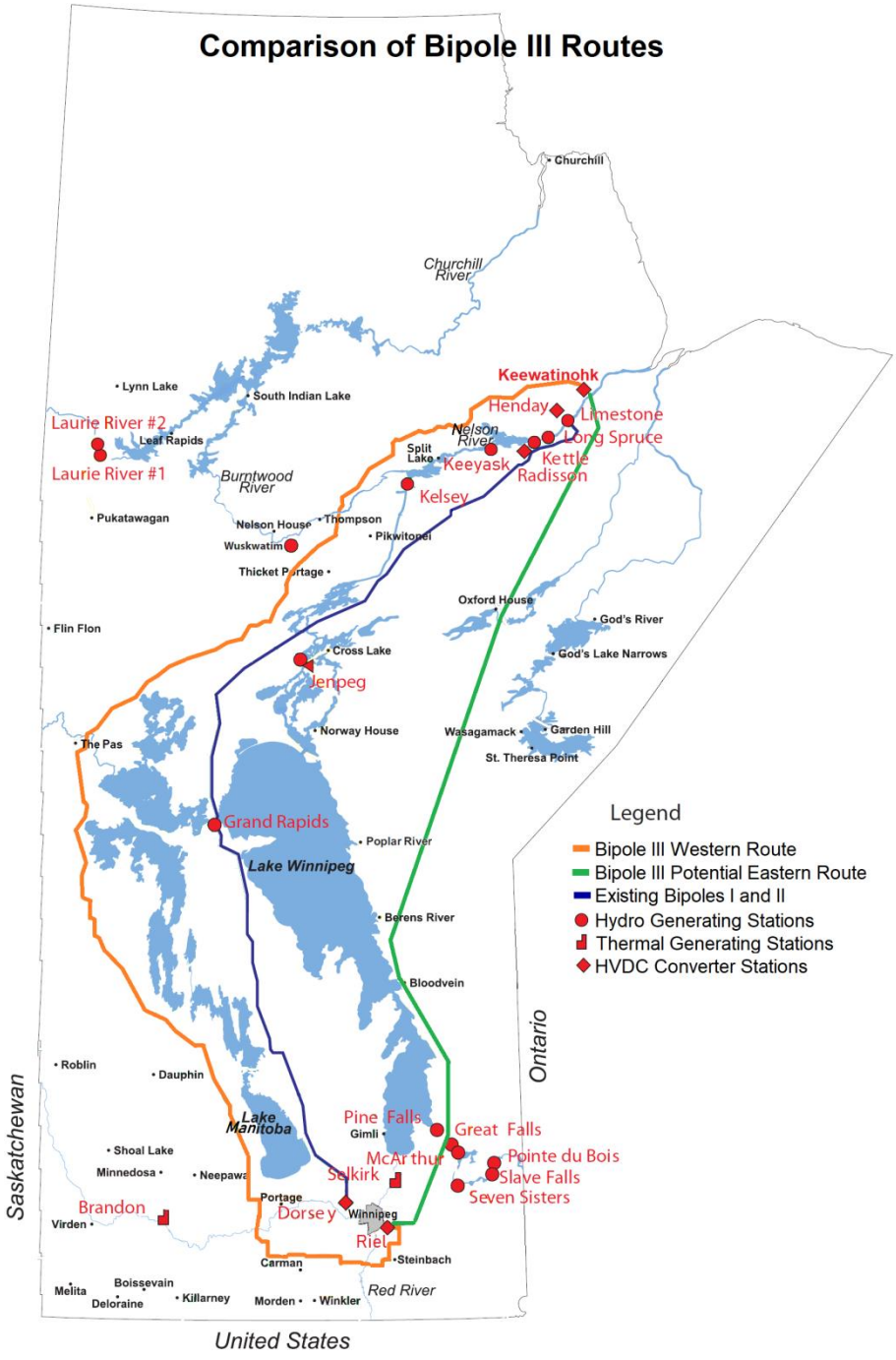
In Order 116/08, the Board noted additional inferiorities with the western routing:

> *While an East Side Bipole III could function in parallel with existing Bipoles I and II, and in the event of the outage of both, make use of Bipoles I and II converters as well as the new Bipole III converters to provide 3,000 MW to the south, a West Side Bipole III would be limited to using only its own converters and thus could only provide the South with 2,000 MW in such a situation. MH advised that an outage of Bipoles I and II during the summer season could result in an additional cost to the Corporation of $160 million over the cost that would be incurred if*

> *Bipole III were built down the east side, the extra costs due to a requirement for additional imports to make up for the 1,000 MW differential.*
>
> *In short, during a major outage of both Bipole I and II, an East Side Bipole III could serve both domestic and firm exports, while a West Side Bipole III would require significant additional needs and presumed expensive imports to meet domestic needs and firm exports.*

Boston Consulting Group identified the increased costs of a western routing as $900 million.

Along with the existing routing of Bipoles I and II, the western and eastern routings of Bipole III are shown in the following map:


Comparison of Bipole III Routes
Churchill
Churchill River
Keewatinohk
Henday
Limestone
Long Spruce
Kettle
Radisson
Keeyask
Kelsey
Nelson River
Split Lake
Lynn Lake
South Indian Lake
Laurie River #2
Leaf Rapids
Laurie River #1
Burntwood River
Pukatawagan
Nelson House
Thompson
Pikwitonei
Wuskwatim
Thicket Portage
Flin Flon
Oxford House
God's River
God's Lake Narrows
Cross Lake
Jenpeg
Norway House
Wasagamack
Garden Hill
St. Theresa Point
The Pas
Grand Rapids
Poplar River
Lake Winnipeg
Berens River
Bloodvein
Ontario
Saskatchewan
Roblin
Dauphin
Lake Manitoba
Pine Falls
Gimli
Great Falls
McArthur
Pointe du Bois
Slave Falls
Seven Sisters
Selkirk
Shoal Lake
Minnedosa
Neepawa
Portage
Brandon
Virden
Dorsey
Winnipeg
Riel
Steinbach
Carman
Boissevain
Melita
Deloraine
Killarney
Morden
Winkler
Red River
United States
Legend
Bipole III Western Route
Bipole III Potential Eastern Route
Existing Bipoles I and II
Hydro Generating Stations
Thermal Generating Stations
HVDC Converter Stations

Board Findings

The Board finds that the $5.04 billion control budget amount incorporated by Manitoba Hydro into MH16 Update with Interim for Bipole III is to be used for Integrated Financial Forecast modeling and rate setting in this GRA.

The Board agrees with the Consumers Coalition that Manitoba Hydro undertook unreasonable risk when it developed its $3.28 billion Bipole III cost estimate in 2011. It appears that Manitoba Hydro had rejected its 2009 internal cost estimate of $3.95 billion, based on what was referred to as the "classic" LCC technology, in order to try to take advantage of new, unproven voltage source conversion technology. The Board finds that Manitoba Hydro compounded this risk by significantly reducing the contingency amounts. Exploring options to use new, improved technology should not be avoided. However, the Board concludes that when estimating costs for a project that includes new, unproven technology, the contingency amounts should be increased, not decreased as was done by Manitoba Hydro.

During the NFAT, Manitoba Hydro did not inform the Board that all the HVDC converter equipment vendors had bid LCC technology and had rejected the riskier voltage source conversion technology. However, as the Board concluded in Order 73/15, Manitoba Hydro at that time was in a position to know that its $3.28 billion cost estimate – which included a cost for converter stations of $1.83 billion – was not realistic and that a cost estimate approaching $4 billion was realistic.

The provincial government excluded Bipole III from the scope of the Board review at the NFAT; however, all of the development plans considered at the NFAT included Bipole III at a projected cost of $3.28 billion. The Board finds that, had a more realistic cost of Bipole III been used in the financial analyses, Manitoba Hydro's debt under all

development plans would have been higher and would be closer to the current projections of debt, as discussed in other sections of this Order.

The Board finds that the $5.04 billion estimate of the final cost of Bipole III is $900 million higher due to the western routing of the line compared to an eastern routing. The Board finds that this was a policy decision of government that should be a cost to taxpayers, not Manitoba Hydro's ratepayers. The Board's recommendation is that the payments Manitoba Hydro makes to the Government related to Bipole III be reduced until the $900 million burden is satisfied, as discussed in another section of this Order.

5.3 Manitoba-Minnesota Transmission Project and Great Northern Transmission Line

The Manitoba-Minnesota Transmission Project ("MMTP") is a single circuit, 883 MW, 500 kV alternating current transmission line starting at the existing Dorsey Converter Station northwest of Winnipeg and connecting at the Manitoba-Minnesota border to the Great Northern Transmission Line ("GNTL"), a new transmission line proposed by Minnesota Power terminating at a new station near Grand Rapids, Minnesota. Together, MMTP and GNTL form a new interconnection between Manitoba Hydro and the Midcontinent Independent System Operator market in the northern United States. MMTP and GNTL facilitate a 250 MW power sale to Minnesota Power beginning June 1, 2020 and ceasing May 31, 2035. MMTP and GNTL were reviewed at the NFAT proceeding. In its NFAT report, the Board recommended these projects proceed.

GNTL is being built in Minnesota by Minnesota Power. Manitoba Hydro, through its wholly-owned subsidiary 6690271 (Manitoba) Ltd., exercises oversight of the construction of GNTL through a Construction Management Agreement with Minnesota

Power. The Agreement grants 6690271 consultation and veto rights over construction decisions. GNTL has received all of its necessary permits for construction.

Manitoba Hydro is responsible for 100% of the construction, operating, and capital maintenance costs of the MMTP. Minnesota Power will fund 28% of the GNTL construction costs, based on the proportion of 883 MW total transmission capacity needed for the 250 MW Power Sale Agreement. Manitoba Hydro will fund the remaining 72% share. Manitoba Hydro is further responsible for 66.7% of the GNTL operating costs. Minnesota Power is responsible for 100% of the GNTL sustaining capital costs.

The new interconnection provides many benefits to Manitoba Hydro, including:

- additional import capacity of 700 MW; the additional winter import capacity allows deferral of new generation by one year,
- reduced import costs by allowing Manitoba Hydro to purchase power at the Minnesota trading hub, avoiding transmission line congestion that can push prices up at the MHEB trading node by 2% to 5% when Manitoba Hydro is importing power,
- improved energy security, emergency response, and reliability benefits in event of drought through increased access to imported power,
- additional export capacity of 883 MW, sufficient to sell the full exportable capacity of Keeyask to the Midcontinent Independent System Operator market under firm transmission,
- economic benefits in average and high flow years as Manitoba Hydro can export more power during more lucrative peak periods and spill less water when the existing interconnection would otherwise be at its maximum export limit, and

- increased prices for exported power through improved bilateral transmission access to the Wisconsin market as well as ability to sell power at the Minnesota trading hub, avoiding congestion and improving prices by 2% to 5%.

Since the NFAT in 2014, the capital cost estimates for MMTP and GNTL have increased. At the NFAT, MMTP was forecast to cost $350 million; Manitoba Hydro now estimates MMTP to cost $453 million. In 2014, GNTL was forecast to cost US$712 million in 2020 dollars. The current cost estimate is confidential and commercially sensitive and was reviewed by the Board *in camera*.

Manitoba Hydro completed the MMTP environmental permitting process before the Clean Environment Commission in 2017 and is awaiting a licence from the provincial government. In late 2017, the National Energy Board ("NEB") ruled that Manitoba Hydro must proceed with a certification process and not a permitting process, adding some additional cost. The in-service date for MMTP is June 1, 2020, coincident with the commencement of the Minnesota Power 250 MW power sale agreement. Manitoba Hydro indicated that it did not anticipate the NEB certification process would delay the in-service date, but that may be contingent upon obtaining a decision from the NEB prior to that regulator's March 2019 decision deadline.

MGF found the cost estimate for MMTP to be reasonable, although the estimated cost is low compared to a benchmark of similar transmission line projects.

MGF recommended that Manitoba Hydro prepare a Basis of Estimate to support the MMTP cost estimate. Preparation of a Basis of Estimate is an industry best practice that helps define the project scope, identifies risks and opportunities, provides a record of documents used in development of the estimate, provides a record of communications made during development of the estimate, and facilitates the review and validation of the estimate.

MGF found MMTP to be on schedule, although MGF identified some issues with the excessive complexity in some schedule areas, insufficient detail in other areas, and problems with the logic of the schedules. MGF recommended that Manitoba Hydro update the construction schedule for MMTP more frequently than every two months, which has been Manitoba Hydro's past practice, once construction commences.

MGF found the cost estimate for GNTL to be high compared to a benchmark of similar transmission line projects and high compared with MMTP. MGF recommended that an updated estimate be prepared.

MGF found that the Construction Management Agreement between Minnesota Power and Manitoba Hydro's subsidiary 6690271 Manitoba Ltd. adequately protects the interests of Manitoba Hydro.

Manitoba Hydro's Position

Manitoba Hydro advises that, although still in relatively early stages, both aspects of the United States interconnection project are on schedule and on budget, with a budget of $453 million for the Manitoba portion of the new interconnection.

Board Findings

The Board finds that the $453 million control budget amount for the Manitoba-Minnesota Transmission Project and Manitoba Hydro's currently forecast portion of the Great Northern Transmission Line project cost are to be used for Integrated Financial Forecast modeling and rate setting in this GRA. The Board expects that Manitoba Hydro will exercise effective management oversight, including with respect to schedule updates and schedule quality.

The Board recommends that, as suggested by MGF, Manitoba Hydro update the MMTP schedule more frequently than every two months once construction begins, especially considering the potential for a delay impact due to the National Energy Board licensing and certification process for MMTP. Manitoba Hydro is to consider implementing the recommendations made by MGF and report to the Board at the next GRA whether and the extent to which it has implemented these recommendations.

5.4 Manitoba-Saskatchewan Transmission Project

The Manitoba-Saskatchewan Transmission Project is a new 230 kV transmission line that runs from Birtle, Manitoba to Tantallon, Saskatchewan. The Manitoba portion of the line is approximately 44 km in length and together with associated upgrades to Manitoba Hydro's transmission system is expected to cost $57 million.

The line is being constructed to facilitate a 100 MW export power sale from Manitoba Hydro to SaskPower Corporation. The power sale agreement begins June 1, 2020 and ceases May 31, 2040. The pricing terms of the power sale agreement are confidential and commercially sensitive but were disclosed to the Board at an *in-camera* hearing. Manitoba Hydro indicates that the environmental attributes, such as carbon-free energy produced by Manitoba Hydro's hydroelectric generating stations, are transferred to SaskPower. The price paid by SaskPower includes these environmental attributes as there is no explicit pricing of environmental attributes.

In 2015 and 2016, prior to signing the contract with SaskPower, Manitoba Hydro evaluated the economics of the power sale agreement against the capital and operating costs of the new transmission line. The economic analysis showed that it was in Manitoba Hydro's interest to proceed with the power sale and construction of the transmission line. As this power sale agreement required the construction of new

facilities, approval of the provincial government was sought and obtained through Order in Council.

The power sale agreement was signed in January 2016. The transmission line is currently in the design and licensing phase. Manitoba Hydro anticipates that the transmission line will require a Class 2 environmental assessment. A licence from the provincial government is expected in the second quarter of 2019. The transmission line is expected to be in service in the second quarter of 2021. This is one year after commencement of the power sale agreement. Manitoba Hydro and SaskPower have made alternative arrangements for the period prior to the transmission line entering service.

Daymark Energy Advisors found that, with updated information, the economic analysis indicates that it is still in Manitoba Hydro's interest to proceed with the project.

Board Findings

The Board finds that the $57 million control budget amount incorporated by Manitoba Hydro into MH16 Update with Interim for the Manitoba-Saskatchewan Transmission Project is to be used for Integrated Financial Forecast modeling and rate setting in this GRA.

The Board finds that the power sale agreement and transmission line project remain economic at this point in time. The Board supports Manitoba Hydro's decision to develop firm export sales to other Canadian jurisdictions including to the west.

6.0 Business Operations Capital

Manitoba Hydro prepares a projection of the capital expenditures needed annually for new and replacement equipment and facilities to meet the electricity requirements in Manitoba and firm export sale commitments outside the province. For Manitoba Hydro's fiscal years ending March 31, 2018 and March 31, 2019, total capital expenditures for its electric operations are forecast to be $3.0 billion and $2.6 billion, respectively.

Historically, and until its most current Capital Expenditure Forecast, Manitoba Hydro had three primary categories of capital projects:

1. "Major New Generation & Transmission Projects", such as Keeyask and Bipole III, which increase capacity and energy or provide increased reliability. In this context, increased reliability refers to reliability that was not previously inherent in the system. For example, replacement of an asset that restores the original or "new" reliability is not typically classified as Major New Generation & Transmission.

2. "Major Capital Projects", the category for larger expenditures, typically in excess of $50 million and with a construction period that usually extended beyond one year, which are not classified as Major New Generation & Transmission projects.

3. "Base Capital Expenditures", also previously referred to as Sustaining Capital, the category for numerous, unspecified projects below the $50 million threshold. These typically represent expenditures to renew existing assets and facilities (also referred to as "sustainment") replacements, to expand the electrical system to new customers, and to address load growth and requirements for additional capacity.

Under Manitoba Hydro's new management and the most current Capital Expenditure Forecast, capital expenditures are divided between Major New Generation & Transmission projects and Business Operations Capital projects, which combines the former categories known as Major and Base capital projects. Under the new approach, Major New Generation & Transmission projects are those that provide significant new generation and transmission capacity and include projects of a substantial cost. Business Operations Capital projects address requirements to sustain electricity service through renewal of aging or obsolete assets, to expand the electrical system to new customers, to address load growth and requirements for additional capacity, and to enhance system performance and functionality.

Of Manitoba Hydro's $3.0 billion of total annual capital expenditures in fiscal 2018, approximately $526 million is forecast to be spent on Business Operations Capital. In future years, the forecast of Business Operations Capital spending is between approximately $500 million and $650 million each year, totaling approximately $13 billion by the end of the 20-year Capital Expenditure Forecast in 2036. Under the Board Act and the Hydro Act, the Board does not have legal jurisdiction to approve Business Operations Capital projects and spending, but only to consider the revenue requirement of those projects for rate-setting purposes.

Manitoba Hydro is an asset-intensive organization that has been managing assets for generations and it has identified the need to mature its asset management practices to maximize value from scarce funding. Due to the magnitude of the past and future Business Operations Capital spending, the Board has long supported the need for Manitoba Hydro to review its spending plans and priorities by incorporating more formal, mature asset management processes.

Asset management involves the balancing of costs, opportunities, and risks against the desired performance of assets to achieve the organizational objectives. Manitoba Hydro defines asset management as the framework of processes and metrics used to make asset life cycle decisions, including operating context (duty cycle), maintenance schedules, and replacements or upgrades in accordance with corporate priorities and risk tolerances to maximize value. In its simplest terms, asset management means providing the required level of service in the most cost effective manner - the “right” work undertaken to achieve the desired performance outcomes in the most efficient and financially responsible manner. Mature and competent asset management enables the application of analytical data-driven approaches to managing assets over the different stages of their life cycle.

In prior Orders, including 116/08 and 73/15, the Board directed Manitoba Hydro to develop asset condition assessments, which are a necessary component of mature asset management processes. Asset condition assessments provide the data necessary with which to make informed asset management decisions. Manitoba Hydro has since developed asset condition assessments and health indices for many of its asset classes, however there are still many asset classes for which there are no condition assessments and the corresponding health indices are based solely on the assets’ ages.

In a comparison of Canadian Electricity Association members, Manitoba Hydro ranks in the top quartile for reliability when compared to rural Canadian utilities and in the second when compared to urban utilities. Manitoba Hydro surveys its customers four times a year for their level of satisfaction with the reliability of their electricity service as well as the price. Since 1999, customers have expressed high levels of satisfaction with reliability, while satisfaction with the price is lower. Manitoba Hydro has more limited

survey data concerning customers' preferences for paying higher rates in order to reinvest in Manitoba Hydro's system and maintain the historical high levels of reliability. A 2014 survey indicated that two-thirds of the customers surveyed opposed annual rate increases of 4% to invest in modernizing Manitoba Hydro's system and add generating capacity.

6.1 Manitoba Hydro's Position

In this GRA, Manitoba Hydro identified the need to improve its asset management practices to maximize the value from limited funding. While the Utility is developing more advanced and mature asset management processes, it reports that it is at least three to five years away from being in a position to use these processes in developing its Capital Expenditure Forecast. The proposed spending in the 2016 Capital Expenditure Forecast, which is incorporated into the Integrated Financial Forecast, is based on Manitoba Hydro's long-standing capital planning processes and assumes that historical spending trends will continue into the future.

Manitoba Hydro is developing its new Asset Management Framework in three phases:

- Phase 1: assessment of current asset management practices, through a "gap assessment" performed by UMS Group Inc., an external consultant engaged by Manitoba Hydro in September of 2016;
- Phase 2: development of asset management policies and strategies. Implementation of Phase 2 has not commenced due to competing organizational priorities and the reduction of resources as a result of the Utility's Voluntary Departure Program. A timeline for initiating Phase 2 and has not been finalized although it is expected to be in 2018; and
- Phase 3: development of a detailed 'roadmap' for the implementation of a corporate asset management framework at Manitoba Hydro.

Manitoba Hydro implemented a software tool called Copperleaf C55 (“C55”) to assist with asset management, and engaged Copperleaf Technologies Inc. to help with the development of an initial Corporate Value Framework. The purpose of the Corporate Value Framework is to help Manitoba Hydro understand the value of investments and to identify the optimal set of investments across the different business units (Generation, Transmission, and Distribution) which deliver the greatest value.

According to Manitoba Hydro, all Test Year system renewal investments are condition-driven and reasonably required for the safe and reliable operation of the system. However, Manitoba Hydro also gave evidence that $160 million of capital spending proposed for the 2018/19 Test Year could be deferred. Manitoba Hydro states that a deferral of this magnitude cannot be repeated in future years.

6.2 Intervener Positions

The Consumers Coalition highlights the fact that Capital Expenditure Forecast CEF16 is based on Manitoba Hydro’s historical capital planning processes, not the asset management processes being developed. The Consumers Coalition states that the competence rating given to Manitoba Hydro in the UMS assessment applies to the asset management processes that the Utility is proposing to implement, not the processes that underpin CEF16 and the Test Year spending.

The expert witness retained by the Consumers Coalition, METSCO Energy Solutions (“METSCO”), was critical of Manitoba Hydro for implementing the C55 software prior to the development of the asset management roadmap and in advance of Manitoba Hydro understanding how the software will be used and what it will achieve.

The Consumers Coalition further submits that, while Manitoba Hydro engineers know their system and deliver good reliability results, the Utility has not demonstrated that it does so in a cost effective manner. Manitoba Hydro may not be doing the right project at the right time. The Consumers Coalition states that Manitoba Hydro does not have a consistent definition of risk that can be used across the three business units: Generation, Transmission, and Distribution. The Utility also does not have a means of planning and prioritizing capital spending across the different business units or across the different geographical areas it serves. For example, Manitoba Hydro may be spending on a Transmission project when the greater need and the greater reliability benefit may be realized with a Distribution project.

In addition, the Consumers Coalition argues that Manitoba Hydro has underspent on Business Operations Capital by 18% over the past three years compared to its planned spending, indicating that Manitoba Hydro's estimates for Test Year Business Operations Capital spending cannot be relied upon for rate setting purposes.

The Manitoba Industrial Power Users Group noted the assessment of the Boston Consulting Group that the equity ratio benefits from reduced spending on Business Operations Capital. In what was described by the Boston Consulting Group as a "Realistic 5-year Change", the deferral of low value capital projects totaling $100 million per year for five years shows a sustained benefit to the equity ratio through the year 2035 (i.e. the deferral was not depicted as a temporary change). In the view of the Manitoba Industrial Power Users Group, Manitoba Hydro has opportunities to reduce its Business Operations Capital spending, and has proven in the past that it is capable of reducing expenditures from forecast amounts.

6.3 Board Findings

The Board finds that, while in a period of major capital spending on Keeyask and Bipole III, Manitoba Hydro should find savings in Business Operations Capital.

The Board does not accept the Business Operations Capital spending forecast in Capital Expenditure Forecast CEF16. The Board does not accept that all Test Year investments are condition-driven and reasonably required for the safe and reliable operation of the system. The Board finds that Business Operations Capital spending can be safely decreased by $160 million, based on Manitoba Hydro's evidence that it can defer $160 million of spending in the Test Year. This is consistent with the Board's findings in Order 73/15 that Manitoba Hydro has not adequately evaluated the long-term pacing and prioritization requirements for Business Operations Capital spending. In that Order, the Board did not endorse Manitoba Hydro's long-term Business Operations Capital plan. The Board accepts the evidence that Manitoba Hydro can reduce the level of spending from its forecast and has shown that it has done so in the past, as with the Gillam Town Site Redevelopment project and with the lower spending in the past three years than was originally forecast.

Based on the suggestion of the Boston Consulting Group in its initial report that the spending reductions can be maintained over a longer period, this issue will be revisited at future GRAs. Reducing Business Operations Capital helps offset the expenditures on Keeyask, which are anticipated to mostly be complete by 2023. Reductions in Business Operations Capital result in a reduced need to borrow funds and will enhance Manitoba Hydro's cash flow. Furthermore, the additional reliability obtained from Bipole III and additional generating capacity from Keeyask mean Manitoba Hydro will have added system-level redundancy, reducing the need for non-critical generation investments.

In addition to the positive impact on Manitoba Hydro's cash flow, reducing Business Operations Capital also results in improvement to the debt-to-equity ratio. Manitoba Hydro's analysis also shows that a reduction of capital spending of $100 million annually increases its retained earnings by $414 million after 10 years.

The Board accepts METSCO's evidence that Manitoba Hydro cannot demonstrate the proposed spending is necessary or has been optimized to any extent. Manitoba Hydro acknowledges that it has not evaluated alternative Business Operations Capital spending scenarios or the performance and reliability impacts of different Business Operations Capital spending levels.

The Board recognizes that Order in Council 92/2017 does not give the Board authority to direct Manitoba Hydro to amend its planned Business Operations Capital spending. Rather, the Board has factored into its rate decision the reduction in Business Operations Capital of $160 million. Manitoba Hydro can decide whether to accept the Board's finding and reduce its Test Year Business Operations Capital spending, or to incur additional debt in order to maintain spending at the proposed levels in CEF16.

The reduction in spending on Business Operations Capital in no way diminishes Manitoba Hydro's responsibility and obligation to provide for an ongoing safe and reliable supply of energy to its customers in the most efficient and environmentally sensitive manner. The Board expects that Manitoba Hydro will appropriately assess, plan, and prioritize Business Operations Capital spending in order to meet its obligations in this regard.

The Board finds that Manitoba Hydro has taken initial steps towards developing asset management processes, and is to be commended for doing so in order to better ensure that the financial resources allocated to Business Operations Capital bring maximum

value to the Utility's ratepayers. Further to the direction from Orders 116/08 and 73/15, Manitoba Hydro has developed asset condition assessments for some asset classes, but the health of certain asset classes is characterized solely by the age of the assets. Manitoba Hydro must continue to develop asset condition assessments for all of its major asset classes so that it has the necessary data to make prudent spending decisions within its asset management framework.

At present, Manitoba Hydro prioritizes its capital spending based on the views and experience of its subject-matter experts in Generation, Transmission, and Distribution. Manitoba Hydro has not yet developed processes and practices that would enable it to objectively compare the value of different projects across its business units, nor can Manitoba Hydro quantify in terms of increased reliability the impact of spending on a generation project compared to a transmission project compared to a distribution project. More mature asset management processes, including a more complete set of asset condition assessments, are required so that Manitoba Hydro is in a position to objectively prioritize and optimize its spending across business units based on a common definition of risk.

The Board understands that developing a modern asset management system takes time and wishes to monitor Manitoba Hydro's progress. Manitoba Hydro is directed to hire an independent consultant to assess the Utility's progress with the development of its asset management program and in addressing the recommendations made by its consultant, UMS. The consultant is to also assess progress with the development of the Corporate Value Framework. Manitoba Hydro is to file with the Board by June 29, 2018 the Terms of Reference for the consultant for the Board's review and comment. Manitoba Hydro is directed to report back to the Board on its progress and the result of the consultant's assessment at the next GRA.

The Board acknowledges the contributions from past and present Manitoba Hydro personnel in designing, constructing, and maintaining the electrical system. Clearly, with top quartile reliability, Manitoba Hydro has constructed, operated, and maintained an outstanding electrical system to the benefit of Manitobans. With this Order, the Board does not intend to diminish these contributions, but it does recognize the cost pressures that result from the capital program that includes Bipole III, Keeyask, and a new interconnection with the U.S. Those cost pressures mean that Manitoba Hydro can no longer continue to fund Business Operations Capital at its historic levels unless and until it can demonstrate through mature asset management processes that those investments are necessary.

7.0 Demand Side Management Spending

Demand side management is a common utility strategy for reducing consumer demand for energy in order to defer the need for new generation assets. Manitoba Hydro's Demand Side Management Plan, marketed under the Power Smart brand, involves various education and incentive programs aimed to reduce domestic consumption of both electricity and natural gas.

Manitoba Hydro combines the impacts of demand side management activities with the load forecast to represent the forecast net load, which is used to forecast domestic revenues in the Integrated Financial Forecast.

As noted above, *The Efficiency Manitoba Act* creates a new Crown Corporation, Efficiency Manitoba, which will have a mandate to provide demand side management programming. *The Efficiency Manitoba Act* requires annual net electricity energy savings of 1.5% of sales (compared to the previous year's weather-normal consumption) for the first 15 years of operation; however, this target can be changed by regulation. Until Efficiency Manitoba develops its long-term demand side management plan, Manitoba Hydro intends to carry forward its 2016/17 15-year Demand Side Management Plan, with one-year plans continuing to be developed.

Manitoba Hydro seeks to pursue all cost effective demand side management opportunities. The Utility assesses the cost effectiveness of demand side management programs against its marginal value of electricity. The assessment of the cost effectiveness considers the levelized resource cost of each program, taking into account, on a per kilowatt-hour basis, the combined incremental cost of the installed program plus any administrative costs associated with promoting the program. The

marginal value is the value to the Utility's system of deferring an increment of load growth to Manitoba Hydro's integrated system.

Marginal value is determined based on each of the components of serving residential load: generation supply, bulk transmission capacity, and distribution capability. The transmission and distribution components are based on a one-year deferral of planned capital additions to meet ongoing capacity requirements. The generation marginal value is based on the value for each of generation capacity and generation energy. In 2017, Manitoba Hydro changed its methodology for calculating the value of generation capacity. Previously, generation capacity was valued using the potential for sales of capacity on the export market. Under the new methodology, Manitoba Hydro values generation capacity on the basis of the deferral of a new generation resource in Manitoba. Under the 2017 methodology, generation energy continues to be valued using the forecast price of energy sales on the export market.

In assessing each individual program, Manitoba Hydro considers the capacity and energy benefits over a period of time, including variations in marginal value by time of day, season, and year. As a result, a specific program may have a levelized cost that is higher or lower than the long-term average marginal value. However, in general terms, when the levelized cost of a program is below the marginal value, Manitoba Hydro considers the program cost effective. This means that, over the life of the program, there is an economic return to the Utility with respect to generation, transmission, and distribution benefits that arise from the energy savings achieved through the program.

The programs in the 2016/17 plan are measured against the 2015/16 levelized electric marginal value of 7.8 ¢/kWh. The planned levelized total resource cost of the individual electric demand side management opportunities, including both the customer's and Manitoba Hydro's investment, range from 1.1 to 13.6¢/kWh, with an average of

3.7¢/kWh for the portfolio of programs as a whole. The average levelized utility cost, or the cost of solely the Utility's investment levelized over a fixed time period, is 1.6¢/kWh for the entire electric demand side management portfolio.

During the course of the GRA proceeding, Manitoba Hydro filed updated marginal value information. The marginal value has decreased to 5.75¢/kWh for generation when serving residential customers. Although the marginal value has decreased by 28%, Manitoba Hydro does not plan to reassess the cost effectiveness of its demand side management programs under a total resource cost test because of the anticipated transfer of programming to Efficiency Manitoba.

Manitoba Hydro's 2016/17 15-year plan seeks to realize electricity savings of 1.2% of the annual average load over the next 10 years, with a Utility investment of $1.2 billion over the next 15 years. Manitoba Hydro's 2017/18 Demand Side Management one-year plan seeks to realize electricity savings of 238 MW and 310 GWh in 2017/18, with an electric utility investment of $58.7 million. Of that amount, $43.7 million was spent as of November 30, 2017. For the 2018/19 Test Year, Manitoba Hydro forecasts Power Smart electric capital and operating spending of $101.1 million for electric capital and operating spending.

The evidence is that demand side management spending exerts an upward pressure on consumer rates. Retained Earnings would be $4.2 billion greater by 2036 if no money was spent on demand side management and no energy savings achieved. While demand side management energy savings can be sold into the export market, there is currently a differential between domestic and export prices, which leads to lower overall revenues for Manitoba Hydro.

7.1 Manitoba Hydro's Position

Manitoba Hydro's position is that, while there continues to be uncertainty in how Efficiency Manitoba will pursue its mandate, it would be poor planning to arbitrarily reduce forecasted demand side management in the face of a legislative mandate that exceeds Manitoba Hydro's current plan. Manitoba Hydro argues that assuming savings on programming that is moving from Manitoba Hydro's control, but not its financial responsibility, is imprudent. Manitoba Hydro estimates that an additional $1 billion in Utility investment, over and above the currently planned $1.2 billion investment, is needed to meet *The Efficiency Manitoba Act* annual savings target of 1.5% of sales.

7.2 Intervener Positions

The Consumers Coalition raises significant concerns about the reliability of projected demand side management expenditures due to a demonstrable failure by Manitoba Hydro to undertake post-NFAT integrated resource planning. Specifically, the Consumers Coalition's position is that Manitoba Hydro has not demonstrated optimized demand side management spending, given excess load, reduced marginal cost thresholds, and the flexibility that exists under *The Efficiency Manitoba Act* to make recommendations regarding appropriate targets. With respect to the latter, the Coalition argues that the legislation supports an ongoing dialogue about the target itself and any efficiency plan that Efficiency Manitoba puts forward. This dialogue should include issues related to accessibility of demand side management programs for all ratepayers. In addition, declining marginal values may leave some demand side management uneconomic.

The Consumers Coalition submits that the Board should direct the formation of a working group on integrated resource planning, involving stakeholders, Efficiency Manitoba, and Manitoba Hydro. The Board should also recommend that funds paid by Manitoba Hydro to the Province be used to fund more extensive demand side management programs specifically targeted to lower-income and high consumption consumers.

The Green Action Centre submits that the Utility's revenue requirement should include sufficient additional funds in a dedicated account to cover rate discounts for the energy poor. As well, these funds should support more aggressive demand side management in order to meet the legislated targets and provide geothermal heating system subsidies as a rate mitigation measure for electric space heating customers.

The Manitoba Industrial Power Users Group argues that it is not apparent that Manitoba Hydro's "status quo" approach to demand side management is reasonable given that export prices and related marginal values have materially declined. The level of demand side management spending included in the financial forecast should be consistent with integrated resource planning, including a material reduction to reflect the decrease in marginal value by approximately one-third. Demand side management should be encouraged where it is proven cost-effective, including where it can benefit customers to manage electricity bills without negatively affecting other ratepayers.

7.3 Board Findings

The Board finds that Manitoba Hydro's revenue requirement should be reduced to reflect lower demand side management spending as a result of the new lower marginal value. The Board agrees with the Manitoba Industrial Power Users Group that the level of demand side management spending included in the financial forecast should be

consistent with integrated resource planning, including a material reduction to reflect the decrease in marginal value by approximately one-third. As discussed below, the Board also recommends that Manitoba Hydro reduce its demand side management expenditures from the level incorporated in MH16 Update with Interim that targets 1.2% in energy savings on average in each year over the next 10 years.

The Board's approved rate increase takes into consideration a reduction in demand side management spending as well as an increase in domestic load that will result from fewer demand side management programs. This reduction in the revenue requirement is appropriate for rate-setting purposes while Manitoba Hydro remains responsible for demand side management spending and programming. Considerations other than the reasonableness of expenditures for rate-setting purposes will apply once Efficiency Manitoba has assumed demand side management programming and presents a demand side management plan to the Board for review.

While Manitoba Hydro has forecast demand side management spending to achieve energy savings over the next 10 years at a level of 0.3% below the energy savings target in *The Efficiency Manitoba Act*, the amount of spending is not justified for the Test Year. Efficiency Manitoba is not yet operational and once it is, there are legislated steps that must occur prior to the entity's implementation of an approved efficiency plan. The adverse rate impacts that arise from Manitoba Hydro's plan are not reasonable in the present context.

Reduced demand side management spending for rate-setting purposes is supported by the change in circumstances since the NFAT review in 2014. In 2014, new generation resources – such as Keeyask - were required as early as 2024 under the load forecast accepted in the NFAT Report, with additional generation resources needed by 2030. With reductions to the load forecast since 2014, including the loss of expected Top

Consumer Petro/Oil/Gas sector loads, the next new generation resource is not needed until approximately 2040, even with new export contract obligations since the NFAT. The 2017 marginal value is lower than the 2013 marginal value by approximately one-third, which affects the economics of demand side management programs. As well, as noted by Manitoba Hydro and expert witnesses in the proceeding, rate increases above inflation will themselves have a conservation impact.

The Board finds that, in light of the new, lower, levelized marginal value, some of Manitoba Hydro's demand side management programming may no longer be cost effective. This was acknowledged by Manitoba Hydro witnesses and is not contested. Consumer rates should not, at this time, recover the costs of demand side management programs that are no longer cost effective, unless justified by having a lower-income target market. Given the evidence adduced in this proceeding about energy poverty and bill affordability, it is reasonable for consumer rates to recover the costs of lower-income demand side management programs, even if not cost effective as assessed against the new lower marginal value.

In light of the above, the Board recommends that Manitoba Hydro reduce its demand side management spending. Manitoba Hydro should review its demand side management programming for cost effectiveness and cease or modify spending on programs that are no longer cost effective, except for programs targeted at lower-income and First Nations on-reserve consumers. In addition to continued Utility investment in lower-income demand side management programs, the Board recommends that the provincial government amend Efficiency Manitoba's mandate to explicitly include consideration of bill affordability. This would include targeting of lower-income consumers with demand side management programs, as well as consideration of the impact of demand side management costs being paid by non-participants.

Amendment of Efficiency Manitoba's mandate to include bill affordability is appropriate in light of the interplay between demand side management, which seeks to mitigate the impact of rate increases, and bill affordability. The Board remains concerned about bill affordability, including in the context of projected annual rate increases over the forecast period. As such, lower-income demand side management programs that are uneconomic or do not meet a cost-effectiveness assessment should continue to be pursued once the transfer to Efficiency Manitoba is complete.

Finally, the interrelationship between demand side management, the need for new generation resources, and the cost of those resources reinforces the recommendation in the NFAT Report that integrated resource planning be implemented in Manitoba.

From one perspective, Manitoba Hydro is financially worse off over the forecast period for undertaking demand side management due to the difference between domestic rates and the price for which Manitoba Hydro can sell energy saved by domestic customers into the export market. However, this analysis neglects the benefits of deferring new generation resources that may be considerably more expensive than the aggregate demand side management investments. For example, in its NFAT report, the Board concluded that:

> *…treating the DSM savings from the Supplemental 2014 Power Smart Plan as a separate, independent energy resource, yields capacity savings that amount to more than 80% of the net system capacity addition from the proposed Conawapa Project. Similarly, the annual dependable energy savings from the Power Smart Plan exceed 85% of the dependable energy output from the proposed Conawapa Project. To achieve these electricity savings, Manitoba Hydro budgets to spend $822 million, which is less than 8% of the $10.7 billion cost of building Conawapa.*

In the current proceeding, by 2031, the 2016 Demand Side Management Plan is expected to deliver capacity and energy savings of 1,232 MW and 4,506 GWh at a cost of $1.2 billion. This compares to Keeyask, which provides 630 MW of winter peak capacity and 4,400 GWh of energy in an average year, at a cost projected by Manitoba Hydro to be $8.7 billion. This is illustrative of the importance of integrated resource planning.

8.0 Export Revenue Forecast

Manitoba Hydro cites a deterioration of its anticipated export revenues as a factor in the Utility seeking higher domestic rate increases than in previous rate applications. While export prices are still forecast to increase over time, that increase is less than previously expected by Manitoba Hydro. Manitoba Hydro now tempers its export price growth as the outlook for low costs of fossil fuel continues and also because American utilities have local options for carbon-free electricity.

A higher forecast of export prices, all else equal, will require lower revenues from domestic ratepayers on a forecast basis. However, if the export price forecast is projected at a level higher than actual revenues achieved, then Manitoba Hydro will not realize the expected export revenues and, as a result, domestic ratepayers will be asked to pay higher rates to make up the shortfall.

Manitoba Hydro's export revenue forecast is comprised of three main components:

- The volumes of energy and generation capacity that are surplus to the needs of Manitobans.
- The forecast of export prices for the surplus energy and capacity. Manitoba Hydro predominantly has two types of export sales: firm, also known as dependable, and opportunity. Firm export energy sales are made from energy which is forecasted to be available if the worst drought conditions previously experienced are repeated. Firm capacity sales are made from energy that is surplus to domestic needs based on winter or summer peak demand. Opportunity sales are from energy that is surplus to domestic requirements and firm sales.
- The revenues from firm export contracts that Manitoba Hydro has negotiated with counterparties.

The exportable volumes are determined based on Manitoba Hydro's domestic load forecast and the generating capability of the Utility's resources. Export revenues are forecast for the first year in the Integrated Financial Forecast based on the actual water inflow conditions, the most current reservoir and lake level elevations, and the expected inflows through to the end of the fiscal year. For the second forecast year, export revenues are now determined for each of the entire range of flow conditions based on expected reservoir levels. Previously, Manitoba Hydro determined the export revenue projections for the second year by using a single median flow scenario and expected reservoir levels. For the third and subsequent years of the forecast, the methodology is unchanged from previous and export revenues are determined for each of the entire expected range of flow conditions and reservoir levels. For each of these 'flow cases' for the second and subsequent years, Manitoba Hydro calculates the expected export revenues by multiplying the exported volumes by the forecasted price. Manitoba Hydro then averages the expected export revenues to arrive at a forecast of export revenues for each year of the financial forecast.

8.1 Manitoba Hydro's Position

To forecast export prices, Manitoba Hydro continues to use a consensus forecast for a 'reference case' derived from the equal weighting of four independent price forecasting consultants; however, as in the past, the Utility has made its own adjustments to the export price forecast.

In this GRA, Manitoba Hydro has removed the premium that has historically been applied to uncontracted long-term dependable energy forecast prices because utilities in the Midcontinent Independent System Operator market have other, competitive options for long-term, fixed-price, and carbon-free energy supplies. The Utility also removed the value of capacity from the pricing of potential uncommitted export sales made from

surplus capacity as there is surplus capacity in the Midcontinent Independent System Operator market. The financial effect of Manitoba Hydro's revisions to the export price forecast is to value all surplus energy at opportunity prices rather than ascribe a higher value for its dependable surplus product.

Lost opportunity export revenues from the delay in the Keeyask in-service further decrease export revenues.

Manitoba Hydro assumes no new firm long term contracts will be negotiated for the substantial surplus dependable energy and capacity in the 20-year forecast. Manitoba Hydro further assumes existing long-term firm contracts will expire without negotiating extensions.

The following is the current list of Manitoba Hydro's long term contracted export sales:

Power Sale Contract	Contract Start	Contract End
Minnesota Power 50 MW System Participation	May 2015	May 2020
Minnesota Power 250 MW System Participation	Jun 2020	May 2020
Minnesota Power 50 MW ZRC System Participation	Jun 2017	May 2020
Great River Energy 200 MW Seasonal Diversity	Nov 2014	Apr 2030
Northern States Power 125 MW System Power	May 2021	Apr 2025
Northern States Power 375/325 MW System Power	May 2015	Apr 2025
Northern States Power 350 MW Seasonal Diversity	May 2015	Apr 2025
Northern States Power 75 MW Seasonal Diversity	Jun 2016	May 2020
Wisconsin Public Service 100 MW Sale	Jun 2021	May 2027
Wisconsin Public Service 108 MW System Participation	Jun 2016	May 2021
SaskPower 100 MW System Participation	Jun 2020	May 2040
SaskPower 25 MW System Participation	Nov 2015	May 2022
American Electric Power 79 MW ZRC	Jun 2016	May 2018
American Electric Power 50 MW ZRC	Jun 2018	May 2020
Basin Electric 50 MW ZRC System Participation	Jun 2018	May 2020
Basin Electric 50 MW ZRC System Participation	Jun 2020	May 2021
NextEra 30 MW ZRC Sale	Jun 2015	May 2018
NextEra 100 MW ZRC Sale	Jun 2016	May 2018

Source: Appendix 3.1, pg 16

8.2 Independent Expert Consultant Evidence

Daymark Energy Advisors reviewed Manitoba Hydro's forecast of exportable volumes of energy and capacity and found those forecasts reasonable. Daymark assessed the revenues from Manitoba Hydro's firm export contracts and likewise found those revenues reasonable and were appropriately included in Manitoba Hydro's forecast of total export revenues.

In Daymark's view, Manitoba Hydro did not demonstrate that the independent price forecasts it purchased from the four external forecasting firms were "reference case" or "P50" forecasts, and therefore the resulting average of these forecasts may not be a true P50 forecast.

Daymark found that Manitoba Hydro did not use the consensus forecast for capacity prices. Daymark also found that not including a dependable energy premium or any revenue potential for capacity sales does not result in a P50 forecast, but rather a P100 forecast. Daymark found that not including the premium or capacity value may be reasonable in the short term but not in the long term, as there is evidence that the Midcontinent Independent System Operator market will be short capacity by 2022 and United States Federal and State policies may still favour Manitoba Hydro's carbon-free, firm electricity exports.

In summary, Daymark found that Manitoba Hydro's export revenue forecast is conservative or low relative to Manitoba Hydro's stated goal of having a P50 forecast of export revenues.

8.3 Intervener Positions

The Consumers Coalition argues that Manitoba Hydro's export revenue forecast is biased low as it is based on policy decisions, is not a true "P50" forecast (i.e. results being higher 50% of the time and lower 50% of the time), and does not reflect the benefits of Manitoba Hydro's new transmission interconnection with the Midcontinent Independent System Operator market in the United States. The United States Federal Energy Regulatory Commission and the United States Energy Information Administration reports support the view of Daymark that Manitoba Hydro's export forecast is conservatively low. The Consumers Coalition submits that this puts unnecessary upward pressure on the domestic rate increases.

The Manitoba Industrial Power Users Group maintains that Manitoba Hydro's Integrated Financial Forecast should include the best estimate for the prices at which the Utility can sell its surplus capacity and energy, including values for capacity, premiums, and

continuing bilateral contracting arrangements. Manitoba Hydro is being pessimistic by assuming its major export contracts that expire in 2025 will not be renewed or replaced with anything that offers more than opportunity export energy value. Manitoba Hydro has assumed the worst-case scenario, and as such the Utility's approach is inconsistent with P50 forecasts in an integrated financial forecast. This Intervener argues that this should be considered by the Board in determining the appropriate rate increases to be awarded.

8.4 Board Findings

The Board finds Manitoba Hydro's forecast of export revenues to be conservative such that, on a probability basis, it will under-forecast the revenues expected to be realized from export sales. Under-forecasting export revenues results in Manitoba Hydro forecasting a need for higher domestic rates. Manitoba Hydro's failure to provide a "P50" probability export revenue forecast is a factor considered by the Board in reducing the rate increase requested by the Utility.

Accepting the evidence of Daymark Energy Advisors, the Board finds Manitoba Hydro's export revenue forecast to be conservative for the following reasons:

- Manitoba Hydro's export revenue forecast is not consistent with a financial forecast that that has a probabilistic goal of P50; and
- Manitoba Hydro's change of methodology - to remove capacity values and dependability premiums from the substantial surplus dependable energy - is reasonable in the near term, but is not reasonable in the long term as it biases the export forecast to be low and is not consistent with third party forecasters nor with the needs in the Midcontinent Independent System Operator and Minnesota markets.

Despite Manitoba Hydro purchasing capacity price forecasts from four independent price forecasters, Manitoba Hydro did not use these forecasts to develop a consensus capacity price forecast, and instead assumed zero capacity prices and revenues. With respect to the carbon price forecasts of the independent price forecasters, Manitoba Hydro argued that the goal to have an unbiased consensus forecast is achieved by accepting other experts' views of the future and not imposing its own biases by choosing forecasts to produce a predetermined result. Yet, it appears Manitoba Hydro did not do this when it ignored the consensus forecast of capacity prices and instead forecast zero capacity prices and revenues.

Additionally, the Board finds that Manitoba Hydro's export revenue forecast is low as it does not reflect the estimated 2% to 5% increase in export prices (and 2% to 5% reduction in import prices, which will increase the net export revenues) that will be achieved once the Manitoba-Minnesota Transmission Project and the Great Northern Transmission Line are in service.

9.0 Load Forecast

Manitoba Hydro's electric load forecast is used for several purposes. Short-term forecasts of sales are needed to forecast revenue for rate design and accounting purposes. Short-term forecasts of energy and peak demand are needed for system operations planning. Long-term forecasts of energy and peak demand are required for power planning to determine long-term supply requirements. Manitoba Hydro's 2017 Electric Load Forecast was created as the Utility's best estimate of Manitoba's future energy requirements on a P50 basis, meaning there is a 50% chance that the future load will exceed the forecast and a 50% chance that it will be less than the forecast.

9.1 Manitoba Hydro's Position

In this GRA, Manitoba Hydro cites a reduced forecast of domestic load growth as a contributing factor for the deterioration in the Utility's financial outlook. The reduced forecast of domestic load growth delays the Manitoba domestic need for energy from Keeyask until the mid-2030s and also, in the Utility's view, lessens the opportunity for Manitoba Hydro to look to load growth to address its financial challenges.

Manitoba Hydro expects no net load growth over the next 10 years when the impact of its current Demand Side Management Plan is included. Over the next 20 years, the net load growth is expected to average 0.7%. Manitoba Hydro identified several other factors that will further depress its load forecast that were not incorporated into the 2017 Electric Load Forecast. One factor is the cancellation of a project in the Top Consumers' Petroleum/Oil/Gas sub-sector that will reduce the load forecast by approximately 500 GWh in 2021. Another factor not included in the 2017 Electric Load Forecast is the six years of 7.9% rate increases that form part of Manitoba Hydro's current plan. The 2017 forecast is based on five years of 7.9% rate increases.

The primary driver of energy load growth in Manitoba is the population and the secondary driver is the economy. The population of Manitoba has grown from 1,185,000 people in 2006/07 to 1,323,000 people in 2016/17, averaging 1.1% growth per year. Manitoba's population is forecast to grow to 1,638,000 by 2036/37, averaging 1.1% per year. 'Real' (i.e. with inflation removed) Manitoba Gross Domestic Product ("GDP") is expected to grow 2.0% in 2017/18 and average 1.6% annually for the next 20 years.

The three main components of Manitoba's electricity use are:

- Residential Basic, with 480,365 customers, including mostly residential structures that include single-family dwellings, multi-family dwellings, and individually metered apartment suites. This residential component of the Load Forecast accounts for 32% of Manitoba Hydro's Total Consumer Sales and is projected to grow at an average rate of 1.3% per year over the next 20 years (excluding demand side management impacts). Customer growth, paralleling population growth, is growing 1.1% per year.

- General Service Mass Market, with 67,676 customers, are small to large commercial and industrial customers. The load growth for this group of customers accounts for 41% of Manitoba Hydro's Total Consumer Sales and is forecast to grow at an average of 1.5% per year (excluding demand side management impacts), which is higher than the historic growth of 1.1% per year over the past 10 years. The growth is primarily due to expected growth in residential customers and GDP.

- General Service Top Consumers, are 10 high-usage companies with 26 individually metered accounts that are forecast individually. This group of customers accounts for 26% of Manitoba Hydro's Total Consumer sales.

  The load growth for these Top Consumers customers is forecast at an average rate of 0.9% per year, which is higher than the 0.2% growth per year experienced during the past 10 years. However, it is less than the 3.2% growth per year

during the period 10 to 20 years ago. The 20-year historical growth of the Top Consumers has been 1.7% per year.

9.2 Independent Expert Consultant Evidence

The Board engaged Daymark Energy Advisors as Independent Expert Consultants to assess Manitoba Hydro's load forecasting methodologies, evaluate historical performance, and assess changes between the Utility's 2014 and 2017 load forecasting methodologies. Daymark concluded that Manitoba Hydro's changes to the forecasting methodology for Potential Large Industrial Load for the Top Consumers category result in a more conservative methodology and significantly reduce the load forecast. Daymark also concluded that Manitoba Hydro has not fully considered fuel switching or the short-term impact of the proposed and projected rate increases on Top Consumers, which could reduce the load forecast and cause the forecasted loads to be lower than the actual future loads. This Independent Expert Consultant also gave evidence that Manitoba Hydro's estimated price elasticity for all sectors of customers may not be reliable. Price elasticity estimates the responsiveness of electricity demand to changes in the price of electricity.

Daymark recommended improvements to Manitoba Hydro's load forecasting methodology, as follows. According to Daymark, Manitoba Hydro should:

- incorporate scenario analysis into its load forecasts. Scenarios should be based on plausible alternative futures. Such scenarios may entail a combination of factors such as high or low growth of population, GDP, or electric vehicles, or high or low adoption of energy efficiency. Considering different scenarios allow utilities to more effectively plan and understand where and how future loads may differ from present forecasts,

- perform probabilistic assessments of the load forecast to determine the sensitivity to input variables such as population or GDP forecasts. This would help Manitoba Hydro and stakeholders understand the uncertainties in the load forecast,
- utilize more than two years of load history to determine the weather dependency of electricity consumption,
- utilize fewer than 25 years of weather data to generate the normal weather baseline, and
- test its econometric models for statistical concerns, such as multi-collinearity.

Dr. Yatchew, an Independent Expert Consultant retained by the Board to provide economic analysis, assessed the likely impacts on and responses of various customer groups to rate increases of the magnitude included in Manitoba Hydro's financial plan as well as the implications for the economy as a whole. Dr. Yatchew found offsetting forces such that electricity price increases will cause a reduction in consumer demand but, as the provincial Gross Domestic Product grows over time, the consumption of electricity to support that economic growth will increase. Factoring in Manitoba Hydro's requested and projected 7.9% rate increases in its 10-year financial plan as well as the expected provincial growth, the net result is that load in Manitoba is likely to be stagnant over the coming decade.

9.3 Intervener Positions

The Consumers Coalition accepts Manitoba Hydro's price elasticity values as being reasonable but questions the conservatism used by the Utility in forecasting long-term load as well as the significant uncertainty relating to the mobility of large industrial customers who may respond to large rate increases by relocating businesses. This Intervener recommends that Manitoba Hydro revise its methodology for estimating the

load of the large industrial customers as well by providing alternative load forecast scenarios through stochastic modelling.

The Manitoba Industrial Power Users Group compared Manitoba Hydro's 2013 Electric Load Forecast, which underpinned development Plan 5 – which is akin to the plan recommended by the Board and which includes Keeyask and the new interconnection with the United States – at the NFAT proceeding, with the 2017 Electric Load Forecast. Compared to the 2013 forecast, in the year 2026/27, there is a 7.1% decrease in load. Of that decrease, approximately 5.3% arises due to customer responses to the assumed five years of 7.9% rate increases as compared to 3.95% rate increases assumed for the NFAT forecast. Absent the effect of successive 7.9% rate increases on load growth, the decline in the load forecast would only be approximately 1.8%, with some portion of this smaller decrease attributable to assumed demand side management activities. Put another way, this Intervener submits that, if approved rate increases are more in line with 3.95%, the load forecast will be higher, resulting in increased domestic rate revenue for the Utility and an improved financial situation for Manitoba Hydro.

9.4 Board Findings

The Board finds that, compared to the methodology used in 2014, the new methodology used by Manitoba Hydro in 2017 generates a lower long-term forecast of consumers' electricity consumption in Manitoba. The Board is prepared to accept the results of Manitoba Hydro's Electric Load Forecast for financial forecasting and rate setting purposes, but concludes that different considerations from those used by Manitoba Hydro support the forecast. The total load in the Test Year should be higher than that forecasted by Manitoba Hydro due to the decrease in the overall approved rate increase from 7.9% to 3.6% and the Board's recommendation in this Order that Manitoba Hydro

reduce its demand side management, all else being equal. The change in the methodology to forecast the long-term Potential Large Industrial Load, while responsive to the Board's prior direction in Order 73/15, may now be an overly conservative methodology, as was found by Daymark Energy Advisors. The Board finds that the overly conservative nature of the Potential Large Industrial Load forecast is partially offset by the fact that the 2017 forecast does not factor in the cancellation of the project in the Top Consumer Petroleum/Oil/Gas sub-sector.

The Board agrees with Dr. Yatchew's assessment that the load growth will be essentially flat over the coming years. The Board finds that any long-term load forecast cannot be relied upon, due to the inherent limitations in forecasting the effects and impacts of disruptive technology, such as customers generating their own electricity with solar photovoltaic systems and storing that electricity in batteries.

The Board finds that Manitoba Hydro's price elasticity for all three of the customer sectors may not be reliable. The Board accepts the evidence in the literature cited by Dr. Yatchew, although the Board also notes that applying those elasticities results to Manitoba Hydro's load data yields results not dissimilar from Manitoba Hydro's load forecast. That literature suggests the price responsiveness of industrial customers can be greater than residential customers. In addition, as discussed in a subsequent section, the Board's recommendation that Manitoba Hydro reduce its demand side management spending will increase domestic load growth.

The Board encourages Manitoba Hydro to review and study the areas Daymark Energy Advisors and Dr. Yatchew identified for improvement and enhancement of the load forecasting methodology. Manitoba Hydro is directed to consider the areas recommended by the Independent Expert Consultants for improvement and enhancement of the load forecasting methodology and to provide details of the

implementation of these recommendations, or reasons for not implementing them, at the next GRA.

10.0 Operating & Administrative Expenses

Operating and administrative expenses ("O&A") are one of Manitoba Hydro's highest expense categories in its revenue requirement. These expenses primarily consist of labour and benefits, materials, contracted services, and overhead costs associated with operating and maintaining Manitoba Hydro's facilities and providing services to customers. O&A expenses do not include capitalized salaries and benefits for employees who work on capital projects, or materials and services related to those projects. The salaries of approximately one out of three Manitoba Hydro employees are capitalized and are therefore not included in O&A expenses.

Dating back to at least Order 116/08, the Board has expressed concern regarding the level of growth in Manitoba Hydro's O&A costs.

In Order 5/12, the Board noted that, from 2005 to 2010, Manitoba Hydro's O&A expenses grew at a compound average growth rate of almost 5% annually, while inflation for the same period was under 2%. The Board concluded that a major reason for the increase of O&A expense was due to staffing levels having increased by 900 additional Equivalent Full-Time positions, or a 15% increase, in the period of 2004 to 2012. Of the additional 900 positions, 498 were in the Power Supply Business unit, which at that time managed the planned development of Keeyask and Conawapa.

In the 2014/15 & 2015/16 GRA, Manitoba Hydro expressed a commitment to reducing the growth of O&A expenses to one percent, excluding the impact of accounting changes. Since that time, Manitoba Hydro has pursued a cost containment strategy. First, over the period of 2014/15 to 2016/17, Manitoba Hydro reduced its operations by 429 positions through attrition and process efficiencies. As a result, Manitoba Hydro achieved cumulative savings of $43.2 million.

In February of 2017, Manitoba Hydro announced a plan to reduce its total workforce by 15%, or 900 positions. This plan commenced with a reduction of the executive leadership team by 30%, or three Vice-President positions, and a reduction of the senior management team by 25%. Manitoba Hydro also implemented a Voluntary Departure Program to achieve the remaining position reductions. By mid-2018, the Voluntary Departure Program will result in 817 employees leaving Manitoba Hydro (plus four employees related to Manitoba Hydro's subsidiaries), approximately 70% of which are assumed to be operational in nature. Including the position reductions resulting from the Voluntary Departure Program, the total reduction of senior management is approximately 40 positions.

10.1 Manitoba Hydro's Position

Manitoba Hydro estimates the salaries associated with the reduced positions to be $91.9 million. These savings do not include the approximately $2 million value of the salaries for those employees who did not leave the Utility through the Voluntary Departure Program but were severed.

The costs of the restructuring program include the severance and salaries paid pursuant to the terms of the Voluntary Departure Program (forecast to be $53 million). In addition, the Utility estimates reorganization costs (for retraining, information technology, and potential benefit impacts) to be $12 million in 2018/19.

Manitoba Hydro also introduced cost reductions through a Supply Chain Management initiative, intended to realize savings on goods and services purchased, reduce or avoid operating costs, reduce working capital, and reduce capital expenditures. Since these initiatives began in 2014/15, the accumulated realized savings to date total approximately $8 million. Manitoba Hydro estimates future annual cost savings between

$20 million and $50 million over the five-year period 2017/18 through 2021/22, with 30% related to operational savings and the remainder related to capital projects.

Due to the timing of the Voluntary Departure Program, Manitoba Hydro did not file detailed O&A budgets as part of the GRA and all detailed schedules embedded in the Application and filing materials for 2017/18 and 2018/19 are incomplete. In addition, Manitoba Hydro has not yet determined the impact of the Voluntary Departure Program on the Utility's pension liability. Manitoba Hydro does not expect to be in a position to forecast the pension liability until the 2018/19 fiscal year. The O&A target for 2017/18 was based on the year-end projection for 2016/17 actual results, adjusted for known wage settlements and the assumptions associated with senior management reductions and the Voluntary Departure Program. The forecast assumed savings for a partial year from a staffing reduction of 500 positions. The O&A target for 2018/19 was based on the preliminary 2017/18 forecast adjusted for known wage settlements and a partial year of operating costs for Bipole III. The forecast was then reduced by the full year impact of the assumed reduction of 500 positions. While 821 and not 500 employees left as a result of the Voluntary Departure Program, there were also differences in timing from the forecast and increased costs associated with the number of employees leaving, such that Manitoba Hydro maintained its forecast amount for 2017/18 and the Test Year.

Manitoba Hydro's position is that it has implemented effective cost reduction measures that have resulted in a growth in O&A costs at or below inflation since 2009/10. While the International Brotherhood of Electrical Workers presented evidence that O&A reductions have sacrificed the safety of Manitoba Hydro employees and customers, and have the potential to lead to decreased reliability of service, Manitoba Hydro maintains

that it continues to operate safely and effectively. It submits, however, that further reductions would result in undue risk to service levels and reliability.

Manitoba Hydro cautions against making comparisons between utilities due to the myriad of factors that can influence the organizational structure, operations, and decisions of an individual utility.

10.2 Intervener Positions

The Consumers Coalition argues that, while Manitoba Hydro provides reliable service, it has failed to demonstrate that it offers economic or efficient service. This position is based on benchmarking undertaken by the Boston Consulting Group which identified that Manitoba Hydro is not generally a top quartile or second quartile performer. The Consumers Coalition indicates concern over Manitoba Hydro's suggestion that it has been able to reduce over 1,100 operational positions since 2014 while continuing to claim that it can provide reliable and quality service. The Consumers Coalition suggests that benchmarking is a useful tool for determining the appropriate level of a utility's costs, including in the context of maintaining services while reducing operational positions, and recommends that a benchmarking working group be convened for 2019/20 and 2020/21.

Representatives of the General Service Small and General Service Medium Customer Classes and Keystone Agricultural Producers submit that, prior to the next GRA, an independent Manitoba Hydro cost benchmarking and customer impact analysis should be performed. This Intervener argues that there is not presently enough detail or information to make a determination on whether Manitoba Hydro's cost control measures are sufficient. It recommends that the Board encourage Manitoba Hydro to

follow through with full cost reduction measures and to file with the Board data that would allow the Board to assess the results and whether further measures are required.

The Manitoba Industrial Power Users Group argues that Manitoba Hydro should fully pursue O&A expense reductions, including reductions to staffing of 900 positions. The Manitoba Industrial Power Users Group is supportive of Manitoba Hydro responding to longstanding Board concerns over staffing levels, dating back to at least 2008.

10.3 Board Findings

The Board accepts the O&A forecast for the Test Year for financial forecasting and rate-setting purposes. The Board accepts that the level of detail needed for a full testing of the forecast is not available until the results of the Voluntary Departure Program are known. The Board directs Manitoba Hydro to file with the next GRA the details of its O&A expenditures with an explanation of the operational plan developed to continue running operations with a workforce that has been reduced by 15%, including any advice or recommendations received from external consultants retained by the Utility to assist with the restructuring and transition. This explanation should include confirmation that and details as to how Manitoba Hydro's operations are being run safely after the workforce reductions are complete. The Board further directs Manitoba Hydro to file with the next GRA details of its actual O&A expenditures dating back 10 years through to the date of the filing, along with forecast O&A expenditures by cost element and business unit, including the details of the Utility's pension liability related to the reduced staffing levels. The actual O& A expenditures are to include the compound annual growth both before and after accounting changes.

The Board acknowledges Manitoba Hydro's efforts to implement cost containment measures. While the level of cost containment has not met the 1% target on average over the five-year periods from 2009/10 through 2013/14 and from 2014/15 through 2018/19, based on the average of both actual and forecast costs, growth in O&A expenditures is at the level of inflation on average over these periods. Further, Manitoba Hydro forecasts a 3.3% reduction in O&A expense in each of 2017/18 and 2018/19, primarily due to staffing reductions. The Utility's review of its operations, at a time of restructuring and transition, presents an opportunity to find further areas to reduce O&A costs. The Board recommends that Manitoba Hydro continue these efforts, both in terms of staff reductions and Supply Chain Management, after the Voluntary Departure Program transition concludes.

The Board notes that, in Order 116/08, Manitoba Hydro was directed to undertake and file with the Board an independent benchmarking study of key performance metrics, using the most currently available data. Completion of this directive was deferred pending Manitoba Hydro's implementation of International Financial Reporting Standards ("IFRS"). While IFRS was adopted April 1, 2015, the benchmarking study directed in order 116/08 has not been filed. The Board views this as an outstanding directive and finds that independent benchmarking should be completed; however, the study should not be performed until after the transition period resulting from the Voluntary Departure Program concludes. The Board will expect an update on the status of the post-Voluntary Departure Program re-organization at the next GRA, including with respect to how the safety of employees and customers has been maintained.

11.0 Accounting Issues

The accounting treatment of Manitoba Hydro's spending has implications for the revenue requirement in the Test Year, as well as in the financial forecast. Five items were at issue in the GRA proceeding: depreciation expense, the regulatory treatment of Conawapa costs, ineligible overheads, the Bipole III Deferral Account, and the Demand Side Management Deferral Account.

11.1 Depreciation Expense

Depreciation expense is Manitoba Hydro's third highest expense category. In Integrated Financial Forecast MH16 Update with Interim, Manitoba Hydro forecasts $396 million in depreciation expense for 2017/18 and $471 million for 2018/19. Depreciation expense is projected to grow to $752 million by 2026/27 as a result of both new major generation and transmission assets and planned Business Operations Capital expenditures.

Two common methods of recording depreciation expense are Equal Life Group and Average Service Life. The Equal Life Group methodology groups assets according to their lifespan, not the type of asset. Average Service Life methodology groups assets by the type of asset and then depreciates the assets in the group according to their average service lives. The Equal Life Group methodology typically increases depreciation costs in the early years of the life of each group of assets, which increases the revenue requirement and therefore the rates that need to be recovered from consumers in those years. Most Canadian Crown-owned electric utilities use the Average Service Life methodology for rate-setting.

In the 2012/13 & 2013/14 GRA, Manitoba Hydro indicated to the Board that it planned to switch to the Equal Life Group methodology of recording depreciation for financial reporting purposes and asked the Board to consider the impact of the change for rate-setting purposes. Manitoba Hydro previously used the Average Service Life methodology.

In Directive 8 of Order 43/13, the Board ordered Manitoba Hydro to file updated depreciation rates and schedules based on an IFRS-compliant Average Service Life methodology with the next GRA. In Directive 9 of Order 43/13, Manitoba Hydro was to file, with the next GRA, a chart showing a comparison of the impact on its Integrated Financial Forecast of asset depreciation pursuant to the Average Service Life methodology (without net salvage) and the Equal Life Group methodology (without net salvage), applying both methodologies to all planned major capital additions.

In Order 73/15, the Board ordered Manitoba Hydro, for purposes of rate-setting, to continue to determine depreciation expense based on the Average Service Life methodology. The Board directed that the Average Service Life methodology be maintained until Directives 8 and 9 from Order 43/13 have been complied with and the Board has been provided with an IFRS-compliant depreciation study based on Average Service Life.

As Manitoba Hydro uses the Equal Life Group methodology for financial reporting purposes, Manitoba Hydro defers the difference between depreciation expense calculated for financial reporting and depreciation expense calculated for rate-setting purposes in a regulatory deferral account. Manitoba Hydro also makes a corresponding adjustment through the net movement in regulatory balances account such that, for rate setting purposes, the revenue requirement reflects depreciation expense based on Average Service Life depreciation rates.

In Integrated Financial Forecasts MH16, MH16 Update, and MH16 Update with Interim, Manitoba Hydro proposed ceasing the deferral of the difference between the two depreciation methodologies in 2022/23, which in effect is a reversion to Equal Life Group. Manitoba Hydro also amortizes the cost of the deferral over 20 years and charges it through net income.

Manitoba Hydro's Position

Manitoba Hydro indicates that its preference is to have a single method of depreciation for both rate setting and financial reporting purposes, so as to avoid the growth expected in the deferral account and the administrative costs associated with maintaining two sets of records for calculating depreciation balances. With respect to an IFRS-compliant Average Service Life depreciation study and the amortization of the deferral account balance for rate setting, Manitoba Hydro asks that the Board hold an alternative process, such as a technical conference, where the issues can be explored in more detail outside of a GRA process and before 2019/20.

Although Manitoba Hydro's GRA filing requested the Board's endorsement of the proposed amortization for the disposition of the regulatory deferral associated with the differences in depreciation methodology, in its closing argument, Manitoba Hydro stated that it is not seeking approval of the amortization period at this time.

Intervener Positions

The Consumers Coalition argues that there should be no amortization of the deferral account pending Manitoba Hydro's IFRS-compliant Average Service Life depreciation study and resolution of the issue of depreciation methodology.

The Manitoba Industrial Power Users Group recommends that the Board direct the implementation of depreciation rates consistent with the Average Service Life methodology, with no reversion to Equal Life Group in the financial forecast. The Manitoba Industrial Power Users Group agrees with the Consumers Coalition that there should be no amortization of the difference in rates.

Board Findings

The Board finds that depreciation is to continue to be recorded using the Average Service Life methodology for rate setting purposes, without reversion to Equal Life Group in the financial forecast. The Board orders Manitoba Hydro to not amortize the difference between Average Service Life and Equal Life Group for rate setting.

The Board finds that Manitoba Hydro has not fully complied with the Board's prior directives on depreciation methodology. In Order 73/15, the Board ordered that the Average Service Life methodology be maintained until the directives from Order 43/13 are complied with and the Board is provided with an IFRS-compliant Average Service Life depreciation study. This study has not been performed. In the absence of full compliance with the Board's past directives, the Board will not make a final disposition with respect to the appropriate long-term depreciation methodology for rate setting purposes. As was the case at the time of Order 73/15, the Board does not currently have sufficient information upon which to make a decision, especially given that a change in methodology leads to significant long-term consumer rate consequences.

By extension, the Board is not in a position to endorse any amortization of the deferral account. As noted by the Consumers Coalition witness, William Harper, the appropriate time to assess the amortization of the regulatory account balance is once Manitoba Hydro has provided the study directed by the Board, when the implications of the

change in depreciation methodology will be better understood. In addition, as indicated by the Manitoba Industrial Power Users Group witness, Patrick Bowman, the principle is that the two depreciation methods will match over time as under both methods, assets are fully amortized upon retirement. This means that any difference will naturally amortize and balance over time, therefore not requiring amortization of the deferral that is intended to recognize the difference.

While Manitoba Hydro proposes that the Board hold an alternative process, the Board has previously established the process to be followed for resolution of this issue. Once Manitoba Hydro has completed and provided to the Board its IFRS-compliant Average Service Life depreciation study, the Board will make a final disposition.

11.2 Conawapa Costs

Manitoba Hydro incurred approximately $380 million in costs related to the development of the Conawapa Generating Station. Following the Board's NFAT Report recommendation, the development of Conawapa was discontinued. Manitoba Hydro expects that its auditor will view this asset as a stranded asset and will require that the asset be written off.

The issue in this hearing is whether the write-off of Conawapa should be recognized as a regulatory asset, which should then be amortized and recovered from ratepayers over a set time period. Pursuant to IFRS, regulatory assets represent the timing differences between when an expenditure must be recognized for financial reporting purposes and when an expenditure is to be recognized for rate setting purposes, as directed by an entity's regulator.

Manitoba Hydro initially advised that expenditures related to Conawapa would be maintained in the Construction Work In Progress category through to the end of fiscal 2018/19. Consistent with this, MH16 included an assumption that, for financial reporting purposes, Manitoba Hydro would be required to write off 100% of the $380 million deferred Conawapa expenditures to net income in fiscal year 2020. However, in the course of the oral GRA hearing, Manitoba Hydro indicated that, as a decision was made to discontinue any further development of the station at this time, the Utility anticipated its auditor would require that the costs would be written off in 2017/18.

In 2015/16, Manitoba Hydro capitalized $19.6 million of interest on the borrowing costs of Conawapa. In 2016/17, the capitalized interest was $15.0 million. Effective December 31, 2016, with the completion of all wind-down activities on the project, Manitoba Hydro ceased capitalizing the Conawapa interest amounts. This was done in accordance with IFRS, which does not allow the capitalization of borrowing costs for projects which are not proceeding. As interest is no longer being capitalized, but still must be paid annually on the expenses, the non-capitalized interest costs are included in finance expense in the Utility's 2017/18 financial statements and in "interest paid" under Operating Activities on the Cash Flow statement.

Manitoba Hydro's Position

Manitoba Hydro proposes that the costs pertaining to the construction of Conawapa be recorded in a regulatory deferral account effective March 2018, with amortization of the costs to income on a straight-line basis over a period of 30 years beginning on April 1, 2018. Manitoba Hydro has not forecast the inclusion of the non-capitalized interest subsequent to December 31, 2016 on Conawapa in the regulatory asset, but rather in finance expense on the financial statement.

Manitoba Hydro submits that its proposal to recognize Conawapa costs as a regulatory asset and amortize those costs over time minimizes the impact on customers. Manitoba Hydro advises that, while the non-capitalized interest on the Conawapa borrowing costs is not currently included as part of a regulatory deferral account asset in the Test Year, the inclusion of that interest is in the discretion of the Board.

Intervener Positions

The only Intervener to take a position on Conawapa costs was the Consumers Coalition, which accepts Manitoba Hydro's proposed treatment.

Board Findings

The Board accepts Manitoba Hydro's proposed treatment of the Conawapa costs. This treatment is appropriate because the decision to discontinue Conawapa construction was part of the NFAT review of the Utility's long-term system planning for long-lived assets. Further, this approach smooths out the impact of this one-time cost on consumers.

The Board finds that the non-capitalized interest related to Conawapa from January 1, 2017 on should not be included with the regulatory deferral account asset, consistent with Manitoba Hydro's forecast treatment of the interest.

11.3 Ineligible Overheads

In its transition to IFRS, Manitoba Hydro reduced the extent of overhead costs capitalized in Property, Plant and Equipment as certain annual overhead costs were deemed ineligible for capitalization under IFRS. In the 2014/15 & 2015/16 GRA, Manitoba Hydro proposed that a higher level of O&A costs than in previous proceedings

be expensed due to changes made by the Utility in compliance with IFRS. In Order 73/15, the Board did not accept for rate-setting purposes the higher level of O&A costs requested and directed that the remaining administrative costs continue to be capitalized.

For rate-setting purposes, Manitoba Hydro defers $20 million annually of O&A charges in a deferral account.

Manitoba Hydro's Position

In Integrated Financial Forecast MH16, the deferral of ineligible overheads discontinues in 2023/24, when the regulatory account balance is expected to be $160 million. Manitoba Hydro proposes that the balance be amortized over a 20-year period, commencing in 2017/18.

Manitoba Hydro argues that, in Order 73/15, the Board did not provide any direction for how long the capitalization of ineligible overhead costs should be continued. It submits that an indefinite deferral is not appropriate given that the deferral and amortization is a non-cash adjustment and there is no impact to net income by the end of the amortization period. This is true regardless of the amortization period used. Manitoba Hydro supports finding an alternate process where the issue of the indefinite deferral of ineligible overhead can be discussed in more detail.

Intervener Positions

The Consumers Coalition submits that the $20 million in ineligible overhead should be continued and the deferral account balance should be amortized over 30 years.

The Manitoba Industrial Power Users Group recommends that the deferred ineligible overhead account should be amortized over 30 years as this is approximately equal to the average age of Manitoba Hydro's overall asset base. The witness for the Manitoba Industrial Power Users Group, Patrick Bowman, recommended a 34-year amortization period to match the average service life of the assets. The Manitoba Industrial Power Users Group further states that the deferral should be continued in perpetuity to mimic the continued capitalization directed by the Board in Order 73/15.

Board Findings

The Board finds that the $20 million annually in ineligible overhead should continue to be deferred. This is consistent with the Board's direction in Order 73/15 that Manitoba Hydro is to continue this practice.

With respect to the amortization period, the Board finds that, if these costs were capitalized, the costs would be amortized over the in-service lives of the assets. As supported by the expert witness for the Manitoba Industrial Power Users Group, Patrick Bowman, the deferral account balance should be amortized over 34 years to match the average service life of the assets. This recognizes that the balance relates to a deferral of capital costs that are linked to service that will be provided by capital assets in the future.

11.4 Bipole III Deferral Account

The Bipole III transmission line is being constructed to improve domestic reliability and to permit exports into the United States. However, while the construction of Bipole III is tied to revenue-generating assets such as Keeyask, the transmission line itself will achieve only limited revenue (approximately $20 million in incremental revenue) through additional export revenue from reduced line losses. As such, there are in-service revenue requirement impacts, with yearly amounts having to be recovered in domestic customers' rates.

In Order 43/13, the Board established a deferral account to assist in funding Bipole III in-service costs and to defray a portion of the rate impacts of Bipole III. Due to the significant rate increases needed at the time Bipole III comes into service, the Deferral Account is a means by which to gradually increase rates and to partially fund the depreciation, interest, and operating costs in order to avoid rate shock at the time the asset enters service. In Order 43/13, the Board directed that the revenues from a 1.5% rate increase were to flow to the Bipole III Deferral Account. Additional rate increases were directed to the Bipole III Deferral Account in subsequent Orders, as follows:

- 0.75% in Order 49/14
- 2.15% in Order 73/15
- 3.36% in Order 59/16
- 3.36% in Order 80/17

In total, Manitoba Hydro has received 11.6% compounded in consumer rates above what the Board determined was necessary for the Utility's general operations in order to assist in mitigating the rate impacts of Bipole III coming into service. At the time Bipole

III is scheduled to enter service in July of 2018, Manitoba Hydro forecasts that there will be approximately $400 million in the Deferral Account.

Manitoba Hydro's Position

As Bipole III is scheduled to enter service in 2018/19, Manitoba Hydro proposes that the Deferral Account begin to be recognized in domestic revenues following the in-service date, effective August 2018. Specifically, Manitoba Hydro proposes that the Deferral Account be amortized over a five-year period through July 2023.

Manitoba Hydro proposes the amortization of the Bipole III Deferral Account over a five-year period as it will help mitigate the initial expected increases in annual in-service costs related to Bipole III. Manitoba Hydro reasons that, after 2023, additional export revenues from Keeyask will be available to help offset those charges, so further recognition of the deferral will not be required at that time.

Intervener Positions

The expert witness for the Manitoba Industrial Power Users Group, Patrick Bowman, testified that, while he opposed the Deferral Account when the Board first introduced it, in retrospect he believes that it was a "very wise decision". No Interveners took issue with Manitoba Hydro's proposed treatment of the Deferral Account.

Board Findings

The Board finds that the Bipole III Deferral Account should begin to be recognized in domestic revenues once Bipole III enters service and amortized over a five-year period.

The Board directs that, once Bipole III enters service, the revenues currently being deferred should no longer be deferred and instead accrue to general revenue. However, the deferral is to continue until the in-service date, including any period of delay. The Board notes that a delay of the in-service date of Bipole III will have an impact on net income in the Test Year, as the compounded cumulative 11.6% in rates will continue to flow to the Deferral Account. This will increase the amount in the Deferral Account, will decrease the amount that is recognized in general revenue in the Test Year, and will correspondingly reduce net income.

11.5 Demand Side Management Deferral Account

In each Integrated Financial Forecast prepared by Manitoba Hydro, the Utility forecasts the level of demand side management spending based on its Power Smart Plan, thereby incorporating these expenditures in the revenue requirement. In response to Directive 12 in Order 43/13, to the extent that Manitoba Hydro's actual spending on demand side management falls below the level included in the Utility's revenue requirement, the amount of the underspending is accumulated as a regulatory deferral debit balance. There is a corresponding regulatory deferral credit balance. This means that, while the Demand Side Management Deferral Account had a March 31, 2017 "balance" of $48.8 million, this amount is purely notional and has no impact on the Utility's net income. The only demand side management amount that is amortized into rates is the amount of actual demand side management expenses, over a 10-year period.

In March 2017, the provincial government introduced legislation to establish a new Crown Corporation, Efficiency Manitoba, to assume responsibility for energy efficiency initiatives in the province. *The Efficiency Manitoba Act* came into force during the GRA proceedings, on January 24, 2018.

Manitoba Hydro's Position

Manitoba Hydro's position is that, until Efficiency Manitoba is fully established and delivers its initial plan, it is uncertain what the impacts will be on future domestic load and what actions are necessary to clear the Demand Side Management Deferral Account balance. Manitoba Hydro states that it therefore continues to incorporate the costs and savings reflected in its current Power Smart Plan.

Intervener Positions

No Interveners offered specific recommendations with respect to the deferred demand side management costs.

Board Findings

The Board finds that there is no cash balance related to this regulatory asset as Manitoba Hydro has established an offsetting regulatory liability. To avoid the misconception that there is a specific reserve for demand side management spending, this accounting practice should be discontinued. The Board will review Manitoba Hydro's disposition of the regulatory asset and liability at the next GRA.

12.0 Macroeconomic Impacts of Rate Increases

The economy is a complex web of interactions and a change in one sector creates ripples through the rest of the economy as households and industries adjust. Households, firms, and governments will adjust their spending patterns – spending more on electricity bills means spending less on other goods and services or inputs.

Manitoba Hydro did not provide a study on the economic impacts on the Utility's ratepayers and the provincial economy arising from Manitoba Hydro's 10-year financial plan. The Board and Interveners further examined this issue through independent expert witness reports and testimony. Expert witnesses in the proceeding filed written evidence and were cross examined on the economic impacts of electricity rate increases. All witnesses agreed that there would be significant negative economic impacts from the proposed and projected rate increases. A number of presentations were also made to the Board highlighting the negative economic impacts of the projected rate increases.

Through computer modelling, including the use of the latest Statistics Canada Input-Output tables for Manitoba, the economic impact of the requested and projected electricity rate increases is measurable. There will be initial direct effects, secondary indirect effects, as well as induced effects.

Doctors Compton and Simpson gave evidence that the electricity rate increases over seven years of Manitoba Hydro's proposed financial plan would result in the decline of Manitoba's GDP of between 2.16% and 3.63%, which is approximately equivalent to a loss of one year of growth in the Manitoba economy. They further found that, relative to electricity rate increases equal to the rate of inflation, Manitoba Hydro's planned rate increases will result in permanent job losses of between 2,480 and 4,105 jobs. Based

on the 467 average monthly jobs created in the Manitoba economy over the past 10 years, Manitoba Hydro's projected rate path is estimated to cost the economy approximately five to eight months of employment growth.

Dr. Yatchew gave evidence that, as the long-term price responses are roughly three times short-term price elasticities (i.e. how much less electricity might be used on an incremental basis due to customer price response to higher rate increases), the economic impacts of the requested rate increases will not be fully realized for some time to come. According to Dr. Yatchew, steady energy price increases that are spread over a number of years do not necessarily lead to disastrous adverse effects on aggregate economic activity. One of the reasons is consumers have some opportunity to adjust and take the price effects into account in their planning for the future. In contrast, large unexpected energy price changes can have a significant disruptive effect on the economy. Large rate increases will induce a price response. This is sub-optimal in a period of energy surpluses, particularly for Manitoba Hydro as its existing surplus of energy will increase when Keeyask enters service and will continue until its energy is needed for domestic load in the mid-2030s.

The City of Winnipeg's witness, Mr. Tyler Markowsky, calculated the direct and indirect costs of electricity rate increases as planned by Manitoba Hydro as well as the increased tax revenue that would result from the City's tax on electricity for non-heating purposes over a 20-year time span. Mr. Markowsky calculated the net increase in electricity costs for the City over this 20-year time period would exceed $100 million. This would result in increases in property and business taxes and user fees, as well as reductions in services.

Dr. Yatchew explained that, while Manitoba has a diversified economy, residential ratepayers, businesses, industries, and community organizations will be negatively affected – possibly severely – by the proposed rate increases. By way of example, some companies may choose to relocate or to scale back production; some will consider very carefully whether to make major new capital investments in Manitoba. The spectre of increasing electricity rates, in the near or more distant future, may have already discouraged investment. The risk of future electricity rate increases that cumulate to 50% or more would likely be part of the decision matrix for any electricity-intensive firm in Manitoba.

The Board heard from the Chair of Manitoba Industrial Power Users Group that its member companies are among the largest electricity users in the province. Collectively, the Manitoba Industrial Power Users Group companies provide $165 million of revenue to Manitoba Hydro each year, contribute $233 million annually in taxes, have invested over $6.4 billion of capital, and directly employ 6,000 Manitobans with an additional 1,300 jobs through contract labour.

The Chair of the Manitoba Industrial Power Users Group echoed the concerns by Dr. Yatchew that Manitoba Hydro's 10-year financial plan ignores the risks of plant closures and downstream effects if the rate increases lead to job losses, out migration, or reduced household budgets. He testified that low energy costs were one of the prevailing reasons that member companies initially invested in Manitoba.

These risks were also discussed by representatives of Manitoba Industrial Power Users Group member companies and other industry representatives who gave oral presentations in this proceeding. Member companies such as Gerdau Long Steel North America ("Gerdau"), Maple Leaf Foods, and Koch Fertilizer Canada have no ability to pass through incremental costs to customers, giving rise to competitiveness concerns in

a global market. A representative from Chemtrade, a sodium chlorate plant located in Brandon, gave evidence that its decisions to further invest in and grow the Brandon facility are being re-evaluated in light of Manitoba Hydro's projected rate path, particularly as many other competing jurisdictions have announced either no or modest electric rate increases for 2018. Similarly, a representative from Gerdau stated that the impact of Manitoba Hydro's rate increases may cause the company to limit investments in its Selkirk facility and to shift production to facilities in other jurisdictions. In 2007, Gerdau shut down its New Jersey location, mainly as a result of high electricity cost forecasts. Testimony from a representative of Maple Leaf Foods reflected similar concerns. In the short-term, Maple Leaf Foods stated that it estimates that electricity rate increases will lead to reductions in discretionary spending, employee headcount, capital spending, and community donations, while in the long-term, Maple Leaf Foods may scale down the work done at its Brandon facility.

Roquette, a company that produces speciality foods in locations across the world, presented evidence that it recently decided to invest in a new $400 million pea processing facility in Portage La Prairie, which in the construction phase will generate approximately 300 jobs. Manitoba's low and stable electricity costs were a factor in Roquette's decision to locate in Portage La Prairie; however, at the time of its decision to build a facility in Manitoba, Roquette was not aware of Manitoba Hydro's plans to accelerate rate increases above the 3.95% level. Manitoba Hydro's projected 7.9% rate increase path would significantly affect the operation and profitability of Roquette's Portage la Prairie facility and would cause Roquette to be less likely to make further investments in Manitoba.

A representative from the Mining Association of Manitoba echoed the concern that higher electricity rate increases will erode Manitoba's competitiveness, will jeopardize ongoing investment decisions by mining operators, and will cost the province billions of dollars in total economic activity over the forecast period.

Beyond industry, representatives from municipalities and community recreation organizations presented evidence that, in combination with a provincial government freeze on municipal operating funds, Manitoba Hydro's planned rate increases will have a negative impact on public recreation facilities and municipal operating budgets. This will result in increased user fees and reduced services. The Board heard evidence that between 20 and 50 recreation facilities in the Interlake region could close as a result of five years of electricity rate increases of 7.9%.

Presenters on a ratepayer panel sponsored by the Consumers Coalition testified that, as opposed to higher rate increases in the near-term with the possibility of rate decreases after 10 years, stable and predictable rate increases are preferred. In particular, Mr. Dan Mazier, who farms 1,000 acres in Elton, Manitoba, and is the President of Keystone Agricultural Producers, expressed concern that Manitoba Hydro's indicated rate plan includes rates that increase too quickly when compared to the expected growth of agricultural businesses, leading to Manitoba's agricultural producers being uncompetitive.

Dr. Yatchew opined that the projected rate increases in Manitoba Hydro's new financial plan are likely to have a modest net effect on aggregate Manitoba output in the long-run, though there could very well be job losses and reduced output in the short-run. The immediate main effects will be distributional, in that portions of certain sectors will be disproportionately affected. Specifically, lower-income households and remote and First Nations communities will be more strongly affected as well as others who do not have

access to alternative sources of energy, in particular natural gas. In addition, lower incomes will hamper substitution of capital goods, such as improved insulation and efficient windows and doors.

In a presentation on behalf of the Business Council of Manitoba, Mr. Murray Taylor testified that a 7.9% increase in the Test Year would not make Manitoba uncompetitive with any other jurisdiction. This witness questioned where businesses could relocate in order to receive electricity rates at a low enough level that the costs of relocation would be economic.

12.1 Intervener Positions

The Consumers Coalition maintains that, compared to inflationary rate increases, the Manitoba Hydro path of sustained 7.9% rate increases would slow the economic growth of the province, the growth in labour income, and the growth in jobs.

Representatives of the General Service Small and General Service Medium and Keystone Agricultural Producers agree with all the expert witnesses who concluded there would be significant negative impacts on the Manitoba economy should Manitoba Hydro's rate plan be followed. This Intervener is also critical of Manitoba Hydro for not factoring into its consideration of the proposed rates the additional carbon tax impact on the agricultural and small and medium business sectors.

The Manitoba Industrial Power Users Group submits that, concurrent with the economic stimulus from the construction of Keeyask ending, the successive 7.9% rate increases in Manitoba Hydro's financial plan will impose material adverse impacts on the overall provincial economy. The impacts are exacerbated as the revenues from the increased rates are planned to be used for debt repayments and not injected back into the Manitoba economy.

The Assembly of Manitoba Chiefs raises concerns that the level of rate increases projected by Manitoba Hydro will substantially increase energy poverty.

The City of Winnipeg is critical of Manitoba Hydro for not undertaking an economic assessment of the impact of its proposed 7.9% rate increases considering the Utility has multiple economists on staff. According to the City of Winnipeg, Manitoba Hydro ignored half of the test of what needs to be considered when setting rates: the impact on ratepayers. The City of Winnipeg's GDP will be reduced by the Utility's proposed rate increases. As with businesses, and for the additional costs that cannot be absorbed within its operating budget, the City will need to pass on the costs of Manitoba Hydro rate increases through increased fees, reduced services, and increased taxes. The impact on residential and business customers will be magnified as a result of the trickle-down effect.

12.2 Board Findings

Manitoba Hydro did not provide evidence as to the macroeconomic impacts of its proposed rate plan, including the Test Year increase. This is a factor in the Board's conclusion that Manitoba Hydro did not meet its onus to establish that the rate increase sought by the Utility is just and reasonable.

Evidence was, however, provided by expert witnesses retained by Interveners and the Board. The Board accepts the evidence that the projected rate path may lead to short-term job losses and negative impacts for some industries that are more economically vulnerable based on the electricity intensity of their production. While the Business Council of Manitoba witness asserted that a 7.9% increase would not make Manitoba businesses uncompetitive, this was not supported by the evidence, including that provided by representatives of Manitoba industries. The Board notes the compelling

evidence from the industrial and large commercial presenters in this regard. While there was evidence regarding potential job losses that could occur, the Board did not hear enough about the long-run general equilibrium effects.

The Board accepts Dr. Yatchew's evidence that the immediate main effects of the projected rate path will be distributional. In the first instance, this involves a transfer of money from ratepayers to the Utility. The Board also accepts Morrison Park Advisors' evidence that rate increases above inflation take money out of the economy and that is a factor to be considered in setting electricity rates. Secondly, rate increases affect lower-income households and remote and First Nations communities more significantly than other electricity customers.

Based on evidence presented, the Board determines that principles of rate stability and predictability are important for residential ratepayers, industry, business, and community organizations. The Board further finds that the rate increase sought by Manitoba Hydro for the Test Year departs from these principles.

13.0 Consumer Rate Increases

As noted above, Manitoba Hydro's GRA sought the Board's approvals for three separate rate increases:

- the 3.36% rate increase to all customer rates, previously approved on an interim basis effective August 1, 2016 in Orders 59/16 and 68/16. Manitoba Hydro requests this interim rate be finalized in this GRA without adjustment.
- a 7.9% interim rate increase for all rates to all customer classes to be effective August 1, 2017. As a result of the interim hearing process, the Board issued Order 80/17 approving a 3.36% average rate increase on an interim basis, effective August 1, 2017. This interim rate was to be further reviewed and considered in this GRA hearing. Manitoba Hydro now requests this interim rate be approved on a final basis with no adjustment.
- an additional 7.9% rate increase for all rates to all customer classes proposed for April 1, 2018.

13.1 Manitoba Hydro Position

While Manitoba Hydro's three rate requests are the subject of adjudication in this proceeding, the Utility also presented a new 10-year financial plan including rate increases beginning with the 2017/18 fiscal year rate increase requested in this GRA. The Utility's new 10-year projected rate plan begins with the 3.36% increase in 2017 and indicates 7.9% rate increases annually for six years followed by a 4.54% rate increase and then returning to inflationary rate increases of 2% in each year thereafter.

Manitoba Hydro acknowledges that the 7.9% rate increase request for 2018/19 and proposed for five years thereafter is an exceptional rate increase not previously sought by the Utility in recent decades. Manitoba Hydro states that "the previous plan has failed". Manitoba Hydro presented extensive evidence as to how the additional

revenues from the 7.9% rate increases would enhance cash flow to facilitate payments of operating expenses, interest expense, and capital expenses while reaching a 25% equity target in a decade so as to be better financially prepared to manage risks.

Manitoba Hydro considers that a 7.9% rate increase fairly shares the burden of rate increases between current and future ratepayers. The Utility's concerns include the prospect that, without 7.9% rate increases now, future rate increases will have to be even larger.

While Manitoba Hydro has implemented cost cutting measures including staff reductions, it determined that lower load growth and lower export revenues from previous forecasts means that higher rate increases than previously forecast are now required.

With respect to the two interim rates, Manitoba Hydro's view is that these rates do not present a challenge to the Board's decision making as the Utility is not seeking to retroactively vary the interim rate increases and no Intervener gave evidence that those rates should be adjusted. Manitoba Hydro advises that it is not seeking an increase in the level of the rates awarded because it chose to focus on the 2018/19 rate increase, recognizing the compounding effect that ratepayers would face if the interim rates were finalized at a higher level at the same time as a general rate increase was implemented for 2018/19.

Manitoba Hydro indicates that it welcomes assistance from the Board in bringing to an end a regulatory cycle that includes frequent interim rate requests.

13.2 Intervener Positions

The Consumers Coalition has long been opposed to the consideration of Manitoba Hydro rate increases through interim hearing processes. Accordingly, should Manitoba Hydro seek a further rate increase for its 2019/20 fiscal year, the Consumers Coalition recommends that the Utility be directed to file its next GRA by the fall of 2018, such that it avoids the need for any interim rate hearing.

This Intervener submits that both the August 1, 2016 and August 1, 2017 3.36% interim rate increases are already built into rates and therefore are 'immunized' through the passage of time. This Intervener directed its focus to the 7.9% rate increase sought for April 1, 2018, rather than deploy resources on the historic interim rate increases.

As for the requested 7.9% rate increase for April 1, 2018, the Consumers Coalition maintains that Manitoba Hydro has not satisfied its legal onus to demonstrate that the requested rate increase is just and reasonable in achieving the needed balance as between the interests of the ratepayers and the financial health of the Utility. According to the Consumers Coalition, the GRA evidentiary record demonstrates that a 7.9% rate increase is more likely to harm Manitoba ratepayers and the Manitoba economy compared to the impacts of a smoothed rate increase at or below the 3.95% NFAT range. Smoothing rate increases at or below the 3.95% NFAT range makes sense, according to the Consumers Coalition, given the long lived and 'lumpy' nature of the Keeyask and Bipole III assets and considerations of regulatory stability, intergenerational equity, risk, and affordable access to the capital markets.

The conclusion of the Consumers Coalition is that, even assuming unbiased forecasts by Manitoba Hydro, appropriate implementation of Board Orders on accounting matters, and prudent management, Manitoba Hydro has not demonstrated a material change in

its financial circumstances to justify the Utility's requested radical departure from the 3.95% NFAT range of rate increases. This Intervener submits that the rate increase for the 2018/19 Test Year could be in the range of 2.95% to 3.5%, where the higher end of the range recognizes the risks related to Keeyask costs and the lower end of the range would send a message of accountability to the Utility for its forecasting inaccuracies. Ultimately, this Intervener recommends a 2.95% rate increase for Manitoba Hydro's next fiscal year.

The Manitoba Industrial Power Users Group concludes that the evidence in the full GRA proceeding sufficiently demonstrated a need for the two 3.36% interim rate increases and that both should be approved by the Board as final without adjustment.

According to the Manitoba Industrial Power Users Group, comparing the previous GRA to this GRA:

- on a net income basis, Manitoba Hydro is now better off;
- on a comparative risk basis, the Utility is now much better off;
- on a total costs over time basis, Manitoba Hydro is approximately equal to previous forecasts;
- on a maximum debt level basis, and with the cost overruns on Keeyask and Bipole III, the Utility is now 'a bit worse off'.

The Manitoba Industrial Power Users Group suggests that, considering this mix of 'ups and downs', it would be reasonable to consider Manitoba Hydro's overall financial position as comparable to previous years.

The Manitoba Industrial Power Users Group submits any rate increase for Manitoba Hydro's 2018/19 fiscal year should fall between 3.36% and 3.57%, based on the evidence on the public record. However, this Intervener advocates this range should be

lowered by the Board because of confidential information related to the understated or pessimistic export revenue forecast and load forecast that were reviewed by the Board. This Intervener also recommends the Board take into account the improvements to Manitoba Hydro's financial forecast resulting from a higher load forecast that would result from a lower rate increase.

The City of Winnipeg argues that nothing has changed from what was presented to the Board when it issued interim Order 80/17 approving a 3.36% August 1, 2017 rate increase, and as such, that rate increase should not now be altered.

As for the 2018/19 requested rate increase, this Intervener adopts the submissions by the Consumers Coalition and maintains Manitoba Hydro has not demonstrated the need for a 7.9% increase or to depart from the NFAT 3.95% rate trajectory. The City of Winnipeg maintains Manitoba Hydro has not justified the change in its financial forecast modelling, which relies on speculation and hypothetical concerns of water flows, export prices, and interest rates to promote a 10-year timeline for reaching a 25% equity level. This Intervener submits the requested 7.9% rate increase is an "exceptional rate increase", is "larger than any previous increase sought from the Public Utilities Board" by Manitoba Hydro, and has not been borne out by the evidence. The City of Winnipeg concludes such a rate increase is neither just nor reasonable nor in the public interest.

The Green Action Centre takes no position on the rate increases. This Intervener accepts the conclusions and recommendations from expert witnesses that the 7.9% proposed and projected rate increases represent a long-term problem for energy poverty in Manitoba, such that only direct rate assistance and energy efficiency plans can mitigate the impacts.

The Business Council of Manitoba encourages the Board to deviate from the historic rate path and order a 2018/19 rate increase along the lines of that requested by Manitoba Hydro. This Intervener submits the accuracy or inaccuracy of previous forecasts is irrelevant to the issues that have been raised as the focus needs to be on the issues that will occur in the near term.

Representatives of General Service Small and General Service Medium Customer Classes and the Keystone Agricultural Producers indicate that the rate increase request by Manitoba Hydro for 2018/19 cannot be considered in isolation. This Intervener maintains that the Board should consider the totality of Manitoba Hydro's 10-year financial plan and all of the 7.9% requested and projected rate increases. If 7.9% rate increase is approved for 2018/19, based on a perceived need to reach a debt-to-equity target by a certain timeframe, this would signal that 7.9% is also needed for the following years in order to achieve the date for that target. Put differently by this Intervener, the only justification for 7.9% rate increases is if the Board concludes a 25% equity level must be achieved by 2027. This Intervener submits that meeting this debt-to-equity target is not required within 10 years and that a 2018/19 rate increase of 3.95%, consistent with the prior rate paths, is appropriate.

A further recommendation by this Intervener is that the Board should schedule annual, shorter reviews of the Utility's rates.

The Assembly of Manitoba Chiefs takes no position on the appropriate rate increase for 2018/19, but submits that the 7.9% rate trajectory in Manitoba Hydro's 10-year financial plan will increase energy poverty in the province and will magnify the problems of affordability for First Nations customers.

Manitoba Keewatinowi Okimakanak adopts the submissions and positions taken by the Consumers Coalition and concludes that there has not been a material change in Manitoba Hydro's financial circumstances since that forecast at the 2014 NFAT such that the maximum rate increase for 2018/19 should be 3.9%. Manitoba Keewatinowi Okimakanak urges the Board, after determining the average electricity rate increase for 2018/19, to reduce the rate charged to First Nations customers by an amount which would serve to remove the portion that accounts for mitigation costs paid to First Nations. Manitoba Keewatinowi Okimakanak's position is that First Nations should not be paying for these costs as they are the beneficiaries of such mitigation payments.

13.3 Board Findings

The approach taken by Manitoba Hydro in this GRA is different than in prior proceedings. In this GRA, the Utility focused on reaching a particular debt-to-equity target in a 10-year time period, rather than a 20-year period as it proposed previously. In addition, Manitoba Hydro constructed a new cash flow analysis that was presented in this GRA as a "new view" of the Utility's cash flow situation. This cash flow analysis was presented to the Board, although Manitoba Hydro advises that it is not used in their audited financial statements or financial forecasts, nor is it presented to credit rating agencies. The Utility placed emphasis on this new cash flow analysis due to its view that traditional financial metrics, including the capital coverage ratio and interest coverage ratio, are deficient in certain aspects.

2016 and 2017 Interim Rate Increases

Based on an assessment of the full GRA evidentiary record, the Board approves as final each of the 3.36% interim rate increases which were effective August 1, 2016 and August 1, 2017. The dissenting member in Order 80/17, Sharon McKay, is in agreement

with the decision to finalize the interim rate that was effective August 1, 2017, based on the review of the full record in the GRA hearing.

No evidence was presented as to why the 3.36% rate increases were not appropriate. However, the lack of testing by Interveners and limited focus from Manitoba Hydro underscores the Board's previous concerns about interim rate applications. The Board reiterates its conclusion in Order 59/16 that "interim rate applications ought not be the 'norm' for Manitoba Hydro. Interim rate applications do not offer the same level of public review as General Rate Applications." Interim rate processes are not to be used for purposes of convenience or as substitutes for the proper planning of GRAs. Both ratepayers and Manitoba Hydro benefit from a robust process that results in final rates that are just and reasonable. Future GRAs by Manitoba Hydro are not expected to be of this magnitude or duration as process improvements have and will continue to be implemented to focus the scope and expedite proceedings. In addition, the Board agrees with the Consumers Coalition that interim rates may create a regulatory *status quo* that is difficult to overturn, despite a lack of full regulatory review. Therefore, in the absence of unforeseen or emergency circumstances, the Board will not consider future interim rate increases.

To avoid future interim rate applications, should Manitoba Hydro request a rate increase for April 1, 2019, it must file a GRA by no later than September 1, 2018. Filing of a GRA after September 1, 2018 but before December 1, 2018 is required for consideration of a request for a revised rate in fiscal year 2019/20. For the next GRA, the Board will not consider rate increases for more than two Test Years.

The Board appreciates Manitoba Hydro's desire to establish a regulatory timetable that does not require the use of interim rates. The Board is prepared to work with Manitoba Hydro and other parties towards the development of that regulatory timetable.

Rate Increase for 2018/19

Manitoba Hydro's request for an April 1, 2018 rate increase of 7.9% is denied. The Board finds that Manitoba Hydro has not met its onus of proving that a 7.9% rate increase is just and reasonable. A 7.9% rate increase is not required for Manitoba Hydro's operations in the Test Year. In addition, the Board does not accept that achieving a 25% equity level in 10 years is an adequate reason in itself to justify a rate increase of 7.9% in 2018/19.

The Board finds that Manitoba Hydro failed to present economic impacts of the 7.9% rate increase or the impact on customers in various sectors – such as residential, commercial, and industrial. In future rate applications, the Utility is to assess the broader impacts of rate increases beyond only the financial health of Manitoba Hydro. The Board is concerned about the impact of electricity rate increases that are four times the rate of inflation in light of impending carbon taxes, both of which will affect individuals and Manitoba businesses, groups, and organizations. Representatives from industry, as well as agricultural representatives and individual ratepayers that presented evidence, stressed the need for stable and predictable rate increases. A summary of the evidence provided by presenters in the GRA proceeding is contained at Appendix C to this Order.

Based on a balancing of the interests of the ratepayers with the financial health of Manitoba Hydro, the Board approves on a final basis an overall rate increase of 3.6% effective June 1, 2018. As discussed below, the Board also approves rate increases that vary by customer class.

The Board finds an overall rate increase of 3.6% to be just and reasonable and in the public interest as it affords Manitoba Hydro sufficient revenues for financial purposes including cash flow and payments of operating expenses, interest expense, and capital

expenses. With this rate increase, the Board finds that Manitoba Hydro has sufficient revenue to operate its business, manage its risks, and pay its finance expenses. From the evidence, the Board finds that the overall rate increase awarded in this Order will provide the revenues required to maintain Manitoba Hydro's cash flow and to allow the Utility to manage its debt advantageously for ratepayers. The Board's recommendations on capital expenditures and demand side management will also assist the Utility in this regard.

The Integrated Financial Forecast filed in the proceeding as Manitoba Hydro Exhibit 93 supports the Board's decision on the level of the overall rate increase. This financial scenario included: continued deferral of $20 million in ineligible overheads, amortized at a 30-year rate; Average Service Life depreciation methodology, without amortization of the difference with the Equal Life Group methodology; achievement of a 25% equity level over a longer period of time, specifically by 2035/36; and debt management based on a weighted average term to maturity of 12 years. In many respects, and as a departure from Manitoba Hydro's plan and Integrated Financial Forecast assumptions, Manitoba Hydro Exhibit 93 is therefore reflective of many of the Board's decisions in this Order.

Beginning in the Test Year, the Manitoba Hydro Exhibit 93 Integrated Financial Forecast scenario results in equal annual rate increases of 3.57%. The Board finds that with minor adjustments, this scenario is directionally consistent with the Board's decisions in this Order.

The Board finds that the 3.6% overall rate increase is to be effective June 1, 2018 in order to begin to move Manitoba Hydro back to a regulatory cycle that is consistent with the start of its fiscal year. The Board accepts that there is a benefit to both Manitoba Hydro and ratepayers in moving back to a regular regulatory cycle. If Manitoba Hydro

does not adjust its planning to allow for sufficient time for the Board's review of the next GRA, any rate increase granted will not be effective April 1, regardless of the Board's intention to return the Utility to a regular regulatory cycle.

14.0 Payments to Government

Manitoba Hydro makes payments to the Province of Manitoba for water and land rentals, debt guarantees, and capital and other taxes. Manitoba Hydro also pays grants in lieu of taxes to municipalities. In Integrated Financial Forecast MH16, Manitoba Hydro forecasts that it will pay $433 million to governments in 2018/19, with $406 million to be paid to the Province for water rentals, debt guarantee fees, payroll tax, and the capital tax.

Pursuant to *The Water Power Act*, water rentals are paid to the Province for Manitoba Hydro's use of water resources for its hydroelectric generation. Land rentals are annual payments for the use of Manitoba Crown lands used for water power purposes.

The debt guarantee fee is an annual fee payable to the Province in exchange for the Government's guarantee of the Utility's debt (with the exception of Manitoba Hydro-Electric Board Bonds). The fee is calculated using a rate of 1% multiplied by the applicable outstanding debt at March 31st of the previous fiscal year. The debt guarantee fee is capitalized to the capital project to which the payment of the fee relates, and forms part of the cost of project.

The Utility pays capital tax to the Province at a rate of 0.5% which is applied to the taxable paid-up capital of Manitoba Hydro. The only corporations that pay a capital tax to the Province are Crown Corporations and financial institutions.

Manitoba Hydro pays grants in lieu of taxes on its land and buildings. The amount of grants in lieu paid is determined based on property valuations and municipal and school division mill rates, similar to the manner in which property taxes are determined for other taxpayers in Manitoba.

Payroll tax is based on a tax rate of 2.15%, which is applied to the Utility's gross payroll.

Business taxes are paid with respect to commercial space occupied by Manitoba Hydro in both leased and owned properties. The Utility pays property taxes to the landlords of leased premises as part of the required lease payments.

Manitoba Hydro also makes other municipal payments with respect to the Town of Gillam and the Frontier School Division.

As noted in the NFAT Report, the Utility's payments to the Province totaled $262 million, representing 16% of Manitoba Hydro's revenues. Since then, the ongoing construction on the $8.7 billion Keeyask and the $5.0 billion Bipole III projects, as well as other capital projects, has increased the annual amounts paid and payable to the Province. Even though Bipole III is not yet in service, in fiscal year 2018, Manitoba Hydro will pay $43 million to the Province for the debt guarantee fee and an additional $22 million to the Province for capital tax. Each of those amounts will increase when Bipole III is fully in-service in fiscal 2019. Likewise, even though Keeyask's in-service date has been delayed 21 months, in fiscal year 2018, Manitoba Hydro will pay $44 million to the Province for the debt guarantee fee and an additional $22 million for capital tax. No water rental fees for Keeyask will be paid to the Province until that generating station enters service when those water rental fees will reach $18 million per year in 2025.

When those two major capital projects are completed and beginning in 2023, Manitoba Hydro estimates it will pay approximately $490 million to the Province each year. The amount paid to the Province will decrease once Manitoba Hydro is repaying debt, thereby reducing its debt guarantee fees.

A comparison of payments to government by Manitoba Hydro and other Canadian Crown-owned electric utilities was provided in evidence and is set out in the chart reproduced below. In addition, the chart separately shows dividend payments in the jurisdictions where dividends are paid. Manitoba Hydro reiterated that there is no policy or policy discussion in Manitoba for paying dividends to the Province and the Utility's rates are not set on the basis of generating a rate of return for the Province. As illustrated in the chart below, Manitoba Hydro's total payments to Government (excluding dividend payments) as a percentage of gross revenue are higher, by a minimum of 7%, than other Canadian Crown-owned electric utilities. When dividend payments are factored in, Manitoba Hydro's total payments to Government as a percentage of gross revenue are second only to Hydro Quebec, which paid $2.146 billion in dividends to the Province of Quebec in 2016 pursuant to a dividend formula.

Payments to Governments ($ Millions)						
($ Millions)	Manitoba Hydro (Forecast 2018/19)	British Columbia Hydro (Forecast 2018/19)	Hydro-Quebec (2016 Actual, forecast not available)	Newfoundland Labrador Hydro (Forecast 2018/19)	SaskPower (Forecast 2018/19)	New Brunswick Power (Forecast 2018/19)
Water Rentals	103	350.1	667	0	21	0
Debt Guarantee Fee	185	0	218	2.2	0	31.8
Capital & Other Taxes	145	238.7	284	0	50	45.1
Other	0	0	0	0	35	0
Payments to Gov't	**433**	**588.8**	**1,169**	**2.2**	**106**	**76.9**
Gross Operations Revenue	2,246	4,836.8	13,339	696.5	2,697.6	1,705.5
Payments to Gov't as Percentage of Gross Revenue	***19.3%***	***12.2%***	***8.8%***	***0.3%***	***3.9%***	***4.5%***
Dividends	0	70.8*	2,146**	0	21	0
Total Payments to Gov't (with dividend)	**433**	**659.6**	**3,315**	**2.2**	**127**	**76.9**
Total Payments to Gov't (with dividend) as Percentage of Gross Revenue	*19.3%*	*13.6%*	*24.9%*	*0.3%*	*4.7%*	*4.5%*

Source: MIPUG-30

* BC Hydro was historically mandated to pay a dividend equal to 85% of net income, subject to an 80:20 debt-to-equity cap; however, this formula was amended by Order in Council, such that beginning in fiscal year 2018, the dividends payable will be reduced by $100 million per year until zero is reached and will thereafter remain at zero until BC Hydro reaches a debt-to-equity ratio of 60:40.

** The amount of dividends paid by Hydro Quebec in 2016 was a result of the formula in that province that requires a dividend of 76% of net income be paid to the Quebec government, unless the Utility's equity ratio would fall below 26%. Hydro Quebec's high net income in 2016, which largely resulted from high run-off and favourable weather conditions, allowed the Utility to pay more than $2 billion in dividends to the Quebec government.

14.1 Intervener Positions

The Consumers Coalition requests that the Board recommend to Government that a portion of capital taxes, water rental fees and debt guarantee fees be redirected by the Province toward extensive demand side management programs for vulnerable customers, such as lower-income customers.

The Manitoba Industrial Power Users Group submits that the Board should recommend that Government implement a 10-year forgiveness of capital tax and debt guarantee fees on Keeyask and Bipole III, commencing with their respective in-service dates. The resulting financial benefits of any such relief could be split between the core objectives of permitting accelerated achievement of longer-term equity level targets and bringing average rate increases to within the range of inflation. This Intervener argues that applying these high capital tax and debt guarantee fees to major new capital projects is not appropriate so long as such charges aggravate concerns regarding equity or reserve levels and add pressures to increase domestic electricity rates above inflation. In addition, these payments have certain features that are consistent with hidden taxes. In the Manitoba Industrial Power Users Group's submission, if the Government is seeking to raise revenues, there are fairer ways than through electricity bills. This Intervener quantified the impact of its suggestion as being worth an approximate 10.6% impact on rates by 2022.

Manitoba Keewatinowi Okimakanak also submitted that the Government of Manitoba should forego some of the revenues it receives from Manitoba Hydro, as did British Columbia's government in respect of B.C. Hydro.

14.2 Board Findings

The Board finds that as a percentage of gross operations revenue, Manitoba Hydro's payments to the Province of Manitoba are high, both before and after considering the jurisdictions where dividends are paid by Crown-owned electric utilities. The evidence demonstrated that, excluding payments made to municipal governments, approximately 17 to 18 cents of each dollar of gross revenue is directed by Manitoba Hydro to the Province of Manitoba.

While the majority of Manitobans are both taxpayers and ratepayers, there is an important distinction. Consistent with the Board's responsibility for setting just and reasonable rates, ratepayers should be responsible for the economic costs associated with electrical services in Manitoba. Economic costs include both the direct costs of producing and supplying electrical power. Ratepayers are therefore billed based on their own consumption. In contrast, taxpayers should be responsible for the broader policy objectives as set by the elected members of Government. This means that the Government, on behalf of taxpayers, is custodian of the economy, owns Crown land and natural resources, and pursues social policies in the collective interest. As citizens of the province, taxpayers contribute revenues towards collective goals and collective good – such as the cost of a hospital that an individual taxpayer may never use. Nor are ratepayers and taxpayers economically identical: although most households are both, the proportion of income paid for electricity bills versus taxes varies considerably across households. As a result, any shift in the burden from taxpayers to ratepayers can have significant distributional impacts.

Consideration must be given to the appropriate allocation of revenues and costs as well as to risks and benefits as between taxpayers and ratepayers. In Manitoba, this issue is informed by the distribution of revenues and costs between the provincial government

and the Crown-owned Utility. In general, the costs of Manitoba Hydro's capital projects are borne by ratepayers once the assets are in service.

The Bipole III project was initially scoped, designed, and engineered by Manitoba Hydro using the most cost effective route. However, as a result of a policy decision by the provincial government, the routing of Bipole III was changed to a western route at an additional cost of approximately $900 million. This decision created a $900 million burden for ratepayers with no apparent technical benefit for the new route. The Board finds that this was a policy decision of government that should be a cost to taxpayers, not Manitoba Hydro's ratepayers.

As such, the Board recommends that the Government suspend payment of the Bipole III debt guarantee fee and capital taxes made by Manitoba Hydro to the provincial government starting with the 2018/19 fiscal year. Manitoba Hydro – and ultimately the ratepayer – should be reimbursed through suspension of such payments for approximately 13 years until the $900 million burden of a policy decision made by government with respect to the Bipole III western route is satisfied.

With respect to Keeyask, after it is fully in-service, Manitoba Hydro will pay approximately $140 million per year to the Province of Manitoba for water rentals, debt guarantee fees, and capital and other taxes. As noted by the Board in its 2014 NFAT Report:

> *While ratepayers will shoulder a significant rate burden over the next 20 years, the Province of Manitoba will reap substantial incremental revenues through capital tax and water rental payments from Manitoba Hydro as a result of the Keeyask Project. The Province should give serious consideration to using some of these incremental revenues to fund energy affordability programs targeted to vulnerable consumers, particularly lower income consumers and customers*

> *residing in northern and First Nations communities. This could involve rate relief programs as well as targeted DSM programs.*

In response to the Board's NFAT recommendations, the provincial government issued a letter on July 2, 2014 to both the Chair of the Manitoba Hydro-Electric Board and to the President and CEO of Manitoba Hydro stating:

> *The Manitoba Government will also consider the Panel's specific recommendation respecting Government revenues from new hydro development, as well as potential alternatives to support vulnerable consumers to reduce their bills.*

As revenues are already accruing to the Province as a result of Keeyask and in the context of projected annual electricity rate increases, the Board continues to be of the view that the Government should use some of the revenues it receives from Keeyask to fund a comprehensive bill affordability program, as discussed in detail below.

Finally, the inter-relationship between Manitoba Hydro and the provincial government will be enhanced with provincial carbon pricing. In the transition to a low-carbon economy, the Province of Manitoba does and will benefit from the strength of its clean hydroelectric resources. As the provincial government will receive revenue from the planned carbon tax, the Board further recommends that the provincial government transfer a portion of the carbon tax revenues to further strengthen Manitoba Hydro's financial health which may allow for lower consumer rate increases.

15.0 Cost of Service Study and Implementation of Order 164/16

Cost of Service is a method of allocating a utility's costs to the various customer classes it serves. Its purpose is to determine the allocation of the utility's approved costs, also referred to as the revenue requirement, among the customer classes. The Utility's Cost of Service Study determines each customer class's share of Manitoba Hydro's overall revenue requirement. A Cost of Service Study is normally filed with each GRA and, together with the proposed revenue requirement, rate design, and other pertinent information, forms the background supporting rate setting.

Through a process that began in December of 2015 and culminated in Order 164/16, the Board reviewed Manitoba Hydro's Cost of Service Study methodology. Order 164/16 provides an explanation of the concepts and terminology related to the Cost of Service Study.

In Order 164/16, the Board determined that the principle of cost causation – the idea that customers should pay for the costs they "cause" the Utility to incur - is paramount in determining the appropriate Cost of Service Study methodology. As such, ratemaking principles and goals should not be considered at the Cost of Service Study stage.

Following the Board's review, Manitoba Hydro implemented Board directives from Order 164/16 in the Prospective Cost of Service Study for Year Ending March 31, 2018 ("PCOSS18"). In scope for the current GRA hearing was the issue of whether the cost treatment of PCOSS18 follows the directions and principles of Order 164/16. Specifically, the matters raised for Board consideration are:

- the classification of wind resources, which was directed to be 100% energy in Order 164/16 on the basis that wind energy cannot be relied upon to meet peak demand and capacity needs. However, Manitoba Hydro now includes wind in its

resource planning for capacity purposes, giving rise to the question of whether the classification of wind resources should be revised;

- the allocation of General Customer Services costs in the remaining general Customer Services sub-category to General Service Large 30-100kV and General Service Large >100kV customers. In PCOSS18, Customer Services activities have now been disaggregated and separated into three distinct categories: (1) Industrial and Commercial Solutions to General Service Large customers, the costs of which are allocated only to that customer class using the C23 allocator, (2) the costs of comparable services provided to smaller customers, which are allocated to all customer classes except General Service Large using the C13 allocator, and (3) the remaining general customer services, the costs of which are allocated to all customer classes on the basis of class revenues using the C10 allocator. The general customer services costs include outage calls, line locates, marketing research & development, safety watches & building moves, and rates & regulatory. These costs are allocated to all customer classes proportionately by revenue;

- the functionalization of Generation Outlet Transmission and specifically, whether there are other Generation Outlet Transmission facilities than those identified by the Board in Order 164/16 that meet the Board's criteria to be functionalized as Generation;

- whether radial transmission lines, also known as non-tariffable transmission, should be included in the allocation of export revenue as these assets are not integrated with the networked transmission system and therefore do not facilitate exports;

- the completion of the further study directed in Order 164/16 of the allocation of common costs, the service drops allocator, and the treatment of primary and secondary distribution lines; and

- how Bipole III revenues should be treated in the Cost of Service Study.

15.1 Manitoba Hydro's Position

Manitoba Hydro submits that PCOSS18 is essentially fully compliant with the methodology directed in Order 164/16. With respect to the remaining Customer Service activity costs allocated using the C10 allocator, Manitoba Hydro argues that the disaggregation of these activities into three distinct categories demonstrates that there is no overlap in the allocation of customer costs. Moreover, the activities in this sub-category are public safety-related and therefore allocable to all customers.

Manitoba Hydro acknowledges that there are two outstanding directives from Order 164/16 that remain to be addressed in the next Cost of Service Study, specifically: updating the allocator for service drops and studying the allocation of common costs. Manitoba Hydro will complete these directives in the next Cost of Service Study, but states that it does not expect that there will be a material impact on allocated costs. With respect to primary and secondary distribution lines and the Board's directive to continue with the existing methodology unless and until additional study and data are presented to justify any changes, Manitoba Hydro states that its records do not distinguish the costs of primary and secondary lines, so the data required are not available.

Manitoba Hydro submits that it annually reviews the facilities functionalized as Generation Outlet Transmission.

While Manitoba Hydro now attributes some capacity to wind generation in its resource planning, the Utility is not looking to vary the Order 164/16 Cost of Service treatment of wind costs.

With respect to the treatment of Bipole III Deferral Account revenues, Manitoba Hydro proposes returning the revenue to domestic classes on the same basis by which the revenues were accumulated in the fund (i.e. proportionally by class). Manitoba Hydro submits that this approach most fairly apportions the reserve account to each class.

15.2 Intervener Positions

The Manitoba Industrial Power Users Group submits that, while PCOSS18 largely follows Order 164/16, the evidence does not support the use of the C10 allocator to allocate the costs of contact centre – outages, marketing research and development, line locates, or building moves and safety watches to the industrial classes. Of these costs, $2.6 million are allocated to the General Service Large classes, but the costs are either driven by the distribution system, do not relate to the services received by the industrial classes, or relate to activities whose costs are already allocated to General Service Large 30-100kV and >100kV customers through the C23: Industrial & Customer Solutions sub-function allocator. The Manitoba Industrial Power Users Group recommends that C10 costs, other than education & safety and rates & regulatory not be allocated to the General Service Large 30-100kV and General Service Large >100kV classes.

15.3 Board Findings

The Board finds that, aside from the issues addressed below, Manitoba Hydro's PCOSS18 is consistent with the methodology arising from the Board's review in Order 164/16. The Board continues to find, as found in Order 164/16, the principle of cost causation is paramount in determining the appropriate Cost of Service Study methodology. As such, ratemaking principles and goals should not be considered at the Cost of Service Study stage.

Classification of Wind

The Board finds that no adjustment is needed to the classification of wind. As the Consumers Coalition expert witness testified, refinement in order to address the now-recognized capacity benefit of wind would add complexity to the Cost of Service Study methodology with minimal benefit. In addition, as a resource, wind is transacted on an energy basis through contracts with suppliers. Manitoba Hydro does not invest in wind assets in order to serve peak demand. This supports the continued classification of wind as 100% energy.

General Customer Service Costs (C10 Allocator)

The Board finds that the activities of education & safety and rates & regulatory should be allocated to all customer classes using the C10 allocator.

The Board finds that cost causality supports allocating the costs of the education & safety and rates & regulatory activities to all customer classes. Education and safety programs include safety around dams, waterways, substations, and overhead powerlines. Rates & regulatory activities relate to the work done by that department of Manitoba Hydro, including for General Rate Applications. It was not contentious in this proceeding that these costs are incurred for the benefit of all customers. As no party proposed an alternative allocator for the education & safety and rates & regulatory costs, Manitoba Hydro is to continue with the PCOSS18 methodology of allocating these costs on the basis of class total revenue.

Building moves and safety watches, contact centre – outages, line locates, and marketing research and development costs should not be allocated to the General Service Large 30-100kV and General Service Large >100kV customer classes.

Manitoba Hydro is directed to allocate the costs of these customer service activities to all classes other than General Service Large 30-100kV and General Service Large >100kV. The costs for these activities relate primarily to distribution-level assets or service to smaller customers or are already solely allocated to the General Service Large 30-100kV and General Service Large >100kV classes through the Industrial & Commercial Solutions sub-function. As detailed below, the evidence does not establish that General Service Large 30-100kV and General Service Large >100kV customers cause these costs to be incurred.

Building moves & safety watches relate primarily to distribution facilities. The safety watches activity primarily relates to on-site safety watching for residential homeowner and contractors during work in close proximity to distribution facilities, although Manitoba Hydro does not track these services by type of electric plant.

Similarly, with respect to contact centre – outages, Manitoba Hydro does not track outage reports by customer class. While Manitoba Hydro states that the contact centre is the initial point of contact for all customers, the Utility could not confirm if General Service Large customers have used the call centre. In addition, industrial customers can directly contact their key account representative, the costs of which are allocated within the C23 costs.

The costs of marketing to large customers are also specifically included in the C23 costs. Manitoba Hydro could not provide information to show that the costs in the C10 activity of marketing research & development are focused in some aspect on the General Service Large >100kV customers.

Line locates relate primarily to distribution facilities. General Service Large 30-100kV and General Service Large >100kV customers use transmission facilities, not distribution facilities. The Board understands that Manitoba Hydro does not have underground transmission lines in its system, therefore Manitoba Hydro does not incur line locating costs related to transmission lines.

Functionalization of Generation Outlet Transmission

The Board finds that Manitoba Hydro conducted a review of the functionalization of Generation Outlet Transmission and no further study is required at this time, other than reviews of the functionalization Generation Outlet Transmission that the Utility states it undertakes from time to time.

Non-Tariffable Transmission

The Board finds that non-tariffable transmission costs are not to be included in the allocation of export revenues. By definition, these lines are not used to facilitate export revenues. As such, it is consistent with the principle of cost causality to exclude the costs from the allocation of export revenues.

Matters for Further Study

Manitoba Hydro is directed to complete the study of the Service Drops Allocator and the Common Costs study that were ordered in Order 164/16 in time for its next Prospective Cost of Service Study. Manitoba Hydro has committed to completing these directives in this time frame.

The Board will not direct further study on primary and secondary lines. The necessary data are not available to conduct such a study. Moreover, Order 164/16 did not direct that this study be completed; rather, the Board directed Manitoba Hydro to continue with its existing methodology unless and until additional study and data are presented to the Board to justify any methodology changes. There is therefore no outstanding directive on the study of primary and secondary lines.

Treatment of Bipole III Revenues

The Board finds that the Bipole III Deferral Account revenues are to be returned in the Cost of Service Study to the domestic classes proportionally. No party opposed this treatment and it is consistent with the basis by which the revenues were accumulated in the fund as each class contributed to the Deferral Account proportionally. If the revenues were applied directly against the cost of the asset, classes that make relatively greater use of Generation facilities would disproportionally benefit, notwithstanding that each class has contributed 11.6% compounded in rates towards the Deferral Account. Inconsistent treatment as between the revenue collection and the recognition of the revenue for cost of service purposes is not justified.

16.0 Revenue to Cost Coverage Ratios and Differentiated Rates

As detailed by the Board in Order 164/16:

> *One of the outputs of a COSS is the calculation of total costs allocated to each customer class. The COSS output is a tool that can be used in the ratemaking process to assign target revenue for each rate class. This step includes comparisons showing scenarios of target class revenue to the cost of service-based costs allocated to the respective class. The ratio of target revenues by class to the allocated class costs results in a Revenue to Cost Coverage ratio ("RCC"). A RCC ratio less than unity (1.0) means that the revenue generated by a class is not sufficient to recover all the costs allocated and assigned to that class; conversely, a RCC ratio greater than unity (1.0) means that Manitoba Hydro is recovering more revenue from that class than its allocated and assigned costs.*

The Revenue to Cost Coverage ratios are calculated by dividing each customer class's revenue by the allocated costs for the class. In addition to revenue from domestic rates, Manitoba Hydro also receives revenues from its export business and those revenues are credited back to the domestic customer classes in the Cost of Service Study. Historically, when calculating class Revenue to Cost Coverage ratios, Manitoba Hydro added each class's share of export revenue to its domestic revenue, and then divided this total revenue number by allocated costs.

An alternative calculation methodology is to treat export revenue as a reduction to allocated class costs, such that domestic class revenue is divided by allocated costs less the class share of export revenue. If this methodology is used, classes move further from unity, particularly those that are outside of the zone of reasonableness, such that they are under- or over-contributing revenue to a greater degree.

Many utilities do not set rates in order to achieve class Revenue to Cost Coverage ratios of exact unity. This is because, despite the appearance of arithmetic exactness, every Cost of Service Study contains a degree of imprecision due to the need to make decisions by applying judgment and limitations on the available data with respect to customer loads. Thus, instead of unity, a zone of reasonableness is used to target the Revenue to Cost Coverage ratios of the customer classes. Revenues that are within this range are deemed to represent full cost recovery. Since 1996, Manitoba Hydro has used a zone of reasonableness of 95-105%. In the current GRA, Manitoba Hydro proposes that the Board consider expanding the zone of reasonableness to a broader 90-110% range.

One use of a Cost of Service Study is to assess class Revenue to Cost Coverage ratios against the zone of reasonableness to indicate where adjustments could be made to customer class rates to address any under- or over-recovery of revenues. The means of making such adjustments is through differentiated rates. As opposed to an across-the-board rate increase, where all components of all class rates are increased by the same percentage, differentiated rates shift revenues between customer classes to bring classes outside of the zone of reasonableness within the zone. Such adjustments may be upwards – the collection of more revenue than the average rate increase – or downwards – the collection of less revenue than the average rate increase.

Revenue to Cost Coverage ratio movement may also occur naturally as new assets of significant magnitude enter service and increase the costs that are allocated to the domestic customer classes in the Cost of Service Study. Manitoba Hydro anticipates that when Bipole III enters service, there will be a degree of immediate impact to class Revenue to Cost Coverage ratios. This is because the increased annual costs associated with Bipole III will be functionalized as Generation. As a result, once Bipole

III enters service, classes with a greater proportion of allocated Generation costs relative to their total costs, such as General Service Large >100kV, will see their allocated costs increase to a greater extent than those classes that do not, such as Residential. As illustrated below, one impact is that the General Service Large 30-100kV, General Service Large >100kV, and Residential customer classes, which are currently outside of the 95-105% range, move closer to unity when Bipole III enters service.

The class Revenue to Cost Coverage ratios are as set out below, including for the Manitoba Hydro PCOSS18 calculation methodology, the alternative calculation methodology, and the estimated ratios in 2020 when Bipole III is in service:

Customer Class	PCOSS18 Revenue to Cost Coverage Ratio	Alternative Methodology Revenue to Cost Coverage Ratio	Estimated 2020 Revenue to Cost Coverage Ratio with Bipole III*
Residential	94.8%	93.5%	96.7%
General Service Small Non-Demand	112.5%	115.7%	115.3%
General Service Small Demand	101.0%	101.3%	101.3%
General Service Medium	98.3%	97.8%	97.4%
General Service Large 0-30kV	99.1%	98.7%	96.5%
General Service Large 30-100kV	109.3%	113.0%	103.5%
General Service Large >100kV	108.6%	112.3%	101.5%
Area & Roadway Lighting	100.3%	100.3%	118.2%

* Based on Manitoba Hydro's PCOSS18 methodology of calculating the Revenue to Cost Coverage ratios

16.1 Manitoba Hydro's Position

Manitoba Hydro submits that the Cost of Service Study and its resultant Revenue to Cost Coverage ratios are tools that may be used when setting rates, but the results of the study should not be used in a purely mechanistic manner. Rather, there should be a reasonable balance with the Utility's ratemaking objectives.

Manitoba Hydro argues that the Board should expand the zone of reasonableness to a broader 90% – 110% range in order to address fairness and equity matters that are no longer guiding principles of the Cost of Service Study. With this expansion of the zone of reasonableness, only the General Service Small Non-Demand class is outside of the zone.

The Utility argues further that revising the method of calculating the Revenue to Cost Coverage ratio would require an expansion to the zone of reasonableness because the alternative approach generates results with a much broader set of outcomes, suggesting a need for a more dramatic and immediate rate adjustment. As such, changing the calculation methodology should not be done in isolation, but rather in concert with acceptance of a broader zone of reasonableness. In addition, the alternative methodology would represent a significant departure from the traditional and long-standing calculation that has been used by Manitoba Hydro to report PCOSS outcomes, producing results that will not be directly comparable to those historically reported.

Manitoba Hydro submits that any evaluation of the current Revenue to Cost Coverage ratios must consider the directional changes that are expected in the next Cost of Service Study once Bipole III is in service and reflected in the revenue requirement. Manitoba Hydro states that the impacts by class of Bipole III entering service are

predictable based on each class's relative usage of the bulk power system and the change in cost structure to the significant, lumpy increase in the amount of Generation-related revenue requirement included in the study. The expected change in costs is sufficient to move the Revenue to Cost Coverage ratios for the Residential and General Service Large classes into the zone of the reasonableness as soon as Bipole III enters service, without any additional rate differentiation.

Based on the foregoing, Manitoba Hydro is not proposing to shift revenues between customer classes to adjust Revenue to Cost Coverage ratios.

16.2 Intervener Positions

The Consumers Coalition notes that the most common zones of reasonableness employed by Canadian regulators are 90% to 110% and 95% to 105%, but submits that the 90% to 110% range is preferred. It argues that, even with the current zone of reasonableness of 95% to 105%, the result of Bipole III entering service will be to move the Residential class well within the zone. There is therefore no basis for a disproportionately higher rate for the Residential class. As well, Residential class rates tend to be significantly above marginal costs, so differential rates for the class are not justified from an economic efficiency perspective.

Representatives of the General Service Small and General Service Medium Customer Classes and Keystone Agricultural Producers argue that the Board should consider improvements to the Revenue to Cost Coverage ratios for certain classes, and in particular the General Service Small Non-Demand class, which is outside the zone of reasonableness at 112.5% (using the PCOSS18 calculation methodology) or 115.7% (using the alternative calculation methodology). Differential rates would therefore be consistent with the rate-making principle of fairness, which seeks to avoid a situation

where any class pays an arbitrarily high rate through a contribution to costs that has the effect of subsidizing another class. There should be adjustment to the ratio for General Service Small Non-Demand in the range of a 1% lower rate increase.

The Manitoba Industrial Power Users Group submits that the calculation of Revenue to Cost Coverage ratios should be performed using the alternative methodology. It argues that the zone of reasonableness of 95% to 105% is appropriate for a large utility with a sophisticated Cost of Service Study like Manitoba Hydro. In evaluating the current Revenue to Cost Coverage ratios, the Board should set rates with positive movement towards the zone of reasonableness to reflect principles applied to utility regulation and to address longstanding overpayment of costs by the General Service Large classes. The degree of adjustment should be a rate increase 1% - 2% lower than average for the classes above 105% to reflect gradualism and to ensure that reversal will not be required in the near-term when Bipole III enters service.

16.3 Board Findings

The Board finds that the Revenue to Cost Coverage ratios are to be calculated using the alternative methodology of treating export revenues as a reduction to allocated class costs. Although this is a departure from the calculation methodology historically used by Manitoba Hydro, the goal of consistency has less weight at this time when the Cost of Service Study methodology itself has changed as a result of the Board's review in Order 164/16. Aside from the means of calculating the Revenue to Cost Coverage ratios, the results from previous Cost of Service Studies are already not directly comparable to post-Order 164/16 results given that significantly different methodologies are employed.

Further, the Board finds that the alternative methodology is consistent with cost causation. As stated by the Board in Order 164/16, "export revenues are not a 'dividend' that can be assigned or based on considerations other than cost causation". The domestic customer classes incur costs to facilitate Manitoba Hydro's export business. Treating export revenues as a reduction of allocated costs in the Revenue to Cost Coverage ratio aligns with the economic justification for major capital projects such as Keeyask, which is based on using the full quantum of export revenues to lower the cost of new generation and transmission.

As such, the Revenue to Cost Coverage ratios arising from PCOSS18 are:

Customer Class	Revenue to Cost Coverage Ratio
Residential	93.5%
General Service Small Non Demand	115.7%
General Service Small Demand	101.3%
General Service Medium	97.8%
General Service Large 0-30kV	98.7%
General Service Large 30-100kV	113.0%
General Service Large >100kV	112.3%
Area & Roadway Lighting	100.3%

In evaluating class Revenue to Cost Coverage ratios, the Board does not accept that the zone of reasonableness should be expanded to 90% to 110% and finds the zone of reasonableness should remain at 95% to 105%. While rate-making principles may justify accepting Revenue to Cost Coverage ratios that are outside of the zone, those principles do not support broadening the zone itself. A 95% to 105% range recognizes the sophistication of Manitoba Hydro's Cost of Service Study and departure from this range has not been justified.

The Board finds that the Revenue to Cost Coverage ratio output of the Cost of Service Study is to be used at this time to more closely align the revenues collected from each customer class with the costs of the electrical system that are caused by each class. As determined in Order 164/16, the Cost of Service Study is a tool that can be used in rate-making. With Manitoba Hydro's implementation of the methodology changes resulting from the Board's review of the Cost of Service Study in Order 164/16, the Utility now has a valid, regulator-approved cost of service result. While the cost of service should not necessarily be the overriding factor in designing rates, it is consistent with the rate-making principle of fairness to consider the output of the Cost of Service Study.

The Board directs Manitoba Hydro to begin to implement differentiated rates to collect the approved revenue requirement. General Service Small Non-Demand, General Service Large 30-100kV, and General Service Large >100kV are all overpaying costs to a significant degree outside of the zone of reasonableness, at 115.7%, 113.0%, and 112.3% respectively. The two General Service Large classes have been overpaying in almost every year since 1996, even using the previous ratio calculation methodology which tended to narrow the range of class ratios.

Manitoba Hydro is to adjust class revenue targets in order to begin to move the General Service Small Non-Demand, General Service Large 30-100kV, and General Service Large >100kV customer classes Revenue to Cost Coverage ratios into the zone of reasonableness. This will result in these customer classes receiving a level of rate increase that is slightly lower than the average rate increase.

For the 2018/19 Test Year rates, Manitoba Hydro is to assume a 10-year timeframe to move all classes within the zone of reasonableness, based on the alternative calculation methodology as directed in this Order. The rate increase impact of doing so is to be shared across all customer classes that are either below or within the zone of

reasonableness: Residential, General Service Small Demand, General Service Medium, General Service Large 0-30kV, and Area & Roadway Lighting. As a result, the Residential customer class, which is currently the only class below the Zone of Reasonableness, will begin to move into the zone of reasonableness.

This approach to the implementation of differentiated rates is consistent with the principle of gradualism and limits the revenue recovery responsibility of the other customer classes, while maintaining overall revenue neutrality. This approach will also assist in limiting the prospect of over-correction of the issue at the time Bipole III enters service.

Manitoba Hydro is directed to include in its compliance filing for 2018/19 differentiated rates consistent with the Board's direction in this Order.

The Board will examine the Revenue to Cost Coverage ratios arising from the Prospective Cost of Service Study filed with the next GRA and will consider adjustment to the differentiation of rates as necessary, including to consider the impact of Bipole III entering service.

17.0 Rate Design

Manitoba Hydro designs its rates to collect the required amount of revenue from each customer class. In selecting a rate design, Manitoba Hydro considers its general rate-making objectives, which it identifies as: recovery of revenue requirement, fairness and equity, rate stability and gradualism, economic efficiency, competitiveness of rates, and simplicity and understandability.

Manitoba Hydro's existing customer class rate designs use a combination of the following charges: (1) a basic charge, which is a fixed charge that includes the direct costs of metering, portions of the distribution system, as well as billing administration, (2) a demand charge, which is a variable charge based on the maximum use of electricity within a specified time period and recovers costs that vary with peak electricity usage, and (3) an energy charge, which is a variable charge based on the electric energy consumed that recovers costs that vary with the consumption of electricity.

A simplified illustration of the existing class rate structures, based on the rates in effect as of August 1, 2017, is contained in the table below:

August 1, 2017	Basic Charge	Energy Charge (¢/kWh)	Demand Charge (/kVA)
Residential	$8.08	8.196	N/A
GSS Non-Demand (1 phase)	$21.91	8.609 * 5.976 ** 3.944	N/A
GSS Demand (3 phase)	$30.89	8.609 * 5.976 ** 3.944	$10.10
GSM	$32.61	8.609 * 5.976 ** 3.944	$10.10
GSL 0-30kV	N/A	3.709	$8.57
GSL 30-100kV	N/A	3.448	$7.34
GSL >100kV	N/A	3.342	$6.53

* First 11,000 kWh
** Next 8,500 kWh

Source: PUB 42-5-1

If a customer class's rate structure is changed, the general result will be to redistribute the collection of revenues between the customers within that class. Some customers within the class will pay more in rates than they would have under the previous rate structure, while others will pay less.

In the current GRA, Manitoba Hydro is seeking to have the requested 7.9% rate increase apply to all components of customer rates, without any change to the existing rate structures. This would increase the basic charges, energy charges, and demand charges by the approved rate increase.

In this proceeding, there were a number of proposals from Interveners and expert witnesses related to changing the rate structure, as well as an illustrative residential electric heating rate design filed by Manitoba Hydro.

First, the expert witness retained by the Green Action Centre, Paul Chernick, recommended that Manitoba Hydro be required to: 1) reduce demand charges over time while increasing energy charges and 2) eliminate the use of demand ratchets (rate provisions that charge demand-metered customers based on their maximum demand in current and previous months). Mr. Chernick gave evidence that these changes would send appropriate price signals to customers.

Second, Mr. Chernick proposed the implementation of a residential conservation rate, also referred to as an inverted block rate. This form of rate design includes a first block of consumption, set at a specified level of consumption exceeds the first block threshold – also referred to as the tail block – is priced at a higher level, based on the marginal value of energy. Because customers under this rate design pay less for consumption in the first block, and more for all kilowatt hours consumed in the tail block, there is a price signal to conserve energy.

Mr. Chernick's inverted block rate design recovers all of the requested rate increase in the tail block, with no increase to the basic charge or the energy charge for the first block of consumption.

Manitoba Hydro last used an inverted block rate structure between 2008 and 2011; however, in Order 40/11, the Board eliminated this rate design because it did not consider home heating load such that electric space heating customers were negatively affected due to their higher winter electricity consumption.

Third, Mr. Chernick proposed a rate design for residential electric space heating customers. Manitoba Hydro also filed an illustrative rate design scenario for residential electric space heating customers. The rationale for a reduced rate for electric space heating customers is that almost 20% do not have the choice of switching to natural gas

space heating which is a lower-cost heating fuel. Natural gas is not available in many areas of the province and, where it is available, converting to natural gas heating may not be economically viable. As a result, rate increases place a burden on consumers who do not have the option of switching to alternative fuel sources.

Mr. Chernick's electric space heating rate design is an inverted block rate with seasonal blocks, such that the level of consumption for the first block threshold varies based on seasonality. The discount for all consumption in the first block of energy is 4¢/kWh. His objective with this rate design was to offset the cost of electric space heating, without reducing incentives to conserve energy, by targeting the reductions to usage blocks that will not be the customer's marginal usage.

Manitoba Hydro's illustrative rate design scenario is aimed at shielding electric heating customers from a portion of the proposed rate increase. Non-electric heating residential customers bear the additional revenue responsibility. This rate design scenario was not approved by the Manitoba Hydro-Electric Board and is not proposed by Manitoba Hydro for regulatory approval.

Fourth, Mr. Chernick and the expert witness retained by the Manitoba Industrial Power Users Group, Patrick Bowman, each proposed time-of-use rates for the General Service Large customer classes. A time-of-use rate recovers the Utility's costs primarily through an energy charge, which is differentiated between on-peak and off-peak hours. This creates an incentive for customers to shift consumption to off-peak times, when the energy charge is lower. Manitoba Hydro previously applied for time-of-use rates in the 2014/15 & 2015/16 GRA, but the Board determined that the issue would be addressed in the Cost of Service Study review. The Cost of Service Study proceeding ultimately excluded the review of rate-related matters from scope and deferred these to the next GRA. In this GRA, Manitoba Hydro did not submit a time-of-use rate proposal as such a

rate design would shift revenue responsibility to customers who cannot make use of off-peak periods to reduce costs, exacerbating the bill impacts from the requested rate increase.

In his evidence, Mr. Chernick recommended that time-of-use energy charges be introduced to encourage reduction of usage in high-load periods. He proposed a three-period (on-peak, shoulder, and off-peak), seasonally differentiated rate with a narrow "critical peak" period. His proposal to eliminate demand charges would be a step towards the introduction of time-of-use rates.

Mr. Bowman proposed an optional time-of-use rate for industrial customers that could make use of off-peak energy at reduced rates to reduce electricity costs. Mr. Bowman's evidence was that this would help address the issue of industrial customers having a limited number of ways to control costs without burdening customers who could not make use of the program. Mr. Bowman acknowledged that an optional time-of-use rate could result in revenue loss to Manitoba Hydro as only customers that could reduce their bills would opt for it, but suggested that the effect is likely to be a very small percentage of what the General Service Large >100kV class has been paying above costs for many years.

17.1 Manitoba Hydro's Position

Manitoba Hydro argues that there should be no change to the rate structure at this time, as the introduction of such changes in an environment where the average customer bill is proposed to increase by 7.9% would result in some customers facing bill increases in excess of 7.9%. As such, Manitoba Hydro proposes that the rate increase of 7.9% apply to all components of the customer class rate structure.

Manitoba Hydro submits that demand charges are appropriate to provide a meaningful price signal to general service customers, without which customers may place greater demand on the system than they would otherwise. Demand charges also provide the Utility with a greater degree of revenue stability. Minimum billing demand and contract demand provisions reinforce the price signal to customers of the cost of demand that they impose on the system.

Manitoba Hydro argues that inverted block rates should not be implemented at this time due to the need to assess this rate design against the future conditions that may be experienced with Keeyask entering service, as well as with the significant change in marginal value. The tail block rate proposed by Mr. Chernick is considerably in excess of the levelized marginal value of electricity and would send an inappropriate price signal to customers.

Manitoba Hydro does not endorse the illustrative residential rate design scenario for a residential electric heating rate. With respect to Mr. Chernick's electric heating rate design, Manitoba Hydro submits that no weight can be given to the proposal as no proof of revenue was provided, making it impossible to test the design to ensure that it produces the appropriate level of revenue.

Manitoba Hydro does not accept that there should be an optional time-of-use rate, as this would result in a revenue shortfall to the Utility of approximately $1.5 million. The suggestion from the witness for the Manitoba Industrial Power Users Group that non-participating customers would not make up the revenue shortfall means that Manitoba Hydro would not be compensated for this revenue loss. This would violate the rate-making objective of full recovery of the revenue requirement.

17.2 Intervener Positions

The Consumers Coalition does not support an alternative residential rate design. At a time when any rate increase is likely to be significantly above inflation, intra-class revenue adjustments would compound consumer challenges. There is also no basis for an inverted block rate due to the differential between estimated marginal costs and the actual residential rate, based on current rates and their projected trajectory. As well, the Consumers Coalition believes that Manitoba Hydro's illustrative rate scenario is not justified by cost causation or efficiency reasons. The Revenue to Cost Coverage ratio for non-electric heating customers is already higher than that for electric heating customers, and it is likely that the marginal cost for electric heating customers is also higher.

The Green Action Centre recommends that it be a strategic priority for Manitoba Hydro and Efficiency Manitoba to address affordability for electric space heating customers through initiatives that reduce and affordably finance the capital costs of geothermal systems. The Green Action Centre also submits that the Board should accept the marginal cost calculation performed by Mr. Chernick, which indicates that current rates are below marginal costs and further supports the implementation of an alternative rate design.

The Manitoba Industrial Power Users Group argues that the Board should direct Manitoba Hydro to bring forward for the Board's review at the next GRA an optional time-of-use rate for General Service Large customers. The rate should be prepared by Manitoba Hydro in consultation with affected customers.

17.3 Board Findings

The Board finds that there will be no change to the rate design, except as may be required to achieve the class revenue targets as directed in the previous section.

First, the Board does not accept that there should be a reduction in demand charges or elimination of the demand ratchet. This change in the existing rate structure would contribute to the magnitude of bill impacts that some customers will have to absorb, including the general rate increase as well as the shift in revenue responsibility as a result of differentiated rates. In addition, the Board heard evidence in this proceeding about the potential for increased use of disruptive technology for non-utility generation, such as customer solar photovoltaic installations. This could potentially require the review of demand charges in the near future in order to ensure that class revenues are fully recovered and that the value of grid reliability is properly assessed when used by customers as a back-up power resource.

Second, the Board finds that the implementation of a residential inverted block rate is not supported on the evidence. Due to the updated marginal value, which is less than the current residential energy rate, an inverted block rate would send an inappropriate price signal and would be contrary to the rate-making principle of efficiency. However, the Board notes that the General Service classes have declining block rate structures and an explanation for this rate design was not provided in this GRA, despite the updated marginal value information. Manitoba Hydro is directed to provide in its next GRA filing the rationale for the rate design for the General Service customer classes and an evaluation of the block thresholds and charges.

Third, the Board finds that neither of Manitoba Hydro's illustrative residential rate design nor the electric space heating residential rate design proposed by Mr. Chernick are to be implemented. These rate designs are not justified on a cost of service basis, given the higher cost to serve electric space heating customers. Due to their higher cost to serve, electric space heating customers are already subsidized by non-electric heat customers. The Board also notes the lack of proof of revenue provided for Mr. Chernick's rate design proposal. However, as discussed further below, the Board is concerned about bill affordability issues for lower-income electric space heating customers and recommends that bill assistance for these customers be provided through a comprehensive Government bill affordability program.

Finally, with respect to time-of-use rates, the Board continues to be of the view that time-of-use rates should be implemented for General Service Large customers; however, due to the updated marginal values filed in this proceeding, further study is required. The Board therefore accepts the recommendation of the Manitoba Industrial Power Users Group and directs Manitoba Hydro to bring forward for the Board's review at the next GRA a time-of-use rate design proposal. The proposal is to be based on further analysis in the context of the updated marginal values. Manitoba Hydro is directed to consult with General Service Large customers before filing its proposal with the Board and to include the results of that consultation with the information provided to the Board.

18.0 Bill Affordability

The Board has long been concerned with utility bill affordability issues. Evidence with respect to energy poverty in the province of Manitoba has been brought before the Board for at least a decade. The Board recognizes that Manitoba Hydro has, over time, developed programs to assist customers in managing their energy consumption, thereby reducing individual customer bills, and such programs include targeted support for lower-income customers. However, the Board has consistently expressed concern that measures focused on energy efficiency implemented by Manitoba Hydro to date, while commendable, have been insufficient to address the energy burden faced by lower-income customers. This is particularly the case in a time of major capital construction by the Utility, which has and is forecast to continue to put upward pressure on electricity rates at a level greater than the rate of inflation. This concern is heightened with Manitoba Hydro's projected rate path that, if implemented, would increase consumer rates by 77% cumulatively over 10 years. The history of the substantial discussions on this important matter bears repeating.

Ten years ago, in Order 116/08, the Board noted that the lower-income, high energy burden problem is pervasive in Manitoba and that "a low-income bill assistance program would assist in reducing the energy burden faced by low-income households. Significant non-energy benefits would arise, including increased comfort, reduced health costs, lower bad debt write-offs etc." The Board went on to hold that "Energy affordability for low-income families is very much an issue that requires more or less immediate attention in Manitoba." The Board directed Manitoba Hydro to propose for Board consideration a lower-income bill assistance program no later than September 30, 2008. Following a Review and Vary Application by Manitoba Hydro, the Board revised its directive to remove the deadline date and to require Manitoba Hydro to provide a new

date for the earliest implementation of a Lower-Income Bill Assistance Program in its update to the Board required by November 30, 2009.

Manitoba Hydro filed a report on lower-income bill assistance on March 4, 2009. In the report, Manitoba Hydro discussed possible bill assistance program expansion and indicated that it would investigate the viability of potential program expansion, citing many variables that required investigation. In Order 32/09, the Board accepted that implementation of a program would require the addressing of issues that are complex and far-reaching. The Board directed Manitoba Hydro to provide a report with respect to Manitoba Hydro's plans for a program after the Utility's planned consultation with stakeholders and subsequent recommendation to the Manitoba Hydro-Electric Board. The Board reiterated the vital importance of protection for lower-income customers, noting Manitoba Hydro's plans for a capital program predicated on consistent future rate increases and the Board's expectations that Manitoba Hydro would put forward its preferred lower-income bill assistance program.

In Order 5/12, the Board expressed its concern with the slow pace of the overall energy poverty relief effort and stated that more should be done, particularly for First Nation communities and specifically First Nation diesel communities. However, the Board found that, before it would require Manitoba Hydro to develop a definitive bill assistance program, more information was required as to existing funding made available by Government and the programs available to directly or indirectly alleviate poverty.

In the NFAT Report, the Board again expressed concern about the impact of projected rate increases on lower-income consumers, including customers living in First Nation communities. The Board noted the significant rate burden on consumers over the next 20 years and the likely substantial incremental revenues that would accrue to the Province of Manitoba as a result of Keeyask. The Board recommended that the

Government of Manitoba direct a portion of the incremental capital taxes and water rental fees from the development of Keeyask be used to mitigate the impact of rate increases on lower-income consumers.

In Order 73/15, the Board recognized that higher electricity rates – then forecast to be at the level of annual increases of 3.95% for 17 years – would have an impact on lower-income ratepayers, and particularly electric space heating ratepayers. On the recommendation of the Green Action Centre's expert witness in the proceeding, the Board directed Manitoba Hydro to initiate a collaborative process to develop a bill affordability program harmonized with Manitoba Hydro's other programs supporting lower-income ratepayers. The Board stated that, upon completion of the collaborative process, the Board would evaluate the options presented and decide on their implementation.

In response to the Board's directive in Order 73/15, Manitoba Hydro established the Bill Affordability Working Group ("Working Group"), which was comprised of a variety of stakeholders who represent, work with, or provide services to lower-income Manitoba Hydro customers. The Working Group participants were:

- Consumers' Association of Canada (MB)
- Employment & Income Assistance (Manitoba Department of Families)
- Green Action Centre
- Manitoba Housing
- Manitoba Hydro
- Manitoba Industrial Power Users Group

- Manitoba Keewatinowi Okimakanak
- Manitoba Metis Federation
- Southern Chiefs Organization
- Social Planning Council of Winnipeg
- Winnipeg Harvest

The Working Group carried out the first collaborative in-depth examination of energy affordability in Manitoba. The collaborative process took place over sixteen months and, in January of 2017, culminated in The Manitoba Hydro Bill Affordability Collaborative Process Summary Report & Recommendations ("Working Group Report"). The Working Group's primary findings included:

- A definition of energy poverty in Manitoba.

  The Working Group established the following definition of energy poverty: "Energy poverty refers to circumstances in which a household is, or would be, required to make sacrifices or trade-offs that would be considered unacceptable by most Manitobans in order to procure sufficient energy from Manitoba Hydro." For the purposes of the Working Group Report, the Working Group considered a household to be energy poor if it spends more than 6% or 10% of pre-tax income on energy and also has a level of income lower than the current Low Income Cut-Off 125 ("LICO-125"), which is 25% above the Statistics Canada lower-income measurement;

- Greater understanding and insights into energy poverty in Manitoba, including an improved understanding of which Manitobans are affected or likely to be affected by energy poverty, and why.

  Based on research conducted as part of the Working Group process, the Working Group concluded that the relationship between unpaid bills or arrears and energy poverty is relatively weak;

- Assessment of existing affordability programs for lower-income customers, including evaluation of program delivery, uptake and success in meeting stated objectives.

  Manitoba Hydro's existing programs and approaches to bill affordability reviewed by the Working Group were the Power Smart Affordable Energy Program, Neighbours Helping Neighbours, the Equal Payment Plan, deferred payment plans, arrears management, and community outreach. The Working Group also considered other assistance and options available in the province, including Employment and Income Assistance, Manitoba Housing programs, and contributions by Indigenous & Northern Affairs Canada towards the cost of Manitoba Hydro bills for customers on First Nations reserves who receive social assistance;

- Research and evaluation of bill affordability programs in other jurisdictions, to better determine if successful initiatives from elsewhere in Canada and the United States could be implemented here.

  Based on a jurisdictional scan, the Working Group concluded that Ontario appears to be the only Canadian jurisdiction to have implemented a rate assistance program. The Ontario Electricity Support Program ("OESP") was introduced in 2016 and provides fixed monthly bill credits to eligible customers. The OESP was initially ratepayer funded, but as a result of provincial legislation, is now taxpayer funded with higher fixed credit amounts;

- Potential impacts of proposed Manitoba Hydro rate increases, determined by a rate-modelling exercise to evaluate how increases would likely affect lower-income customers.

  This showed that impacts of higher energy costs are anticipated to be most pronounced for households that already spend a significant proportion of their total income on energy; and

- Rate assistance mechanisms and options that could improve affordability for lower-income customers, as well as analysis of estimated revenue losses associated with each option.

> The Working Group identified and modelled three rate assistance options: (1) basic monthly charge waiver (2) straight rate discount (3) percentage of income payment plan.

Ultimately, the Working Group concluded that its findings illustrate:

> *the deeply complex, multi-faceted nature of energy poverty. Energy poverty spans issues of income, geography, cultural identity, family size, awareness of available support programs, and more. The Working Group's findings make it clear that no single initiative or program will solve the issue of energy poverty. Rather, the Working Group's recommendations reflect the consensus view that a suite or "toolkit" of improvements is required to improve energy affordability in the province.*

The Working Group's recommendations addressed lower-income energy efficiency initiatives, electric heating, emergency assistance, landlord and tenant initiatives, extreme weather impacts, equal payment plans, bill collection, arrears management and bill forgiveness, and funding. While improvements to Manitoba Hydro's existing lower-income offerings were recommended, the Working Group did not reach consensus on any specific rate options or rate assistance program.

18.1 Jurisdiction of the Board to Order Lower-Income Rate Assistance

In Order 116/08, the Board found that it would be acting within its legislative mandate if it were to direct Manitoba Hydro to implement a bill assistance program.

In Order 73/15, the Board again considered an argument from Manitoba Hydro that the Board does not have jurisdiction to order the Utility to implement a bill affordability program. On review of the Board's constating legislation, the Board rejected Manitoba Hydro's submission and reiterated its finding from Order 116/08 that ordering a bill affordability program is within the Board's legislative powers. The Board concluded that

any future proposals for bill assistance would therefore be evaluated from a comprehensive policy perspective, rather than being focused on the issue of the Board's legal jurisdiction.

Manitoba Hydro's Position

Manitoba Hydro argues that, based on the text, context, and purpose of The Crown Act, The Hydro Act, and The Board Act, the Board does not have jurisdiction to order the implementation of lower-income rates or other bill affordability programs. Although the Board has previously concluded that it does have such jurisdiction, Manitoba Hydro submits that this conclusion is inconsistent with the legislation, remains untested in the courts in Manitoba, and that the Board ought to reconsider the issue. In particular, Manitoba Hydro argues that none of the statutory factors which the Board may consider in reviewing rates explicitly permit consideration of affordability or ability to pay. Rather, the Board's rate-setting function must be interpreted as being limited to accomplishing Manitoba Hydro's mandate of providing for the supply of power adequate to meet the province's needs and to promote economy and efficiency in all matters related to the generation, transmission, distribution, and use of power. Finally, Manitoba Hydro submits that the amendments to The Hydro Act that brought in uniform residential rates were intended to create a single rate for residential electricity users. A program targeting First Nations living on reserve would necessarily classify customers based on geographic location in violation of subsection 39(2.2) of The Hydro Act.

Intervener Positions

The Assembly of Manitoba Chiefs takes the position that the Board has jurisdiction to order a bill affordability program and that this jurisdiction is affirmed by *Charter* values.

Similarly, the Consumers Coalition concludes that the Board does have jurisdiction to order implementation of a bill affordability program.

The Green Action Centre takes the position that the issue of Board jurisdiction to order a bill affordability program has long been decided and should not be revisited. It argues that the Board's constating legislation gives the Board wide latitude to take into consideration any compelling policy considerations that the Board considers relevant to setting rates, and any other factors that the Board considers relevant. This jurisdiction is similar to that of the Ontario Energy Board, which the Ontario Divisional Court concluded has the jurisdiction to consider "ability to pay" in setting rates. It argues further that, in order to achieve its mandate of supplying economic power to ratepayers at fair rates, Manitoba Hydro must deal with the issue of affordability.

Manitoba Keewatinowi Okimakanak also argues that the Board has jurisdiction with respect to bill affordability programs. It submits that the Board's mandate to set equitable rates must be governed by the direction set out in *The Path to Reconciliation Act*.

Board Findings

The Board finds that it has legal jurisdiction to order implementation of lower-income rate assistance. This issue was raised previously before the Board and addressed in Orders 116/08 and 73/15, in both of which the Board concluded that it has the legal jurisdiction. The previous position of the Board was supported by many of the parties in

this hearing other than Manitoba Hydro. The Board continues to be of the view that it has jurisdiction.

The Board's jurisdiction with respect to Manitoba Hydro is derived from a suite of legislation, primarily consisting of The Board Act, The Crown Act, and The Hydro Act. While the Board's jurisdiction over Manitoba Hydro is largely limited to the review of rates, that jurisdiction is broad. As set out in paragraph 25(4)(a) of The Crown Act, in reaching a decision with respect to rates charged by Manitoba Hydro with respect to the provision of power, the Board has the discretion to take into consideration, in addition to factors relating to the revenue requirement of the Utility:

> *25(4)(a)*
>
> *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.*

The considerations set out in paragraph 25(4)(a) serve as a guide to the Board in exercising its mandate under section 77 of The Board Act to fix just and reasonable rates. As the Manitoba Court of Appeal held in *Consumers' Association of Canada (Manitoba) Inc v Manitoba Hydro Electric Board*, 2005 MBCA 55, this requires the Board to balance two concerns: "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." Each of these two concerns support the ability of the Board to consider the affordability of Manitoba Hydro's rates, whether broadly or within a class or sub-set of its customers. Affordability is not only relevant to the interests of the Utility's ratepayers, but also to the financial health of the Utility as rates that are in excess of what customers can afford may lead to depressed revenues

through a combination of reduced energy consumption, business closures or relocation, and as acknowledged by Manitoba Hydro, potentially an increase in arrears.

The scope of the Board's discretion in reviewing Manitoba Hydro's rates is not limited to Manitoba Hydro's mandate of providing for the supply of power adequate to meet the province's needs and to promote economy and efficiency in all matters related to the generation, transmission, distribution, and use of power, as set out in section 2 of The Hydro Act. Had it been the legislature's intention to narrowly circumscribe the Board's jurisdiction in this way, it would have done so expressly using the same statutory language contained in The Hydro Act. Instead, the legislature chose to grant the Board broad discretion to consider, "any compelling policy considerations" and "any other factors" that the Board considers relevant to the matter. Affordability is a factor that the Board may consider when setting rates.

As the Board held in Order 73/15, subsection 39(1) of The Hydro Act requires that the aggregate price of power realized by Manitoba Hydro achieve full cost recovery, but this is subject to the requirement that rates must be just and reasonable. Moreover, the Board's constating legislation does not prohibit the creation of a customer class that pays less than the average cost to serve such customers.

Amendments to The Hydro Act in 2001 resulted in the elimination of regional zone rates, which had charged higher rates for customers in Northern and rural Manitoba than for those in the City of Winnipeg based on lower customer densities having higher costs to serve. Subsections 39(2.1) and 39(2.2) of The Hydro Act provide as follows:

39(2.1) The rates charged for power supplied to a class of grid customers within the province shall be the same throughout the province.

39(2.2) For the purposes of subsection (2.1),

(a) grid customers are those who obtain power from the corporation's main interconnected system for transmitting and distributing power in Manitoba; and

(b) customers shall not be classified based solely on the region of the province in which they are located or the population density of the area in which they are located.

In defining a customer class, the classification of customers cannot be based solely on the region of the province in which the customers are located or the population density of the area in which they are located. However, once a customer class has been defined in accordance with subsection 39(2.2), the requirement is only that all customers within that class be charged the same rate. The classification of customers based on other characteristics, either instead of or in addition to region or population density, is not prohibited. For example, the legislation does not prohibit the creation of a lower-income customer class as such a class would not be based solely on region or population density, subject only to the limitation that all customers within the class be charged the same rates for power.

Manitoba Hydro argues that the Board should depart from its previous findings on jurisdiction based on the decision of the Nova Scotia Court of Appeal in *Dalhousie Legal Aid Service v Nova Scotia Power*, 2006 NSCA 74. In that decision, the Court found that the Nova Scotia Utility and Review Board does not have jurisdiction to implement a rate assistance program for lower-income customers, based on subsection 67(1) of the Nova Scotia Board's governing legislation. Manitoba Hydro submits that subsection

67(1) of the Nova Scotia legislation is similar to subsection 39(2.1) of The Hydro Act, and therefore this Board should follow the guidance of the Nova Scotia Court of Appeal.

The Board does not agree. Subsection 67(1) of the Nova Scotia legislation is considerably more restricted than the statutory framework contained in The Board Act, The Crown Act, and The Hydro Act. Subsection 67(1) of the Nova Scotia legislation provides:

> *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.*

Due to the requirement that customers receiving "substantially similar" service, and the Nova Scotia Board's finding that lower-income residential customers receive substantially the same level of service as all other residential customers, the Nova Scotia Court of Appeal concluded that the Board was prohibited from ordering differential rates based on the customer's income.

Unlike the Nova Scotia Board, this Board is empowered to take into account "any compelling policy considerations" and "any other factors that the Board considers relevant to the matter". In Manitoba, there is no similar restriction as in Nova Scotia that all customers receiving substantially similar service "shall always" be charged the same rate. Rather, the only limitation on the Board's broad authority under *The Crown Act* is the requirement that customers not be classified solely based on region or population density. As detailed above, this does not prohibit the creation of a lower-income customer class.

Contrary to Manitoba Hydro's submission, this Board's jurisdiction is more closely aligned with the statutory framework in Ontario. In *Advocacy Centre for Tenants-Ontario v Ontario Energy Board* (2008), 293 DLR (4th) 684, the Ontario Divisional Court distinguished the Nova Scotia decision based on the restrictive wording of subsection 67(1) of the Nova Scotia legislation. In contrast, the Court in Ontario noted that section 36 of the Ontario Energy Board's governing legislation has broad language that empowers the Ontario Board to set "just and reasonable" rates. The Ontario Court concluded that the Board could, in setting rates, take into account income levels to achieve the delivery of affordable energy to lower-income consumers as this would meet the objective of protecting consumer interests.

The Ontario legislation does differ from the legislation in Manitoba in that subsection 36(3) expressly states that the Ontario Energy Board "may adopt any method or technique that it considers appropriate" in fixing just and reasonable rates. This provision provided greater flexibility to the Ontario Energy Board than it had previously under a statutory regime that required rate-setting on a very prescriptive cost of service basis. Similarly, the Manitoba legislation grants broad authority to this Board to take into account policy considerations and other relevant factors in rate-setting. Moreover, as the Supreme Court of Canada held in *Ontario (Energy Board) v Ontario Power Generation Inc*, 2015 SCC 44, "where a statute requires only that the regulator set "just and reasonable" payments… the regulator may make use of a variety of analytical tools in assessing the justness and reasonableness of a utility's proposed payment amounts." The Manitoba Court of Appeal has similarly determined that, in Manitoba, cost of service is a tool that may or may not be used in setting rates. Thus, although in Manitoba there is no express statutory provision akin to the Ontario subsection 36(3), the Board is empowered to employ a variety of analytical tools in fixing rates. Indeed, Manitoba Hydro itself in this GRA urges the Board to be guided by considerations in

rate-setting beyond pure cost to serve. Thus, the Board does not accept the argument of Manitoba Hydro that this Board's jurisdiction is more limited than the Ontario Board because of the absence of a provision similar to subsection 36(3) in Ontario.

Therefore, the Board has jurisdiction under its governing statutory framework to order a bill affordability program such as a lower-income rate, and to take into account affordability as a factor in setting just and reasonable rates.

18.2 Bill Affordability for Manitoba Hydro Customers

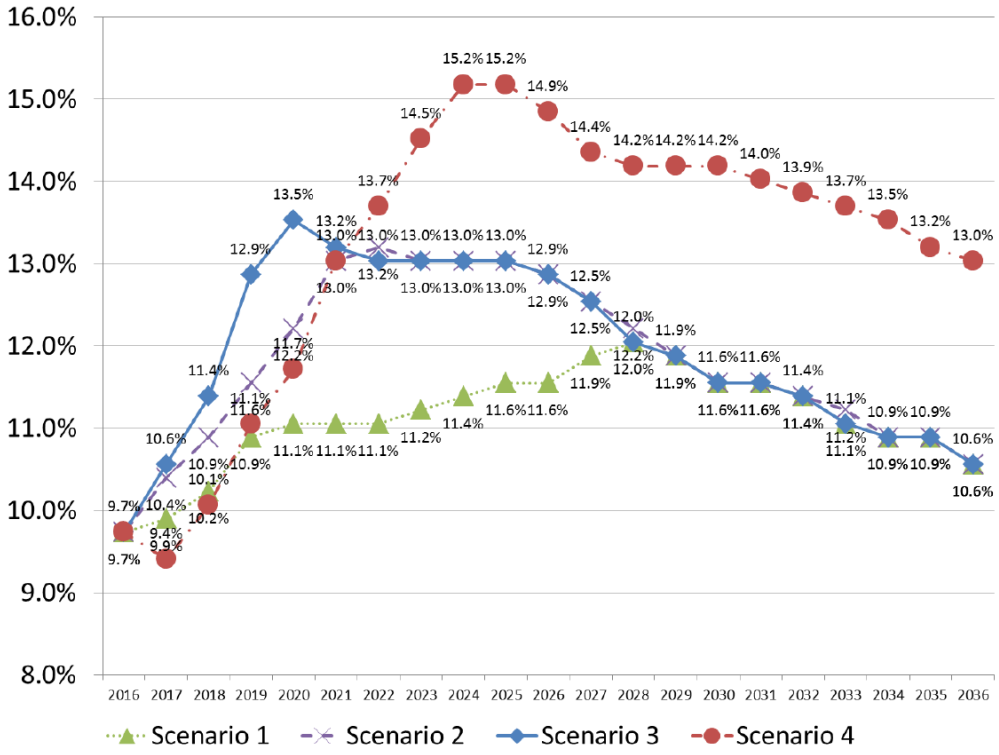
In the current GRA, which followed the completion of the Working Group Report, Manitoba Hydro did not propose an affordability rate or rate assistance program. In the GRA filing, Manitoba Hydro did provide a response to the specific recommendations of the Working Group, including actions to be taken with regards to each recommendation. However, with respect to an affordability rate or rate assistance program, Manitoba Hydro's position is that:

> *issues of poverty and distribution effects are complex and ought to be addressed through the setting of social policy which is within the purview of government. As such, Manitoba Hydro is of the view that of the provision of social assistance programs directed to low income customers is appropriately reserved for the Province of Manitoba.*

However, in testimony in the oral hearing, Manitoba Hydro's President and Chief Executive Officer stated his recognition that the matter of bill affordability will become increasingly important to resolve as Manitoba Hydro proceeds with higher rate increases and therefore, there is a need to find solutions to the issue.

The figure below depicts the impact of various Manitoba Hydro rate increases on the proportion of Manitoba Hydro's total number of residential customers (households) that are LICO-125 and above the 6% energy poverty threshold. In the figure, the plotted line for "Scenario 4" is based on the projected rate plan contained in MH16 Update with Interim. As illustrated in the figure below, the projected rate plan would result in the proportion of energy poverty increasing from 9.7% to 15.2% in 2024, and remaining at a permanently higher level through at least 2036.

Percentage of Households That Are LICO-125 and Above 6% Energy Burden Threshold



Scenario 1 - 3.95% nominal electricity rate increases for 12 years; *Scenario 2* - 5.95% nominal electricity rate increases for 6 years; *Scenario 3* - 7.95% nominal electricity rate increases for 4 years; *Scenario 4* - 3.36% nominal electricity rate increase in 2017, followed by 7.9% rate increases for 6 years and a 4.54% rate increase for 1 year

Source: AMC/MH II-23

The Board heard evidence from residential ratepayers who have to make sacrifices in their daily lives in order to be able to pay their electricity bills. As one ratepayer testified, rate increases add stress and, in the context of being on a fixed income, present difficult and limited opportunities for saving. Another ratepayer gave evidence that, if Manitoba Hydro receives the full amount of its planned rate increases, he may have to consider changing where he lives. He went on to explain that “I’m tired of working so I think it would be - - put more of a squeeze on us. I support my grandson right now. He’s out of work, lives with us - - I don’t know what else to say. It’s just getting tougher.”

A single mother of four children testified before the Board that, if Manitoba Hydro's planned rate increases are granted:

> *I will be forced to further dig in deeper into my food budget, decreasing the amount of groceries I am able to buy per month. And in terms of food, I will be looking at alternatives, cheaper, unhealthier alternatives in order to make my groceries last.*
>
> *It will reduce the amount - - it will reduce the amount that I'm able to engage in social activities with my children, social outings. It will negatively impact us … where it would not allow me to save up for the future or to have an emergency fund. It makes it more challenging for me to put money away in terms of getting a vehicle down the road and just saving - - saving money overall, it would be very challenging because I'm having a hard time with my utility bills as it is.*

In addition to the evidence of the real-life experiences of ratepayers in Manitoba, expert witnesses in the proceeding provided specific proposals for an affordability rate. In particular, the expert witness retained by the Green Action Centre, Paul Chernick, proposed inverted block rate structures both for LICO-125 ratepayers and for LICO-125 ratepayers with electric space heating.

For LICO-125 ratepayers, Mr. Chernick designed a rate based on estimates of energy consumption. His proposal is to eliminate the basic monthly charge and discount the energy charge for the first block of energy consumed by 4¢/kWh. The size of the first block for this rate design is maintained at 500 kWh in each month. Mr. Chernick recommended that the lost revenues that would result from this rate design be recovered from all non-LICO customers, including general service customers, not just non-LICO residential customers.

For LICO-125 ratepayers with electric space heating, Mr. Chernick based his rate design on the distribution of residential electric use among seasons. As with the LICO-125 rate design, the basic charge is waived and the discount for the energy charge for the first block of energy is 4¢/kWh, but the size of the first block varies by season, with the greatest discount being in the winter months. Again, Mr. Chernick recommends that the lost revenues be recovered from all non-LICO customers.

The expert witness retained by the Assembly of Manitoba Chiefs, Philip Raphals, recommended that the Board order Manitoba Hydro to present a ready-to-implement affordability rate for implementation in 2019/20, and that Manitoba Hydro do so with the assistance of a working group to develop the details of the rate. With respect to eligibility, Mr. Raphals' evidence was that coverage at this time should be limited to energy-poor customers with electric space heat, but that there should be *a priori* eligibility for First Nation residents on reserve who pay their own energy bills.

Dr. Wayne Simpson, an expert witness retained by the Consumers Coalition, recommended that, along with enhancements to affordable energy programming, Manitoba Hydro and its stakeholders continue research into energy poverty and its characteristics. Dr. Simpson recommended that Manitoba Hydro be ordered to develop an efficient rate assistance program that provides assistance to lower-income energy poor households that is not directly tied to the level of energy consumption, along the lines of fixed credit approaches taken by Colorado and Ontario.

Manitoba Hydro's Position

Manitoba Hydro's view is that the provision of lower-income social assistance programs is appropriately reserved for the Province of Manitoba. Government already administers income-based programs, has the resources, and provides these programs through a

variety of existing mechanisms. While Manitoba Hydro offers programs to assist lower-income customers in lowering their energy bills through energy efficiency opportunities, it submits that the difficulties with the administration, implementation, and on-going operation of a rate assistance program pose significant challenges in identifying which customers truly require assistance. Unlike the Province of Manitoba, Manitoba Hydro does not have resources to administer a new income-based program, nor does it have access to pertinent data that would be necessary to successfully implement such a program.

Manitoba Hydro further argues that it is impossible to test Mr. Chernick's rate design proposal to ensure that it produces the appropriate level of revenue.

Intervener Positions

The Assembly of Manitoba Chiefs urges the Board to consider the goal of reconciliation, consistent with *The Path to Reconciliation Act*. The Assembly of Manitoba Chiefs states that on-reserve First Nations communities have higher rates of energy poverty, lower quality housing, lower incomes, and lower income growth than the rest of the province. Manitoba Hydro's rate increases will disproportionately affect First Nations communities. As such, the Board should order Manitoba Hydro to immediately implement bill affordability measures that offer discounts to residential customers in on-reserve First Nations communities.

Specifically, the Assembly of Manitoba Chiefs argues that Mr. Chernick's LICO-125 electric space heating rate should be ordered for implementation for on-reserve residential customers, with automatic eligibility for the first 500 kWh block of consumption, and an increased electric space heating discount that reflects the different consumption patterns on reserve. The resulting lost revenue should be recovered from

all classes as the burden of the additional costs from major new generation and transmission projects which facilitate export power sales falls disproportionately on First Nations, whose Treaty rights are adversely affected. For off-reserve residents, the Board should order an engagement process for bill affordability measures and require Manitoba Hydro to report back on the chosen program within one year.

The Consumers Coalition submits that energy poverty should be addressed through a lower overall rate increase, coupled with effective provincial social benefit programs. The Consumers Coalition does not endorse a ratepayer-funded bill assistance program due to the evidence in the proceeding regarding the likelihood of unacceptably low participation rates. It also does not accept the use of an inverted block rate design for lower-income residential consumers, due to the gap between estimated marginal costs and the actual rate, nor does it support bill assistance targeted at only First Nations customers, as too many vulnerable consumers are left out. Rather, the Board should recommend that the Government establish a taxpayer-funded program to address energy poverty.

The Green Action Centre submits that, given the environment of rising rates, moving forward with implementing a bill affordability program should not be delayed by administrative concerns or differences of opinion regarding the design of the program. The Green Action Centre recommends that Mr. Chernick's LICO-125 electric space heating rate design should be selected for piloting in 2018/19, with first application to LICO-125 customers whose energy burden exceeds 6%. The program can be reviewed at the next GRA, limiting any risk associated with administration. The costs of the program should be funded by all ratepayers and Manitoba Hydro should implement a separate account to be funded at a sufficient level in addition to the revenue requirement. The Green Action Centre also suggests that there should be a single

application process, amalgamated with other Manitoba Hydro assistance programs such as the Affordable Energy Program and arrears management.

Manitoba Keewatinowi Okimakanak argues that, consistent with the mandate under *The Path to Reconciliation Act*, the Board should create a separate class for First Nations residential and General Service Small and General Service Medium ratepayers – a class which can be easily identified with existing Manitoba Hydro data – and apply affordability measures to this separate class. Manitoba Keewatinowi Okimakanak suggests that lost revenues associated with the affordability measures implemented for a First Nations customer class should be allocated to all customer classes or natural gas heating customers or both. The Board should also recommend that the Government reduce the payments that Manitoba Hydro is required to make to the Government.

Board Findings

Provincial Government Bill Affordability Program

There is an important role for governments in advancing bill affordability for all Manitobans. The Board unanimously recommends that the provincial government introduce a comprehensive bill affordability program run by a government department to address energy poverty issues faced by Manitobans throughout the province. The Board heard evidence that there is a long-standing need to address this issue and the government is best situated to do so in a comprehensive fashion. The provincial government has social program infrastructure already in place.

The Working Group performed extensive research and analysis. On a consensus basis, the Working Group's Report identified three programs as options for rate assistance:

- A straight-rate discount, which would deduct a fixed percentage amount from the bills of qualifying customers. The Working Group identified three levels of discount: 25%, 35%, and 45%;
- A fixed charge waver, which would eliminate the basic monthly charge from the bills of qualifying customers; and
- A percentage of income payment plan, which would cap the energy bills of qualifying customers at a set level.

The program options identified by the Working Group provide a starting point for the provincial government's development of a bill affordability program. The Board recommends that the provincial government establish a stakeholder group to build on the research and analysis undertaken by the Working Group, as well as programs in other jurisdictions, such as the Ontario Energy Support Program.

Given Manitoba Hydro's expertise regarding its customers, billing system, and affordability issues, and the evidence of Manitoba Hydro's President and Chief Executive Officer of there being an increasing need to find solutions to the unaffordability of bills, the Utility should take initiative to work with the provincial government and other stakeholders to assist in the development of a comprehensive program.

As discussed elsewhere in this Order, the Board notes that there are new sources of revenues flowing to the provincial government and increased revenues from Manitoba Hydro – specifically as a result of the major capital projects – that can be used to fund a government bill affordability measure. This is consistent with the NFAT recommendation that the provincial government direct a portion of the incremental capital taxes and

water rental fees from the development of Keeyask be used to mitigate the impact of rate increases on lower-income consumers.

First Nations On-Reserve Residential Customer Class

A majority of the Board directs Manitoba Hydro to establish a First Nations On-Reserve Residential customer class for existing First Nations reserves and that this customer class will receive a 0% rate increase for the 2018/19 Test Year, such that the rate for this customer class will be maintained at the August 1, 2017 approved Residential rate. The 0% rate increase for 2018/19 is also to apply to First Nations diesel zone residential customers. This decision is not unanimous and Board member Larry Ring provides dissenting reasons below. This section sets out the reasons of the majority on this issue.

The issue of bill affordability has been a matter of serious concern for this Board for over a decade. Yet, despite the long history of substantial evidence and discussion before the Board on bill affordability, there have been impediments that have limited the achievement of a concrete plan or program. Particularly in the context of the continuation of rising rates over the recent past, the situation must begin to be addressed.

As noted by Manitoba Hydro's President and Chief Executive Officer, while Government has a role to play in addressing the issue of affordability, so too does Manitoba Hydro and rate design can assist the Utility in fulfilling its role. Under its mandate to set rates in the public interest, the Board can and should play a part.

The Board recognizes that there are potential administrative and program design hurdles associated with a bill affordability program, and that parties in this proceeding remain of the view that these hurdles give rise to impracticalities, inefficiencies, and cost

ineffectiveness. However, the Board concludes that there are steps that must be taken today to address bill affordability.

An appropriate starting point for bill affordability in Manitoba is a program targeted at on-reserve ratepayers, specifically through the creation of a First Nations On-Reserve Residential customer class with a differentiated rate to address energy poverty on Manitoba reserves. Manitoba Hydro is kept whole because the cost of the 0% increase for this new customer class has been factored into the level of the average general rate increase granted for the Test Year to all other customer classes.

The creation of this customer class is justified by the need to address energy poverty on-reserve, supported by evidence that 96% of First Nations people on-reserve live in poverty and that reserves in Manitoba have the highest rates of child poverty in Canada. In addition, the poor housing stock on reserves in Manitoba and the fact that the vast majority of First Nations on-reserve residential customers (61 out of 63 First Nations communities) have no access to the more economical option of natural gas for heating exacerbate the issue of energy poverty. In his testimony, Manitoba Hydro's President and Chief Executive Officer described the housing conditions on First Nations reserves that he has visited as "abysmal". This results in residents on First Nations reserves having to use more energy to heat their homes. On average, First Nations on-reserve customers consume more energy than off-reserve residential customers, despite the efforts of Manitoba Hydro to use demand side management programming to improve energy efficiency for homes on reserves. Taken together, these factors lead to higher utility bills and a population of Manitobans that is disproportionately vulnerable to rate increases.

The customer class and related affordability measure of a 0% increase are also consistent with the principle of reconciliation. As defined in *The Path to Reconciliation Act*, reconciliation is the ongoing process of establishing and maintaining mutually respectful relationships between Indigenous and non-Indigenous peoples in order to build trust, affirm historical agreements, address healing, and create a more equitable and inclusive society. The creation of a separate customer class is in response to the degree of poverty on reserves. This separate customer class is to continue until otherwise ordered. Shielding the customer class from the general rate increase in the 2018/19 Test Year recognizes the particular factors that make on-reserve ratepayers uniquely situated among residential consumers in Manitoba. As argued by the Assembly of Manitoba Chiefs, rate increases should not widen the existing gap between First Nations living on reserve and other Manitobans.

The First Nations On-Reserve Residential customer class is consistent with the requirements of The Hydro Act because this customer class is not defined solely on the basis of the region of the province in which the customers are located or population density. As a creation of Canadian Aboriginal law, reserves are tracts of land that are vested in and held by the Crown for the use and benefit of the respective bands for which they were set aside through treaties or agreements with the Crown. Reserves are defined by the legal relationship between the Crown and Indigenous peoples, not by the region of the province in which they are located. Beyond this, there are 63 First Nations reserves in Manitoba, located in regions throughout the province. There is no one region that can be isolated as being the location that gives rise to the classification of these customers. For this reason, an on-reserve customer class cannot be equated with the regional zone rates that were in effect prior to the amendments to The Hydro Act.

Moreover, the Board agrees with the Assembly of Manitoba Chiefs that many more factors distinguish on-reserve residents as electricity ratepayers, such that even if this classification were based in part on the region of the province in which the customers are located, it is not solely based on region. The circumstances of on-reserve residential customers include the particular housing infrastructure, energy consumption patterns, non-availability of natural gas heating, and poverty levels. The specific conditions of electricity needs, usage, and cost on First Nations reserves justifies the creation of a separate customer class.

This step in addressing bill affordability is also administratively simple and can be effectively implemented to reach the target recipients. As Manitoba Hydro already identifies on-reserve residential ratepayers in its billing system, the members of this new customer class are readily identifiable. No application process to determine eligibility is required. The new customer class can be created immediately and the affordability measure of a 0% rate increase can be applied at the same time with minimal administration.

Due to the administrative complexity and cost concerns raised by Manitoba Hydro regarding other bill affordability program options discussed in this proceeding, the Board will not, at this time, order Manitoba Hydro to implement a broader bill affordability measure. However, the Board views the 0% rate increase for the First Nations On-Reserve Residential customer class as a modest first step in addressing bill affordability. The Board is aware that there will be some obvious anomalies created where one household on-reserve will receive a lower rate than a nearby off-reserve household living in similar circumstances; however, this is a limited measure designed to reach a targeted group experiencing a high degree of poverty. The anomalies that result from this measure are best addressed by a more wide-reaching government bill

affordability program. The Board envisions that, with the introduction of a comprehensive government bill affordability program, the new First Nations On-Reserve customer class and lower rate built into the 2018/19 Test Year may no longer be required.

18.3 Dissenting Decision and Findings of Board Member Ring

I agree with the majority of Board members that Governments should develop and implement a comprehensive bill affordability program to address the needs of First Nations, remote and Northern consumers, and lower-income ratepayers. However, having read the majority reasons by my Board colleagues with respect to their decision to create a separate First Nations On-Reserve Residential customer class and order a 0% rate increase, I cannot support this decision.

Deviation from Cost of Service Regulation

In my view, the decision of the majority departs from principles of utility regulation in this province and enters a realm that is reserved for the federal and provincial governments. In particular, the context of how Manitoba Hydro operates and is regulated is not recognized in the approach taken by the majority. Manitoba Hydro is an energy utility, not a social service agency of the provincial government.

Manitoba Hydro is regulated on a cost of service basis, with rates set to recover the Utility's costs of supplying power. Board Order 164/16 set out that cost causation is paramount.

Legislated Uniform Residential Customer Class

Prior to the 2001 amendments to The Hydro Act, this regulatory principle was reflected in the use of regional zone rates, which were set to recover the higher costs to serve customers in low population density regions of Manitoba. Through legislative action by the provincial government, uniform rates were implemented and a single Residential customer class was created. Customers in low density and high cost to serve regions had their electricity rates reduced to be equivalent to the electricity rate paid by customers in the high density and lower cost to serve area of the City of Winnipeg. In effect, a policy decision of the provincial government introduced intra-class subsidization, as the cost of serving rural and Northern customers is not equivalent to the cost of serving customers in the City of Winnipeg, but the rate is nonetheless equal.

The Creation of Another Separate Residential Customer Class Should be Legislated

If there is to be another significant deviation or change to the long-standing approach to cost recovery on a cost of service basis, that change should be made by the Government as it was in 2001, and not by Manitoba Hydro or its regulator. That is particularly so with respect to the matter of energy poverty, which is a complex social policy issue that is interwoven with other issues of poverty, income adequacy, and economic development. As such, the affordability of energy bills should be resolved by elected representatives in Government, not the Utility or its regulator. In particular, the approach taken by the majority of selecting a particular sub-set of residential ratepayers to pay less than may be required to serve those customers is making social policy. Social policy should be made by the provincial government.

While I acknowledge the concerns of the majority about reconciliation, *The Path to Reconciliation Act* mandates that it is the provincial government that is to take the lead in advancing measures to promote reconciliation, through the responsible minister's development of a strategy for reconciliation.

I also cannot agree with the majority's selection of a rate increase exemption for a new customer class of First Nations On-Reserve Residential ratepayers. Beyond the issue of this being a matter outside of the role of this Board, the approach taken is significantly under-inclusive. I agree with the Consumers Coalition that bill assistance targeted only at on-reserve First Nations customers excludes too many vulnerable consumers. First Nations customers on reserve are not the only ratepayers who experience energy poverty, nor are they the only ratepayers who have no choice but to heat with higher-cost options such as electricity as opposed to natural gas.

In addition, the selection of First Nations on-reserve residential ratepayers ignores the issue of competing provincial and federal government jurisdiction on reserves. The Board heard evidence that the federal government is already involved in bill assistance for some on-reserve ratepayers. In granting a 0% increase for on-reserve customers, the Board may actually be subsidizing the costs of the federal government and not providing a form of rate relief to ratepayers.

Geographic Regions

I accept that the Board has jurisdiction to create a lower-income customer class. It does not have jurisdiction to create a discriminatory customer class based on regions of the province. A glance at most Manitoba maps will show these geographic regions.

Creating a Permanent Separate Residential Class

I am also concerned that the new customer class will become entrenched in the regulation of Manitoba Hydro rates, such that the class will be difficult to remove or revise in future proceedings. Even if the 0% rate increase is only implemented for 2018/19, it will create a rate differential with the general Residential rate that will, for all practical purposes, be permanently entrenched absent a government program that specifically eliminates the differential. Otherwise, to eliminate the differential would require the Board to approve a rate increase targeted to the First Nations On-Reserve Residential class over and above any rate increase approved for the Residential customer class.

Over time, and in the context of projected annual rate increases, the gap in residential rates will continue to grow. This would become onerous on other ratepayers that will be responsible for subsidizing through their rates the lost revenues not recovered from the First Nations on-reserve residential customer class.

19.0 Solar Generation Program Rate

Solar energy is generated by photovoltaic ("PV") generating systems that produce direct current electricity from sunlight. The direct current electricity can in turn be used to power equipment or charge batteries, generally with the use of an inverter to convert the direct current electricity to alternating current electricity for residential use.

While solar PV systems can be configured as off-grid systems, residential solar PV installations are usually tied into the local electric grid system. This allows solar PV customers to benefit from reduced grid-electricity consumption while maintaining system reliability through access to the local grid for back-up electric energy. Similarly, any excess solar PV power not consumed by the solar PV customer can be sold back to the local utility, usually through a power purchase agreement. As a result, grid-connected solar PV installations incorporate a bi-directional electricity meter that records both the amount of energy supplied by the utility as well as the excess solar PV energy flowing back into the electricity grid. Such customers are typically known as net-metered customers.

To evaluate the opportunities, challenges, and technology requirements of solar PV in the Manitoba market, Manitoba Hydro introduced its Solar Energy Program in the spring of 2016 as an energy efficiency and load displacement program. This two-year pilot program, targeted at residential and small commercial customers with less than 200 kW of electrical load, offers incentives toward the capital cost of solar PV installations. Manitoba Hydro provides an incentive of $1 per watt installed, which can represent approximately one-third of the total installed costs. The incentive is limited to the PV capacity that, at a maximum, generates less energy than that customer's annual load. In addition, Manitoba Hydro's Residential Earth Power Loan program is offered to solar PV customers to assist with the up-front capital costs of solar PV installations.

Once participating customers successfully complete the required electrical inspection, Manitoba Hydro awards the program incentives and installs a bi-directional meter that monitors power imported from the grid as well as power exported from the customer site to Manitoba Hydro's electricity grid. The meter will record the amount of energy supplied by Manitoba Hydro each month. As Manitoba Hydro explained in evidence in this proceeding, for both residential and commercial customers, the billing system will charge for this monthly consumption at the Board-approved August 1, 2017 residential energy rate. The meter will also record the amount of excess energy put on the grid by the customer's solar PV system. A billing line item reflecting the corresponding value calculated at the Board-approved residential rate is applied to the customer's monthly bill. Under Manitoba Hydro's billing system, customers with non-utility generation systems do not bank energy credits for use in later periods. Rather, energy bills are reconciled monthly using the Board-approved residential electricity rate.

Manitoba Hydro's two-year pilot Solar Energy Program will end in April 2018. At that time, the installation incentives will no longer be offered but Manitoba Hydro will continue to offer financing for solar installations through its Earth Power Loan program. Those customers who participated in the pilot program will continue to get credit for surplus energy that is within their own usage, although Manitoba Hydro is currently reviewing its policy of crediting a customer's excess electricity at the full residential rate.

As a result of the pilot Solar Energy Program, Manitoba Hydro currently has 2.6 MW of installed solar generation, which results in 3.47 GWh of energy annually displaced from the electricity grid.

19.1 Board Findings

The Board is concerned that Manitoba Hydro implemented the Solar Energy Program with a rate for excess solar energy without prior Board approval. Rate designs for net metered customers must be brought before the Board for review and rate approvals.

The Board has legal jurisdiction to review and approve the electricity rate that Manitoba Hydro applies to customers participating in the Solar Energy Program, or to customers with any on-site generation, for the return of excess energy to the grid. All rates for services, changes in rates for services, and new rates for services provided by Manitoba Hydro must be reviewed and approved by the Board. The Board's jurisdiction with respect to reviewing and approving rates is framed broadly under The Crown Act and extends to all rates, rate changes, and new rates for electricity "howsoever generated". There is no exclusion for customer-generated electricity.

The price paid by Manitoba Hydro for excess customer-generated solar power is currently unilaterally set by the Utility, which has a retail monopoly in the Manitoba market. This unilateral fee is a price charged by Manitoba Hydro, as it is an expense or cost that Manitoba Hydro sets for the supply of excess solar power. While Manitoba Hydro ultimately pays the cost for the power, this does not detract from the fact that Manitoba Hydro is setting the price for the supply of a particular form of power. Therefore, the price for customer-generated solar power is a "rate for service" subject to the Board's review and approval under The Crown Act.

The Board's conclusion with respect to jurisdiction is supported by section 38 of The Hydro Act, which provides that any person who is required by the Manitoba Hydro-Electric Board to supply power to the Utility may apply to the Board to review the price computed by Manitoba Hydro for the power. This section does not directly apply to the

purchase of customer generated solar power by Manitoba Hydro as customers are not "required" to supply the power; however, as Manitoba Hydro's Solar Energy Program includes the Utility purchasing customers' excess solar electricity, section 38 should be understood broadly as demonstrating the intention of the legislature to protect all persons who are paid a unilaterally set price in a monopoly market.

Moreover, the Solar Energy Program is a demand side management program. Demand side management programs introduced by Manitoba Hydro to support customer-generated renewable power, including the Solar Energy Program, are subject to review by the Board. This includes the rates paid for customer-generated energy.

Manitoba Hydro has not yet provided evidence demonstrating the appropriate rate for crediting of customers' excess energy. For all net metering installations, the Board approves Manitoba Hydro crediting customers' excess energy put on the grid at the rate of 8.196¢/kWh for 2018/19. For any future net metered rates or changes to the 8.196¢/kWh rate, Manitoba Hydro is directed to apply to the Board for approval. For the next GRA, Manitoba Hydro is directed to provide additional details on the Solar Energy Program and other net metering installations in Manitoba.

In future, rate designs for net metered customers must be brought before the Board for review and rate approvals.

20.0 Special Rates

As noted above, in addition to the general rate increase sought by Manitoba Hydro, the Utility is also seeking approval of a number of items related to special rates:

1. Final approval of the Light Emitting Diode ("LED") rates for the Area and Roadway Lighting class (Outdoor Lighting) approved on an interim basis in Order 79/14, and approval of new LED rates for the Area and Roadway Lighting class (Sentinel Lighting) as discussed in Tab 9 of Manitoba Hydro's Application;

2. Approval to remove the Area and Roadway Lighting (Festoon Lighting) and the Area & Roadway Lighting (Christmas Lighting) rates from Manitoba Hydro's rate schedule, as discussed in Tab 9 of Manitoba Hydro's Application;

3. Endorsement of modifications to the Terms and Conditions of Option 1 of the Surplus Energy Program ("SEP") that were accepted on an interim basis in Order 43/13, as outlined in Tab 9 of Manitoba Hydro's Application;

4. Final approval of all SEP interim *ex parte* rate Orders as set forth in Tab 10 of its Application, as well as any additional SEP *ex parte* Orders issued subsequent to the filing of Manitoba Hydro's Application and prior to the Board's Order in this matter; and

5. Final approval of Curtailable Rate Program ("CRP") *ex parte* Order 54/16 as well as any additional *ex parte* Orders in respect of the CRP issued subsequent to the filing of Manitoba Hydro's Application and prior to the Board's Order in this matter.

20.1 Board Findings

The special rates were not contentious and were discussed by Manitoba Hydro during the oral hearing. The Board approves the special rates sought by the Utility, excluding finalization of the interim diesel zone rates which Manitoba Hydro is no longer seeking as part of this GRA.

Manitoba Hydro is directed to provide confirmation to the Board that the executed Settlement Agreement documents have been received by the Utility and that the documents are in proper form. With this confirmation, Manitoba Hydro is to advise the Board of its intention regarding finalization of the interim diesel zone rates.

21.0 Capital Project Review per Order in Council 92/2017

Order in Council 92/2017 assigned the Board the duty of considering Manitoba Hydro's capital expenditures as a factor in reaching a decision regarding rates for services. In the course of considering the evidence from Manitoba Hydro, Independent Expert Consultants, and Intervener Experts related to Manitoba Hydro's capital expenditures, the Board identified improvements that should be made to Manitoba Hydro's capital expenditure approval and execution processes in the future, as well as aspects that Manitoba Hydro has performed well and should therefore be continued.

21.1 Capital Project Cost Estimating

Manitoba Hydro, like all electric utilities, has significant capital assets and undertakes major capital projects in order to deliver reliable electrical service to Manitoba residents and businesses. Manitoba Hydro's initial capital cost estimates have often under-estimated the final in-service costs of these projects. The following table provides examples of changes in capital cost estimates from the original capital cost estimate to the most current estimate, and the percentage change.

Comparison of Original Cost Estimates to Current Cost Estimates for Major New Generation & Transmission Projects

($ millions)	Original CEF* Estimate	Most Current CEF* Estimate	Percentage Change
In Progress			
Keeyask	3,700	8,726	136%
Bipole III	1,880**	5,042	168%
Manitoba-Minnesota Transmission Project	205	453	121%
Completed			
Pointe du Bois Spillway	318	576	81%
Wuskwatim (including transmission)	988	1,742	76%
Riel AC Station and Sectionalization	96	320	233%

* Manitoba Hydro's Capital Expenditure Forecast. The time between the development of the original CEF estimate and the most current CEF estimate varies for each project in this table.
** Original estimate in this table is based on the western routing with converter stations.

The above table shows the original approved cost estimate when it was first included in a Capital Expenditure Forecast. This original estimate is sometimes approved years in advance of the initiation of the project construction. As more detailed design, engineering, and project scope development are completed, the original estimates are revised – and approved – until such time as final pre-construction estimates are developed. For example, the original Keeyask estimate of $3.7 billion was approved in 2008 but construction did not commence until 2014. During that period, additional design and engineering were completed, resulting in the final pre-construction estimate for Keeyask – approved in early 2014 during the NFAT – of $6.5 billion.

METSCO, an expert for the Consumers Coalition, in an analysis of 49 generation, transmission, and distribution projects, similarly found that Manitoba Hydro significantly underestimated the capital cost of projects in comparison to the final actual costs. Compared to the original cost estimates used when the project is first approved by the Manitoba Hydro Executive, METSCO found the final actual costs to be 106% higher

(when weighted by project cost). At the original cost estimating stage, Manitoba Hydro has not generally completed detailed design, engineering, and scope development.

In contrast to the original cost estimates, when compared to the final pre-construction estimates, METSCO found that the actual costs for these 49 projects were only 6% higher. In other words, the accuracy of the estimates is significantly enhanced once detailed design, engineering, and scope development are completed prior to construction.

In this GRA, MGF introduced the concept of a 'stage gate' approval process, specifically for MMTP but which could apply to other large projects such as Keeyask. This is a project management tool, common in the energy industry, that shepherds a project through five phases: conception, concept selection, tendering, execution, and operation, with a decision gate following each phase. The 'stage gate' concept is that a project does not move from one stage to the next – that is, receive approval to go to the next stage – until a set of criteria is satisfied. The criteria may be technical, financial, commercial, or other criteria. In some cases, a peer review by engineering, commercial, and project management professionals is completed to ensure that the risks associated with the project are addressed.

MGF recommends other improvements for Manitoba Hydro's estimating processes on future projects. Those improvements include having the estimate team prepare the estimate with input from each department, providing supporting back-up, and providing a more detailed explanation outlining the structure and relationship between the physical scope of work and resources to complete the work. MGF also suggested that a higher contingency, such as a P95 contingency, be used when evaluating the business cases of future projects.

MGF explained that preparation of a Basis of Estimate document is an industry best practice. A Basis of Estimate helps define the project scope, identifies risks and opportunities, provides a record of documents used in development of the estimate, provides a record of communications made during development of the estimate, and facilitates the review and validation of the estimate. Manitoba Hydro prepared a Basis of Estimate for Bipole III which, in MGF's view, was extremely well done.

As explained earlier in this Order, MGF found Manitoba Hydro's cost estimating methodologies (with respect to the $4.65 billion and $5.04 billion Bipole III estimates) are consistent with industry standard and best practices. This finding is supported by the cost increase of 8%, which is in line with the 6% average cost increase from final pre-construction budget to actual cost as found by METSCO.

Manitoba Hydro's Position

Manitoba Hydro appears to agree with METSCO that the previous cost estimating and capital approval process that resulted in these inflated final costs is not acceptable. In response to METSCO's findings, Manitoba Hydro explained that its previous process for obtaining corporate approval required estimates of these projects to be developed and submitted for approval prior to any engineering or planning being done, and the initial estimate was completed without a clear definition of project scope. According to Manitoba Hydro, this past process has been replaced with new scope development and approval processes, which allow for the scope of the project to be developed in greater detail before the cost is estimated and the investment considered for approval to execute.

According to Manitoba Hydro, the role of the newly-created position of Director of Strategic Business Integration is to ensure that spending on Business Operations Capital is integrated into Manitoba Hydro's financial planning processes. Previously, each division – Generation, Transmission, and Marketing & Customer Service (or Distribution) – provided its list of proposed capital projects and corresponding budgets to the Executive Committee for corporate approval.

Board Findings

The Board finds that Manitoba Hydro has been approving projects too early in the process, without sufficient development of scope, design, and engineering. The Board recognizes that, with additional scope, design, and engineering development prior to advancing the capital project for financial and economic analysis and subsequent executive approval, there will be additional front-end costs. In the Board's view, these additional sunk costs would be money well spent as the additional work will allow a more informed decision by Manitoba Hydro's Executive.

The evidence shows that when Manitoba Hydro undertakes more thorough design, engineering, and project planning, the final costs of the project are closer to the estimated costs. With the sample of projects reviewed by METSCO, the final pre-construction estimate to actual cost variances were only 6%. However, the Board notes that Keeyask does not align with this sample, as Keeyask has experienced a variance between the final pre-construction estimate and the current estimate of 34%. As explained elsewhere in this Order, Keeyask has not experienced an undue number of design changes nor have the concrete or earthworks quantities driven the costs higher. As a result, Keeyask may not have benefited from additional design, engineering, and planning prior to construction the way other projects have.

Manitoba Hydro's prior capital estimating and approval process leads to the capital expenditure forecast being understated in future years, potentially resulting in inaccurate financial forecasts. It also potentially means that projects are approved without management knowing the full cost implications. It is not known how many projects would not have received approval, or that may have had their scope amended, if Manitoba Hydro's Executive had a more realistic forecast for the project costs prior to approval.

The impact of this on revenue requirements and rates is two-fold. First, for projects that are included in the capital expenditure forecast but are several years out, the underestimate of the capital cost can result in understated revenue requirements in those future years. With understated revenue requirements, Manitoba Hydro's financial ratios and metrics are more favourable and the projected rate increases beyond the Test Years may be understated. Second, and conversely, when the final actual costs are realized, the revenue requirements are higher – as will be the rates – in order for Manitoba Hydro to recover the costs of those projects and achieve its financial targets. If the final actual costs were more accurately known earlier in the process, projects may not proceed or alternatives may be considered which have a lower revenue requirement impact.

The Board notes that, with the creation of the position of Director of Strategic Business Integration, Manitoba Hydro appears to be embarking on a more robust planning, scoping, and engineering process for Business Operations Capital. The Board finds that in the area of Business Operations Capital, Manitoba Hydro has made structural changes to its organization that should improve how capital cost estimating is done. Such scrutiny should be extended to Manitoba Hydro's Major New Generation & Transmission projects. The Board recommends that Manitoba Hydro review and revise

its capital project planning, scoping, and engineering processes to provide for a more certain in-service cost before such capital projects are economically and financially analyzed and presented to Manitoba Hydro's Executive for approval and, where required, subsequently to the Province of Manitoba.

There is a dilemma facing any project developer such as Manitoba Hydro, which is how much work – scope development, design, and engineering – should be completed before a decision is made whether to proceed with the project. Additional work to refine the cost estimate will result in increased costs being incurred prior to the final evaluation of the project. At the evaluation stage when the project is compared with alternatives, there is the issue of how to deal with these costs, which are also called "sunk costs".

As recommended above by the Board, more work should be done prior to making a final decision whether to proceed with a project, although this will necessarily result in greater sunk costs. However, the Board acknowledges that, as was done at the NFAT, sunk costs of any project are excluded from the economic comparison with alternative projects since these costs, having already been incurred, can no longer be avoided by choosing an alternative project. Exclusion of sunk costs from the analysis can distort the comparison of the project with alternatives. In its NFAT report, the Board recommended not only cessation of all activities and spending related to Conawapa but that existing sunk costs should not become a future justification of Conawapa.

To address the sunk cost dilemma, the Board finds there is merit in Manitoba Hydro considering the "stage gate" approach put forward by MGF, in order to improve its past performance on cost estimating and completing projects on budget. The Board recommends that Manitoba Hydro engage an external consultant to assist in studying this matter.

As explained earlier in this Order with respect to Bipole III, the Board finds that when estimating costs for a project that includes new, unproven technology, the contingency amounts should be increased, not decreased as was done by Manitoba Hydro.

Order 73/15 Directive 13 requires Manitoba Hydro to report quarterly to the Board as to the status and cost against budget in order to ensure the Board is informed of accurate and timely cost and schedule information. The Board directs that this reporting is to continue, and be amended to include not only the control budget and control schedule, but also the most current forecast at completion cost and schedule milestones based on weekly or monthly reports made by or to Manitoba Hydro. These reports are to be provided to the Board no later than 45 days following the last day of each quarter.

21.2 Potential Capital Project Approvals by the Board

The Board's review of the Manitoba-Saskatchewan Transmission Line project in this proceeding is a precedent for how independent reviews can be conducted of Manitoba Hydro's capital projects.

The Board's concern with approval of Manitoba Hydro's capital expenditures is long standing. In Order 116/08, the Board stated:

> *In prior Orders, the Board has recommended to Government, that The Public Utilities Board Act be amended to make the regulation of MH equivalent to the regulation of Centra Gas by removing the exemption now provided under Section 2(5) of the Act. In Order 143/04 the Board noted: "Given the risks related to the very significant additional plant investments and associated borrowings contemplated, the Board is of the view that the Province of Manitoba should re-evaluate the existing legislation." The Board reiterates its past recommendation.*

Also, as held in Order 73/15, in the context of Bipole III:

> *The Board has no inherent jurisdiction to review and approve the costs and economics of Bipole III. The Board agrees with the Coalition's suggested recommendation to the Province of Manitoba for a change in legislation and that the Board should have approval authority relative to Manitoba Hydro's major capital projects.*

The Board continues to be of the view that it should have legislative authority to approve Manitoba Hydro's capital expenditures. The current process whereby the Lieutenant Governor in Council approves the debt for the development of capital projects does not appear to involve a detailed review of the projects.

As discussed in the previous section, the shortcomings in Manitoba Hydro's previous capital approval process led to inaccurate financial forecasts. The original cost estimates - which generally understate the final costs - artificially depress the revenue requirement when projects are years away but then put upward pressure on the revenue requirement when the final costs - which are generally higher - are known and accounted for. As capital project costs have a substantial influence on Manitoba Hydro's revenue requirement and the resulting rates the Board approves to recover the revenue requirement from ratepayers, the Board recommends that Government grant the Board authority to review and approve Manitoba Hydro's capital projects and expenditures.

The Board envisions that, if it were granted authority to approve Manitoba Hydro's capital projects, it would require Manitoba Hydro to submit projects for the Board's review and approval that have a higher level of scope definition, design, and engineering completed. The Board expects that this will result in the final approval to proceed being based on a more accurate estimate of the final cost. As discussed

above, the stage gate approval process could be used to improve the cost estimating at the approval stages while minimizing sunk costs.

21.3 Construction Contract Types and Structures

Manitoba Hydro uses contractors with specific expertise to design, engineer, procure, construct, and commission capital assets. Contracts let by Manitoba Hydro range in value from hundreds or thousands of dollars up to the largest contract for the Keeyask project, the General Civil Contract ("GCC"), which has a contract value in excess of $1 billion.

As explained earlier in this Order, there are several types of pricing structure that can be used in a contract. The pricing structure in the Keeyask GCC is a "cost reimbursable - target price" structure. In a contract with a cost reimbursable-target price payment structure, the owner (Manitoba Hydro) is at risk for quantities, productivity, and efficiency of the contractor, while the contractor is at risk for its profit. Other types of pricing structures include 'fixed price' or 'unit price' structures. In a fixed price contract (also known as a lump sum contract), the contractor is at risk for quantities and productivity. In a unit price contract, the contractor is paid a pre-defined unit rate (or rate per quantity) multiplied by the quantity of work and is at risk for productivity but not the quantities of work; the quantity risk resides with the owner.

In MGF's view, the root cause of the billions of dollars of cost overruns for Keeyask is that the cost reimbursable payment structure of the GCC fails to provide sufficient incentive for the general civil contractor to be responsible for productivity. MGF also identified that Manitoba Hydro is managing the Keeyask GCC as if it were a lump sum or unit rate contract and not in a manner that is required to exert control over a contract with a cost reimbursable payment structure. MGF states that, to properly manage a cost

reimbursable contract, the owner needs to hold the contractor accountable for its performance, hire experienced trades supervisors to assist the contractor with planning the work in a more efficient manner, understand why planned progress is not achieved, and develop realistic and achievable cost and schedule estimates.

Similarly, Klohn Crippen Berger found that the principal reason for the cost increase in the GCC and overall Keeyask budget is the nature of the payment structure in the GCC. Specifically, the general civil contractor is being paid in full for its actual costs for labour and materials rather than for quantities of work performed against fixed or unit prices.

Board Findings

As explained earlier in this Order, the Board agrees with Independent Expert Consultants MGF and Klohn Crippen Berger that the primary root cause of the cost overrun of the GCC, and the whole Keeyask project, relates to the nature of the cost reimbursable payment structure in the GCC. The reduction in profit that results from the contractor exceeding the GCC target price was not sufficient protection for Manitoba Hydro to ensure the contractor delivered the project on time and at the target price.

As explained earlier in this Order, the Board concludes that Manitoba Hydro did not exercise effective oversight of the Keeyask general civil contractor and did not manage the GCC as was required of a contract with a cost reimbursable payment structure. The Board therefore recommends that Manitoba Hydro use the services of an external construction management expert, particularly for high value projects and those with cost reimbursable payment structures, beginning with the initial study and planning through to project execution. Such a construction management expert would be able to assist Manitoba Hydro with effective project controls, enforcement of the contract terms, and identification of recourse in the event of contractor non-performance.

The Board finds nothing inherently wrong with the use of a cost reimbursable pricing structure, but the suitability of this payment structure depends on the circumstances in which it is used. If used, effective oversight of the contractor must be exercised, as explained by MGF.

The Keeyask GCC utilized a 'cost reimbursable-target price' payment structure for all aspects of the project work. The Board envisions a different approach be used in the future. When there are major portions of the construction project that involve below-grade construction – such as river management, removing earth and rock, and preparing the foundations for a generating station on bedrock – those below-grade aspects of the overall project cannot be known with certainty before the construction commences. Because of that uncertainty, it is more appropriate that the geological risk would be borne by Manitoba Hydro as the owner, and not the contractor in the contract. Unit price or cost reimbursable pricing structures are more appropriate for these portions of the project. Conversely, once the foundations are exposed and the remaining work is above grade, far more certainty can be obtained in the design of the project for which the contractor can and should bear more of the risk. A fixed price payment structure in the contract for this aspect of the work is therefore appropriate. There is no rule or requirement for the entire GCC to have the same payment structure.

The Board recognizes that the above approach would not solve all of Manitoba Hydro's issues with capital cost overruns. Major construction projects throughout North America are frequently reported to be over budget. Contracts with fixed price or unit price payment structures are still susceptible to cost overruns, although these are usually related to design changes made by the owner in the case of the former and to uncertain quantities in the case of the latter. But, as identified by Klohn Crippen Berger, Keeyask

did not experience significant issues with design changes or inaccurate quantities of concrete or earthworks.

21.4 What Went Well on Capital Projects

This Order identifies a number of problems, shortcomings, and issues with Manitoba Hydro's capital project estimating, planning, and execution. The evidence in this proceeding also identified a number of positives related to Manitoba Hydro's capital projects. The following is a list of the major positives:

- Issues with interfaces between contractors, as were experienced on Wuskwatim, appear to have been reduced or avoided with the inclusion of increased scopes of work under the Keeyask GCC,
- The Keeyask design and geotechnical investigations were reasonable,
- Keeyask design changes and extra work orders have not been excessive,
- Keeyask quantity estimates, in aggregate, were close to actual quantities,
- While Manitoba Hydro originally allowed over 1,000 activities in the Keeyask GCC schedule to have negative float, the Utility was able to eliminate the negative float in the most current schedule presented to the Board,
- The Bipole III transmission line was contracted with an appropriate mix of fixed price, unit price, and cost reimbursable contracts, providing cost certainty to project,
- The Bipole III transmission line project was well organized and managed,
- The Bipole III transmission line estimating team is knowledgeable and capable,
- Preparation of a Basis of Estimate is an industry best practice that helps define the project scope, identifies risks and opportunities, provides a record of

documents used in development of the estimate, provides a record of communications made during development of the estimate, and facilitates the review and validation of the estimate. Manitoba Hydro prepared a Basis of Estimate for Keeyask and for Bipole III, the latter of which MGF found to be well written and followed best practices,

- Bipole III converter stations were competitively tendered with appropriate pricing mechanisms, in particular a fixed price contract to engineer, procure, and construct the HVDC converter equipment, shifting much of the cost, schedule, and productivity risk to the contractor, and

- Together, the Bipole III converter stations and transmission line are only 8% over the final pre-construction budget.

Board Recommendations For Future Capital Projects

MGF made numerous recommendations which Manitoba Hydro could use to improve the execution of its existing projects as well which could be used in the planning, estimating, and construction of future projects. The Board recommends that Manitoba Hydro consider these recommendations, some of which are itemized below, along with other recommendations made by the Board.

- Where possible, tailor the payment structure for contracts such that risk is appropriately allocated between Manitoba Hydro and the contractor, including potentially having multiple payment structures within the same contract,

- Prepare economic evaluations of projects based on a higher probability contingency, such as at a P90 or P95 level,

- Retain external construction management expertise, particularly for high value projects and those that utilize cost reimbursable pricing mechanisms,

- Prepare a thorough Basis of Estimate document,

- Prepare a comprehensive Basis of Schedule document,
- Use estimate and schedule templates to promote consistency across groups preparing estimates and schedules,
- When developing estimates and schedules, provide supporting back-up and more detailed explanation outlining the structure and relationship between the physical scope of work and resources to complete the work,
- When developing estimates for projects that include new, unproven technology or construction methods, the contingency amounts should be increased, and
- Conduct periodic contract compliance reviews during execution of major projects to ensure the contractor is meeting its obligations.

22.0 Compliance with Board Directives

Manitoba Hydro recognizes that there is a backlog and history of not following Board directives, and that more can be and must be done by the Utility. As discussed above, directives related to depreciation, O&A benchmarking, asset condition assessment reports, and matters for further study in the Cost of Service Study have not been completed in a timely fashion.

22.1 Manitoba Hydro's Position

Manitoba Hydro's President and Chief Executive Officer advises that Manitoba Hydro takes the Orders and direction from the Board seriously, but recognizing the history of directives not being complied with, the Utility has to do a better job. In closing argument, Manitoba Hydro confirmed that, barring appeals, there will be compliance with Board directives. Manitoba Hydro states there can be no dispute that the objective of implementing a directive is to provide value to the regulatory process. Manitoba Hydro recommends that the Board contemplate follow-up or feedback mechanisms when directives are issued so that the work can proceed in a meaningful way and provide value to all parties that desire it.

22.2 Board Findings

The Board finds that the Utility has not complied with all or part of a number of past directives. If Manitoba Hydro disputes a directive issued by the Board, the Utility may choose to file a request for variance or seek leave to appeal from the Manitoba Court of Appeal. The Board has jurisdiction to impose financial penalties and stay any future applications in the event that the Utility does not comply with all or part of a Board Order.

The Board directs Manitoba Hydro to file with the Board on or before August 1, 2018 the status of compliance with all outstanding and ongoing directives. Manitoba Hydro is to provide with this filing the Utility's comments on a process for feedback and clarification on Board directives.

23.0 Recommendations to the Provincial Government

In this Order, the Board makes the following recommendations to the provincial Government:

1. The Board should have legislative authority to approve Manitoba Hydro's capital expenditures;
2. Efficiency Manitoba's mandate should be amended to include explicit consideration of bill affordability. This would include targeting of lower-income consumers with demand side management programs, as well as consideration of the impact of demand side management costs being paid by non-participants;
3. The provincial government should introduce a comprehensive bill affordability program run by a government department to address energy poverty issues faced by Manitobans throughout the province;
4. The provincial government should establish a stakeholder group to build on the research and analysis undertaken by the Working Group, as well as programs in other jurisdictions, such as the Ontario Energy Support Program;
5. The provincial government should use some of the revenues it receives from Keeyask to fund a comprehensive bill affordability program, consistent with the NFAT report recommendations;
6. The provincial government should transfer a portion of the carbon tax revenues to Manitoba Hydro to further strengthen Manitoba Hydro's financial health, which may allow for lower consumer rate increases; and
7. The provincial government should suspend payment of the annual Bipole III debt guarantee fee and capital taxes made by Manitoba Hydro to the Province of Manitoba, starting with the 2019 fiscal year and until the $900 million burden of a

policy decision made by government is satisfied, which will occur in approximately 13 years.

24.0 Recommendations to Manitoba Hydro

In this Order, the Board recommends that Manitoba Hydro:

1. Defer $160 million of Business Operations Capital spending to a future period beyond 2018/19;
2. Continue to find reductions in Business Operations Capital spending during the current period of record spending on major capital projects such as Keeyask and Bipole III;
3. Update the Manitoba-Minnesota Transmission Project schedule more frequently than every two months once construction begins;
4. Make efforts to find further areas to reduce O&A costs, both in terms of staff reductions and Supply Chain Management, after the Voluntary Departure Program transition concludes;
5. Review and revise its capital project planning, scoping, and engineering processes to provide for a more certain in-service cost before such capital projects are economically and financially analyzed and presented to Manitoba Hydro's Executive for approval and, where required, subsequently to the Province of Manitoba;
6. Consider the "stage gate" project approval process and engage an external consultant to assist in studying the use of this process;
7. Use the services of an external construction management expert, particularly for high value projects and those with cost reimbursable payment structures, beginning with the initial study and planning through to project execution;
8. Consider the recommendations made by MGF to improve Manitoba Hydro's execution of its existing projects and in the planning, estimating, and construction of future projects; and

9. Review demand side management programming for cost effectiveness and cease or modify spending on programs that are no longer cost effective, except for programs targeted at lower-income and First Nations on-reserve consumers.

25.0 IT IS THEREFORE ORDERED THAT:

1. The rate increase of 3.36% previously approved as interim effective August 1, 2016 **BE AND IS HEREBY APPROVED AS FINAL**.

2. The rate increase of 3.36% previously approved as interim effective August 1, 2017 **BE AND IS HEREBY APPROVED AS FINAL.**

3. Manitoba Hydro's Application for a 7.9% across-the-board rate increase effective April 1, 2018 **BE AND HEREBY IS DENIED** as filed.

4. A 3.6% average revenue increase to be recovered in Manitoba Hydro consumers' rates effective June 1, 2018 **BE AND IS HEREBY APPROVED**.

5. Manitoba Hydro implement differentiated rates to collect the approved revenue requirement for 2018/19 in order to begin to move the Revenue Cost Coverage ratios of the General Service Small Non-Demand, General Service Large 30-100kV, and General Service Large >100kV customer classes into the zone of reasonableness of 95% to 105%, using the alternative calculation methodology. Manitoba Hydro is to assume a 10-year timeframe to move all classes within the zone of reasonableness, using the alternative calculation methodology. The rate increase impact of doing so is to be shared across the Residential, General Service Small Demand, General Service Medium, General Service Large 0-30kV, and Area & Roadway Lighting classes.

6. Manitoba Hydro create a First Nations On-Reserve Residential customer class. This customer class is to receive a 0% rate increase for the 2018/19 Test Year, such that the rate for this class will be maintained at the August 1, 2017

approved Residential rate. A 0% rate increase is to also apply to First Nations Residential customers in the diesel zone communities.

7. Manitoba Hydro credit net-metered customers' excess energy put on the grid at the rate of 8.196¢/kWh for 2018/19. Manitoba Hydro must apply to the Board for approval of any future net-metered rate or changes to the 8.196¢/kWh rate.

8. Manitoba Hydro recalculate and file, for Board approval, a schedule of rates reflecting the overall rate increase and differentiated rates effective June 1, 2018 for all customer classes, together with all supporting schedules including proof of revenue, customer impacts, and revenue requirement, by May 15, 2018.

9. Manitoba Hydro participate in a technical conference hosted by Board Staff or an external consultant appointed by the Board for the consideration of the establishment of a minimum retained earnings or similar test to provide guidance in the setting of consumer rates for use in rule-based regulation.

10. Manitoba Hydro provide information about the Other Cash Payments included in the Cash Flow Statement in the next GRA filing.

11. Manitoba Hydro consider the areas recommended by the Independent Expert Consultants for improvement and enhancement of the load forecasting methodology and provide details of the implementation of these recommendations, or reasons for not implementing them, at the next GRA.

12. Manitoba Hydro file with the next GRA the details of its Operating & Administrative expenditures with an explanation as to how Manitoba Hydro is carrying on its operations with reduced staffing levels, including the details of the operational plan developed to continue running operations with a workforce that

has been reduced by 15%, and any advice or recommendations received from external consultants retained to assist with the restructuring and transition.

13. Manitoba Hydro file with the next GRA details of its actual Operating & Administrative expenditures dating back 10 years through to the date of the filing, along with forecast Operative & Administrative expenditures by cost element and business unit, including the details of the Utility's pension liability related to the reduced staffing levels. The actual Operating & Administrative expenditures are to include the compound annual growth both before and after accounting changes.

14. Manitoba Hydro retain an independent consultant to assess Manitoba Hydro's development of its asset management program and its progress in addressing the recommendations made by UMS, as well as the progress of the development of the Corporate Value Framework. Manitoba Hydro is to file with the Board by June 29, 2018 the Terms of Reference for the consultant for the Board's review and comment. Manitoba Hydro is directed to report back to the Board on its progress and the result of the consultant's assessment at the next GRA.

15. Manitoba Hydro consider implementing the recommendations made by the Independent Expert Consultants with respect to Keeyask, Manitoba-Minnesota Transmission Project, and Great Northern Transmission Line, including implementing the recommendations to improve productivity to meet the control budget and schedule for Keeyask. Manitoba Hydro is to report to the Board at the next GRA whether and the extent to which it has implemented these recommendations and the projected cost savings and schedule impacts.

16. Manitoba Hydro file detailed quarterly reports for all Major New Generation and Transmission projects currently under development. These reports are to outline the proposed budget and schedule (at time of contract), budget and schedule changes and reasons for such changes, and the current forecast at completion costs and schedule based on weekly or monthly reports made by or to Manitoba Hydro. Where actual or forecast capital costs have materially increased, Manitoba Hydro is to explain how such increases will impact domestic revenue requirements and projected impacts on Manitoba Hydro's financial forecasts and targets. Specific contract costs are to be detailed for any contracts in excess of $50 million. These reports are to be provided to the Board no later than 45 days following the last day of each quarter. This Directive replaces Order 73/15 Directive 13.

17. Manitoba Hydro continue to use its existing Average Service Life methodology for calculating depreciation rates for rate-setting purposes, without reversion to Equal Life Group in the financial forecast. Manitoba Hydro shall not amortize the difference between Average Service Life and Equal Life Group for rate setting.

18. Manitoba Hydro's request to hold an alternate process for discussion of the depreciation directives as set out in Order 43/13 **BE AND IS HEREBY DENIED**.

19. Manitoba Hydro's proposed treatment of the Conawapa costs **BE AND IS HEREBY APPROVED**.

20. Manitoba Hydro's request to cease the deferral of ineligible overhead in 2023/24 and amortize the regulatory account balance over 20 years **BE AND IS HEREBY DENIED**.

21. Manitoba Hydro continue the annual deferral of $20 million in ineligible overhead. The regulatory account balance is to be amortized over 34 years.

22. Manitoba Hydro's request to begin recognizing the Bipole III Deferral Account in domestic revenues following the in-service date of Bipole III, amortized over a five-year period **BE AND IS HEREBY APPROVED**.

23. Manitoba Hydro discontinue the accounting practice of recognizing a Demand Side Management Deferral Account.

24. Manitoba Hydro exclude non-tariffable transmission costs from the allocation of export revenues in its future Prospective Cost of Service Studies.

25. Manitoba Hydro allocate the activities of building moves & safety watches, contact centre-outages, line locates, and marketing research & development costs to all customer classes other than General Service Large 30-100kV and General Service Large >100kV in future Prospective Cost of Service Studies.

26. Manitoba Hydro complete the study of the Service Drops Allocator and the Common Costs study in time for its next Prospective Cost of Service Study.

27. Manitoba Hydro calculate Revenue to Cost Coverage ratios using the alternative methodology of treating export revenues as a reduction to class costs in future Prospective Cost of Service Studies filed with the Board.

28. Manitoba Hydro provide in its next GRA filing the rationale for the declining block rate design for the General Service customer classes and an evaluation of the block thresholds and charges.

29. Manitoba Hydro file with the next GRA a time-of-use rate design proposal, including the results of consultation undertaken with General Service Large customers prior to filing the proposal with the Board.

30. Manitoba Hydro provide with the next GRA additional details on the Solar Energy Program and other net metering installations in Manitoba.

31. Manitoba Hydro's request for final approval of the Light Emitting Diode rates for the Area and Roadway Lighting class (Outdoor Lighting) approved on an interim basis in Order 79/14 **BE AND HEREBY IS APPROVED**.

32. Manitoba Hydro's requests for approval of new Light Emitting Diode rates for the Area and Roadway Lighting class (Sentinel Lighting) and for approval of the removal of the Area and Roadway Lighting (Festoon Lighting) and the Area & Roadway Lighting (Christmas Lighting) from Manitoba Hydro's rate schedule **BE AND HEREBY ARE APPROVED**.

33. Manitoba Hydro's request for endorsement of the Terms and Conditions of Option 1 of the Surplus Energy Program that were accepted on an interim basis in Order 43/13 **BE AND HEREBY IS APPROVED**.

34. Manitoba Hydro's request for final approval of all interim *ex parte* Surplus Energy Program rate Orders as set out in Tab 10 of Manitoba Hydro's Application, as well as in Appendix 17.1 of Manitoba Hydro's Written Final Argument, and issued subsequent to Manitoba Hydro's Written Final Argument and prior to the issuance of this Order **BE AND HEREBY IS APPROVED**.

35. Manitoba Hydro's request for final approval of Curtailable Rate Program *ex parte* Order 54/16 as well as any additional *ex parte* Orders in respect of the

Curtailable Rate Program issued prior to this Order **BE AND HEREBY IS APPROVED**.

36. Manitoba Hydro provide confirmation to the Board that the executed diesel zone Settlement Agreement documents have been received by the Utility and that the documents are in proper form. With this confirmation, Manitoba Hydro is to advise the Board of its intention regarding finalization of the interim diesel zone rates.

37. Manitoba Hydro file with the Board on or before August 1, 2018 the status of compliance with all outstanding and ongoing directives, along with the Utility's comments on a process for feedback and clarification on Board directives.

Board decisions may be appealed in accordance with the provisions of Section 58 of *The Public Utilities Board Act*, or reviewed in accordance with Section 36 of the Board's Rules of Practice and Procedure. The Board's Rules may be viewed on the Board's website at www.pubmanitoba.ca

THE PUBLIC UTILITIES BOARD
FOR THE MAJORITY ON ALL ISSUES:

"Darren Christle"
Secretary

"Robert Gabor, Q.C."
Chair

Certified a true copy of Order No. 59/18 issued by The Public Utilities Board

Secretary

FOR THE DISSENT ON THE ISSUE OF THE RATE INCREASE TO THE FIRST NATIONS ON-RESERVE RESIDENTIAL CUSTOMER CLASS:

"Larry Ring, Q.C."
Member

Appendix A: Glossary of Terms and Acronyms

Acronyms

Acronym	Definition	Description
C10, C13, C23	N/A	The name given to a specific Prospective Cost of Service Study allocation table related to the customer cost classification. Each table will have a unique numeric code (e.g.: C10) that is then used as reference in the PCOSS calculations made by Manitoba Hydro. C10, C13, and C23 relate to general customer services costs.
CRP	Curtailable Rate Program	A program offered to Manitoba Hydro's industrial customers that gives credits on the customer bills in exchange for commitments to curtail their load during times of system emergencies.
DSM	Demand Side Management	A common utility strategy for reducing consumer demand (frequently through energy efficiency measures) for energy in order to defer the need for new generation assets. Manitoba Hydro's Demand Side Management Plan, marketed under the Power Smart brand, involves various education and incentive programs aimed to reduce domestic consumption of both electrical and natural gas.
GCC	General Civil Contract	The single largest contract with respect to the construction of the Keeyask generating station. The GCC encompasses work related to river management, earthworks to build dams and dykes, concrete structures, and electrical and mechanical work within the powerhouse and spillway structures.
GNTL	Great Northern Transmission Line	The American portion of a new 500 kV alternating current interconnection under construction between Dorsey converter station northwest of Winnipeg and a new station near Grand Rapids, Minnesota.

Acronym	Definition	Description
GRA	General Rate Application	PUB process to review Manitoba Hydro's proposed changes to electrical or gas rates and their impacts on various customer groups.
GWh	Gigawatt-Hour	An amount of electrical energy equivalent to 1,000,000 kilowatt hours (kWh), or 1,000 megawatt hours (MWh). As an example, a typical non-electrically heated home uses 10,000 kWh per year. One GWh is enough to power 100 homes for one year.
HVDC	High-Voltage Direct Current	An electric power transmission system that uses direct current for the bulk transmission of electrical power, in contrast with the more common alternating current (AC) systems. HVDC transmission is point-to-point, as opposed to the interlaced networks that are possible with AC systems. For long-distance transmission, HVDC systems may be less expensive and suffer lower electrical losses.
IFF	Integrated Financial Forecast	Provides projections of Manitoba Hydro's financial results and position over a multi-year forecast period, typically 20 years. The Integrated Financial Forecast serves as the primary forecast to determine the need for rate increases that are necessary for Manitoba Hydro to maintain a reasonable financial position and progress towards attaining and maintaining its financial targets. The most current forecast is MH16 Update with Interim.
IFRS	International Financial Reporting Standards	Accounting standards adopted by Manitoba Hydro in April 2015 which replace Canadian Generally Accepted Accounting Principles.

Acronym	Definition	Description
kV	Kilovolt	An amount of electromotive force equivalent to 1,000 volts. A volt is unit of measure for the electromotive force, and representative of the difference of potential that would drive one ampere of current against one ohm of resistance. It is roughly analogous to pressure in a water pipe.
kW	Kilowatt	An amount of electrical power equivalent to 1,000 watts. A watt is unit of measure for electrical power, corresponding to the power in an electric circuit in which the potential difference is one volt and the current is one ampere.
kWh	Kilowatt-Hour	The basic unit of electric energy equal to one kilowatt of power supplied to, or taken from, an electric circuit steadily for one hour (e.g.: ten 100 W lightbulbs left on for 1 hour would use 1 kWh, or 1000 W for one hour). A typical home without electric heat uses about 10,000 kWh each year.
LICO	Low-Income Cut-Off	A poverty measure used by Statistics Canada that represents an income threshold below which a family is likely to devote a larger share of its income on food, shelter and clothing than the average family. LICO is calculated based on total pre-tax household income, as well as family and community sizes.
LICO-125	125% of Low-Income Cut-Off	The eligibility threshold used by Manitoba Hydro for its Affordable Energy program. LICO-125 is based on 125% of Statistics Canada's Low Income Cut-Off (LICO) threshold for the large urban centre (i.e., a community with 500,000 or more inhabitants).
MH16	Manitoba Hydro Integrated Financial Forecast 2016	The original integrated financial forecast presented by Manitoba Hydro in support of its 2017/18 & 2018/19 General Rate Application.

Acronym	Definition	Description
MH16 Update	Manitoba Hydro Integrated Financial Forecast 2016	An update to Manitoba Hydro's integrated financial forecast reflecting more current forecasts of export prices, water flow conditions, domestic loads, and economic and financial indicators.
MH16 Update with Interim	Manitoba Hydro Integrated Financial Forecast 2016	An update to Manitoba Hydro's integrated financial forecast reflecting the MH16 Update forecasts of export prices and domestic loads as well as the impact of the Public Utilities Board's interim approval of rates effective August 1, 2017.
MMTP	Manitoba-Minnesota Transmission Project	The Canadian portion of a new 500 kV alternating current interconnection under construction between Dorsey converter station northwest of Winnipeg and a new station near Grand Rapids, Minnesota.
MW	Megawatt	An amount of electrical power equivalent to 1,000,000 watts, or 1,000 kilowatts (kW). Manitoba Hydro's peak generating capability from its hydroelectric generating stations is approximately 5,200 MW.
NEB	National Energy Board	Canadian federal regulator for international electricity exports and imports.
NFAT	Needs For and Alternatives To	Extensive review of Manitoba Hydro's Preferred Development Plan by the PUB with final recommendations made to the Province of Manitoba as to which development option should proceed. Last undertaken in 2014 to review Manitoba Hydro's Keeyask, Conawapa, US Intertie, and expanded DSM project investments.

Acronym	Definition	Description
P50, P90	Probability 50%, Probability 90%	A value at which the expected outcomes have a 50% probability of being higher than the value and 50% chance of being lower than the value. A P90 value is a value for which the expected outcomes have a 90% probability of being lower and a 10% probability of being higher.
PCOSS	Prospective Cost of Service Study	An embedded cost of service study in that it is based on forecast financial costs for a single test year period from the Integrated Financial Forecast. PCOSS18 refers to the PCOSS with a test year of 2017/18, which is based on IFF16 and the methodology changes directed in Order 164/16
PV	Photovoltaic	Equipment used to generate direct current electricity from solar radiation (i.e. sunlight).

Terms

Term	Description
Arrear	An amount owing, generally from unpaid bills or a portion thereof. Arrears can lead to service disconnection.
Bipole	An electrical power transmission line, within a high voltage direct current system, having two direct current conductors in opposite polarity. Manitoba Hydro implemented a high voltage direct current system in order to economically and efficiently transmit power generated by hydroelectric stations on the Lower Nelson River to southern Manitoba.
Business Operations Capital	A category within the Capital Expenditure Forecast. Capital projects in this category relate to expenditures to renew existing assets and facilities (also referred to as "sustainment") replacements, to expand the electrical system to new customers, and to address load growth and requirements for additional capacity.
Capital Expenditure Forecast	A projection of the capital expenditures needed annually for new and replacement equipment and facilities to meet the electricity requirements in Manitoba and firm export sale commitments outside the province.
Conawapa	A potential hydroelectric generating station on the Nelson River, most recently proposed by Manitoba Hydro as part of its Preferred Development Plan in 2013 and reviewed at the NFAT in 2014. The Board recommended that Manitoba Hydro cease its development and this recommendation was accepted by the provincial government.
Conservation Rates	See Inverted Block Rates.
Control Budget	A formal budget for a capital project developed by the project team and approved by management.

Term	Description
Converter Station	A high voltage direct current (HVDC) converter station is a specialized type of substation which forms the terminal equipment for a HVDC transmission line. Converter station equipment converts alternating current to direct current, or the reverse. Manitoba Hydro currently operates, or has in construction, three northern converter stations (Henday, Radisson, and Keewatinohk) to convert from alternating current (AC) collected from nearby generating stations to direct current (DC) power for transmission. As well, Manitoba Hydro operates, or has in construction, two southern converter stations (Dorsey and Riel) to convert DC to AC for downstream customer transmission and distribution.
Corporate Value Framework	A systematic means of understanding the value of all investments in an organization. The Manitoba Hydro value framework consists of 28 value measures that span five categories: financial (including the cost of the investment), reliability, environmental, safety, and corporate citizenship. Each investment's value is assessed using these measures and the net present value is then used to determine both its independent merit and its standing among other investments competing for resources in a constrained optimization process. The value framework helps identify the optimal set of investments that deliver the greatest value to the organization while respecting funding, resource, and timing constraints.
Cost-of-Service	A process undertaken to determine the responsibilities that each customer class has for Manitoba Hydro's total revenue requirement and to assist in determining whether domestic rates are fair and reasonable.
Cost-of-Service Study	A method of allocating a utility's costs to the various classes of customers that it serves. Its purpose is to determine a fair sharing of the utility's revenue requirement among the customer classes.
Curtailable Rate Program	A program offered to Manitoba Hydro's industrial customers that gives credits on the customer bills in exchange for commitments to curtail their load during times of system emergencies.

Term	Description
Customer Class	A category of similarly situated customers. Customers are categorized into customer classes according to the characteristics of the equipment and assets that serve them as well as the characteristics of how they consume power.
"Customer" Cost Classification	A classification within the cost of service study. Utility costs that tend to vary with the number of customers. These include asset costs related to meters and service drops, as well as billing, meter reading, and customer service costs.
Customer Service	In the Cost of Service Study, customer service costs are associated with service provided to the customer after delivery of energy.
"Demand" Cost Classification	A classification within the cost of service study. Utility costs associated with consumption of electricity at peak periods and the maximum size (capacity) of facilities to serve those demands. These would generally include assets such as transmission lines and substations.
Demand Side Management	A common utility strategy for reducing consumer demand (frequently through energy efficiency measures) for energy in order to defer the need for new generation assets. Manitoba Hydro's Demand Side Management Plan, marketed under the Power Smart brand, involves various education and incentive programs aimed to reduce domestic consumption of both electrical and natural gas.
Dependable Energy	Energy that can be produced by Manitoba Hydro even during drought conditions. It is based on water levels and flows experienced in the lowest flow year on record. This includes the minimum expected generation from the hydroelectric generating stations plus continuous operation of the Selkirk and Brandon thermal generating stations, plus the minimum expected wind generation from St. Leon and St. Joseph, plus contracted imports.
Dependable Sales	Export sales made from dependable energy resources. These are also referred to as firm sales.

Term	Description
Distribution	Utility assets used to distribute lower voltage electricity to individual customers. These assets include distribution lines operating at less than 30 kV along with associated low voltage portions of substations, as well as low voltage transformers and metering.
Energy Burden	The percentage of household income that goes toward energy costs (e.g., electricity and gas).
"Energy" Cost Classification	A classification within the cost of service study. Utility costs that vary with the consumption of electricity are classified as "energy".
Energy Poverty	As defined by the Bill Affordability Working Group, energy poverty refers to circumstances in which a household is, or would be, required to make sacrifices or trade-offs that would be considered unacceptable by most Manitobans in order to procure sufficient energy from Manitoba Hydro." For the purposes of the Working Group Report, the Working Group considered a household to be energy poor if it spends more than 6% or 10% of pre-tax income on energy and also has a level of income lower than the current Low Income Cut-Off 125 ("LICO-125"), which is 25% above the Statistics Canada lower-income measurement.
Firm Sales	Export sales made from dependable energy resources.
Functionalization	The first of three main steps in a cost of service study (the others being classification and allocation) where the annual costs of a utility's assets and operations are separated according to the function performed by each asset or operation. Manitoba Hydro's cost of service study has five main functions: Generation, Transmission, Sub-Transmission, Distribution, and Customer Service.

Term	Description
Gas Available Area	Regions of Manitoba where Centra Gas Manitoba Inc. (a subsidiary of Manitoba Hydro) holds a franchise agreement with the local municipality to distribute natural gas, which is generally consumed for space and water heating. Gas available areas are generally found in the southern areas of Manitoba (mostly adjacent to the TransCanada Mainline pipeline).
General Service Large	Customer class containing predominantly industrial customers. These customers make use of customer-owned voltage transformation assets. This customer class is divided into three sub-categories, 0-30kV, 30-100kV, and >100kV, to reflect the voltage supplied to the customer by Manitoba Hydro.
General Service Medium	Customer class containing predominantly large commercial customers. These customers use Manitoba Hydro-owned transformation assets and have loads exceeding 200 kW.
General Service Small	Customer class containing predominantly small commercial customers with loads less than or equal to 200 kW. This customer class is divided into two sub-categories, Demand and Non-Demand. Demand customers pay a Demand rate based on the peak demand each month, in addition to a basic monthly charge and an energy (per kWh) charge.
Generation	Utility assets used to generate electricity. Manitoba Hydro considers all generating facilities, northern collector transmission lines, and HVDC facilities (such as Bipoles and converter stations) as generation in its cost of service studies.
Generation Outlet Transmission	Electrical conductors, and related switching and control equipment, linking electrical generators to transmission substations or converter stations.

Term	Description
Independent System Operator	An independent organization, formed at the direction or recommendation of the Federal Energy Regulatory Commission in the United States or other Canadian provincial regulator, that operates a region's electricity grid, administers the region's wholesale electricity markets, and provides reliability planning for the region's bulk electricity system.
Integrated Financial Forecast	Provides projections of Manitoba Hydro's financial results and position over a multi-year forecast period, typically 20 years. The Integrated Financial Forecast serves as the primary forecast to determine the need for rate increases that are necessary for Manitoba Hydro to maintain a reasonable financial position and progress towards attaining and maintaining its financial targets. The most current forecast is MH16 Update with Interim.
Interconnection	The physical linking of a utility's electrical network with equipment or facilities not belonging to that network. The term may refer to a connection between a utility's facilities and the equipment belonging to its customer, or to a connection between two (or more) utilities.
Inverted Block Rate	A rate design that uses a tiered pricing structure in which higher-usage customers pay an increasing marginal rate for the commodity that is consumed. The increasing pricing structure is intended to provide a price signal to customers to encourage energy efficiency. Inverted block rates are also sometimes called inverted rates or conservation rates.
Keeyask	Manitoba Hydro’s newest and fourth largest hydroelectric generating station under construction on the Nelson River. It is projected to enter service in August 2021.

Term	Description
Line Loss	While transmitting from generating stations to the end users, electricity passes through a complex transmission and distribution network, consisting of transformers, switches, and conductors. As it passes through the system, some of the energy is consumed by various system components or is dissipated due to the physical properties of the equipment. As a result, the total amount of electric energy measured at customer meters is always less than the total amount of electric energy measured at generation stations. The difference between the two is known as line loss.
Major New Generation & Transmission	Refers to capital projects that are utilized to both generate electricity and transmit this electricity to remote load centres (i.e. populated areas). Major New Generation & Transmission is a category within the Capital Expenditure Forecast that includes projects that provide significant new generation and transmission capacity and are of a substantial cost.
Marginal Value	The marginal value is the value to the Manitoba Hydro's system of deferring an increment of load growth (i.e. 1 kWh) to Manitoba Hydro's integrated system. Marginal value is determined based on each of the components of serving residential load: generation supply, bulk transmission capacity, and distribution capability.
Midcontinent Independent System Operator	A regional electricity transmission organization that assures unbiased regional grid management and open access to the transmission facilities. The Midcontinent Independent System Operator serves as a link in the safe, reliable, and cost-effective delivery of electric power across all or parts of 15 U.S. states and the Canadian province of Manitoba. It is the principal market that Manitoba Hydro exports power to.
National Energy Board	Canadian federal regulator for international electricity exports and imports.
Network Transmission	A system of interconnected electrical transmission lines that minimizes the probability of grid instability and failure. Network transmission also facilitates the exchange of electrical power amongst utilities.

Term	Description
Non-Tariffable Transmission	A sub-function in Manitoba Hydro's cost of service study that captures costs of transmission lines and substations that are not eligible to be included in the Open Access Transmission Tariff. Non-tariffable transmission includes radial transmission lines.
Off-Peak	Off-peak refers to periods when lower electricity prices are generally expected, coinciding with periods of low electricity usage. Manitoba Hydro's off-peak periods are defined as all night time hours from 11pm to 7am.
On-Peak	On-peak refers to periods when higher electricity prices are generally expected, coinciding with periods of high electricity usage. Manitoba Hydro's on-peak periods are defined as Monday to Friday (excluding Statutory Holidays) 12pm-8pm (May-October), as well 7am-11am and 4pm-8pm (November-April).
Opportunity Sales	Export sales made from surplus generation, typically hydraulic generation that is available in most water flow conditions except drought conditions.
Peak Demand	The instantaneous maximum amount of electricity required by a customer or group of customers.
Radial Transmission	Radial transmission refers to transmission lines feeding high voltage power to regions of the province using a single path without a redundant transmission line, as opposed to network transmission which provides multiple redundant paths. For example, a radial transmission line feeds the Town of Churchill.
Rate Design	The process of determining the rates charged to each customer class in order to recover the utility's revenue requirement. The cost of service study is an input to the rate design. Rates for each customer class can have basic monthly charges, demand charges, and energy rates, or a subset of these three charges.
Revenue to Cost Coverage	The ratio of class revenues and costs. Generally, the objective is to obtain a ratio close to 1 (or 100%) for each customer class.

Term	Description
Surplus Energy Program	The Surplus Energy Program is a Manitoba Hydro rate program that enables a qualifying customer to purchase surplus energy at export market prices that are determined on a weekly basis for peak, shoulder, and off-peak periods, if Manitoba Hydro has surplus energy to sell.
Test Year	The year which is the subject of the Public Utilities Board's review and approval of a rate increase. For this GRA and this Order, the Test Year is Manitoba Hydro's fiscal year beginning April 1, 2018 and concluding March 31, 2019.
Time of Use Rates	A rate design concept that varies the cost of electricity based on when it is used. The aim is to promote energy conservation and load smoothing in order to reduce overall system peak loads, thus deferring the need for new generation assets and to maximize the value of electricity exports during on-peak periods.
Transmission	Utility assets used to transmit electricity between load centres. In the cost of service study, Manitoba Hydro considers all transmission lines and high voltage portions of substations operating in excess of 100 kV as transmission. With respect to capital expenditures, transmission refers to assets operating in excess of 33 kV.
Uniform Rates	In 2001, legislation mandated uniform rates in Manitoba (also known as "postage stamp rates"). Previously, residential customers in Northern Manitoba and in rural areas paid higher rates than those in Winnipeg. Under the uniform rates legislation, the previous geographic rate zones were eliminated and the costs to serve urban customers were pooled with the costs to serve rural customers.
Water Rentals	Fees paid by Manitoba Hydro to the Provincial Government based on the amount of electricity produced from hydraulic generation.

Term	Description
Working Group	The Bill Affordability Working Group, established in response to the Board's directive in Order 73/15. The Working Group was comprised of a variety of stakeholders who represent, work with, or provide services to lower-income Manitoba Hydro customers.
Zone Of Reasonableness	An established tolerance zone around the COSS RCC target of 100% for each class. Manitoba Hydro's RCC Zone of Reasonableness currently has a range of 95 to 105 percent. A RCC ratio outside of the ZOR is one factor to be considered in the possible differentiation of rate increases.

Appendix B: Order in Council 92/17

MANITOBA

ORDER IN COUNCIL

Finance

DATE: **April 05, 2017**

ORDER IN COUNCIL NO.: **00092 / 2017**

RECOMMENDED BY: **Minister of Finance**

ORDER

1. The Public Utilities Board (the "PUB") is assigned the duty of considering capital expenditures by The Manitoba Hydro-Electric Board ("Manitoba Hydro") as a factor in reaching a decision regarding rates for services under Part IV of *The Crown Corporations Public Review and Accountability Act* to support setting rates for services in a manner that balances the interests of ratepayers and the financial health of Manitoba Hydro.

2. For the purpose of the PUB's consideration of capital expenditures as a factor in the next review of Manitoba Hydro rates for services, Manitoba Hydro shall provide to the PUB the following information:

   (a) Capital Expenditure: existing records related to planned capital expenditures, such as details on new, current committed, and proposed, planned or forecast major

capital expenditures and base/sustaining capital expenditures, including copies of contracts, current and previous cost estimates, cost overrun justifications, schedule change justifications, current and future scheduled capital expenditure commitments and forecasts;

(b) Explanatory: existing records related to project justification, such as capital project justification forms, cost-benefit analyses, business case and other supporting information related to Manitoba Hydro capital expenditures identified by the PUB, including Asset Condition Assessments for previous, current and proposed major capital expenditures and base/sustaining capital expenditures;

(c) Revenue and other: existing records related to revenues and income, such as any correspondence, agreements, term sheets, export contracts, externally commissioned or internally created reports, studies or analyses, including forecasts (capital, capital structure, financial, export, import, load and power resource).

3. Manitoba Hydro may request that information it deems to be commercially sensitive be held in confidence by PUB. The PUB shall conduct the rate review in accordance with its Rules of Practice and Procedure, including determining the access of any person to information received in confidence.

4. This Order comes into effect immediately.

AUTHORITY

The Public Utilities Board Act, C.C.S.M. c. P280, states:

Power of board to perform assigned duties
107 The board may perform duties assigned to it
...
(b) by order of the Lieutenant Governor in Council; or

and Part I, in so far as it is applicable, applies to the carrying out of duties so assigned.

BACKGROUND

1. No change in rates for services shall be made and no new rates for services shall be introduced without the approval of the PUB under Part IV of *The Crown Corporations Public Review and Accountability Act*.

2. Manitoba Hydro intends to submit a general rate application to the PUB in 2017.

Appendix C: Summary of Presenter Evidence

In the GRA hearing, the Board heard evidentiary public presentations. As with other witnesses before the Board, those giving public presentations were sworn and subject to questioning by all parties and the Board. Written public presentations were provided by members of the public who registered with the Board to give an oral presentation but who were not available for the times scheduled for oral presentations during the hearing. The written public presentations were certified by the authors.

The summary of presenter evidence below is provided in the order in which presenters appeared in front of the Board.

Consumers Coalition Ratepayer Panel

Mr. Dan Mazier

Mr. Mazier resides in the rural municipality of Elton, Manitoba, on a farm property with a primary residence as well as a farm operation of 1,000 acres and a rental home. While Mr. Mazier's electricity costs for his primary residence are essentially zero due to his investments in renewable energy, he is concerned about the effect electric rate increases will have on his farm operation and on their renters in the rental home. Mr. Mazier indicated that Manitoba Hydro's projected rate plan could make Manitoba businesses uncompetitive globally. His preference is, rather than having higher rate increases in the short-term followed by lower rate increases, to have lower rate increases over a longer period of time as this is more predictable and realistic. He also stated that ratepayers do not know where the money Manitoba Hydro receives from ratepayers goes, and expressed concern that there is a lack of transparency.

Ms. Rebecca Trudeau

Ms. Trudeau is a resident of Winnipeg. Ms. Trudeau would prefer lower rate increases for a longer period of time, because this is consistent and reliable, which allows her to have an expectation of her monthly bill charges. As she lives paycheque-to-paycheque, Manitoba Hydro's proposed rate increases would affect her ability to save a portion of her income, potentially cause her to find employment that is less fulfilling but pays more, and would give rise to anxiety and stress. Her view is that Manitobans should not spend more than 5% – 6% of their annual income on energy bills, with 10% being the upper limit. She is supportive of a program to assist lower-income Manitobans in paying their electricity bills and is willing to pay a few dollars extra each month for such a program. Ms. Trudeau also noted that she finds many of Manitoba Hydro's energy efficiency programs to not be accessible for renters.

Mr. Gordon Barton

Mr. Barton is from Anola, Manitoba. He does not agree with Manitoba Hydro's proposed rate increases and feels that forecast rate decreases in 10 years cannot be relied on as Manitoba Hydro is unable to control its money today. Mr. Barton does not believe Manitoba Hydro needs the rate increases it is seeking. As well, if Manitoba Hydro receives all of the proposed rate increases, it would be a disaster for his spending and budget and he may have to consider changing where he lives. Mr. Barton's view is that rates should be increased slowly, over a longer period of time, and at a steady pace over time. Mr. Barton believes that Manitobans should not have to spend more than 3% of their income on energy bills.

Ms. Lyndie Bright

Ms. Bright lives in Winnipeg, Manitoba. She explained that she has cut back on her energy bills by lowering the heat in her apartment to 65 degrees Fahrenheit. When rates are increased, and because she is on a fixed income, Ms. Bright has to look at what in her budget she can cut back on or ways she can reduce consumption at home. This adds more stress for her. Ms. Bright advised that, if there are rate increases, she would also like there to be transparency on Manitoba Hydro's part to show what they are doing to keep rates down as much as possible. Ms. Bright's preference is for lower rate increases over a longer period of time. She would also like to see more energy efficiency programs for renters.

Ms. Emily Mayham

Ms. Mayham resides in Winnipeg, Manitoba with her four children. She finds paying her utility bills challenging at current rates. She gave evidence that, if Manitoba Hydro receives its proposed rate increases, she will have to cut her food budget by decreasing the amount of groceries she purchases and buying cheaper and generally less healthy food. She will also have to reduce the extent of her social activities with her children. In addition, Ms. Mayham explained that she would not be able to save money or have an emergency fund. Her preference is for lower rate increases over a longer period of time because it is predictable, allowing her to adjust and adapt as needed. Her view is that there should be a sliding scale based on income for utility rates. Ms. Mayham would like to see more energy efficient programs targeted to renters. Ms. Mayham also indicated that she would like to see more accountability and transparency from Manitoba Hydro as she feels consumers are being held responsible for financial irresponsibility or mismanagement by the Utility.

Oral Public Presentations

Mr. Jonathan Alward, Canadian Federation of Independent Business

Based on feedback received from its Manitoba members, the Canadian Federation of Independent Business expressed concern that the proposed 7.9% rate increases would severely affect the global competitiveness and provincial economic contributions of business and their employees, as energy costs are already among the top three cost pressures faced by Manitoba small business owners. Business owners surveyed said that the rate increases may significantly increase their electricity costs, increase prices of their products or services, delay investments in their business, or may even result in future hiring plans being put on hold and reductions in staff or staff hours. The Canadian Federation of Independent Business would like Manitoba Hydro to further its efforts to curb operating spending first instead of pursing significant rate increases.

Mr. Tim Sale

Mr. Sale identified concerns with inaccurate forecasts and cost estimates on the part of Manitoba Hydro, the difficult market for the Utility with the economics and improved technologies of wind and solar energy, and low export prices for Manitoba's hydroelectric power. He recommends that the Utility stop pursuing firm export contracts, start measures to increase electrical energy consumption in Manitoba, work with Manitoba businesses and property owners to use renewable technologies, and work with Saskatchewan to provide that province with "green" energy.

Ms. Bonnie Sheppard

Ms. Sheppard expressed her belief that Manitoba Hydro has been mismanaged for over a decade and is now asking consumers to bail out the Utility through rate increases. She suggested that Manitoba Hydro correct failures within its organization before rates are increased in order to bring an end to bad decisions, poor management, and fiscal irresponsibility, which she believes will eventually result in privatization of the Crown Corporation.

Mr. Haimana Romana

Mr. Romana spoke in opposition to a rate increase, but stated that, if an increase is approved, it should be only half of the requested amount. He questioned the need for a rate increase and suggested that ratepayers should not have to pay for the blunders of the Utility, including capital project cost overruns and increased debt, at a time when other organizations are having their budgets and funding cut. Mr. Romana expressed concern about accountability on the part of Manitoba Hydro, and questioned whether privatization is the ultimate goal.

Mayor Chris Goertzen, Association of Manitoba Municipalities

Mayor Goertzen spoke on behalf of the Association of Manitoba Municipalities to voice concerns of municipalities regarding the proposed rate increase. In particular, Mayor Goertzen raised concerns about the negative impact on the operations of public recreation facilities and municipal operating budgets due to limited means to raise funds to offset rising costs, including in the context of the provincial government's freeze on municipal operating funds. He stated that the result will be increased user fees and reduced services.

Dr. Garland Laliberte, Bipole III Coalition

Dr. Laliberte gave evidence that, in his view, the current Manitoba Hydro load forecast artificially and significantly inflates projections of future domestic revenue by approximately $2.3 billion over a future 20-year period. Dr. Laliberte recommended that the Board direct Manitoba Hydro to revise its load forecast downward to reflect recent historic experience, price elasticity impacts, and insights from other North American jurisdictions.

Dr. Laliberte estimated that the additional impact on domestic revenue as a result of the legislated demand side management target for Efficiency Manitoba is approximately $5.1 billion over a 20-year future period. In addition, Manitoba Hydro will also have to cover additional program delivery costs. Dr. Laliberte therefore concluded that the combined cumulative impact of load forecast choices and the more aggressive demand side management plan mandated by *The Efficiency Manitoba Act* is $7.4 billion over the next 20 years. Dr. Laliberte recommended that the Board direct Manitoba Hydro to conduct an analysis of the impact on its balance sheet of the Government's legislated plan for electric demand side management and report its findings at the next GRA.

Dr. Laliberte submitted that Manitoba Hydro should devote more effort to making use of its post-Keeyask energy glut, such as through advancing electric transportation and promoting a Western Canadian transmission grid.

Mr. John Greenaway

Mr. Greenaway voiced his concern with Manitoba Hydro rate increases over the years as the increases are above the cost of living and likely also above average employment wage increases. He suggested that, rather than over a three-year period, Manitoba Hydro be given a 21% rate increase over a seven-year period.

Mr. Chris Mravinec, Canadian Union Of Public Employees Local 998

Mr. Mravinec appeared on behalf of the Canadian Union of Public Employees ("CUPE"), Local 998, which represents Manitoba Hydro employees. Mr. Mravinec stated that the members of CUPE Local 998 have experienced unrealistic workloads and increased stress due to staff reductions at Manitoba Hydro. He stated that arbitrary targets for staff reductions are not feasible to operations and have a negative effect on employee well-being, safety, and customer service levels. At the same time, Manitobans are facing futures of wage increases at levels lower than inflation and rate increases at the level of 7.9% will negatively affect consumers. Mr. Mravinec recommended a balancing of interests and suggested that, rather than granting the full rate increase sought, the Board recommend that Government pursue new market opportunities within Manitoba through increased electrification, as well as in other provinces.

Mr. Allan Ciekiewicz

Mr. Ciekiewicz presented his view that ratepayers are burdened with Manitoba Hydro's capital development for the purpose of supporting Manitoba Hydro's export business. He indicated that this burden is heightened given the risk and possible repercussions of a drought. Mr. Ciekiewicz suggested that the construction of Keeyask and Bipole III should have been halted, with the savings used to finance the construction of efficient

gas turbines in order to ensure a secure supply of energy for Manitobans. He also stated that rate increases above the rate of inflation are unacceptable.

Mr. Dennis Woodford, Bipole III Coalition

Mr. Woodford expressed his view that Manitoba Hydro has to be more responsive to unexpected external conditions that have and continue to occur. Mr. Woodford stated that Manitoba Hydro had ample opportunity to reassess the need for Keeyask and to stop construction, especially in light of the aggressive Demand Side Management program that it was proposing in 2016 and a soft U.S. export market. Additionally, Mr. Woodford identified that the disruptive technology of solar power may lower the domestic demand for energy produced by Keeyask. Manitoba Hydro also failed to act on opportunities to limit the project costs for Bipole III, which was not approved by the Board at the NFAT, and has also made decisions that have increased the costs.

By contrast, Mr. Woodford observed that there is a potential for a significant increase in the use of electric vehicles, which would increase domestic usage of Manitoba Hydro's surplus electricity and generate higher revenues for Manitoba Hydro than lower priced exports.

As a result, Mr. Woodford recommended that the Manitoba Hydro grid should be changed to "open access" allowing competitive marketing of electricity between consumers and producers of electricity to provide needed competition and address Manitoba Hydro's inability to adjust quickly to changing times. Furthermore, the Manitoba Hydro debt for generation and transmission should be assumed by the provincial government and not the ratepayers.

Mr. Murray Taylor, Business Council of Manitoba

Mr. Taylor, appearing on behalf of the Business Council of Manitoba, expressed his concerns regarding the current and future financial condition of Manitoba Hydro, including growing debt and the need to incur additional borrowing costs as rates are insufficient to pay for ongoing operating costs. Mr. Taylor observed that Manitoba Hydro's rates are among the lowest relative to other locations in Canada and the U.S. and questioned why rates in Manitoba are held below the costs of running the Utility. Mr. Taylor identified risks in what he sees as optimistic forecasts of Manitoba Hydro's forecast net income levels, as well as in the likelihood that interest rates will increase from the current record-low levels.

Mr. Taylor also advanced that, since the 2008 financial crisis, credit agencies have become more rigorous and continue to tighten their analysis of each entity that they examine. As a result, Mr. Taylor stated that showing leadership to increase rates substantially for the next two years will be important.

Mr. Taylor appealed to the Board to consider a path to ensuring financial stability and the lowest costs over future years collectively, and not be so focused on near-term rates at the expense of overall future costs for Manitobans. In the view of the Business Council of Manitoba, such considerations are well represented by the proposal made by Manitoba Hydro.

Ms. Andrea McLandress, Mining Association of Manitoba

Ms. McLandress presented evidence on behalf of the Mining Association of Manitoba. She testified that members of the Mining Association of Manitoba are typically the largest private employers and economic drivers in their regions. Together, Manitoba's mining operators have over 3,100 employees, largely located in the North and in rural communities, and make over $130 million in total annual purchases from Manitoba suppliers. Moreover, Manitoba's mining operators make annual electricity purchases in excess of $82 million, which for the large northern operators, represents approximately 10% to 15% of annual cash requirements.

Mining companies compete in an intense global market and are heavily affected by the cost of labour, transportation, regulations, and energy. With the exception of low electricity rates, these mining operating costs are generally higher in Manitoba than in other jurisdictions. Therefore, eroding Manitoba's only competitive advantage in mining (i.e., low electricity rates) could be disastrous for the entire mining sector of Manitoba's economy.

According to Ms. McLandress, the importance of the mining industry to the economy of Northern Manitoba makes it a vital public interest consideration when reviewing Manitoba Hydro's electric rate increase proposal. Ms. McLandress therefore advocated for a 0% rate increase as the only electric rate increase that would be acceptable to Manitoba's mining operators.

Mr. Michael Velie, International Brotherhood of Electrical Workers, Local 2034

Mr. Velie testified on behalf of the International Brotherhood of Electrical Workers, Local 2034. He gave evidence that, largely as a result of the Voluntary Departure Program and workforce reductions done numerically without planning for future operational needs, Manitoba Hydro's employees are feeling pressured to accomplish more and more work with fewer resources, resulting in shortcuts that are dangerous to both Manitoba Hydro's employees and customers. Additionally, Mr. Velie stated that Manitoba Hydro's restricted ability to employ sufficient internal resources will directly affect the reliability of the electrical service provided to Manitobans. Mr. Velie also maintained that Manitoba Hydro continues to increase its use of external contractors, which he identified as being two to three times more expensive than Utility employees.

Mr. Velie expressed support for Manitoba Hydro's 7.9% rate increase request for a period of one year to help Manitoba Hydro overcome its manpower shortage and to reduce safety risks to persons and property. However, Mr. Velie urged the Board to give Manitoba Hydro the direction it needs to curtail any further reductions in staffing levels and explore creative options for reducing the exorbitant costs of engaging contractors

Mr. Chris Hornby, Interlake Recreation Practitioners

Mr. Hornby gave evidence that there are approximately 100 recreation facilities across the Interlake and that utility costs represent about 25% to 30% of total expenses. Given the magnitude of Manitoba Hydro's planned rate increases for the next five years, the Interlake Recreation Practitioners Association is strongly against the proposed rate increase. Together with recent provincial funding cuts to community recreation and services programs, Manitoba Hydro's proposed rate increase plan will make sustaining

recreation programs very difficult. Moreover, Mr. Hornby estimated that between 20 and 50 recreation facilities in the region could be expected to close as a result of Manitoba Hydro's proposed five-year rate increase plan.

Mr. Hornby also noted that Manitoba Hydro recently cut long-standing advertising at rural arenas and curling clubs. While Manitoba Hydro is still funding many local festivals, events, and non-profits, Manitoba Hydro now advertises with large private organizations such as the Winnipeg Jets.

Manitoba Industrial Power Users Group Panel Presentation

Mr. Dale Bossons, Chair of the Manitoba Industrial Power Users Group

The Manitoba Industrial Power Users Group is an association of 12 major industrial companies that belong to the three Manitoba Hydro General Service Large customer classes. On behalf of the members of the Manitoba Industrial Power Users Group, Mr. Bossons gave evidence that the difference between Manitoba Hydro's proposed 7.9% rate increase plan, compared to the previous 3.95% baseline scenario, is almost $850 million higher for the General Service Large customer classes over the next 10 years. These additional costs will affect decision-making regarding future operational investments and, for some, threaten their very future.

While the members of the Manitoba Industrial Power Users Group are not opposed to rate increases, Mr. Bossons clarified that it is important for Manitoba Hydro's revenue requirement to be based on true costs, that rates are fairly distributed across customer classes, and that options to manage electricity bills

are offered and expanded. Furthermore, member companies are seeking stable and predictable energy rates that will allow them to manage their businesses and plan for their futures.

Mr. Bossons also stated that despite other operational challenges associated with Manitoba, low energy costs was the reason why member companies initially invested in this province. Additionally, there is little opportunity to pass along Manitoba Hydro's rate increases as member companies produce globally-traded commodities.

Mr. Michael St. Pierre, Chemtrade Logistics

Mr. St. Pierre explained that Chemtrade Logistics' ("Chemtrade") facility in Brandon has operated for 50 years and is the largest sodium chlorate plant in the world. For the Brandon plant, electrical power accounts for 70% of Chemtrade's variable plant manufacturing costs. Chemtrade's Brandon facility consumes approximately 5% of the province's electrical load and provides Manitoba Hydro with over $70 million in annual revenues. As a result, Chemtrade estimates that, for the coming year, Manitoba Hydro's proposed 7.9% rate increase would correspond with a $5.6 million increase in costs.

Chemtrade's decisions to further invest and grow the Brandon facility are now being re-evaluated, including due to announcements in other competing jurisdictions which will have either no or modest electric rate increases for 2018. While Chemtrade has publicly announced an additional $50 million investment in its Brandon facility, the company is finding it difficult to proceed in light of Manitoba Hydro's planned rate increases.

Mr. St. Pierre testified that Manitoba Hydro's significant and multiple rate increases will drive industry out of the province, thus decreasing baseload electricity demand and placing even more burden on those who live and work in Manitoba. Mr. St. Pierre insisted that electricity rates must be kept as low as possible to ensure a relative cost advantage for industry and to offset geographic disadvantages.

Mr. Darren MacDonald, Gerdau Long Steel North America

Mr. MacDonald gave evidence on behalf of Gerdau Long Steel North America ("Gerdau"), which currently operates 20 facilities in North America and 60 steel mills worldwide. Gerdau's facility in Selkirk makes products from recycled steel. Gerdau employs 436 people in Selkirk, with an additional 300 employees at downstream locations. Gerdau's Selkirk operations also use over 721 Manitoba vendors.

Mr. MacDonald testified that the Selkirk facility has annual electricity costs of $8 million. Gerdau has no ability to pass through incremental costs to customers as its products are traded globally. As a result of increasing electricity costs and the potential carbon tax impact, Gerdau is concerned about the Selkirk facility's competitiveness and cost structure relative to its other North American facilities. The impact of Manitoba Hydro's rate increases may cause Gerdau to limit investments made into its Selkirk facility and to shift production to other facilities. In 2007, for example, Gerdau shut down a steel mill in New Jersey, mainly as a result of high electricity cost forecasts.

Mr. MacDonald expressed support for reduced rate increases (e.g., 3.46%), reduced payments to Government, and maintaining a 20-year plan for Manitoba

Hydro to reach a 25% equity level. Manitoba Hydro should develop additional programs or rate options that would allow customers to further manage their electricity costs.

Mr. Gerald Samuel, Koch Fertilizer Canada

As Mr. Samuel explained in his presentation, the Koch Fertilizer Canada ("Koch") facility in Brandon produces anhydrous ammonia, urea, and other fertilizer products. Koch's Brandon facility provides employment for over 215 people and over 1,000 contractors, and is part of a network of five Koch fertilizer plants in North America. As electricity and natural gas are used as process feedstock, Koch has minimal opportunities to reduce its electric load. Mr. Samuel stated that Manitoba Hydro's proposed rate increase plan will cost Koch over $20 million in the next 10 years.

Mr. Samuel testified that the Brandon facility needs to remain competitive relative to the internal rate of return of Koch's other facilities. Together with the implementation of a carbon tax and federal air pollution regulations, Manitoba Hydro's proposed electric rate increases will directly affect Koch's competitiveness and will have an adverse impact on the long-term viability of the Koch Brandon plant.

Mr. Morgan Curran-Blaney, Maple Leaf Foods

Mr. Curran-Blaney testified that Maple Leaf Foods' ("Maple Leaf") operations in Manitoba employ approximately 4,000 people and represent approximately $753 million in direct economic benefits to Manitoba ($1.25 billion in indirect benefits). Its Brandon facility produces chilled pork products for the Japanese market,

which is labour and energy intensive. Maple Leaf's electricity costs for the Brandon facility are approximately $4.6 million annually (or roughly 7% of its total budget overhead costs).

Mr. Curran-Blaney gave evidence that one of the few advantages of being located in Manitoba is low electricity rates. Manitoba Hydro's proposed rate increase plan will have a $4 million impact to Maple Leaf's operations in Manitoba over the next five years - a $2 million increase for the Brandon facility alone. Since Maple Leaf operates in a commodity based market, cost increases cannot be passed on to customers. Consequently, Maple Leaf estimates that in the short term, Manitoba Hydro's electric rate increases will likely lead to reductions in discretionary spending, employee headcount, capital spending, and community donations. In the long term, Maple Leaf may scale down the work done in Brandon or look at alternate sources of power generation in order to reduce grid electricity costs.

Mr. Benoit Lentz, Roquette

Mr. Lentz presented evidence that Roquette, a France-based family-owned company that produces specialty foods around the world, decided in 2017 to invest in a new $400 million pea processing facility in Portage la Prairie. As part of its investment decision, Roquette assessed its possible options using criteria that included a reliable, sustainable, and competitive electricity source. This is because, after raw input materials, electricity is, by far, Roquette's highest production cost. As a result, Manitoba's low and stable electricity costs represented an opportunity to compete against competitors located in jurisdictions with a higher carbon energy mix. In making their final investment decision, Roquette considered Manitoba Hydro's previous 3.95%

electric rate increase plan on the understanding that future rate increases would likely be between 0% and 3.95%.

Mr. Lentz stated that Manitoba Hydro's proposed 7.9% rate increase plan will significantly affect the operation and profitability of Roquette's Portage la Prairie facility. The rate increases would also undermine the Manitoba advantage of reliable and competitive electricity supply. In addition, Manitoba Hydro's rate increase plan would cause Roquette to be less likely to make further investments in Manitoba.

Dr. John Gray

Dr. Gray stated that Manitoba Hydro's proposed rate increases would have a disproportionate impact on electric heating customers. In Dr. Gray's view, Manitoba Hydro's illustrative residential electric heat rate is insufficient as it only provides minimal rate relief and pits one set of customers against another. Dr. Gray also expressed concern that Manitoba Hydro's proposed 7.9% rate increase plan will have a significant impact on the budgets of Manitobans, which are already stretched. As well, Manitoba Hydro's five-year rate plan will affect the economy in terms of job losses, reductions in consumer spending, and increased inflation.

In the short term, Dr. Gray suggested that there will be little opportunity for customers to reduce their electricity consumption but that in the long term, Manitoba Hydro's electricity sales will be significantly affected. In Dr. Gray's opinion, Manitoba Hydro under-estimates the revenue impacts of its rate increase plan.

To address Manitoba Hydro's financial situation, Dr. Gray stated that Manitoba Hydro has a huge opportunity to support electric cars, which would help increase domestic revenues, and could divest some its non-core assets such as Centra Gas.

Certified Written Public Presentations

Manitoba School Boards Association

The Manitoba School Boards Association represents Manitoba's 38 public school boards. For the 2016/17 school year, the total annual electricity costs of all 38 member school boards were $28.4 million. Manitoba Hydro's proposed rate increases over the next six years would result in additional costs of $16.4 million.

School boards are publicly funded and any additional school operation costs need to be paid by local taxpayers. As many taxpayers are also Manitoba Hydro ratepayers, Manitoba Hydro's proposed rate plan will result in a far greater personal investment from the average ratepayer. These increases would be in addition to the direct increases in the personal or business electric bills of Manitoba Hydro's ratepayers.

Given the anticipated level of impact of Manitoba Hydro's rate increase plan on school boards, and since school boards are restricted from incurring deficits or overruns, the Manitoba School Boards Association has limited options available to absorb significant increases in energy costs. As a result, reductions to the level of programs, supports, and services provided are likely.

David Sattler, Portage Regional Recreation Authority

The Portage Regional Recreation Authority is a non-profit corporation responsible for the provision of recreation and leisure facilities as well as programs for the benefit of citizens in the Portage la Prairie region. The Portage Regional Recreation Authority believes that Manitoba Hydro needs to look at other options to repair its financial position that do not involve levying a 70% increase on electricity costs over the next seven years.

Manitoba Hydro's potential annual electricity rate increases of 7.9% until 2024 are of concern to the Portage Regional Recreation Authority. There are significant electricity costs associated with the operation of recreation facilities. Manitoba Hydro's 7.9% rate increase plan will increase the Portage Regional Recreation Authority's annual electricity costs from $265,900 in 2017 to $452,760 by 2024.

To absorb Manitoba Hydro's rate increases, ignoring any other inflationary pressures or cost increases, the Portage Regional Recreation Authority would be required to increase rental fees for ice, pool, and meeting rooms. As the facility user fee increases would ultimately be combined with increases in the facility users' home utility bills, Manitoba Hydro's proposed rate plan will result in fewer individuals being financially able to participate in recreation activities that Manitobans have come to enjoy.

Josh Brandon, Social Planning Council of Winnipeg

If Manitoba Hydro's 2018/19 rate increase proposal is approved, it would mark the largest rate increase in a generation and would mean that many low-income Manitobans would be forced to choose between keeping their power on and paying for other basic necessities. Furthermore, the Manitoba Hydro Board has indicated that the 2018/19 proposed rate increase will be the first in a series of large rate increases that would raise the price of electricity by 60% by 2024. This would risk the affordable energy advantage that Manitobans have enjoyed for many years.

The Board should consider what impacts these proposed rate increases will have on the economy, on Manitoba households, and especially on low-income Manitobans. The Manitoba Government should also consider its role in protecting residents from unaffordable price increases, which would intensify energy poverty and act as a drain on the Manitoba economy. Alternative options are available that would preserve

Manitoba's affordable energy advantage and benefit all Manitobans. These options would include reducing the need for new large-scale generation, distributing the rate increases differently among the different customer classes, and the implementation of a low-income electric rate affordability program. The Social Planning Council of Winnipeg also recommends that the rate burden of any energy poverty reduction measure should be shared among all customer classes since all customers benefit from Manitoba's shared energy resources and all must therefore pay the costs required to ensure that these remain affordable for everyone.

Appendix D: Appearances

PARTY	LEGAL COUNSEL
The Public Utilities Board	Bob Peters, Dayna Steinfeld
Manitoba Hydro	Patricia Ramage, Odette Fernandes, Helga Van Iderstine, Janet Mayor, Doug Bedford, Marla Boyd, Matthew Ghikas, Brent Czarnecki
Independent Expert Consultants	William Haight, William Gardner, Kimberley Gilson
Assembly of Manitoba Chiefs	Senwung Luk, Corey Shefman
Business Council of Manitoba	Kevin Williams, Douglas Finkbeiner, Carrie Ho
Consumers Coalition	Byron Williams, Katrine Dilay
Representatives of the General Service Small & General Service Medium Customer Classes and Keystone Agricultural Producers	Christian Monnin
Green Action Centre	Bill Gange, David Cordingley Dr. Peter Miller, Coordinating Member
Manitoba Industrial Power Users Group	Antoine Hacault
Manitoba Keewatinowi Okimakanak Inc.	George Orle Q.C. Kelvin Lynxleg, Executive Director
Winnipeg (City of)	Daryl Ferguson

Appendix E: Parties of Record and Hearing Witnesses

PARTY	WITNESSES
Manitoba Hydro	**Policy Panel** Kelvin Shepherd, President and Chief Executive Officer, Manitoba Hydro; Jamie McCallum, Vice-President, Finance & Strategy, Manitoba Hydro; **Revenue Requirement Panel** Jamie McCallum, Vice-President, Finance & Strategy, Manitoba Hydro; Sandy Bauerlein, Corporate Controller, Corporate Controller Division, Finance & Strategy, Manitoba Hydro; Liz Carriere, Manager, Strategic & Financial Planning Department, Manitoba Hydro; David Cormie, Director, Wholesale Power and Operations Division, Manitoba Hydro; Terry Miles, Director, Power Planning, Manitoba Hydro; Lois Morrison, Director, Marketing and Sales, Marketing and Customer Service, Manitoba Hydro; Gerald Neufeld, Director, Transmission Planning and Design Division, Manitoba Hydro; Chuck Steele, Director, Engineering & Construction, Manitoba Hydro;

Susan Stephen, Treasurer, Manitoba Hydro;

David Swatek, Manager, System Planning Development, Manitoba Hydro;

Hal Turner, Director, Generation Asset Management, Manitoba Hydro;

Joel Wortley, Director, Strategic Business Integration, Finance & Strategy, Manitoba Hydro;

Greg Barnlund, Director, Rates & Regulatory Affairs, Manitoba Hydro;

Cost of Service, Rate Design, and Bill Affordability Panel

Greg Barnlund, Director, Rates & Regulatory Affairs, Manitoba Hydro;

Lois Morrison, Director, Marketing and Sales, Marketing and Customer Service, Manitoba Hydro;

Paul Chard, Director, Customer Care, Manitoba Hydro;

Colleen Galbraith, Manager, Bill Affordability Department, Manitoba Hydro;

Dr. Gregory Mason, Senior Consultant, Prairie Research Associates;

	Major Capital Projects Panel Lorne Midford, Vice-President, Generation & Wholesale, Manitoba Hydro;
	David Cormie, Director, Wholesale Power and Operations Division, Manitoba Hydro;
	Glenn Penner, Director, Transmission Construction and Line Maintenance, Manitoba Hydro;
	Dave Bowen, Project Director, Keeyask Project, Generation & Wholesale, Manitoba Hydro;
	Jeff Strongman, Business Manager, Keeyask Project Division, Manitoba Hydro;
	Alastair Fogg, Manager, Converter Stations Commercial & Controls Department, Manitoba Hydro;
Assembly of Manitoba Chiefs	Philip Raphals, Executive Director, Helios Centre;
Business Council of Manitoba	Murray Taylor, Chair of Fiscal Issues Committee, Business Council of Manitoba;
Consumers Coalition	Pelino Colaiacovo, Managing Director, MPA Morrison Park Advisors Inc.;
	Dr. Wayne Simpson, Professor, Department of Economics, University of Manitoba;
	Dr. Janice Compton, Assistant Professor, Department of Economics, University of Manitoba;

	William O. Harper, President, Econalysis Consulting Services;
	Thor Hjartarson, Managing Partner and Chief Executive Officer, METSCO Energy Solutions Inc.;
	Alexander Bakulev, Vice-President, Strategy and Assets, METSCO Energy Solutions Inc.;
	Dmitry Balashow, Director, Utilities Strategy and Economic Regulation, METSCO Energy Solutions Inc.;
	Dan Mazier;
	Rebecca Trudeau;
	Gordon Barton;
	Lyndie Bright;
	Emily Mayham;
Representatives of the General Service Small & General Service Medium Customer Classes and Keystone Agricultural Producers	A.J. Goulding President, London Economics International; LLC.;
	Jerome Leslie, Consultant, London Economics International; LLC.;
Green Action Centre	Paul Chernick, President, Resource Insight, Inc.;

Manitoba Industrial Power Users Group	Pelino Colaiacovo, Managing Director, MPA Morrison Park Advisors Inc.; Patrick Bowman, Principal, InterGroup Consultants Ltd.; Cameron F. Osler, Chair/Principal/Senior Consultant, InterGroup Consultants Ltd.; Gerry Forrest, Management Consultant, Forkast Municipal and Regulatory Consulting;
Manitoba Keewatinowi Okimakanak Inc.	(No Witnesses)
Winnipeg (City of)	Tyler Markowsky, Economist, City of Winnipeg;
Independent Expert Consultants	Dr. Adonis Yatchew, Professor, Department of Economics, University of Toronto; Kathleen A. Kelly, Vice President and Principal Consultant, Daymark Energy Advisors; Dr. Suman Gautam, Economist and Senior Consultant, Daymark Energy Advisors; Daniel E. Peaco, Principal Consultant, Chairman, and Past President, Daymark Energy Advisors; Douglas A. Smith, Managing Consultant and Treasurer, Daymark Energy Advisors; Kieran Flanagan, Managing Director, MGF Project Services;

Campbell Adams, Chartered Quantity Surveyor, MGF Project Services;

Ryan Devereux, Professional Quantity Surveyor, MGF Project Services;

Valerie Musfelt, Lead Scheduler, MGF Project Services;

Les Brand, Director and Principal Consultant, Amplitude Consultants;

Jim Potter, Transmission Group Manager/Senior Engineer, Stanley Consultants;

Duane Phillips, Constructability Lead, Stanley Consultants;

Dan Campbell, Manager Hydro Projects, Principal, Klohn Crippen Berger.

TAB 2

Law Society of British Columbia *Appellant*

v.

Trinity Western University and Brayden Volkenant *Respondents*

and

Lawyers' Rights Watch Canada, National Coalition of Catholic School Trustees' Associations, International Coalition of Professors of Law, Christian Legal Fellowship, Canadian Bar Association, Advocates' Society, Association for Reformed Political Action (ARPA) Canada, Canadian Council of Christian Charities, Canadian Conference of Catholic Bishops, Canadian Association of University Teachers, Law Students' Society of Ontario, Seventh-day Adventist Church in Canada, BC LGBTQ Coalition, Evangelical Fellowship of Canada, Christian Higher Education Canada, British Columbia Humanist Association, Egale Canada Human Rights Trust, Faith, Fealty & Creed Society, Roman Catholic Archdiocese of Vancouver, Catholic Civil Rights League, Faith and Freedom Alliance, Canadian Secular Alliance, West Coast Women's Legal Education and Action Fund and World Sikh Organization of Canada *Interveners*

Law Society of British Columbia *Appelante*

c.

Trinity Western University et Brayden Volkenant *Intimés*

et

Lawyers' Rights Watch Canada, National Coalition of Catholic School Trustees' Associations, International Coalition of Professors of Law, Alliance des chrétiens en droit, Association du Barreau canadien, Société des plaideurs, Association for Reformed Political Action (ARPA) Canada, Canadian Council of Christian Charities, Conférence des évêques catholiques du Canada, Association canadienne des professeures et professeurs d'université, Société des étudiants et étudiantes en droit de l'Ontario, Église adventiste du septième jour au Canada, BC LGBTQ Coalition, Alliance évangélique du Canada, Christian Higher Education Canada, British Columbia Humanist Association, Égale Canada Human Rights Trust, Faith, Fealty & Creed Society, Roman Catholic Archdiocese of Vancouver, Ligue catholique pour les droits de l'homme, Faith and Freedom Alliance, Canadian Secular Alliance, West Coast Women's Legal Education and Action Fund et World Sikh Organization of Canada *Intervenants*

Indexed as: Law Society of British Columbia *v.* Trinity Western University

2018 SCC 32

File No.: 37318.

2017: November 30, December 1; 2018: June 15.

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

Répertorié : Law Society of British Columbia *c.* Trinity Western University

2018 CSC 32

N° du greffe : 37318.

2017 : 30 novembre, 1er décembre; 2018 : 15 juin.

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Law of professions — Barristers and solicitors — Law society — Approval of law school — Law society denying approval to proposed law school with mandatory covenant prohibiting sexual intimacy except between married heterosexual couples — Whether law society entitled under its enabling statute to consider admissions policy and to hold referendum of members in deciding whether to approve proposed law school — Law Society Rules, r. 2-27 — Legal Profession Act, S.B.C. 1998, c. 9, s. 13.

Administrative law — Judicial review — Standard of review — Law society — Administrative decision engaging Charter protections — Law society denying approval to proposed law school with mandatory religiously-based covenant — Application for judicial review challenging decision on basis that it violated religious rights — Whether law society's decision engages Charter by limiting freedom of religion — If so, whether decision proportionately balanced limitation on freedom of religion with law society's statutory objectives — Whether law society's decision reasonable — Application of Doré/Loyola framework — Canadian Charter of Rights and Freedoms, ss. 1, 2(a) — Legal Profession Act, S.B.C. 1998, c. 9, s. 3.

Trinity Western University ("TWU") is an evangelical Christian postsecondary institution that seeks to open a law school that requires its students and faculty to adhere to a religiously-based code of conduct, the Community Covenant Agreement (Covenant), which prohibits "sexual intimacy that violates the sacredness of marriage between a man and a woman". The Covenant would prohibit the conduct throughout the three years of law school, even when students are off-campus in the privacy of their own homes. The Law Society of British Columbia ("LSBC") is the regulator of the legal profession in British Columbia. The Benchers of the LSBC voted to hold a referendum of its members on the issue of the approval of TWU's proposed law school and agreed to be bound by the results. The members voted to implement a resolution declaring that TWU's proposed law school was not an approved faculty of law because of its mandatory Covenant. The Benchers therefore passed the resolution. TWU and V, a graduate of TWU's undergraduate program who would have chosen to attend TWU's proposed law school, successfully brought judicial review proceedings to the Supreme Court of British Columbia, arguing that the LSBC's decision not

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit des professions — Avocats et procureurs — Barreau — Reconnaissance d'une faculté de droit — Barreau refusant d'agréer une faculté de droit proposée dont la fréquentation est assujettie à un covenant obligatoire interdisant toute intimité sexuelle sauf au sein des couples hétérosexuels mariés — En vertu de sa loi habilitante, le barreau peut-il examiner une politique d'admission et tenir un référendum auprès de ses membres pour décider s'il y a lieu d'agréer la faculté de droit proposée? — Law Society Rules, art. 2-27 — Legal Profession Act, S.B.C. 1998, c. 9, art. 13.

Droit administratif — Contrôle judiciaire — Norme de contrôle — Barreau — Décision administrative mettant en cause les protections conférées par la Charte — Barreau refusant d'agréer une faculté de droit proposée dont la fréquentation est assujettie à un covenant obligatoire fondé sur des croyances religieuses — Demande de contrôle judiciaire de cette décision au motif qu'elle porte atteinte aux droits religieux — La décision du barreau fait-elle intervenir la Charte en restreignant la liberté de religion? — Dans l'affirmative, la décision met-elle en balance de façon proportionnée la restriction imposée à la liberté de religion et les objectifs qui incombent au barreau en vertu de la loi? — La décision du barreau est-elle raisonnable? — Application du cadre d'analyse établi dans les arrêts Doré et Loyola — Charte canadienne des droits et libertés, art. 1, 2a) — Legal Profession Act, S.B.C. 1998, c. 9, art. 3.

Trinity Western University (« TWU »), un établissement d'enseignement postsecondaire chrétien évangélique, souhaite ouvrir une faculté de droit exigeant que ses étudiants et les membres de son corps professoral adhèrent à un code de conduite fondé sur des croyances religieuses, le *Community Covenant Agreement* (*Covenant*), qui interdit toute « intimité sexuelle qui viole le caractère sacré du mariage entre un homme et une femme ». Le *Covenant* interdirait cette conduite pendant les trois années de fréquentation de la faculté de droit, même si les étudiants se trouvent à l'extérieur du campus dans l'intimité de leur foyer. La Law Society of British Columbia (« LSBC ») est l'organisme chargé de réglementer la profession juridique en Colombie-Britannique. Les conseillers de la LSBC ont voté pour la tenue d'un référendum auprès de ses membres sur la question de la reconnaissance de la faculté de droit proposée par TWU et ils ont convenu qu'ils seraient liés par les résultats. Les membres ont voté pour l'application d'une résolution déclarant que la faculté de droit proposée par TWU n'était pas une faculté de droit agréée en raison de son *Covenant* obligatoire. Les conseillers ont donc adopté la résolution. TWU et V, un diplômé du programme

to approve TWU's proposed law school violated religious rights protected by s. 2(*a*) of the *Charter*. The Court of Appeal dismissed the appeal.

Held (Côté and Brown JJ. dissenting): The appeal should be allowed. The resolution of the LSBC to declare that TWU's proposed law school not be approved is restored.

Per Abella, Moldaver, Karakatsanis, Wagner and Gascon JJ.: The LSBC's decision not to approve TWU's proposed law school represents a proportionate balance between the limitation on the religious protections under s. 2(*a*) of the *Charter* and the statutory objectives that the LSBC sought to pursue. The LSBC's decision was therefore reasonable.

The LSBC was entitled under its enabling statute to consider TWU's admissions policies, apart from the academic qualifications and competence of individual graduates, in determining whether to approve TWU's proposed law school under Rule 2-27 of the *Law Society Rules*. The LSBC's enabling statute requires the Benchers to consider the overarching objective of upholding and protecting the public interest in the administration of justice in determining the requirements for admission to the profession, including whether to approve a particular law school. As the governing body of a self-regulating profession, the LSBC's determination of the manner in which its broad public interest mandate will best be furthered is entitled to deference. The public interest is a broad concept and what it requires will depend on the particular context.

The LSBC in this case interpreted its duty to uphold and protect the public interest as precluding the approval of TWU's proposed law school because the requirement that students sign the Covenant as a condition of admission effectively imposes inequitable barriers on entry to the school and ultimately, inequitable barriers on entry to the profession. It was reasonable for the LSBC to conclude that promoting equality by ensuring equal access to the legal profession, supporting diversity within the bar, and preventing harm to LGBTQ law students were valid means to pursue the public interest. The LSBC has an overarching interest in protecting the values of equality and human rights in carrying out its functions. Approving or facilitating inequitable barriers to the profession could

de premier cycle de cette université qui aurait choisi de fréquenter la faculté de droit proposée, ont eu gain de cause dans leur demande de contrôle judiciaire devant la Cour suprême de la Colombie-Britannique, dans laquelle ils ont fait valoir que la décision de la LSBC de ne pas agréer la faculté de droit proposée par TWU portait atteinte aux droits religieux protégés par l'al. 2*a*) de la *Charte*. La Cour d'appel a rejeté l'appel.

Arrêt (les juges Côté et Brown sont dissidents) : Le pourvoi est accueilli. La résolution par laquelle la LSBC déclare que la faculté de droit proposée par TWU n'est pas une faculté de droit agréée est rétablie.

Les juges Abella, Moldaver, Karakatsanis, Wagner et Gascon : La décision de la LSBC de ne pas agréer la faculté de droit proposée par TWU représente une mise en balance proportionnée de la restriction imposée aux protections religieuses conférées par l'al. 2*a*) de la *Charte* et des objectifs prévus par la loi que cherchait à poursuivre la LSBC. La décision de la LSBC était donc raisonnable.

En vertu de sa loi habilitante, la LSBC pouvait examiner — outre les diplômes universitaires et la compétence de diplômés individuels — les politiques d'admission de TWU pour décider s'il y avait lieu d'agréer la faculté de droit proposée par TWU au titre de l'art. 2-27 des *Law Society Rules*. La loi habilitante de la LSBC exige que les conseillers tiennent compte de l'objectif primordial de défendre et de protéger l'intérêt public dans l'administration de la justice lorsqu'ils déterminent les conditions d'admission dans la profession, et notamment lorsqu'ils décident s'il y a lieu d'agréer une faculté de droit en particulier. Il faut faire preuve de déférence à l'égard de la décision que prend la LSBC, en tant qu'organisme chargé de réglementer une profession autonome, sur la meilleure façon de s'acquitter de son vaste mandat de protection de l'intérêt public. Le concept d'intérêt public est large et ce qu'il requiert dépendra du contexte particulier en cause.

En l'espèce, la LSBC a considéré que son obligation de défendre et de protéger l'intérêt public l'empêchait d'agréer la faculté de droit proposée par TWU parce qu'obliger les étudiants à signer le *Covenant* comme condition d'admission dresse effectivement des barrières inéquitables à l'entrée à la faculté et impose au bout du compte des barrières inéquitables à l'entrée dans la profession. Il était raisonnable que la LSBC conclue que promouvoir l'égalité en assurant un accès égal à la profession juridique, soutenir la diversité au sein du barreau et empêcher qu'un préjudice soit causé aux étudiants en droit LGBTQ étaient des moyens valides de s'acquitter de son obligation de protection de l'intérêt public. La LSBC a un intérêt primordial à protéger les valeurs d'égalité et des

undermine public confidence in the LSBC's ability to regulate in the public interest.

Also, the LSBC Benchers were entitled to hold a referendum of members on the question of TWU's proposed law school. Section 13 of the *Legal Profession Act* does not limit the circumstances in which the Benchers can elect to be bound to implement the results of such a referendum. The legal profession in British Columbia is self-governing; the majority of Benchers are elected by the LSBC membership and make decisions on behalf of the LSBC as a whole. It is consistent with this statutory scheme that the Benchers may decide that certain decisions they take would benefit from the guidance or support of the membership as a whole. This is no less the case where a decision implicates the *Charter* and raises questions as to the best means to pursue the LSBC's statutory objectives.

The LSBC was not required to give reasons formally explaining why the decision to refuse to approve TWU's proposed law school amounted to a proportionate balancing of freedom of religion with the LSBC's statutory objectives. Not all administrative decision-making requires the same procedure. In this context, the vast majority of Benchers serve as elected representatives, and reached their decision by a majority vote. It is clear from the speeches that the LSBC Benchers made during their meetings that they were alive to the question of the balance to be struck. Reviewing courts may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.

Administrative decisions that engage the *Charter* are reviewed based on the framework set out in the binding precedents of the Court of *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, and *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613. Under the *Doré*/*Loyola* framework, if the administrative decision engages the *Charter* by limiting its protections — both rights and values — 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* protections at play and the relevant statutory mandate.

droits de la personne dans l'exercice de ses fonctions. Le fait d'approuver ou de faciliter l'imposition de barrières inéquitables à l'entrée dans la profession pourrait compromettre la confiance du public à l'égard de la capacité de réglementation de la LSBC dans l'intérêt public.

De plus, les conseillers de la LSBC étaient autorisés à tenir un référendum auprès des membres sur la question de la faculté de droit proposée par TWU. L'article 13 de la *Legal Profession Act* ne limite pas les circonstances dans lesquelles les conseillers peuvent décider d'être tenus de donner effet aux résultats d'un tel référendum. En Colombie-Britannique, la profession juridique est une profession autonome; dans la majorité des cas, les conseillers sont élus par les membres de la LSBC et prennent des décisions au nom de cet organisme dans son ensemble. Il est compatible avec ce régime législatif que les conseillers puissent décider que certaines de leurs décisions gagneraient à être guidées ou appuyées par l'ensemble des membres. C'est d'autant plus vrai lorsque la décision met en cause la *Charte* et soulève des questions quant aux meilleurs moyens d'atteindre les objectifs que confie la loi à la LSBC.

La LSBC n'était pas tenue d'expliquer par écrit les raisons pour lesquelles la décision de refuser d'agréer la faculté de droit proposée par TWU constituait une mise en balance proportionnée de la liberté de religion et des objectifs confiés par la loi à la LSBC. Les décisions administratives ne requièrent pas toutes la même procédure. Dans ce contexte, les conseillers de la LSBC, qui agissent en grande majorité à titre de représentants élus, ont pris leur décision par un vote majoritaire. Il ressort clairement des discours prononcés par les conseillers lors de leurs réunions que ceux-ci étaient conscients de l'équilibre qu'il fallait établir. La cour de révision peut, si elle le juge nécessaire, examiner le dossier pour apprécier le caractère raisonnable du résultat.

Les décisions administratives qui font intervenir la *Charte* sont examinées selon le cadre d'analyse qu'a établi la Cour dans des précédents qui la lient, à savoir les arrêts *Doré c. Barreau du Québec*, 2012 CSC 12, [2012] 1 R.C.S. 395, et *École secondaire Loyola c. Québec (Procureur général)*, 2015 CSC 12, [2015] 1 R.C.S. 613. Suivant le cadre d'analyse établi dans les arrêts *Doré* et *Loyola*, si la décision administrative fait intervenir la *Charte* en restreignant les protections qu'elle confère — qu'il s'agisse de droits ou de valeurs —, il faut se demander 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 législatif et factuel, la décision est le fruit d'une mise en balance proportionnée des protections en cause conférées par la *Charte* et du mandat pertinent prévu par la loi.

Section 2(*a*) of the *Charter* is limited, or engaged, when the claimant demonstrates that he or she sincerely believes in a practice or belief that has a nexus with religion, and that the impugned state conduct interferes, in a manner that is more than trivial, with his or her ability to act in accordance with that practice or belief. If s. 2(*a*) is not engaged, there is nothing to balance. In this case, it is clear from the record that evangelical members of the TWU community sincerely believe that studying in an environment defined by religious beliefs in which members follow particular religious rules of conduct contributes to their spiritual development. Precluding the approval of TWU's law school governed by the mandatory Covenant limits the ability of members of the TWU community to enhance their spiritual development through studying law in an environment defined by their religious beliefs. Accordingly, their religious rights were limited, and therefore engaged, by the LSBC's decision.

Where an administrative decision engages a *Charter* protection, the reviewing court should apply a robust proportionality analysis consistent with administrative law principles, instead of a literal s. 1 analysis. The administrative decision will be reasonable if it reflects a proportionate balancing of the *Charter* protection with the relevant statutory mandate. This approach recognizes that an administrative decision-maker is generally in the best position to weigh the *Charter* protections with his or her statutory mandate in light of the specific facts of the case. It follows that deference is warranted when a reviewing court is determining whether the decision reflects a proportionate balance.

For a decision to be proportionate, it is not enough for the decision-maker to simply balance the statutory objectives with the *Charter* protection in making its decision. The reviewing court must consider whether there were other reasonable possibilities that would give effect to *Charter* protections more fully in light of the objectives. The reviewing court must also consider how substantial the limitation on the *Charter* protection was compared to the benefits to the furtherance of the statutory objectives in this context.

The LSBC was faced with only two options — to approve or reject TWU's proposed law school. Given the LSBC's statutory mandate, approving TWU's proposed law school would not have advanced the relevant statutory

L'alinéa 2*a*) de la *Charte* est restreint ou mis en cause lorsque le demandeur démontre, d'une part, qu'il croit sincèrement à une pratique ou à une croyance ayant un lien avec la religion, et, d'autre part, que la conduite qu'il reproche à l'État limite d'une manière plus que négligeable sa capacité de se conformer à cette pratique ou croyance. Si l'al. 2*a*) n'est pas en cause, il n'y a rien à mettre en balance. En l'espèce, il ressort clairement du dossier que les membres évangéliques de la communauté de TWU croient sincèrement que le fait d'étudier dans un milieu défini par des croyances religieuses où les membres suivent certaines règles de conduite à caractère religieux contribue à leur développement spirituel. Empêcher la reconnaissance de la faculté de droit de TWU régie par le *Covenant* obligatoire limite la capacité des membres de la communauté de TWU d'accroître leur développement spirituel en étudiant le droit dans un milieu défini par leurs croyances religieuses. En conséquence, la décision de la LSBC a restreint, et donc mis en cause, leurs droits religieux.

Lorsqu'une décision administrative fait intervenir une protection conférée par la *Charte*, la cour de révision doit procéder à une analyse robuste de la proportionnalité compatible avec les principes de droit administratif au lieu d'adopter une approche fondée sur l'article premier prise littéralement. La décision administrative sera raisonnable si elle est le fruit d'une mise en balance proportionnée de la protection conférée par la *Charte* et du mandat pertinent prévu par la loi. Cette démarche reconnaît que le décideur administratif est généralement le mieux placé pour mettre en balance les protections conférées par la *Charte* et le mandat que lui confie la loi au regard des faits précis de l'affaire. Il s'ensuit que la déférence est justifiée lorsqu'une cour de révision est appelée à décider si la décision est le fruit d'une mise en balance proportionnée.

Pour qu'une décision soit proportionnée, il ne suffit pas que le décideur se contente de mettre en balance les objectifs de la loi et la protection conférée par la *Charte* en rendant sa décision. La cour de révision doit se demander s'il existait d'autres possibilités raisonnables qui donneraient davantage effet aux protections conférées par la *Charte* eu égard aux objectifs applicables. Elle doit aussi se pencher sur l'importance de la restriction de la protection conférée par la *Charte* par rapport aux avantages qu'il y a à favoriser la réalisation des objectifs de la loi dans ce contexte.

Seules deux possibilités s'offraient à la LSBC — agréer ou ne pas agréer la faculté de droit proposée par TWU. Compte tenu du mandat que confère la loi à la LSBC, reconnaître la faculté de droit proposée par TWU

objectives, and therefore was not a reasonable possibility that would give effect to *Charter* protections more fully in light of the statutory objectives.

The LSBC's decision also reasonably balanced the severity of the interference against the benefits to its statutory objectives. The LSBC's decision did not limit religious freedom to a significant extent because a mandatory covenant is not absolutely required to study law in a Christian environment in which people follow certain religious rules of conduct, and studying law in an environment infused with the community's religious beliefs is preferred, not necessary, for their spiritual growth.

On the other side of the scale, it is clear that the decision not to approve TWU's proposed law school significantly advanced the LSBC's statutory objectives by maintaining equal access to and diversity in the legal profession and by preventing the risk of significant harm to LGBTQ people. The public confidence in the administration of justice could be undermined by the LSBC's decision to approve a law school that forces some to deny a crucial component of their identity in the most private and personal of spaces for three years in order to receive a legal education.

Freedom of religion protects the rights of religious adherents to hold and express beliefs through both individual and communal practices. Where a religious practice impacts others, however, this can be taken into account at the balancing stage. In this case, the effect of the mandatory Covenant is to restrict the conduct of others. The LSBC's decision prevents the risk of significant harm to LGBTQ people who feel they have no choice but to attend TWU's proposed law school. These individuals would have to deny who they are for three years to receive a legal education. Being required by someone else's religious beliefs to behave contrary to one's sexual identity is degrading and disrespectful.

Given the significant benefits to the relevant statutory objectives and the minor significance of the limitation on the *Charter* rights at issue, and given the absence of any

n'aurait pas favorisé la réalisation des objectifs de la loi pertinents et ne constituait donc pas une possibilité raisonnable qui donnerait davantage effet aux protections conférées par la *Charte* eu égard aux objectifs prévus par la loi.

La décision de la LSBC a également mis en balance de façon raisonnable la gravité de l'atteinte et les avantages qu'il y a à favoriser la réalisation de ses objectifs en vertu de la loi. Cette décision n'a pas restreint de manière importante la liberté de religion parce que, d'une part, il n'est pas absolument nécessaire d'adhérer à un covenant obligatoire pour étudier le droit dans un milieu chrétien où les gens suivent certaines règles de conduite à caractère religieux et parce que, d'autre part, le fait d'étudier le droit dans un milieu imprégné des croyances religieuses de la communauté constitue une préférence, et non une nécessité, à l'égard de la croissance spirituelle.

Sur l'autre plateau de la balance, il est clair que la décision de ne pas agréer la faculté de droit proposée par TWU a nettement favorisé la réalisation des objectifs que la loi confie à la LSBC en maintenant un accès égal à la profession juridique et une diversité au sein de celle-ci et en prévenant le risque que soit causé un préjudice important aux personnes LGBTQ. La confiance du public dans l'administration de la justice pourrait être compromise par la décision de la LSBC d'agréer une faculté de droit qui force certaines personnes à renier pendant trois ans un élément essentiel de leur identité dans leur espace le plus intime et le plus personnel afin de pouvoir recevoir une formation juridique.

La liberté de religion protège les droits des fidèles d'avoir des croyances et de les exprimer au moyen de pratiques tant individuelles que collectives. Cependant, lorsqu'une pratique religieuse a une incidence sur autrui, on peut en tenir compte à l'étape de la mise en balance. En l'espèce, le *Covenant* obligatoire a pour effet de limiter la conduite d'autrui. La décision de la LSBC permet de prévenir le risque que soit causé un préjudice important aux personnes LGBTQ qui ont l'impression de n'avoir d'autre choix que de fréquenter la faculté de droit proposée par TWU. Ces personnes auraient à renier ce qu'elles sont pendant trois ans afin de pouvoir recevoir une formation juridique. Être tenu par les croyances religieuses de quelqu'un d'autre de se conduire d'une manière qui va à l'encontre de son identité sexuelle est dégradant et irrespectueux.

Compte tenu des avantages importants qu'il y a à favoriser la réalisation des objectifs pertinents visés par la loi et de l'importance mineure de la restriction aux droits

reasonable alternative that would reduce the impact on *Charter* protections while sufficiently furthering those same objectives, the decision to refuse to approve TWU's proposed law school represents a proportionate balance. The decision was reasonable.

Per McLachlin C.J.: There is agreement with the majority that the jurisdiction and decision-making process of the LSBC are reviewable on a standard of reasonableness. Where legislatures delegate regulation of the legal profession to a law society, the law society's interpretation of the public interest is owed deference.

There is also agreement with the majority that *Charter*-infringing administrative decisions are reviewed according to the *Doré/Loyola* framework. This framework has two discrete steps. The reviewing court must first determine if the decision limits a *Charter* right, and then determine whether the limitation of the right is proportionate in light of the state's objective, and hence is justified as a reasonable measure in a free and democratic society under s. 1 of the *Charter*. In most cases, the ultimate question will be whether the decision under review balances the negative effects on the right against the benefits derived from the decision in a proportionate way.

However, certain gaps and omissions in the framework must be addressed. To adequately protect the *Charter* right, the initial focus must be on whether the claimant's constitutional right has been infringed. *Charter* values may play a role in defining the scope of rights; it is the right itself, however, that receives protection under the *Charter*. Also, the scope of the guarantee of the *Charter* right must be given a consistent interpretation regardless of the state actor, and it is the task of the courts on judicial review of a decision to ensure this. Since this is a matter of justification of a rights infringement under s. 1, the onus is on the state actor that made the rights-infringing decision to demonstrate that the limits its decisions impose on the rights of the claimants are reasonable and demonstrably justifiable in a free and democratic society. Finally, relying on the language of deference and reasonableness as does the majority in this case may be unhelpful. Where an administrative decision-maker renders a decision that has an unjustified

garantis par la *Charte* en cause, et compte tenu de l'absence de solution de rechange raisonnable susceptible de réduire l'incidence sur les protections conférées par la *Charte* tout en favorisant suffisamment la réalisation de ces objectifs, la décision de refuser d'agréer la faculté de droit proposée par TWU représente une mise en balance proportionnée. La décision était raisonnable.

La juge en chef McLachlin : Il y a accord avec la conclusion de la majorité portant que la norme de la décision raisonnable est la norme applicable à l'égard des décisions sur la compétence et le processus décisionnel de la LSBC. Lorsqu'un législateur délègue à un barreau la tâche de réglementer la profession juridique, l'interprétation que donne le barreau de l'intérêt public commande la déférence.

Il y a également accord avec la conclusion des juges majoritaires selon laquelle le contrôle des décisions administratives portant atteinte à la *Charte* s'effectue selon le cadre d'analyse établi dans les arrêts *Doré* et *Loyola*. Ce cadre d'analyse comporte deux étapes distinctes. La cour de révision doit d'abord décider si la décision restreint un droit garanti par la *Charte*, puis juger si cette restriction est proportionnée eu égard aux objectifs de l'État et si, de ce fait, elle constitue une mesure raisonnable qui se justifie dans le cadre d'une société libre et démocratique conformément à l'article premier de la *Charte*. La plupart du temps, il s'agira en définitive de décider si la décision faisant l'objet du contrôle judiciaire représente une mise en balance proportionnée des effets négatifs de la décision sur les droits touchés et des avantages qui découlent de celle-ci.

Cependant, certaines lacunes et omissions de ce cadre d'analyse doivent être analysées. Pour que soit protégé adéquatement le droit garanti par la *Charte* qui est en cause, il faut s'attacher au départ à la question de savoir s'il y a eu atteinte au droit constitutionnel du demandeur. Il est possible que les valeurs consacrées par la *Charte* jouent un rôle dans la définition de la portée des droits en jeu; toutefois, c'est le droit lui-même qui est protégé par la *Charte*. De plus, l'interprétation de la portée du droit garanti par la *Charte* doit être la même, peu importe l'identité de l'acteur étatique concerné, et il incombe aux tribunaux de veiller à ce que ce soit le cas à l'occasion d'un contrôle judiciaire. Comme il s'agit d'une affaire de justification d'une atteinte à des droits au regard de l'article premier, il incombe à l'acteur étatique qui a pris la décision attentatoire de démontrer que les limites que sa décision impose aux droits des demandeurs sont raisonnables et que leur justification peut se démontrer dans le cadre d'une société libre et démocratique. Enfin, il

and disproportionate impact on a *Charter* right, it will always be unreasonable.

In this case, the first step of the *Doré/Loyola* framework is satisfied, because the LSBC's decision not to approve TWU's proposed law school limits the freedom of religion of members of the TWU community. The LSBC's denial of accreditation precludes members of the TWU community from engaging in the practice of providing legal education in an environment that conforms to their religious beliefs, deprives them of the ability to express those beliefs in institutional form, and prevents them from associating in the manner they believe their faith requires. While it may not be necessary to conduct a separate analysis for the guarantees of freedom of expression and freedom of association, the Court must include them in the ambit of the guarantee of freedom of religion.

As for the second step of the *Doré/Loyola* framework, the LSBC has shown its infringement of TWU's freedom of religion to be justified under s. 1. No one suggests that there was not an objective capable of overriding the *Charter* right to freedom of religion. Moreover, the decision was minimally impairing. The LSBC was faced with the choice of either accrediting the law school or denying that accreditation. Therefore, the analysis comes down to the final stage of weighing the benefit achieved by the infringing decision against its negative impacts on the right.

Contrary to the majority's analysis, the negative impacts of the LSBC's denial of accreditation on the religious, expressive and associational rights of the TWU community are not of minor significance. If the community wishes to operate a law school, it must relinquish the mandatory Covenant it says is core to its religious beliefs, with the attendant ramifications on religious practices. However, the LSBC cannot condone a practice that discriminates by imposing burdens on LGBTQ people on the basis of sexual orientation, with negative consequences for the LGBTQ community, diversity and the enhancement of equality in the profession. It was faced with an either-or decision on which compromise was impossible — either allow the mandatory Covenant in TWU's proposal to

pourrait ne pas être utile de s'appuyer sur les notions de « déférence » et de « raisonnabilité » comme le font les juges majoritaires en l'espèce. Dans les cas où un décideur administratif prend une décision dont les effets sur un droit garanti par la *Charte* sont injustifiés et disproportionnés, une telle décision sera toujours déraisonnable.

Dans la présente affaire, il a été satisfait à la première étape du cadre d'analyse établi dans les arrêts *Doré* et *Loyola*, étant donné que la décision de la LSBC de refuser d'agréer la faculté de droit proposée par TWU restreint la liberté de religion des membres de la communauté de TWU. Le refus par la LSBC d'accorder l'agrément demandé empêche les membres de la communauté de TWU de mettre en œuvre la pratique consistant à enseigner et à apprendre le droit dans un environnement conforme à leurs croyances religieuses, en plus de les priver de la possibilité d'exprimer leurs croyances à l'échelle institutionnelle et de s'associer d'une façon qui, selon eux, respecte les exigences de leur foi. Bien qu'il ne soit peut-être pas nécessaire d'analyser séparément les garanties de liberté d'expression et de liberté d'association, la Cour se doit d'inclure ces garanties dans le champ d'application de la garantie de liberté de religion.

Pour ce qui est de la seconde étape du cadre d'analyse établi dans les arrêts *Doré* et *Loyola*, la LSBC a démontré que l'atteinte qu'elle a portée à la liberté de religion de TWU est justifiée au regard de l'article premier. Personne ne met en doute l'existence d'un objectif susceptible de l'emporter sur le droit à la liberté de religion protégé par la *Charte*. Qui plus est, la décision constituait une atteinte minimale. La LSBC devait choisir entre soit agréer la faculté de droit, soit refuser la demande d'agrément. Par conséquent, l'analyse se résume en définitive à la dernière étape, soit la mise en balance des effets bénéfiques de la décision attentatoire et des effets négatifs de celle-ci sur le droit touché.

Contrairement à l'analyse qu'en font les juges majoritaires, les effets négatifs du refus de la LSBC d'accorder l'agrément sur les droits à la liberté de religion, d'expression et d'association de la communauté de TWU ne peuvent être qualifiés d'importance mineure. Si cette communauté souhaite se doter d'une faculté de droit, elle doit renoncer au *Covenant* obligatoire, qui prétend-elle constitue un élément fondamental de ses croyances religieuses, en plus de devoir composer avec les conséquences qui en résultent au chapitre des pratiques religieuses. En revanche, la LSBC ne saurait cautionner une pratique qui crée de la discrimination à l'endroit des membres de la communauté LGBTQ en leur imposant certains fardeaux en raison de leur orientation sexuelle, avec tout ce que

stand, and thereby condone unequal treatment of LGBTQ people, or deny accreditation and limit TWU's religious practices. Ultimately, the LSBC concluded that the imperative of refusing to condone discrimination and unequal treatment on the basis of sexual orientation outweighed TWU's claims to freedom of religion. This decision of the LSBC represents a proportionate balancing of freedom of religion, on the one hand, and the avoidance of discrimination, on the other. The decision was therefore reasonable.

cela implique de répercussions négatives pour cette communauté, ainsi que pour la diversité et pour l'amélioration de l'égalité au sein de la profession. La LSBC n'avait le choix qu'entre deux possibilités, aucun compromis n'était possible — soit elle autorisait le maintien du *Covenant* obligatoire dans la proposition de TWU et cautionnait ainsi le traitement inégal de la communauté LGBTQ, soit elle refusait l'agrément demandé et limitait les pratiques religieuses de TWU. En définitive, la LSBC a conclu que la nécessité de refuser de cautionner toute discrimination et inégalité de traitement fondées sur l'orientation sexuelle l'emportait sur les prétentions de TWU fondées sur la liberté de religion. Cette décision de la LSBC représente une mise en balance proportionnée de la liberté de religion, d'une part, et de la volonté d'éviter la discrimination, d'autre part. La décision était en conséquence raisonnable.

Per Rowe J.: There is agreement with the majority that the LSBC acted within its jurisdiction when it considered the discriminatory effect of the Covenant on prospective law students at TWU. With the privilege of self-government granted to the LSBC comes a corresponding duty to self-regulate in the public interest. The LSBC was entitled to interpret its public interest mandate as including consideration of the effect of the Covenant on prospective law students. The fact that the Covenant is a statement of religious rules and principles does not insulate it from such scrutiny.

Le juge Rowe : Il y a accord avec la conclusion des juges majoritaires selon laquelle la LSBC n'a pas outrepassé sa compétence en prenant en considération les effets discriminatoires du *Covenant* sur les éventuels étudiants en droit de TWU. Le privilège d'autoréglementation accordé à la LSBC est assorti du devoir pour cette dernière de l'exercer dans l'intérêt public. La LSBC était justifiée de considérer que son mandat de protection de l'intérêt public impliquait l'examen des effets du *Covenant* sur les éventuels étudiants en droit. Le fait que le *Covenant* constitue un énoncé de règles et principes de nature religieuse n'a pas pour effet de le soustraire à cet examen.

There is disagreement, however, with the majority's approach to assessing whether the decision of the LSBC infringed the *Charter* rights raised by TWU. This appeal raises issues that call for clarification of the *Doré*/*Loyola* framework. First, when courts review administrative decisions for compliance with the *Charter*, *Charter* rights must be the focus of the inquiry — not *Charter* values. *Charter* values have no independent function in the administrative context and their scope is often undefined in the jurisprudence. This lack of clarity is an impediment to applying a structured and consistent approach to adjudicating *Charter* claims.

Il y a cependant désaccord avec l'approche appliquée par les juges majoritaires pour décider si la décision de la LSBC a porté atteinte aux droits garantis par la *Charte* invoqués par TWU. Le présent pourvoi soulève des questions requérant que soient apportées des précisions au cadre d'analyse établi dans les arrêts *Doré* et *Loyola*. Premièrement, la cour qui contrôle une décision administrative pour s'assurer de sa conformité avec la *Charte* doit centrer son analyse sur les droits garantis par la *Charte* — et non sur les valeurs consacrées par celle-ci. Ces valeurs ne remplissent pas de fonction indépendante en contexte administratif et leur portée n'est souvent pas définie dans la jurisprudence. Cette absence de clarté nuit à l'application d'une approche structurée et uniforme à l'examen des demandes fondées sur la *Charte*.

Second, the adjudication of *Charter* claims needs to follow a structured two-step analysis. Under the *Doré*/*Loyola* framework, the initial burden is on the claimant to demonstrate that the decision infringes his or her *Charter* rights. This first step requires that the reviewing court possess a proper understanding of the scope of the rights at issue. An approach that skims over the proper delineation

Deuxièmement, l'examen des demandes fondées sur la *Charte* doit se faire selon un processus structuré comportant deux étapes. Selon le cadre établi dans les arrêts *Doré* et *Loyola*, il incombe au départ au demandeur de prouver que la décision porte atteinte aux droits que lui garantit la *Charte*. Cette première étape exige que la cour de révision possède une compréhension adéquate de la

of rights and freedoms runs the risk of distorting the relationship between s. 1 of the *Charter* and the protections guaranteed by the *Charter*. This approach can lead to situations whereby certain rights are routinely said to be infringed only for the claimant to be told that the infringement is justified by any number of countervailing considerations. This erodes the seriousness of finding *Charter* violations. It increases the role of policy considerations in the adjudication of *Charter* claims by shifting the bulk of the analysis to s. 1. And it distorts the proper relationship between the branches of government by unduly expanding the policy-making role of the judiciary. The result is an unstructured, somewhat conclusory exercise that ignores the framing of the *Charter* and departs fundamentally from the Court's foundational *Charter* jurisprudence. On judicial review, as in other proceedings, *Charter* claims demand analytical rigour. This starts with the correct delineation of the scope of the rights and freedoms at issue.

Once the claimant has demonstrated that an administrative decision infringes his or her *Charter* rights, the second step of the *Doré*/*Loyola* framework requires the state actor to demonstrate that the infringement is justified. The *Doré*/*Loyola* framework does not shift this justificatory burden onto rights claimants. The justificatory burden must remain where the *Charter* places it, on the state actor. For the administrative state, this is no more than what s. 1 requires.

The *Doré/Loyola* framework does not deviate fundamentally from the principles set out in *Oakes* for assessing the reasonableness of a limit on a *Charter* right under s. 1. All the stages of the *Oakes* test have a role to play in the judicial review of administrative decisions for compliance with the *Charter*. Often, however, the main hurdle for the state will be the final stages of the *Oakes* test: minimal impairment and balancing. The fact that most statutes reviewed under *Oakes* have failed at the minimal impairment or balancing stages does not mean that the rational connection stage and consideration of the pressing and substantial objective cease to be relevant. Similarly, in the administrative context, the fact that most decisions will be rationally connected to an identified statutory objective does not mean that the inquiry need not be carried out. It

portée des droits en jeu. Une démarche qui ne procède que superficiellement à l'étape de la délimitation adéquate des droits et libertés en cause risque de déformer le rapport entre l'article premier de la *Charte* et les protections garanties par cette dernière. Une telle approche peut mener à des situations où les tribunaux concluraient couramment à l'existence d'atteintes à certains droits, mais se contenteraient en définitive de répondre au demandeur concerné que l'atteinte est justifiée par un certain nombre de considérations faisant contrepoids. Cela a pour effet d'atténuer la gravité d'une conclusion portant qu'il y a eu atteinte à la *Charte*, en plus d'accroître le rôle des considérations de politique générale dans l'examen des demandes fondées sur la *Charte* en déplaçant l'essentiel de l'analyse à l'étape fondée sur l'article premier. En outre, cela déforme le rapport approprié qui doit exister entre les différentes branches de l'État en élargissant d'une manière excessive le rôle des tribunaux en matière d'établissement de politiques. Il en résulte une opération non structurée et plutôt conclusive, qui ne tient pas compte de l'organisation de la *Charte* et qui déroge radicalement à la jurisprudence fondamentale de la Cour concernant ce texte. Lors d'un contrôle judiciaire, comme dans d'autres instances, les demandes fondées sur la *Charte* commandent une analyse rigoureuse. La première étape consiste à délimiter correctement la portée des droits et libertés en jeu.

Une fois que le demandeur a démontré qu'une décision administrative porte atteinte aux droits qui lui sont garantis par la *Charte*, il incombe alors à l'État, à la deuxième étape du cadre établi dans les arrêts *Doré* et *Loyola*, de démontrer que cette atteinte est justifiée. Le cadre en question ne transfère pas ce fardeau de justification sur les épaules des demandeurs. Ce fardeau doit continuer d'incomber à la partie à qui la *Charte* l'a imposé, c'est-à-dire l'État. Pour les organismes administratifs étatiques, il s'agit de l'obligation imposée par l'article premier, rien de plus.

Le cadre d'analyse établi dans *Doré* et *Loyola* ne s'écarte pas fondamentalement des principes énoncés dans *Oakes* pour déterminer si une restriction à un droit garanti par la *Charte* est raisonnable au regard de l'article premier. Toutes les étapes de l'analyse établie dans *Oakes* ont un rôle à jouer lors du contrôle judiciaire de décisions administratives pour s'assurer de leur conformité avec la *Charte*. Cependant, le principal obstacle pour l'État résidera souvent dans les étapes finales de l'analyse énoncée dans *Oakes* : atteinte minimale et équilibre. Le fait que la plupart des lois qui ont été analysées au regard de l'arrêt *Oakes* n'ont pas satisfait aux étapes relatives à l'atteinte minimale ou à la proportionnalité ne signifie pas que l'étape portant sur le lien rationnel et la prise en compte de l'objectif urgent et réel ne sont plus des considérations pertinentes.

means only that this component of the analysis will often readily be met.

The main *Charter* right at issue in this appeal is the freedom of religion guaranteed by s. 2(*a*). The freedom of religion protected by s. 2(*a*) is premised on two principles: the exercise of free will and the absence of constraint. From this perspective, religious freedom aims to protect individuals from interference with their religious beliefs and practices. While this focus on the individual choice of believers does not detract from the communal aspect of religion, it must be underscored that religious freedom is premised on the personal volition of individual believers. Although religious communities may adopt their own rules and membership requirements, the foundation of the community remains the voluntary choice of individual believers to join together on the basis of their common faith.

The alleged infringement of s. 2(*a*) in this case — namely, that the decision of the LSBC interferes with the claimants' ability to attend an accredited law school at TWU with its mandatory Covenant — does not fall within the scope of freedom of religion. The religious belief or practice at issue relates to the religious proscription of sexual intimacy outside heterosexual marriage and the importance of imposing this proscription by means of the mandatory Covenant on all students attending the proposed law school at TWU. At the first stage of the s. 2(*a*) analysis, it does not suffice that the claimants sincerely believe that studying in a community defined by religious beliefs contributes to their spiritual development. Rather, the claimants must show that they sincerely believe that doing so is a practice required by their religion. The question of whether a belief or practice is objectively required by official religious dogma or is in conformity with the position of religious officials is irrelevant. All that matters is that the claimant sincerely believes that their religion compels them to act, regardless of whether that line of conduct is objectively or subjectively obligatory. Much of the affidavit evidence relied upon by the majority undermines the view that the claimants have advanced a sincere belief or practice that is required by their religion. Despite this concern, it is assumed that the claimants sincerely believe in the importance of studying in an environment where all students abide by this Covenant.

De même, en contexte administratif, le fait que la majorité des décisions ont un lien rationnel avec l'objectif législatif invoqué à leur égard ne signifie pas qu'il n'est plus nécessaire d'effectuer cet examen. Cela signifie seulement que, bien souvent, cet aspect de l'analyse sera aisément respecté.

Le principal droit garanti par la *Charte* qui est en jeu dans le présent pourvoi est la liberté de religion garantie par l'al. 2*a*). La liberté de religion protégée par l'al. 2*a*) repose sur deux principes : l'exercice du libre arbitre et l'absence de contrainte. Considérée sous cet angle, la liberté de religion vise à protéger les personnes contre les entraves à l'observance de leurs croyances et pratiques religieuses. Bien que cette importance accordée au libre choix individuel des croyants n'atténue en rien l'aspect collectif de la religion, il faut souligner que la liberté de religion repose sur l'exercice par chaque croyant de sa volonté personnelle. Même si les communautés religieuses peuvent adopter leurs propres règles de fonctionnement et conditions d'adhésion, l'assise de la communauté demeure le choix volontaire que font les croyants, individuellement, de se regrouper sur la base de leur foi commune.

L'atteinte à l'al. 2*a*) reprochée en l'espèce — à savoir que la décision de la LSBC empêche les demandeurs de fréquenter, à TWU, une faculté de droit agréée dotée du *Covenant* obligatoire — échappe à la portée de la liberté de religion. La croyance ou pratique religieuse en cause consiste en la proscription religieuse de toute intimité sexuelle en dehors du mariage hétérosexuel et en l'importance d'imposer cette proscription au moyen du *Covenant* obligatoire à tous les éventuels étudiants de la faculté de droit proposée par TWU. À la première étape de l'analyse fondée sur l'al. 2*a*), il n'est pas suffisant que les demandeurs croient sincèrement que le fait d'étudier au sein d'une communauté définie par des croyances religieuses contribue à leur croissance spirituelle. Les demandeurs doivent plutôt démontrer qu'ils croient sincèrement qu'étudier dans un tel milieu constitue une pratique que leur religion leur impose. Il n'est pas pertinent de savoir si la croyance ou la pratique est objectivement prescrite par un dogme religieux officiel ou est conforme à la position de représentants religieux. La seule chose qui importe est que le demandeur croie sincèrement que sa religion le contraint à agir, indépendamment du fait que cette conduite soit objectivement ou subjectivement obligatoire. Les témoignages par voie d'affidavit sur lesquels s'appuient les juges majoritaires jettent pour la plupart de sérieux doutes sur l'opinion selon laquelle les demandeurs ont fait valoir une croyance ou une pratique sincère requise par leur religion. Malgré cette préoccupation, il est tenu pour acquis que les demandeurs croient sincèrement à l'importance d'étudier dans un milieu où tous les étudiants se conforment au *Covenant*.

At the second stage of the s. 2(*a*) analysis, the proper delineation of the scope of s. 2(*a*) comes into play. Where the protection of s. 2(*a*) is sought for a belief or practice that constrains the conduct of nonbelievers — those who have freely chosen not to believe — the claim falls outside the scope of the freedom. Therefore, interference with such a belief or practice is not an infringement of s. 2(*a*) because the coercion of nonbelievers is not protected by the *Charter*.

The student body at TWU is not coextensive with the religious community of evangelical Christians who attend TWU. Although TWU teaches from a Christian perspective, its statutory mandate requires that its admission policy not be restricted to Christian students. The Covenant is a commitment to enforcing a religiously-based code of conduct, not just in respect of one's own behaviour, but also in respect of others', including members of other religions and nonbelievers. Given that the coercion of nonbelievers is not protected by the *Charter*, TWU's claim falls outside the scope of freedom of religion as protected by s. 2(*a*).

Given the absence of a *Charter* infringement, the decision of the LSBC must be reviewed under the usual principles of judicial review rather than the *Doré/Loyola* framework. Reviewed under the standard of reasonableness, the decision of the LSBC will command deference if it meets the criteria set out in *Dunsmuir*.

The LSBC is a self-governing entity. Therefore, with respect to process, the LSBC had discretion in determining how to carry out its duty to regulate the legal profession in the public interest. There is agreement with the majority that the LSBC's enabling statute does not preclude the Benchers from holding a referendum or choosing to be bound by the results of such a referendum. Consequently, the procedure employed by the Benchers is not fatal to the reasonableness of their decision.

As to the substance of the decision, reasonableness does not always require the decision-maker to give formal reasons. In some cases, a reviewing court may look to the record to assess the reasonableness of the decision. In this appeal, the range of possible outcomes was informed by the LSBC's mandate to regulate the legal profession in the public interest and by the binary choice available to the

C'est à la deuxième étape de l'analyse fondée sur l'al. 2*a*) que la délimitation adéquate de la portée de cet alinéa entre en jeu. Lorsque la demande sollicite la protection de l'al. 2*a*) à l'égard d'une croyance ou pratique qui impose des contraintes à la conduite d'incroyants — c'est-à-dire des personnes qui ont délibérément choisi de ne pas croire —, cette demande échappe à la portée de la liberté de religion. Par conséquent, une entrave à l'observance d'une telle croyance ou pratique ne constitue pas une atteinte à l'al. 2*a*), étant donné que le fait d'exercer de la coercition à l'endroit d'incroyants n'est pas protégé par la *Charte*.

Le corps étudiant de TWU n'est pas composé uniquement de chrétiens évangéliques. Bien que TWU offre son enseignement dans une perspective chrétienne, la mission que lui confie la loi lui interdit de limiter l'admission à ses programmes aux seuls étudiants chrétiens. Le *Covenant* est un engagement à assurer le respect d'un code de conduite fondé sur des croyances religieuses, à l'égard non seulement de son propre comportement, mais aussi de celui d'autres personnes, y compris des adeptes d'autres religions et des incroyants. Puisque le fait d'exercer de la coercition à l'endroit d'incroyants n'est pas protégé par la *Charte*, la demande de TWU échappe à la portée de la liberté de religion protégée par l'al. 2*a*).

Vu l'absence de violation de la *Charte*, la décision de la LSBC doit être contrôlée selon les règles habituelles du contrôle judiciaire et non selon le cadre d'analyse établi dans les arrêts *Doré* et *Loyola*. Considérée selon la norme de contrôle de la décision raisonnable, la décision de la LSBC commandera la déférence si elle satisfait aux critères énoncés dans *Dunsmuir*.

La LSBC est une entité qui s'autoréglemente. En conséquence, pour ce qui concerne la procédure, la LSBC disposait du pouvoir discrétionnaire nécessaire pour décider comment s'acquitter de son devoir de réglementer la profession juridique dans l'intérêt public. Il y a accord avec les juges majoritaires pour dire que rien dans la loi habilitante de la LSBC n'empêche les conseillers de tenir un référendum ou de décider d'être liés par les résultats d'un tel référendum. Par conséquent, la procédure utilisée par les conseillers n'est pas fatale au caractère raisonnable de leur décision.

Pour ce qui est du fond de la décision, le décideur n'est pas toujours tenu de motiver formellement sa décision pour que celle-ci soit raisonnable. Dans certains cas, la cour de révision peut consulter le dossier de l'instance pour apprécier le caractère raisonnable de cette décision. Dans le présent pourvoi, l'éventail des issues possibles découlait du mandat de la LSBC qui consiste à réglementer

Benchers. Given the deference owed to the LSBC, it was open to the LSBC to conclude that it should not accredit the proposed law school given the Covenant's imposition of discriminatory barriers to admission. It was also open to the LSBC to conclude that its mandate included promoting equal access to the legal profession, supporting diversity within the bar and preventing harm to LGBTQ law students. It was in this context that the LSBC declined to accredit the proposed law school. This decision falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and law. It was therefore reasonable.

Per Côté and Brown JJ. (dissenting): Under the LSBC's enabling statute, the only proper purpose of a law faculty approval decision is to ensure that individual graduates are fit to become members of the legal profession because they meet minimum standards of competence and ethical conduct. Given the absence of any concerns relating to the fitness of prospective TWU law graduates, the only defensible exercise of the LSBC's statutory discretion would have been to approve TWU's proposed law school.

Under Rule 2-27(4.1) of the *Law Society Rules*, the LSBC's authority to approve law schools acts only as a proxy for determining whether a law school's graduates, as individual applicants to the LSBC, meet the standards of competence and conduct required to become licensed. Rule 2-27(4.1) does not grant the LSBC authority to regulate law schools or to guarantee equal access to law schools. So long as a law school's admissions policies do not raise concerns over its graduates' fitness to practise law, the LSBC is simply not statutorily empowered to scrutinize them. The LSBC is properly concerned with competence, not with merit. This interpretation is consistent with the purpose of the *Legal Profession Act* as a whole and respects the express limits to the LSBC's rule-making powers under s. 11 for the regulation of the legal profession and its constituent parts, extending no further than the licensing process — the doorway to the profession. Although s. 3 states the LSBC's overarching object and duty includes upholding and protecting the public interest in the administration of justice by "preserving and protecting the rights and freedoms of all persons", it does not empower the LSBC to police human rights standards in law schools. Any harms to marginalized communities in the context of legal education are considered by provincial

la profession juridique dans l'intérêt public, ainsi que du choix binaire devant lequel se trouvaient les conseillers. Compte tenu de la déférence qui doit être accordée à la LSBC, il était donc loisible à cette dernière de conclure qu'elle ne devait pas agréer la faculté de droit proposée en raison des obstacles à l'admission de nature discriminatoire qu'imposait le *Covenant*. Il était également loisible à la LSBC de conclure que son mandat consistait également à promouvoir l'égalité d'accès à la profession, à appuyer la diversité au sein du barreau et à prévenir l'infliction de préjudices aux étudiants en droit issus de la communauté LGBTQ. C'est dans ce contexte que la LSBC a refusé d'agréer la faculté de droit proposée. Cette décision appartient aux issues possibles acceptables pouvant se justifier au regard des faits et du droit. Elle était par conséquent raisonnable.

Les juges Côté et Brown (dissidents) : Selon la loi habilitante de la LSBC, la décision relative à la reconnaissance d'une faculté de droit a pour seule fin légitime de veiller à ce que les diplômés soient individuellement aptes à devenir membres de la profession juridique parce qu'ils respectent des normes minimales en matière de compétence et de déontologie. Vu l'absence de préoccupations à l'égard de l'aptitude des éventuels diplômés en droit de TWU, le seul exercice justifiable du pouvoir discrétionnaire statutaire de la LSBC aurait été pour elle d'agréer la faculté de droit proposée par TWU.

Pour l'application du par. 2-27(4.1) des *Law Society Rules*, le pouvoir de la LSBC d'agréer les facultés de droit sert uniquement d'indicateur pour déterminer si les diplômés d'une faculté de droit, en tant que personnes présentant une demande individuelle à la LSBC, respectent les normes de compétence et de conduite requises pour accéder à la profession. Ce paragraphe 2-27(4.1) ne confère pas à la LSBC le pouvoir de réglementer les facultés de droit ni de garantir l'égalité d'accès aux facultés de droit. Dans la mesure où les politiques d'admission d'une faculté de droit ne soulèvent pas de préoccupations quant à l'aptitude des diplômés de celle-ci à pratiquer le droit, la loi ne confère tout simplement pas le pouvoir à la LSBC de les scruter. La LSBC s'intéresse à bon droit à la compétence des candidats et non à leur mérite. Cette interprétation est compatible avec l'objet de la *Legal Profession Act* dans son ensemble et respecte les limites expresses au pouvoir de la LSBC d'établir des règles, prévu à l'art. 11, qui vise la réglementation de la profession juridique et de ses éléments constitutifs et qui s'arrête au processus de délivrance de permis — la porte d'entrée de la profession. Même si l'art. 3 énonce que l'objet et le devoir primordiaux de la LSBC comprennent le fait de défendre et de protéger l'intérêt public dans l'administration de la

human rights tribunals, by legislatures, and by members of the executive, which grant such institutions the power to confer degrees.

The LSBC violated its statutory duty by adopting the results of a referendum affecting *Charter* rights without engaging in the process of balancing *Charter* rights and statutory objectives required by the *Doré/Loyola* framework. The results of the referendum were adopted with no further discussion and therefore no substantive debate. The LSBC's decision is therefore completely devoid of any reasoning. And yet, the majority of the Court has replaced the (non-) reasons of the LSBC with its own reasons and made the outcome the sole consideration. Although such a serious error would normally require that the LSBC's decision be quashed and returned for a proper determination, it now falls to this Court to determine the proportionate balance in this case.

The majority's lack of rationale for insisting on a distinct framework for judicial review of *Charter*-infringing administrative decisions is troubling, particularly in light of the fact that the application of the *Oakes* test is already context-specific. The orthodox test — the *Oakes* test — must apply to justify state infringements of *Charter* rights, regardless of the context in which they occur. Holding otherwise subverts the promise of the Constitution that the rights and freedoms guaranteed by the *Charter* will be subject only to "such reasonable limits prescribed by law as can be demonstrably justified". Under the *Doré/Loyola* framework, *Charter* rights are guaranteed only so far as they are consistent with the objectives of the enabling statute. Section 1 of the *Charter* does not guarantee certain rights and freedoms subject only to the limits imposed by statutory objectives, but to limits that are "demonstrably justified in a free and democratic society". Further, the Court has been silent on who bears the burden to justify a rights limitation in the administrative context, leaving a conspicuous and serious lacuna in the framework. The burden must rest with the state actor.

justice en « préservant et en protégeant les droits et libertés de chacun », cet article n'habilite pas la LSBC à veiller au respect des normes relatives aux droits de la personne dans les facultés de droit. Tout préjudice causé aux communautés marginalisées dans le contexte de la formation juridique est examiné par les tribunaux provinciaux des droits de la personne, par les assemblées législatives et par les membres de l'exécutif, qui confèrent à ces institutions le pouvoir de délivrer des diplômes.

La LSBC a manqué à son devoir statutaire en s'en remettant aux résultats d'un référendum ayant une incidence sur des droits garantis par la *Charte* sans réaliser, comme le requiert le cadre d'analyse prescrit dans les arrêts *Doré* et *Loyola*, un juste équilibre entre ces droits et les objectifs législatifs en cause. Les résultats du référendum ont été entérinés sans autre discussion et, par conséquent, sans la tenue d'un débat de fond. La décision de la LSBC ne repose donc sur aucun raisonnement. Et pourtant, les juges majoritaires de la Cour ont remplacé les motifs (inexistants) de la LSBC par les leurs et ils font du résultat leur seule considération. Bien qu'une erreur aussi grave commande normalement que la décision de la LSBC soit annulée et que le dossier lui soit renvoyé pour qu'elle tranche la question adéquatement, il revient maintenant à la Cour de déterminer ce qui constitue une mise en balance proportionnée en l'espèce.

Le manque de logique quant au fait pour les juges majoritaires d'insister pour qu'un cadre d'analyse distinct soit appliqué aux décisions administratives attentatoires est troublant, d'autant plus que l'application des étapes de l'analyse de l'arrêt *Oakes* est déjà contextuelle. L'analyse traditionnelle — celle de l'arrêt *Oakes* — doit s'appliquer aux atteintes par l'État aux droits garantis par la *Charte*, peu importe le contexte dans lequel elles se produisent. Conclure différemment viole la promesse découlant de la Constitution que les droits et libertés garantis par la *Charte* ne seront assujettis qu'à « des limites qui soient raisonnables et dont la justification puisse se démontrer ». Selon le cadre d'analyse des arrêts *Doré* et *Loyola*, les droits garantis par la *Charte* ne sont protégés que dans la mesure où ils sont compatibles avec les objectifs de la loi habilitante. L'article premier de la *Charte* protège certains droits et libertés non seulement sous réserve des limites qu'imposent les objectifs visés par la loi, mais sous réserve des limites « dont la justification [peut] se démontrer dans le cadre d'une société libre et démocratique ». De surcroît, la Cour est restée muette quant à l'identité de la personne à qui incombe le fardeau de justifier la restriction de droits dans le contexte administratif, laissant ainsi une lacune, évidente et grave, dans ce cadre d'analyse. Ce fardeau doit reposer sur l'acteur étatique.

The majority's continued reliance on values protected by the *Charter* as equivalent to rights is similarly troubling. Resorting to *Charter* values as a counterweight to constitutionalized and judicially defined *Charter* rights is a highly questionable practice. *Charter* values are unsourced, amorphous and, just as importantly, undefined. The majority's preferred value of equality is, without further definition, too vague a notion on which to ground a claim to equal treatment in any and all concrete situations, such as admission to a law school. A value of equality is, therefore, a questionable notion against which to balance the exercise by the TWU community of its *Charter*-protected rights.

Le fait que les juges majoritaires utilisent de façon soutenue les valeurs consacrées par la *Charte* comme notion équivalant aux droits est tout aussi préoccupant. Invoquer les valeurs consacrées par la *Charte* pour faire contrepoids aux droits garantis par celle-ci, constitutionnalisés et définis par les tribunaux, est une pratique fort discutable. Les valeurs consacrées par la *Charte* ne découlent pas d'une source particulière, elles sont floues et, qui plus est, non définies. Sans autre définition, la valeur de l'égalité, privilégiée par les juges majoritaires, est une notion trop vague pour servir de fondement à une demande portant sur le droit à un traitement égal dans une situation concrète, comme l'admission à une faculté de droit. Il est donc discutable de mettre en balance une valeur d'égalité pour apprécier l'exercice par la communauté de TWU des droits que lui garantit la *Charte*.

The LSBC's decision not to approve TWU's proposed law school infringes the religious freedom of members of the TWU community. The freedom of religion under s. 2(*a*) of the *Charter*, interpreted broadly and purposively, captures the freedom of members of the TWU community to express their religious beliefs through the Covenant — a code of conduct protected by provincial human rights legislation — and to associate with one another in order to study law in an educational community which reflects their religious beliefs. The LSBC's decision is a profound interference with religious freedom, and is contrary to the state's duty of religious neutrality. It is substantively coercive in nature.

La décision de la LSBC de ne pas agréer la faculté de droit proposée par TWU porte atteinte à la liberté de religion des membres de la communauté de TWU. La liberté de religion garantie par l'al. 2*a*) de la *Charte*, lorsqu'elle reçoit une interprétation large et téléologique, s'étend à la liberté des membres de la communauté de TWU d'exprimer leurs croyances religieuses au moyen du *Covenant* — un code de conduite protégé par la législation provinciale relative aux droits de la personne — et de s'associer les uns aux autres afin d'étudier le droit dans un milieu d'enseignement qui témoigne de leurs croyances religieuses. La décision de la LSBC constitue une atteinte profonde à la liberté de religion et est contraire au devoir de neutralité religieuse de l'État. Elle est de nature hautement coercitive.

The LSBC's statutory objective in rendering an approval decision is to ensure that individual applicants are fit for licensing. Accordingly, the justification under s. 1 of the *Charter* of a restriction on freedom of religion requires evidence of a detrimental impact in the form of the unfitness of future graduates of TWU's proposed law school to practise law. As the fitness of future graduates of TWU's proposed law school was not in dispute, this statutory objective cannot justify any limitations on the TWU community's s. 2(*a*) rights.

L'objectif statutaire vers lequel la LSBC doit tendre lorsqu'elle décide de l'opportunité d'agréer une faculté de droit est celui de veiller à ce que les candidats soient individuellement aptes à accéder à la profession. Par conséquent, la justification au regard de l'article premier de la *Charte* de la restriction à la liberté de religion exige que soit démontrée une incidence préjudiciable prenant la forme de l'inaptitude à pratiquer le droit des éventuels diplômés de la faculté de droit proposée par TWU. Étant donné que l'aptitude des éventuels diplômés de cette faculté de droit n'a pas été remise en question, cet objectif statutaire ne saurait justifier une restriction apportée aux droits de la communauté de TWU garantis par l'al. 2*a*) de la *Charte*.

Even if the LSBC's statutory mandate had permitted the consideration of broader public interest concerns, the LSBC's decision would not be justified, since withholding approval substantially interferes with the TWU community's freedom of religion and approving TWU's proposed law school was not against the public interest.

Même si le mandat que lui confère la loi avait autorisé la LSBC à prendre en considération les questions plus vastes d'intérêt public, sa décision ne serait pas justifiée parce que le refus d'agréer la faculté de droit constitue une entrave substantielle à la liberté de religion de la communauté de TWU et que le fait d'agréer la faculté de droit

Accommodating religious diversity is in the public interest, broadly understood, and approving the proposed law school does not condone discrimination against LGBTQ persons. The purpose of TWU's admissions policy is not to exclude LGBTQ persons, or anybody else, but to establish a code of conduct which ensures the vitality of its religious community. No one group is singled out, and many others (notably unmarried heterosexual persons) would be bound by it. The unequal access resulting from the Covenant is a function of accommodating religious freedom, which itself advances the public interest by promoting diversity in a liberal, pluralist society. The state and state actors — not private institutions like TWU — are constitutionally bound to accommodate difference in order to foster pluralism in public life. Equating approval to condonation turns the protective shield of the *Charter* into a sword by effectively imposing *Charter* obligations on private actors.

Accommodating diverse beliefs and values is a precondition to the secularism and the pluralism that are needed to protect and promote the *Charter* rights of all Canadians. State neutrality requires that the state neither favour nor hinder any particular belief, and the same holds true for non-belief. Either way, state neutrality must prevail. Tolerance and accommodation of difference serve the public interest and foster pluralism. Approving TWU's proposed law school was the only decision reflecting a proportionate balancing between *Charter* rights and the LSBC's statutory objectives.

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proposée par l'université n'était pas contraire à l'intérêt public. Respecter la diversité religieuse est dans l'intérêt public au sens large, et le fait d'agréer la faculté de droit proposée ne revient pas à approuver des actes discriminatoires à l'égard des personnes LGBTQ. La politique d'admission de TWU n'a pas pour objet d'exclure les personnes LGBTQ — ni personne d'autre, d'ailleurs —, mais bien d'établir un code de conduite qui assure la vitalité de la communauté religieuse de l'université. Elle ne concerne pas un seul groupe de personnes, et bien d'autres groupes (notamment les personnes hétérosexuelles non mariées) y seraient assujettis. L'inégalité d'accès que cause le *Covenant* découle directement du respect de la liberté de religion, qui en soi permet de promouvoir l'intérêt public en favorisant la diversité au sein d'une société libérale et pluraliste. Seuls l'État et les acteurs étatiques — et non les institutions privées comme TWU — sont constitutionnellement tenus de respecter la différence de sorte à promouvoir le pluralisme dans la sphère publique. Assimiler ainsi reconnaissance et approbation fait du rempart qu'est la *Charte* une arme qui impose à des acteurs privés des obligations découlant de la *Charte*.

Le respect de la diversité de croyances et de valeurs est une condition préalable à la laïcité et au pluralisme, lesquels sont nécessaires pour protéger et favoriser les droits garantis par la *Charte* de tous les Canadiens. La neutralité de l'État exige qu'il ne favorise ni ne défavorise aucune croyance, pas plus du reste que l'incroyance. Dans tous les cas, la neutralité de l'État doit primer. La tolérance et le respect de la différence servent l'intérêt public et favorisent le pluralisme. La reconnaissance de la faculté de droit proposée par TWU constituait la seule décision représentant une mise en balance proportionnée des droits garantis par la *Charte* et des objectifs statutaires de la LSBC.

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Peter A. Gall, *Q.C.*, *Donald R. Munroe*, *Q.C.*, *Benjamin J. Oliphant* and *Deborah Armour*, for the appellant.

Kevin L. Boonstra, *Jonathan B. Maryniuk* and *Kevin G. Sawatsky*, for the respondents.

Julius H. Grey, *Gail Davidson* and *Audrey Boissonneault*, for the intervener Lawyers' Rights Watch Canada.

Eugene Meehan, *Q.C.*, and *Daniel C. Santoro*, for the intervener the National Coalition of Catholic School Trustees' Associations.

Eugene Meehan, *Q.C.*, and *Marie-France Major*, for the intervener the International Coalition of Professors of Law.

Derek Ross and *Deina Warren*, for the intervener the Christian Legal Fellowship.

Susan Ursel, *David Grossman* and *Olga Redko*, for the intervener the Canadian Bar Association.

Chris Paliare, *Joanna Radbord* and *Monique Pongracic-Speier*, for the intervener the Advocates' Society.

André Schutten and *John Sikkema*, for the intervener the Association for Reformed Political Action (ARPA) Canada.

Barry W. Bussey and *Philip A. S. Milley*, for the intervener the Canadian Council of Christian Charities.

William J. Sammon and *Amanda M. Estabrooks*, for the intervener the Canadian Conference of Catholic Bishops.

Peter J. Barnacle and *Immanuel Lanzaderas*, for the intervener the Canadian Association of University Teachers.

2326, 392 D.L.R. (4th) 722, 344 C.R.R. (2d) 267, 85 B.C.L.R. (5th) 174, [2016] 8 W.W.R. 298, 100 Admin. L.R. (5th) 99, [2015] B.C.J. No. 2697 (QL), 2015 CarswellBC 3618 (WL Can.). Pourvoi accueilli, les juges Côté et Brown sont dissidents.

Peter A. Gall, *c.r.*, *Donald R. Munroe*, *c.r.*, *Benjamin J. Oliphant* et *Deborah Armour*, pour l'appelante.

Kevin L. Boonstra, *Jonathan B. Maryniuk* et *Kevin G. Sawatsky*, pour les intimés.

Julius H. Grey, *Gail Davidson* et *Audrey Boissonneault*, pour l'intervenante Lawyers' Rights Watch Canada.

Eugene Meehan, *c.r.*, et *Daniel C. Santoro*, pour l'intervenante National Coalition of Catholic School Trustees' Associations.

Eugene Meehan, *c.r.*, et *Marie-France Major*, pour l'intervenante International Coalition of Professors of Law.

Derek Ross et *Deina Warren*, pour l'intervenante l'Alliance des chrétiens en droit.

Susan Ursel, *David Grossman* et *Olga Redko*, pour l'intervenante l'Association du Barreau canadien.

Chris Paliare, *Joanna Radbord* et *Monique Pongracic-Speier*, pour l'intervenante la Société des plaideurs.

André Schutten et *John Sikkema*, pour l'intervenante Association for Reformed Political Action (ARPA) Canada.

Barry W. Bussey et *Philip A. S. Milley*, pour l'intervenant Canadian Council of Christian Charities.

William J. Sammon et *Amanda M. Estabrooks*, pour l'intervenante la Conférence des évêques catholiques du Canada.

Peter J. Barnacle et *Immanuel Lanzaderas*, pour l'intervenante l'Association canadienne des professeures et professeurs d'université.

Kristine Spence, for the intervener the Law Students' Society of Ontario.

Gerald Chipeur, *Q.C.*, *Jonathan Martin* and *Grace Mackintosh*, for the intervener the Seventh-day Adventist Church in Canada.

Karey Brooks and *Elin Sigurdson*, for the intervener the BC LGBTQ Coalition.

Albertos Polizogopoulos and *Kristin Debs*, for the interveners the Evangelical Fellowship of Canada and Christian Higher Education Canada.

Wesley J. McMillan and *Kaitlyn Meyer*, for the intervener the British Columbia Humanist Association.

Adriel Weaver, for the intervener Egale Canada Human Rights Trust.

Michael Sobkin and *E. Blake Bromley*, for the intervener the Faith, Fealty & Creed Society.

Gwendoline Allison and *Philip Horgan*, for the interveners the Roman Catholic Archdiocese of Vancouver, the Catholic Civil Rights League and the Faith and Freedom Alliance.

Tim Dickson and *Catherine George*, for the intervener the Canadian Secular Alliance.

Robyn Trask and *Rajwant Mangat*, for the intervener the West Coast Women's Legal Education and Action Fund.

Avnish Nanda and *Balpreet Singh Boparai*, for the intervener the World Sikh Organization of Canada.

The following is the judgment delivered by

Abella, Moldaver, Karakatsanis, Wagner and Gascon JJ. —

I. Overview

[1] Trinity Western University (TWU), an evangelical Christian postsecondary institution, seeks to open a law school that requires its students and

Kristine Spence, pour l'intervenante la Société des étudiants et étudiantes en droit de l'Ontario.

Gerald Chipeur, *c.r.*, *Jonathan Martin* et *Grace Mackintosh*, pour l'intervenante l'Église adventiste du septième jour au Canada.

Karey Brooks et *Elin Sigurdson*, pour l'intervenante BC LGBTQ Coalition.

Albertos Polizogopoulos et *Kristin Debs*, pour les intervenants l'Alliance évangélique du Canada et Christian Higher Education Canada.

Wesley J. McMillan et *Kaitlyn Meyer*, pour l'intervenante British Columbia Humanist Association.

Adriel Weaver, pour l'intervenante Égale Canada Human Rights Trust.

Michael Sobkin et *E. Blake Bromley*, pour l'intervenante Faith, Fealty & Creed Society.

Gwendoline Allison et *Philip Horgan*, pour les intervenants Roman Catholic Archdiocese of Vancouver, la Ligue catholique pour les droits de l'homme et Faith and Freedom Alliance.

Tim Dickson et *Catherine George*, pour l'intervenante Canadian Secular Alliance.

Robyn Trask et *Rajwant Mangat*, pour l'intervenant West Coast Women's Legal Education and Action Fund.

Avnish Nanda et *Balpreet Singh Boparai*, pour l'intervenante World Sikh Organization of Canada.

Version française du jugement rendu par

Les juges Abella, Moldaver, Karakatsanis, Wagner et Gascon —

I. Aperçu

[1] Trinity Western University (TWU), un établissement postsecondaire chrétien évangélique, souhaite ouvrir une faculté de droit exigeant que ses

faculty to adhere to a religiously based code of conduct prohibiting "sexual intimacy that violates the sacredness of marriage between a man and a woman".

[2] At issue in this appeal is a decision of the Law Society of British Columbia (LSBC) not to recognize TWU's proposed law school. TWU and Brayden Volkenant, a graduate of TWU's undergraduate program who would have chosen to attend TWU's proposed law school, successfully brought judicial review proceedings to the Supreme Court of British Columbia, arguing that the LSBC's decision violated religious rights protected by s. 2(*a*) of the *Canadian Charter of Rights and Freedoms*. The Court of Appeal for British Columbia found that the LSBC should have approved the law school.

[3] In our respectful view, the LSBC's decision not to recognize TWU's proposed law school represents a proportionate balance between the limitation on the *Charter* right at issue and the statutory objectives governing the LSBC. The LSBC's decision was therefore reasonable.

II. Background

A. *The Parties*

[4] TWU is a privately funded evangelical Christian university located in Langley, British Columbia. It offers around 40 undergraduate majors and 17 graduate programs spanning an array of academic disciplines and subjects, all taught from a Christian perspective. Its object is "to provide for young people of any race, colour, or creed university education in the arts and sciences with an underlying philosophy and viewpoint that is Christian" (*Trinity Western University Act*, S.B.C. 1969, c. 44, s. 3(2)).

étudiants et les membres du corps professoral adhèrent à un code de conduite fondé sur des croyances religieuses interdisant toute [TRADUCTION] « intimité sexuelle qui viole le caractère sacré du mariage entre un homme et une femme ».

[2] Ce pourvoi porte sur une décision de la Law Society of British Columbia (LSBC) de ne pas reconnaître la faculté de droit proposée par TWU. TWU et Brayden Volkenant, un diplômé du programme de premier cycle de cette université qui aurait choisi de fréquenter la faculté de droit proposée, ont eu gain de cause dans leur demande de contrôle judiciaire devant la Cour suprême de la Colombie-Britannique, dans laquelle ils faisaient valoir que la décision de la LSBC avait porté atteinte aux droits religieux protégés par l'al. 2*a*) de la *Charte canadienne des droits et libertés*. La Cour d'appel de la Colombie-Britannique a conclu que la LSBC aurait dû agréer la faculté de droit.

[3] Soit dit en tout respect, nous sommes d'avis que la décision de la LSBC de ne pas reconnaître la faculté de droit proposée par TWU représente une mise en balance proportionnée de la restriction imposée au droit en cause garanti par la *Charte* et des objectifs prévus par la loi qui régissent la LSBC. La décision de la LSBC était donc raisonnable.

II. Contexte

A. *Les parties*

[4] TWU est une université chrétienne évangélique financée par des sources privées, située à Langley en Colombie-Britannique. Elle offre environ 40 programmes d'études de premier cycle et 17 programmes d'études supérieures couvrant un éventail de disciplines et de matières, toutes enseignées dans une perspective chrétienne. Elle vise à [TRADUCTION] « offrir aux jeunes de toute race, couleur ou croyance une formation universitaire dans le domaine des arts et des sciences reposant sur une philosophie et une perspective chrétiennes » (*Trinity Western University Act*, S.B.C. 1969, c. 44, par. 3(2)).

[5] Its approach to Christian education is set out in its mission statement:

> The mission of Trinity Western University, as an arm of the Church, is to develop godly Christian leaders: positive, goal-oriented university graduates with thoroughly Christian minds; growing disciples of Christ who glorify God through fulfilling the Great Commission, serving God and people in the various marketplaces of life.

(A.R., vol. I, at p. 119)

[6] Evangelical Christians believe in the authority of the Bible, the commitment to sharing the Christian message through evangelism, and sexual moral purity which requires sexual abstention outside marriage between a man and a woman. TWU's curriculum is developed and taught in a manner consistent with its religious worldview. The foundational beliefs of evangelical Christianity are also reflected in TWU's Community Covenant Agreement (Covenant). The Covenant requires TWU community members to "voluntarily abstain" from a number of actions, including harassment, lying, cheating, plagiarism, and the use or possession of alcohol on campus. At the heart of this appeal, however, is the Covenant's prohibition on "sexual intimacy that violates the sacredness of marriage between a man and a woman" (A.R., vol. III, at p. 403).

[7] All TWU students and faculty must sign and abide by the Covenant as a condition of attendance or employment. The behavioural expectations set out in the Covenant apply to conduct both on and off campus. A student's failure to comply with the Covenant may result in disciplinary measures including suspension or permanent expulsion. Students are expected to hold each other accountable for complying with the Covenant; disciplinary processes may be initiated as a result of a complaint by a TWU student regarding another student's behaviour.

[5] Son approche de l'éducation chrétienne est exposée dans son énoncé de mission :

> [TRADUCTION] La mission de la Trinity Western University, en tant que ramification de l'Église, est de former des chefs de file chrétiens pieux : des diplômés universitaires qui soient positifs et qui aient des objectifs à atteindre dans un esprit entièrement chrétien; des disciples de plus en plus fervents de Jésus-Christ qui rendent gloire à Dieu en remplissant la grande mission, servir Dieu et leur prochain dans les différents aspects de leur vie.

(d.a., vol. I, p. 119)

[6] Les chrétiens évangéliques croient à l'autorité de la Bible, à l'engagement de faire partager le message chrétien par l'évangélisation et à la pureté morale sexuelle qui exige une abstinence sexuelle en dehors du mariage entre un homme et une femme. Le programme d'études de TWU est conçu et enseigné d'une manière qui respecte sa vision religieuse du monde. Les croyances fondamentales du christianisme évangélique se reflètent également dans un engagement intitulé le *Community Covenant Agreement* (*Covenant*). Le *Covenant* exige que les membres de la communauté de TWU [TRADUCTION] « s'abstiennent volontairement » de certains comportements, dont le harcèlement, le mensonge, la tricherie, le plagiat et la consommation ou la possession d'alcool sur le campus. Toutefois, c'est l'interdiction de toute [TRADUCTION] « intimité sexuelle qui viole le caractère sacré du mariage entre un homme et une femme » qui est au cœur de ce pourvoi (d.a., vol. III, p. 403).

[7] Tous les étudiants et les membres du corps professoral de TWU sont obligés, comme condition de fréquentation ou d'emploi, de signer et de respecter le *Covenant*. Les attentes en matière de comportement énoncées dans cet engagement s'appliquent sur le campus et hors campus. Le défaut d'un étudiant de s'y conformer peut entraîner des mesures disciplinaires, dont la suspension ou le renvoi définitif. On s'attend à ce que les étudiants se tiennent mutuellement responsables du respect du *Covenant*; des procédures disciplinaires peuvent être engagées à la suite d'une plainte d'un étudiant de TWU concernant le comportement d'un autre étudiant.

[8] While a large proportion of the students who enroll at TWU identify as Christian, TWU says that its students may, and in fact do, hold and express diverse opinions on moral, ethical and religious issues and are encouraged to debate different viewpoints inside and outside the classroom.

[9] Brayden Volkenant is a graduate of TWU's undergraduate program, who identifies as an evangelical Christian. He deposed that at the time he was applying to attend law school, TWU's proposed law school would have been his "top choice".

[10] The LSBC is the regulator of the legal profession in British Columbia. The LSBC's structure, object and powers are set out in its governing statute, the *Legal Profession Act*, S.B.C. 1998, c. 9 (*LPA*). The LSBC has the statutory authority to determine who may be admitted to the British Columbia bar (see *LPA*, ss. 19 to 21).

B. *TWU's Proposed Law School*

[11] Over two decades ago, TWU decided that it wished to establish a faculty of law and to add a three-year juris doctor (J.D.) common law degree program to its degree offerings. In June 2012, TWU submitted its proposal to British Columbia's Minister of Advanced Education for the approval required to be able to grant law degrees, pursuant to the Minister's authority under the *Degree Authorization Act*, S.B.C. 2002, c. 24, s. 4(1).

[12] TWU also submitted its proposal to the Federation of Law Societies of Canada, which received delegated authority from each of the provincial law societies in 2010 to ensure that new Canadian common law degree programs meet established national requirements. In December 2013, the Federation granted preliminary approval to TWU's proposed law school program. The following day, the Minister granted approval to TWU's proposed

[8] Bien qu'une grande partie des étudiants inscrits à TWU s'identifient comme chrétiens, TWU affirme qu'ils peuvent avoir et exprimer des opinions diverses sur des questions morales, éthiques et religieuses — et que, de fait, ils le font — et qu'ils sont encouragés à débattre de différents points de vue à l'intérieur et à l'extérieur des salles de cours.

[9] Brayden Volkenant est un diplômé du programme de premier cycle de TWU, qui s'identifie comme un chrétien évangélique. Il a affirmé dans son témoignage qu'à l'époque où il a fait ses demandes pour être admis en droit, la faculté de droit proposée par TWU aurait été son [TRADUCTION] « premier choix ».

[10] La LSBC est l'organisme chargé de réglementer la profession juridique en Colombie-Britannique. La structure, l'objet et les pouvoirs de la LSBC sont établis dans sa loi habilitante, la *Legal Profession Act*, S.B.C. 1998, c. 9 (*LPA*). Cette loi confère à la LSBC le pouvoir de déterminer qui peut être admis au barreau de la Colombie-Britannique (voir la *LPA*, art. 19 à 21).

B. *La faculté de droit proposée par TWU*

[11] Il y a plus de deux décennies, TWU a décidé d'établir une faculté de droit et d'ajouter un programme de common law juris doctor (J.D.) de trois ans à son offre de diplômes. En juin 2012, elle a présenté sa proposition au ministre de l'Enseignement supérieur de la Colombie-Britannique pour qu'il lui accorde, conformément au pouvoir que lui confère la *Degree Authorization Act*, S.B.C. 2002, c. 24, par. 4(1), l'autorisation requise pour pouvoir décerner des diplômes en droit.

[12] TWU a également présenté sa proposition à la Fédération des ordres professionnels de juristes du Canada, à laquelle chacun des barreaux provinciaux a délégué en 2010 le pouvoir de veiller à ce que les nouveaux programmes de grade universitaire en common law canadiens répondent à des exigences nationales reconnues. En décembre 2013, la Fédération a accordé une approbation préliminaire au programme de la faculté de droit proposée par

law school, authorizing TWU to grant law degrees to its graduates.

C. *The LSBC's Decision Not to Approve TWU's Proposed Law School*

[13] Under the LSBC's Rules, adopted pursuant to the *LPA*, enrollment in the LSBC's bar admission program requires proof of "academic qualification". Under Rule 2-27 (now Rule 2-54 of the *Law Society Rules 2015*), this requirement is met with a bachelor of laws or equivalent degree issued by an "approved" common law faculty of law in a Canadian university.

[14] A common law faculty of law is "approved" for the purposes of Rule 2-27 if it has been approved by the Federation "unless the Benchers adopt a resolution declaring that it is not or has ceased to be an approved faculty of law".

[15] Therefore, when the Federation granted its preliminary approval to TWU's law school on December 16, 2013, the law school became an "approved" faculty of law under the LSBC's Rule 2-27, unless the Benchers declared that it was not.

[16] At their meeting of February 28, 2014, the LSBC Benchers confirmed that they would vote on whether to adopt the following resolution at a meeting scheduled for April 11, 2014:

> Pursuant to Law Society Rule 2-27(4.1), the Benchers declare that, notwithstanding the preliminary approval granted to Trinity Western University on December 16, 2013 by the Federation of Law Societies' Canadian Common Law Program Approval Committee, the proposed School of Law at Trinity Western University is not an approved faculty of law.

(A.R., vol. VII, at p. 1136)

TWU. Le lendemain, le ministre a donné son aval à la faculté de droit proposée par TWU, permettant ainsi à cette université de décerner des diplômes de droit à ses diplômés.

C. *La décision de la LSBC de ne pas agréer la faculté de droit proposée par TWU*

[13] Selon les règles de la LSBC, adoptées en vertu de la *LPA*, l'inscription au programme d'admission au barreau de la LSBC requiert une preuve de [TRADUCTION] « diplôme universitaire ». L'article 2-27 (maintenant l'art. 2-54 des *Law Society Rules 2015*) des règles prévoit qu'un baccalauréat en droit ou un diplôme équivalent délivré par une faculté de common law « agréée » d'une université canadienne remplit cette exigence.

[14] Une faculté de common law est [TRADUCTION] « agréée » pour l'application de l'art. 2-27 si elle a reçu l'approbation de la Fédération « à moins que les conseillers n'adoptent une résolution déclarant qu'elle n'est pas une faculté de droit agréée ou qu'elle a cessé de l'être ».

[15] En conséquence, lorsque la Fédération a accordé son approbation préliminaire à la faculté de droit de TWU le 16 décembre 2013, celle-ci est devenue une faculté de droit « agréée » pour l'application de l'art. 2-27 des règles de la LSBC, à moins que les conseillers ne déclarent qu'elle ne l'était pas.

[16] Lors de leur réunion du 28 février 2014, les conseillers de la LSBC ont confirmé qu'ils voteraient sur l'opportunité d'adopter la résolution suivante au cours de la réunion prévue le 11 avril 2014 :

> [TRADUCTION] En application du par. 2-27(4.1) des règles de la Law Society, les conseillers déclarent que, malgré l'approbation préliminaire accordée à la Trinity Western University le 16 décembre 2013 par le Comité d'agrément des programmes d'études en common law canadiens de la Fédération des ordres professionnels de juristes du Canada, la faculté de droit que l'on se propose d'ouvrir à la Trinity Western University n'est pas une faculté de droit agréée.

(d.a., vol. VII, p. 1136)

Ahead of the scheduled vote, the Benchers received written submissions and other information from TWU, submissions from the profession and the public, and various legal opinions. At the April 11, 2014 meeting, the resolution failed, and TWU's proposed law school remained approved under Rule 2-27.

[17] This prompted a considerable response from members of British Columbia's legal profession. LSBC members requisitioned a Special General Meeting pursuant to what was then Rule 1-9(2) (now Rule 1-11(2) of the *Law Society Rules 2015*) to consider and vote on a resolution that would direct the Benchers to declare that TWU's law school not be an approved faculty of law under Rule 2-27. The members were provided with, and encouraged to review, the material that had been provided to the Benchers before their April 11, 2014 meeting, and to review the webcast or transcript of that meeting.

[18] The Special General Meeting was held on June 10, 2014. By a vote of 3210 members for and 968 members against, the members voted to adopt the proposed resolution not approving the law school.

[19] At a meeting held on September 26, 2014, the Benchers considered their response, debating among three alternative means of proceeding. The first was to hold a referendum of members on the question of whether the Benchers should be required to implement the resolution. The second was for the Benchers to immediately implement the resolution by declaring that TWU's proposed law school was not approved. The third was for the Benchers to postpone consideration of the issue until the release of a trial decision in any one of the three parallel litigation proceedings relating to recognition of TWU's law school then taking place in British Columbia, Ontario and Nova Scotia.

Avant la tenue du vote, les conseillers ont reçu des observations écrites et d'autres renseignements de TWU, des observations des membres de la profession et du public ainsi que divers avis juridiques. Lors de la réunion du 11 avril 2014, la résolution n'a pas été adoptée et la faculté de droit proposée par TWU a continué d'être une faculté agréée selon l'art. 2-27 des règles.

[17] Cela a suscité de nombreuses réactions de la part des membres de la profession juridique de la Colombie-Britannique. Les membres de la LSBC ont demandé la tenue d'une assemblée générale extraordinaire conformément à ce qui était alors le par. 1-9(2) (maintenant le par. 1-11(2) des *Law Society Rules 2015*) des règles afin de se pencher et de voter sur une résolution qui intimerait aux conseillers de déclarer que la faculté de droit de TWU n'est pas une faculté de droit agréée pour l'application du par. 2-27 des règles. Les membres ont reçu les documents qui avaient été fournis aux conseillers avant la réunion du 11 avril 2014 et ils ont été encouragés à les examiner ainsi qu'à visionner la webémission de la réunion ou à consulter sa transcription.

[18] L'assemblée générale extraordinaire a eu lieu le 10 juin 2014. Les membres ont voté à 3210 voix contre 968 en faveur de l'adoption de la résolution proposée de refuser d'agréer la faculté de droit.

[19] Lors d'une réunion tenue le 26 septembre 2014, les conseillers ont discuté de leur réponse et considéré trois façons de procéder. Le premier scénario consistait à tenir un référendum auprès des membres sur la question de savoir si les conseillers étaient tenus d'appliquer la résolution. Dans le deuxième scénario, les conseillers appliquaient immédiatement la résolution en déclarant que la faculté de droit proposée par TWU n'était pas une faculté de droit agréée. Dans le troisième scénario, les conseillers reportaient l'examen de la question jusqu'à ce qu'une décision de première instance soit rendue dans l'une ou l'autre des trois procédures parallèles sur la reconnaissance de la faculté de droit de TWU alors pendantes en Colombie-Britannique, en Ontario et en Nouvelle-Écosse.

[20] The Benchers chose the first option, voting to hold a referendum on the issue of TWU's law school approval. The Benchers agreed to be bound by the results only if one-third of members voted in the referendum and two-thirds of the votes were in favour of implementing the June 10, 2014 resolution.

[21] The referendum of all members was conducted by mail-in ballot in October 2014: 5951 members voted to implement the resolution through a declaration that TWU's proposed law school was not an approved faculty of law, while 2088 members voted against the resolution.

[22] On October 31, 2014, the Benchers passed a resolution declaring that TWU's law school was not an approved faculty of law. The resolution was passed with 25 votes in favour, one against, and four abstentions. On December 11, 2014, the Minister withdrew his approval of TWU's proposed law school under the *Degree Authorization Act*.

III. Prior Decisions

A. *Judicial Review — 2015 BCSC 2326, 392 D.L.R. (4th) 722 (Hinkson C.J.)*

[23] TWU and Mr. Volkenant applied to the Supreme Court of British Columbia for judicial review of the LSBC's decision, arguing that it failed to appropriately take into account their freedom of religion under s. 2(*a*).

[24] The court concluded that while refusing TWU's proposed faculty of law based on its admissions policy was within the LSBC's statutory mandate, by putting the issue to a referendum, the Benchers had improperly fettered their discretion. The court further concluded that the Benchers were obligated to consider and balance TWU's and Mr. Volkenant's s. 2(*a*) *Charter* rights with the equality rights of current and prospective LSBC members, particularly the LGBTQ community. Since the LSBC had proceeded by referendum, this balancing had not taken place. The court quashed the LSBC's decision

[20] Les conseillers ont opté pour le premier scénario : voter pour la tenue d'un référendum sur la question de la reconnaissance de la faculté de droit proposée par TWU. Ils ont convenu qu'ils seraient liés par les résultats seulement si un tiers des membres votaient au référendum et que deux tiers des votes étaient favorables à l'application de la résolution du 10 juin 2014.

[21] En octobre 2014, un référendum par scrutin postal a été tenu auprès de tous les membres : ceux-ci ont voté par 5951 voix contre 2088 pour que la résolution soit appliquée au moyen d'une déclaration indiquant que la faculté de droit proposée par TWU n'était pas une faculté de droit agréée.

[22] Le 31 octobre 2014, les conseillers ont adopté une résolution déclarant que la faculté de droit de TWU n'était pas une faculté de droit agréée. La résolution a été adoptée par 25 voix pour, une voix contre et quatre abstentions. Le 11 décembre 2014, le ministre a retiré l'approbation qu'il avait donnée à la faculté de droit proposée par TWU en vertu de la *Degree Authorization Act*.

III. Décisions antérieures

A. *Contrôle judiciaire — 2015 BCSC 2326, 392 D.L.R. (4th) 722 (le juge en chef Hinkson)*

[23] TWU et M. Volkenant ont saisi la Cour suprême de la Colombie-Britannique d'une demande de contrôle judiciaire de la décision de la LSBC au motif que cette dernière n'avait pas adéquatement pris en compte leur liberté de religion protégée par l'al. 2*a*).

[24] La cour a conclu que le refus d'agréer la faculté de droit proposée par TWU en raison de sa politique d'admission relevait du mandat confié par la loi à la LSBC, mais qu'en tenant un référendum sur la question, les conseillers avaient limité indûment leur pouvoir discrétionnaire. Elle a en outre conclu que les conseillers étaient tenus de prendre en considération et de mettre en balance les droits de TWU et de M. Volkenant protégés par l'al. 2*a*) de la *Charte* avec les droits à l'égalité des membres actuels et futurs de la LSBC, et plus particulièrement ceux de la communauté LGBTQ. Étant donné que la

and restored the results of the April 11, 2014 vote whereby TWU's proposed law school remained "approved" under Rule 2-27.

B. *Court of Appeal — 2016 BCCA 423, 405 D.L.R. (4th) 16 (Bauman C.J. and Newbury, Groberman, Willcock and Fenlon JJ.A.)*

[25] The Court of Appeal for British Columbia dismissed the appeal. The court was of the view that the Benchers had improperly fettered their discretion by binding themselves to the referendum results. As the Benchers were aware that the *Charter* was implicated by the decision, they were required to balance any potential infringement of *Charter* rights with the relevant statutory objectives.

[26] In any case, the Court of Appeal also concluded that the decision not to approve TWU's law school did not represent a proportionate balance between the LSBC's statutory objectives and the relevant *Charter* protections. Applying *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, and *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613, the court found that the impact on TWU's religious freedom was severe, while any practical effect on access to the legal profession for LGBTQ persons was insignificant. The Court of Appeal therefore concluded that the LSBC's decision not to approve TWU's law school was unreasonable.

IV. Analysis

A. *Questions on Appeal*

[27] At the outset, it is important to identify what the LSBC actually decided when denying approval to TWU's proposed law school. The LSBC did not deny graduates from TWU's proposed law school admission to the LSBC; rather, the LSBC denied TWU's proposed law school with a mandatory covenant.

LSBC avait procédé par référendum, cette mise en balance n'avait pas été effectuée. La cour a annulé la décision de la LSBC et rétabli les résultats du vote du 11 avril 2014 suivant lequel la faculté de droit proposée par TWU demeurait « agréée » pour l'application de l'art. 2-27 des règles.

B. *Cour d'appel — 2016 BCCA 423, 405 D.L.R. (4th) 16 (le juge en chef Bauman et les juges Newbury, Groberman, Willcock et Fenlon)*

[25] La Cour d'appel de la Colombie-Britannique a rejeté l'appel. Elle s'est dite d'avis que les conseillers avaient limité indûment leur pouvoir discrétionnaire en acceptant d'être liés par les résultats du référendum. Comme les conseillers savaient que la décision mettait en cause la *Charte*, ils étaient tenus de mettre en balance toute atteinte potentielle aux droits protégés par celle-ci avec les objectifs de la loi pertinents.

[26] Quoi qu'il en soit, la Cour d'appel a aussi conclu que la décision de ne pas agréer la faculté de droit de TWU ne représentait pas une mise en balance proportionnée des objectifs confiés par la loi à la LSBC et des protections pertinentes conférées par la *Charte*. Appliquant les arrêts *Doré c. Barreau du Québec*, 2012 CSC 12, [2012] 1 R.C.S. 395, et *École secondaire Loyola c. Québec (Procureur général)*, 2015 CSC 12, [2015] 1 R.C.S. 613, la cour a jugé que l'incidence sur la liberté de religion de TWU était importante, alors que les effets concrets sur l'accès à la profession juridique pour les personnes LGBTQ étaient négligeables. La Cour d'appel a donc statué que la décision de la LSBC de ne pas reconnaître la faculté de droit de TWU était déraisonnable.

IV. Analyse

A. *Les questions soulevées dans le pourvoi*

[27] D'entrée de jeu, il importe de déterminer ce que la LSBC a véritablement décidé lorsqu'elle a refusé d'agréer la faculté de droit proposée par TWU. La LSBC n'a pas refusé l'admission en son sein à des diplômés de la faculté de droit proposée; elle a plutôt refusé d'agréer la faculté de droit proposée par TWU, dont la fréquentation était assujettie à un covenant obligatoire.

[28] In reviewing this decision, we must consider the following issues: whether the LSBC was entitled under its enabling statute to consider TWU's admissions policies and to hold a referendum of its members in deciding whether to approve its proposed law school; whether the LSBC's decision limited a *Charter* protection; and if so, whether that decision reflected a proportionate balance of the *Charter* protection and the statutory objectives.

B. *The Scope of the LSBC's Statutory Mandate*

[29] This appeal requires us to address the scope of the LSBC's statutory mandate. At issue in this case is the LSBC's decision not to approve TWU's proposed law school as a route of entry to the legal profession in British Columbia — a decision that falls within the core of the LSBC's role as the gatekeeper to the profession. A question that arises is whether the LSBC was entitled to consider factors apart from the academic qualifications and competence of individual graduates in making this decision to deny approval to TWU's proposed law school.

[30] TWU argues that the LSBC is only entitled to consider a law school's academic program, rather than its admissions policies, in deciding whether to approve it. It submits that Rule 2-27, the LSBC Rule under which the decision not to approve TWU's law school was made, was passed pursuant to the Benchers' statutory authority to make rules to "establish requirements, including academic requirements, and procedures" for enrolment of articled students and for admission to the bar, set out in ss. 20(1)(a) and 21(1)(b) of the *LPA*. However, ss. 20(1)(a) and 21(1)(b) of the *LPA* both explicitly allow the Benchers to "establish requirements, including academic requirements". TWU's argument also ignores the Benchers' authority, under s. 11(1) of the *LPA*, to "make rules for the governing of the society, lawyers, law firms, articled students and applicants, and for the carrying out of [the *LPA*]". This authority is explicitly "not limited by any specific power or

[28] Dans l'examen de cette décision, nous devons trancher les questions suivantes : En vertu de sa loi habilitante, la LSBC pouvait-elle examiner les politiques d'admission de TWU et tenir un référendum auprès de ses membres pour décider s'il y avait lieu d'agréer la faculté de droit proposée par cette université? La décision de la LSBC avait-elle pour effet de restreindre une protection conférée par la *Charte*? Dans l'affirmative, cette décision était-elle le fruit d'une mise en balance proportionnée de la protection conférée par la *Charte* et des objectifs visés par la loi?

B. *L'étendue du mandat confié par la loi à la LSBC*

[29] En l'espèce, nous sommes appelés à nous pencher sur l'étendue du mandat confié par la loi à la LSBC. Ce pourvoi porte sur la décision de la LSBC de ne pas agréer la faculté de droit proposée par TWU comme voie d'entrée dans la profession juridique en Colombie-Britannique — une décision qui est au cœur du rôle qu'exerce la LSBC en tant que gardienne de la profession. Une question qui se pose est celle de savoir si la LSBC était en droit de prendre en considération des facteurs autres que les diplômes universitaires et la compétence de diplômés individuels pour décider de refuser de reconnaître la faculté de droit proposée par TWU.

[30] TWU soutient que la LSBC peut seulement examiner le programme d'études d'une faculté de droit, et non ses politiques d'admission, pour décider s'il convient de l'agréer. Elle fait valoir que l'art. 2-27 des règles de la LSBC, en application duquel la décision de ne pas reconnaître la faculté de droit de TWU a été prise, a été édicté dans l'exercice du pouvoir conféré par la loi aux conseillers d'instaurer des règles pour [TRADUCTION] « établir des exigences, y compris des exigences en matière de diplômes, et des procédures » relatives à l'inscription de stagiaires et à l'admission au barreau, pouvoir prévu aux al. 20(1)(a) et 21(1)(b) de la *LPA*. Toutefois, les al. 20(1)(a) et 21(1)(b) de la *LPA* permettent tous deux explicitement aux conseillers d'« établir des exigences, y compris des exigences en matière de diplômes ». L'argument de TWU ne tient pas compte non plus du pouvoir que le par. 11(1) de la *LPA* confère aux conseillers « d'établir des règles

requirement to make rules given to the benchers" elsewhere in the *LPA* (see *LPA*, s. 11(2)).

[31] In our view, the *LPA* requires the Benchers to consider the overarching objective of protecting the public interest in determining the requirements for admission to the profession, including whether to approve a particular law school.

[32] The legal profession in British Columbia, as in other Canadian jurisdictions, has been granted the privilege of self-regulation. In exchange, the profession must exercise this privilege in the public interest (*Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, at para. 36, quoting D. A. A. Stager and H. W. Arthurs in *Lawyers in Canada* (1990), at p. 31). The statutory object of the LSBC is, broadly, to uphold and protect the public interest in the administration of justice. That object is set out in s. 3 of the *LPA*, which reads as follows:

3 It is the object and duty of the society to uphold and protect the public interest in the administration of justice by

(a) preserving and protecting the rights and freedoms of all persons,

(b) ensuring the independence, integrity, honour and competence of lawyers,

(c) establishing standards and programs for the education, professional responsibility and competence of lawyers and of applicants for call and admission,

(d) regulating the practice of law, and

(e) supporting and assisting lawyers, articled students and lawyers of other jurisdictions who are

concernant la gestion de la société, des avocats, des cabinets d'avocats, des stagiaires et des demandeurs, et l'application de [la *LPA*] ». Il est explicitement prévu que ce pouvoir « n'est pas limité par une obligation ou un pouvoir exprès des conseillers d'établir des règles », prévus ailleurs dans la *LPA* (voir la *LPA*, par. 11(2)).

[31] Selon nous, la *LPA* exige que les conseillers tiennent compte de l'objectif primordial de protéger l'intérêt public lorsqu'ils déterminent les conditions d'admission dans la profession, et notamment lorsqu'ils décident s'il y a lieu d'agréer une faculté de droit en particulier.

[32] La profession juridique en Colombie-Britannique tout comme dans les autres provinces et territoires du Canada s'est vu conférer le privilège de l'autoréglementation. En contrepartie, la profession doit exercer ce privilège dans l'intérêt public (*Barreau du Nouveau-Brunswick c. Ryan*, 2003 CSC 20, [2003] 1 R.C.S. 247, par. 36, citant D. A. A. Stager et H. W. Arthurs dans *Lawyers in Canada* (1990), p. 31). La LSBC a pour objet, de façon générale, de défendre et de protéger l'intérêt public dans l'administration de la justice. Cet objet est énoncé à l'art. 3 de la *LPA* :

[TRADUCTION]

3 Le Barreau a pour objet et devoir de défendre et de protéger l'intérêt public dans l'administration de la justice :

(a) en préservant et en protégeant les droits et libertés de chacun;

(b) en assurant l'indépendance, l'intégrité, l'honneur et la compétence des avocats;

(c) en établissant des normes et des programmes pour la formation, la responsabilité professionnelle et la compétence des avocats et des personnes qui demandent l'admission;

(d) en réglementant la pratique du droit;

(e) en appuyant et en aidant les avocats, les stagiaires et les avocats d'autres ressorts autorisés à

permitted to practise law in British Columbia in fulfilling their duties in the practice of law.

[33] The LSBC's overarching statutory object in s. 3 of the *LPA* — to uphold and protect the public interest in the administration of justice — is stated in the broadest possible terms. While the provisions of s. 3 set out means by which this overarching objective is to be achieved, those means are framed expansively and include "regulating the practice of law" and "preserving and protecting the rights and freedoms of all persons". Section 3 of the *LPA*, read as a whole, manifests the legislature's intention to "leave the governance of the legal profession to lawyers" (see *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869, at p. 888).

[34] As the governing body of a self-regulating profession, the LSBC's determination of the manner in which its broad public interest mandate will best be furthered is entitled to deference. The public interest is a broad concept and what it requires will depend on the particular context.

[35] This Court most recently considered the self-regulation of the legal profession in *Green v. Law Society of Manitoba*, 2017 SCC 20, [2017] 1 S.C.R. 360. There, Wagner J. repeatedly noted the deference owed to law societies' interpretation of "public interest": that they have "broad discretion to regulate the legal profession on the basis of a number of policy considerations related to the public interest" (para. 22); that they must be afforded "considerable latitude in making rules based on [their] interpretation of the 'public interest' in the context of [their] enabling statute" (para. 24); and that they have "particular expertise when it comes to deciding on the policies and procedures that govern the practice of their professions" (para. 25).

[36] *Green* affirmed a long history of deference to law societies when they self-regulate in the public

pratiquer le droit en Colombie-Britannique dans l'accomplissement de leurs obligations dans la pratique du droit.

[33] L'objet primordial de la LSBC énoncé à l'art. 3 de la *LPA* — défendre et protéger l'intérêt public dans l'administration de la justice — est libellé en des termes on ne peut plus larges. Bien que les dispositions de l'art. 3 prévoient des moyens permettant d'atteindre cet objectif fondamental, ces moyens sont formulés de façon large et comprennent la [TRADUCTION] « réglement[ation de] la pratique du droit » et la « préserva[tion] et [la] prot[ection] [d]es droits et libertés de chacun ». L'article 3 de la *LPA*, lu dans son ensemble, témoigne de la volonté du législateur de « laisser aux avocats l'administration de la profession juridique » (voir *Pearlman c. Comité judiciaire de la Société du Barreau du Manitoba*, [1991] 2 R.C.S. 869, p. 888).

[34] Il faut faire preuve de déférence à l'égard de la décision que prend la LSBC, en tant qu'organisme chargé de réglementer une profession autonome, sur la meilleure façon de s'acquitter de son vaste mandat de protection de l'intérêt public. Le concept d'intérêt public est large et ce qu'il requiert dépendra du contexte particulier en cause.

[35] Tout récemment, dans l'arrêt *Green c. Société du Barreau du Manitoba*, 2017 CSC 20, [2017] 1 R.C.S. 360, notre Cour a examiné la question de l'autoréglementation de la profession juridique. Dans cet arrêt, le juge Wagner a fait remarquer à maintes reprises que la déférence s'impose à l'égard de l'interprétation que donnent les barreaux au concept d'« intérêt public » : les barreaux ont « un large pouvoir discrétionnaire pour réglementer la profession d'avocat en fonction de plusieurs considérations de principe dans l'intérêt public » (par. 22), ils doivent jouir « d'une vaste latitude pour adopter des règles fondées sur [leur] interprétation de "l'intérêt public" aux termes de [leur] loi habilitante » (par. 24) et ils sont dotés d'une « expertise particulière [. . .] pour prescrire les politiques et procédures qui régissent l'exercice d'une profession en particulier » (par. 25).

[36] L'arrêt *Green* confirme la longue tradition de déférence à l'égard des barreaux en ce qui concerne

interest. For many years, this Court has recognized that law societies self-regulate in the public interest (*Canada (Attorney General) v. Law Society of British Columbia*, [1982] 2 S.C.R. 307 (*Canada (A.G.)*), at pp. 335-36; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at pp. 187-88; *Pearlman*, at p. 887; *Ryan*, at para. 36). As Iacobucci J. explained in *Pearlman*, the regulation of professional practice through a system of licensing is directed toward the protection of vulnerable interests — those of clients and third parties.

[37] To that end, where a legislature has delegated aspects of professional regulation to the professional body itself, that body has primary responsibility for the development of structures, processes, and policies for regulation. This delegation recognizes the body's particular expertise and sensitivity to the conditions of practice. This delegation also maintains the independence of the bar; a hallmark of a free and democratic society (*Canada (A.G.)*, at pp. 335-36). Therefore, where a statute manifests a legislative intent to leave the governance of the legal profession to lawyers, "unless judicial intervention is clearly warranted, this expression of the legislative will ought to be respected" (*Pearlman*, at p. 888). As Iacobucci J. later explained in *Ryan*, we give deference to law society decisions to "giv[e] effect to the legislature's intention to protect the public interest by allowing the legal profession to be self-regulating" (para. 40).

[38] In sum, where legislatures delegate regulation of the legal profession to a law society, the law society's interpretation of the public interest is owed deference. This deference properly reflects legislative intent, acknowledges the law society's institutional expertise, follows from the breadth of the "public interest", and promotes the independence of the bar.

l'autoréglementation dans l'intérêt public. Depuis de nombreuses années, notre Cour reconnaît que les barreaux sont des organismes d'autoréglementation guidés par l'intérêt public (*Canada (Procureur général) c. Law Society of British Columbia*, [1982] 2 R.C.S. 307 (*Canada (P.G.)*), p. 335-336; *Andrews c. Law Society of British Columbia*, [1989] 1 R.C.S. 143, p. 187-188; *Pearlman*, p. 887; *Ryan*, par. 36). Comme le juge Iacobucci l'a expliqué dans *Pearlman*, la réglementation de l'exercice d'une profession au moyen d'un système de délivrance de permis vise à assurer la protection de droits vulnérables — ceux des clients et des tiers.

[37] À cette fin, lorsque le législateur délègue certains aspects de la réglementation d'une profession à l'organisme professionnel lui-même, l'organisme en question a comme responsabilité primordiale la mise en place des structures, des processus et des politiques en matière de réglementation. Par cette délégation on reconnaît l'expertise particulière de l'organisme ainsi que sa sensibilité à l'égard des conditions d'exercice de la profession. Cette délégation maintient également l'indépendance du barreau concerné, l'une des marques d'une société libre et démocratique (*Canada (P.G.)*, p. 335-336). En conséquence, lorsqu'une loi traduit l'intention du législateur de laisser aux avocats l'administration de la profession juridique, « à moins qu'une intervention des tribunaux ne soit manifestement justifiée, cette expression de la volonté du législateur devrait être respectée » (*Pearlman*, p. 888). Comme le juge Iacobucci l'a plus tard expliqué dans *Ryan*, nous faisons preuve de déférence à l'égard des décisions des barreaux de manière à « donne[r] effet à l'intention du législateur de protéger les intérêts du public en permettant à la profession juridique de s'autoréglementer » (par. 40).

[38] En bref, lorsque les assemblées législatives délèguent la réglementation de la profession juridique à un barreau, son interprétation de l'intérêt public commande la déférence. Cette déférence reflète bien l'intention du législateur, reconnaît l'expertise institutionnelle du barreau, découle de la portée de l'« intérêt public » et favorise l'indépendance du barreau.

[39] The LSBC in this case interpreted its duty to uphold and protect the public interest in the administration of justice as precluding the approval of TWU's proposed law school because the requirement that students sign the Covenant as a condition of admission effectively imposes inequitable barriers on entry to the school. The LSBC was entitled to be concerned that inequitable barriers on entry to law schools would effectively impose inequitable barriers on entry to the profession and risk decreasing diversity within the bar. Ultimately, the LSBC determined that the approval of TWU's proposed law school with a mandatory covenant would negatively impact equitable access to and diversity within the legal profession and would harm LGBTQ individuals, and would therefore undermine the public interest in the administration of justice.

[40] In our view, it was reasonable for the LSBC to conclude that promoting equality by ensuring equal access to the legal profession, supporting diversity within the bar, and preventing harm to LGBTQ law students were valid means by which the LSBC could pursue its overarching statutory duty: upholding and maintaining the public interest in the administration of justice, which necessarily includes upholding a positive public *perception* of the legal profession. We arrive at this conclusion for the following reasons.

[41] Limiting access to membership in the legal profession on the basis of personal characteristics, unrelated to merit, is inherently inimical to the integrity of the legal profession. This is especially so in light of the societal trust placed in the legal profession and the explicit statutory direction that the LSBC should be concerned with "preserving and protecting the rights and freedoms of all persons" as a means to upholding the public interest in the administration of justice (*LPA*, s. 3(a)). Indeed, the LSBC, as a public actor, has an overarching interest in protecting the values of equality and human rights in carrying out its functions. As Abella J. wrote in *Loyola*, at para. 47, "shared values — equality, human rights and democracy — are values the state always has a legitimate

[39] En l'espèce, la LSBC a considéré que son obligation de défendre et de protéger l'intérêt public dans l'administration de la justice l'empêchait d'agréer la faculté de droit proposée par TWU parce qu'obliger les étudiants à signer le *Covenant* comme condition d'admission dresse effectivement des barrières inéquitables à l'entrée à la faculté. La LSBC était en droit de craindre que l'imposition de barrières inéquitables à l'entrée aux facultés de droit impose dans les faits des barrières inéquitables à l'entrée dans la profession et risque ainsi de diminuer la diversité au sein du barreau. En fin de compte, la LSBC a conclu que la reconnaissance de la faculté de droit proposée par TWU, dont la fréquentation était assujettie à un covenant obligatoire, aurait un effet défavorable sur l'accès équitable à la profession juridique et sur la diversité au sein de celle-ci, causerait un préjudice aux personnes LGBTQ et compromettrait donc l'intérêt public dans l'administration de la justice.

[40] Selon nous, il était raisonnable que la LSBC conclue que promouvoir l'égalité en assurant un accès égal à la profession juridique, soutenir la diversité au sein du barreau et empêcher qu'un préjudice soit causé aux étudiants en droit LGBTQ étaient des moyens valides de permettre à la LSBC de s'acquitter de son obligation primordiale en vertu de la loi : défendre et protéger l'intérêt public dans l'administration de la justice, ce qui suppose nécessairement de préserver une *perception* publique positive de la profession juridique. Nous arrivons à cette conclusion pour les motifs exposés ci-après.

[41] Limiter l'accès à la profession juridique sur la base de caractéristiques personnelles n'ayant aucun rapport avec le mérite va en soi à l'encontre de l'intégrité de la profession juridique. Cela est particulièrement vrai en raison de la confiance que place la société dans la profession juridique et du fait que la loi prévoit expressément que la LSBC devrait s'attacher à la [TRADUCTION] « préserva[tion] et [à la] prot[ection] [d]es droits et libertés de chacun » comme moyen de défendre l'intérêt public dans l'administration de la justice (*LPA*, al. 3(a)). En fait, la LSBC, en tant qu'acteur public, a un intérêt primordial à protéger les valeurs d'égalité et des droits de la personne dans l'exercice de ses fonctions. Comme la juge Abella l'a écrit dans l'arrêt *Loyola*, par. 47, les « valeurs

interest in promoting and protecting". Constitutional and *Charter* values have been recognized as an important tool in judicial decision making since *R. v. Oakes*, [1986] 1 S.C.R. 103 (p. 136), affirmed in subsequent jurisprudence (see e.g. *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at paras. 64-66; *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 S.C.R. 704, at para. 25; *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477). Far from controversial, these values are accepted principles of constitutional interpretation. In the administrative context, this Court has recognized that "any exercise of statutory discretion must comply with the *Charter* and its values" (*R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765, at para. 41. See also G. Régimbald, *Canadian Administrative Law* (2nd ed. 2015), at pp. 94-100). There is no reason why *Charter* values should be seen as less significant in the context of administrative decision-making.

[42] Eliminating inequitable barriers to legal education, and thereby, to membership in the legal profession, also promotes the competence of the bar and improves the quality of legal services available to the public. The LSBC is statutorily mandated to ensure the competence of lawyers as a means of upholding and protecting the public interest in the administration of justice (*LPA*, s. 3(b)). The LSBC is not limited to enforcing minimum standards of competence for the individual lawyers it licenses; it is also entitled to consider how to promote the competence of the bar as a whole.

[43] As well, the LSBC was entitled to interpret the public interest in the administration of justice as being furthered by promoting diversity in the legal profession — or, more accurately, by avoiding the imposition of additional impediments to diversity in the profession in the form of inequitable barriers to entry. A bar that reflects the diversity of the public it serves undeniably promotes the administration of justice and the public's confidence in the same. A

communes — l'égalité, les droits de la personne et la démocratie — sont des valeurs que l'État a toujours un intérêt légitime à promouvoir et à protéger ». Depuis l'arrêt *R. c. Oakes*, [1986] 1 R.C.S. 103 (p. 136), confirmé dans la jurisprudence subséquente (voir, p. ex., *Renvoi relatif à la sécession du Québec*, [1998] 2 R.C.S. 217, par. 64-66; *Renvoi relatif à la réforme du Sénat*, 2014 CSC 32, [2014] 1 R.C.S. 704, par. 25; *R. c. National Post*, 2010 CSC 16, [2010] 1 R.C.S. 477), on reconnaît que les valeurs inscrites dans la Constitution et la *Charte* constituent un outil important dans le processus décisionnel judiciaire. Loin de prêter à controverse, ces valeurs constituent des principes d'interprétation constitutionnelle reconnus. Dans le contexte du droit administratif, la Cour a reconnu que « le pouvoir discrétionnaire conféré par une loi doit être exercé dans le respect de la *Charte* et des valeurs qui la sous-tendent » (*R. c. Conway*, 2010 CSC 22, [2010] 1 R.C.S. 765, par. 41; voir aussi G. Régimbald, *Canadian Administrative Law* (2e éd. 2015), p. 94-100). Il n'y a pas de raison pour laquelle on devrait considérer que les valeurs de la *Charte* ont une importance moindre dans le contexte du processus décisionnel administratif.

[42] L'élimination des barrières inéquitables à la formation juridique et, par le fait même, à l'accès à la profession juridique, favorise également la compétence du barreau et améliore la qualité des services juridiques offerts au public. La loi a chargé la LSBC d'assurer la compétence des avocats comme moyen de défendre et de protéger l'intérêt public dans l'administration de la justice (*LPA*, al. 3(b)). La LSBC n'a pas uniquement à faire respecter des normes minimales de compétence à l'égard de chaque avocat à qui elle délivre un permis; elle peut également se pencher sur la manière de favoriser la compétence du barreau dans son ensemble.

[43] De même, la LSBC pouvait considérer qu'elle pouvait s'acquitter de son mandat de protection de l'intérêt public dans l'administration de la justice en favorisant la diversité dans la profession juridique — ou, plus précisément, en évitant d'imposer des obstacles additionnels à la diversité au sein de la profession qui revêtent la forme de barrières inéquitables à l'entrée dans la profession. Un barreau qui reflète la diversité du public qu'il sert favorise

diverse bar is more responsive to the needs of the public it serves. A diverse bar is a more competent bar (see *LPA*, s. 3(b)).

[44] The LSBC's statutory objective of "protect[ing] the public interest in the administration of justice by . . . preserving and protecting the rights and freedoms of all persons" entitles the LSBC to consider harms to some communities in making a decision it is otherwise entitled to make, including a decision whether to approve a new law school for the purposes of lawyer licensing. In the context of its decision whether to approve TWU's proposed law school, the *LPA*'s direction that the LSBC should be concerned with the rights and freedoms of all persons in our view permitted the LSBC to consider potential harm to the LGBTQ community as a factor in its decision making.

[45] That the LSBC considered TWU's admissions policies in deciding whether to approve its proposed law school does not amount to the LSBC regulating law schools or confusing its mandate for that of a human rights tribunal. As explained above, the LSBC considered TWU's admissions policies in the context of its decision whether to approve the proposed law school for the purposes of lawyer licensing in British Columbia, in exercising its authority as the gatekeeper to the legal profession in that province. The LSBC did not purport to make any other decision governing TWU's proposed law school or how it should operate.

[46] Respectfully, we disagree with the suggestion that in making a decision about whether to approve a law school for the purposes of lawyer licensing in British Columbia, the LSBC was purporting to exercise a free-standing power to seek out conduct which it finds objectionable. Nor did the LSBC usurp

indéniablement l'administration de la justice et la confiance du public dans cette administration. Un barreau diversifié est plus sensible aux besoins du public qu'il sert. Un barreau diversifié est un barreau plus compétent (voir la *LPA*, al. 3(b)).

[44] L'objectif que confie la loi à la LSBC qui consiste à [TRADUCTION] « protég[er] l'intérêt public dans l'administration de la justice en [. . .] préservant et en protégeant les droits et libertés de chacun » permet à cet organisme de tenir compte des préjudices causés à certaines communautés lorsqu'il prend une décision qu'il est par ailleurs autorisé à prendre, notamment une décision sur la question de savoir s'il convient d'agréer une nouvelle faculté de droit aux fins de la délivrance de permis d'exercice de la profession d'avocat. Dans le cadre de sa décision sur l'opportunité de reconnaître la faculté de droit proposée par TWU, le fait que la LSBC devait, en vertu de la *LPA*, se préoccuper du respect des droits et libertés de chacun lui permettait, à notre avis, de prendre en considération le facteur du préjudice que risquait de subir la communauté LGBTQ.

[45] Que la LSBC ait tenu compte de la politique d'admission de TWU lorsqu'elle a décidé s'il y avait lieu d'agréer la faculté de droit que cette université proposait n'équivaut pas à réglementer les facultés de droit ou à confondre son mandat avec celui d'un tribunal des droits de la personne. Comme nous l'avons expliqué précédemment, dans l'exercice des pouvoirs qu'elle possède en tant que gardienne de la profession juridique en Colombie-Britannique, la LSBC a plutôt tenu compte de la politique d'admission de TWU dans le cadre de sa décision sur l'opportunité de reconnaître la faculté de droit proposée aux fins de la délivrance de permis d'exercice de la profession d'avocat dans cette province. La LSBC n'entendait prendre aucune autre décision relative à la faculté de droit proposée par TWU ou à la manière dont cette faculté devrait exercer ses activités.

[46] Soit dit en tout respect, nous ne sommes pas d'accord avec la proposition selon laquelle, en se prononçant sur la question de savoir s'il y avait lieu d'agréer une faculté de droit aux fins de la délivrance de permis d'exercice de la profession d'avocat en Colombie-Britannique, la LSBC entendait exercer

the role of a human rights tribunal in considering the inequitable barriers to entry posed by the Covenant in making its decision: the LSBC did not purport to declare that TWU was in breach of any human rights legislation or issue a remedy for any such breach. Its consideration of equality values is consistent with law societies historically acting "to remove obstacles . . . such as religious affiliation, race and gender, so as to provide previously excluded groups the opportunity to obtain a legal education and thus become members of the legal profession" (*Trinity Western University v. Law Society of Upper Canada*, 2015 ONSC 4250, 126 O.R. (3d) 1, at para. 96). In any case, it should be beyond dispute that administrative bodies other than human rights tribunals may consider fundamental shared values, such as equality, when making decisions within their sphere of authority — and may look to instruments such as the *Charter* or human rights legislation as sources of these values, even when not directly applying these instruments (see e.g. *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772 (*TWU 2001*), at paras. 12-14 and 26-28). This is what the LSBC, quite properly, did.

[47] Thus, there can be no question that the LSBC was entitled to consider an inequitable admissions policy in determining whether to approve the proposed law school. Its mandate is broad. In promoting the public interest in the administration of justice and, relatedly, public confidence in the legal profession, the LSBC was entitled to consider an admissions policy that imposes inequitable and harmful barriers to entry. Approving or facilitating inequitable barriers to the profession could undermine public confidence in the LSBC's ability to self-regulate in the public interest.

un pouvoir autonome lui permettant de chercher à découvrir des comportements qu'elle juge répréhensibles. Lorsqu'elle a pris sa décision, la LSBC n'a pas non plus usurpé le rôle d'un tribunal des droits de la personne en prenant en considération les barrières inéquitables à l'entrée dans la profession que pose le *Covenant* : la LSBC n'entendait pas déclarer que TWU avait violé une loi sur les droits de la personne ou accorder réparation pour une telle violation. Son analyse des valeurs d'égalité est compatible avec le fait que les barreaux ont depuis toujours pris des mesures visant à [TRADUCTION] « éliminer les obstacles [. . .] comme l'appartenance religieuse, la race et l'identité sexuelle, de manière à donner aux personnes faisant partie des groupes antérieurement exclus la possibilité de faire des études de droit et donc de devenir membres de la profession juridique » (*Trinity Western University c. Law Society of Upper Canada*, 2015 ONSC 4250, 126 O.R. (3d) 1, par. 96). Quoi qu'il en soit, il devrait ne faire aucun doute que les organismes administratifs autres que les tribunaux des droits de la personne peuvent tenir compte de valeurs communes fondamentales, telle l'égalité, lorsqu'ils rendent des décisions dans leur sphère de compétence — et considérer des instruments comme la *Charte* ou les lois sur les droits de la personne comme étant à l'origine de ces valeurs, même lorsqu'ils n'appliquent pas directement ces instruments (voir, p. ex., *Université Trinity Western c. British Columbia College of Teachers*, 2001 CSC 31, [2001] 1 R.C.S. 772 (*TWU 2001*), par. 12-14 et 26-28). C'est ce qu'a fait, à très juste titre, la LSBC.

[47] Il ne fait donc aucun doute que la LSBC pouvait prendre en considération l'existence d'une politique inéquitable d'admission pour décider s'il y avait lieu d'agréer la faculté de droit proposée. Son mandat est large. Afin de favoriser l'intérêt public dans l'administration de la justice et, corollairement, la confiance du public dans la profession juridique, la LSBC pouvait tenir compte de l'existence d'une politique d'admission qui imposait des barrières inéquitables et préjudiciables à l'entrée dans la profession. Le fait d'approuver ou de faciliter l'imposition de barrières inéquitables à l'entrée dans la profession pouvait compromettre la confiance du public à l'égard de la capacité d'autoréglementation de la LSBC dans l'intérêt public.

C. *The Referendum Procedure Adopted by the LSBC*

[48] TWU argues that the LSBC's decision not to approve TWU's proposed law school should be set aside because the LSBC Benchers improperly fettered their discretion by holding a referendum of members on the issue. We reject this argument.

[49] The Benchers concluded that they were authorized under the *LPA* to proceed as they did. Section 13 of the *LPA* provides that the *LSBC members* can elect to bind the Benchers to implement the results of a referendum of members in certain circumstances. This provision indicates the legislature's intent that the LSBC's decisions be guided by the views of its full membership, at least in some circumstances. However, s. 13 does not limit the circumstances in which the *Benchers* can elect to be bound to implement the results of a referendum of members. The Benchers were therefore not precluded from holding a referendum merely because all of the circumstances described in s. 13 were not present.

[50] The Court of Appeal held that the Benchers violated their statutory duties by holding a referendum on the approval of TWU's proposed law school because the issue implicated the *Charter*. That a decision may implicate the *Charter* does not, by itself, render the referendum procedure otherwise available under the *LPA* inappropriate. The legal profession in British Columbia is self-governing; the majority of Benchers are elected by the LSBC membership and make decisions on behalf of the LSBC as a whole. It is consistent with this statutory scheme that the Benchers may decide that certain decisions they take would benefit from the guidance or support of the membership as a whole. This is no less the case where a decision implicates the *Charter* and raises questions as to the best means to pursue the LSBC's statutory objectives. The LSBC Benchers were entitled to proceed as they did in this case.

C. *La procédure de référendum adoptée par la LSBC*

[48] TWU soutient que la décision de la LSBC de ne pas agréer la faculté de droit qu'elle propose devrait être annulée parce que les conseillers de la LSBC ont limité indûment leur pouvoir discrétionnaire en soumettant la question à un référendum auprès des membres. Nous rejetons cet argument.

[49] Les conseillers ont estimé que la *LPA* les autorisait à agir comme ils l'ont fait. L'article 13 de la *LPA* prévoit que les *membres de la LSBC* peuvent décider d'obliger les conseillers à donner effet aux résultats d'un référendum tenu auprès des membres dans certaines circonstances. Cette disposition indique que le législateur entendait faire en sorte que les décisions de la LSBC soient guidées par l'opinion de l'ensemble de ses membres, du moins dans certaines circonstances. Toutefois, l'art. 13 ne limite pas les circonstances dans lesquelles les *conseillers* peuvent décider d'être tenus de donner effet aux résultats d'un référendum tenu auprès des membres. Il n'était donc pas interdit aux conseillers de tenir un référendum simplement parce que toutes les circonstances décrites à l'art. 13 n'étaient pas réunies.

[50] La Cour d'appel a conclu que les conseillers avaient manqué à leurs obligations prévues par la loi en tenant un référendum sur la question de la reconnaissance de la faculté de droit proposée par TWU parce que cette question mettait en cause la *Charte*. Le fait qu'une décision puisse mettre en cause la *Charte* ne rend pas à lui seul inappropriée la procédure de référendum par ailleurs offerte en vertu de la *LPA*. En Colombie-Britannique, la profession juridique est une profession autonome; dans la majorité des cas, les conseillers sont élus par les membres de la LSBC et prennent des décisions au nom de la LSBC dans son ensemble. Il est compatible avec ce régime législatif que les conseillers puissent décider que certaines de leurs décisions gagneraient à être guidées ou appuyées par l'ensemble des membres. C'est d'autant plus vrai lorsque la décision met en cause la *Charte* et soulève des questions quant aux meilleurs moyens d'atteindre les objectifs que confie la loi à la LSBC. Les conseillers de la LSBC avaient le droit d'agir comme ils l'ont fait en l'espèce.

D. *Reasonableness Review in the Absence of Formal Reasons*

[51] As previously noted, the LSBC gave no formal reasons. The British Columbia Court of Appeal held that where *Charter* protections are implicated in an administrative decision, the decision-maker is required to balance the potential *Charter* limitation against the statutory objectives (para. 80). The court found that, in voting to affirm the results of the binding referendum, the Benchers failed to follow the "procedure to be adopted by a tribunal in balancing statutory objectives against *Charter* values", and did not "engage in any exploration of how the *Charter* values at issue in this case could best be protected in view of the objectives of the *Legal Profession Act*" (paras. 84-85).

[52] We disagree. It is true that reasonableness review is concerned *both* with "the reasonableness of the substantive outcome of the decision, and with the process of articulating that outcome" (*Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38, [2016] 2 S.C.R. 80, at para. 18). To be reasonable, a decision must "fal[l] within a range of possible, acceptable outcomes" (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 47) *and* exhibit "justification, transparency and intelligibility within the decision-making process" (*Dunsmuir*, at para. 47).

[53] However, not all administrative decision making requires the same procedure. Reasonableness "takes its colour from the context" (*Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 18) and the requirements of process will "vary with the context and nature of the decision-making process at issue" (*Catalyst*, at para. 29). In *Catalyst*, which involved the review of a by-law passed by a municipality, the Court held that there was no duty to give formal reasons in a context where the decision was made by elected representatives pursuant to a democratic process.

D. *Le contrôle judiciaire selon la norme de la décision raisonnable en l'absence de motifs écrits*

[51] Comme il a déjà été mentionné, la LSBC n'a fourni aucun motif écrit. La Cour d'appel de la Colombie-Britannique a conclu que, lorsque les protections conférées par la *Charte* sont mises en cause dans une décision administrative, le décideur doit mettre en balance la restriction potentielle de telles protections et les objectifs visés par la loi (par. 80). La cour a estimé qu'en confirmant par un vote les résultats du référendum ayant force obligatoire, les conseillers n'ont pas suivi la [TRADUCTION] « procédure que doit adopter un tribunal lorsqu'il met en balance les objectifs visés par la loi et les valeurs consacrées par la *Charte* », et n'ont « procédé à aucune analyse sur la meilleure façon de protéger les valeurs consacrées par la *Charte* en cause en l'espèce compte tenu des objectifs de la *Legal Profession Act* » (par. 84-85).

[52] Nous sommes en désaccord. Il est vrai que le contrôle judiciaire selon la norme de la décision raisonnable s'intéresse *à la fois* « au caractère raisonnable du résultat concret de la décision [et] au raisonnement qui l'a produit » (*Canada (Procureur général) c. Igloo Vikski Inc.*, 2016 CSC 38, [2016] 2 R.C.S. 80, par. 18). Pour être raisonnable, la décision doit « apparten[ir] [. . .] aux issues possibles acceptables » (*Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, par. 47) *et* faire ressortir « la justification de la décision, [. . .] la transparence et [. . .] l'intelligibilité du processus décisionnel » (*Dunsmuir*, par. 47).

[53] Toutefois, les décisions administratives ne requièrent pas toutes la même procédure. La norme du caractère raisonnable « s'adapte au contexte » (*Catalyst Paper Corp. c. North Cowichan (District)*, 2012 CSC 2, [2012] 1 R.C.S. 5, par. 18) et le processus à suivre « varie selon le contexte et la nature du processus décisionnel en cause » (*Catalyst*, par. 29). Dans l'arrêt *Catalyst*, qui portait sur le contrôle judiciaire d'un règlement pris par une municipalité, la Cour a conclu qu'il n'existait aucune obligation de fournir des motifs écrits dans un contexte où la décision a été prise par des représentants élus conformément à un processus démocratique.

[54] The decision in this case was made in similar circumstances. The vast majority of LSBC Benchers serve as elected representatives and they reached their decision to refuse to approve TWU's proposed law school by a majority vote. As this Court noted in *Green*, at para. 23:

> . . . many of the benchers of the Law Society are elected by and accountable to members of the legal profession. . . . Thus, McLachlin C.J.'s comments in *Catalyst Paper* in the context of municipal bylaws are apt here as well: ". . . reasonableness means courts must respect the responsibility of elected representatives to serve the people who elected them and to whom they are ultimately accountable" (para. 19).

[55] Given this context, the LSBC was not required to give reasons formally explaining why the decision to refuse to approve TWU's proposed law school amounted to a proportionate balancing of freedom of religion with the statutory objectives of the *LPA*. It is clear from the speeches that the LSBC Benchers made during the April 11, 2014 and September 26, 2014 meetings that they were alive to the question of the balance to be struck between freedom of religion and their statutory duties.

[56] As the Benchers were alive to the issues, we must then assess the reasonableness of their decision. Reasonableness review requires "a respectful attention to the reasons offered or which could be offered in support of a decision" (*Dunsmuir*, at para. 48 (emphasis added); see also *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 11). Reviewing courts "may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome" (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at para. 52, quoting *Newfoundland Nurses*, at para. 15). As we will explain, the Benchers came to a decision that reflects a proportionate balancing.

[54] La décision en cause en l'espèce a été prise dans des circonstances semblables. Les conseillers de la LSBC, qui agissent en grande majorité à titre de représentants élus, ont pris leur décision de refuser d'agréer la faculté de droit proposée par TWU par un vote majoritaire. Comme l'a souligné la Cour dans l'arrêt *Green*, par. 23 :

> . . . les conseillers du Barreau sont nombreux à être élus par les membres de la profession juridique et à devoir leur rendre des comptes. [. . .] En conséquence, les commentaires que la juge en chef McLachlin a formulés dans l'arrêt *Catalyst Paper* sur les règlements municipaux sont également pertinents en l'espèce : « . . . la norme de la décision raisonnable signifie que les tribunaux doivent respecter le devoir qui incombe aux représentants élus de servir leurs concitoyens, qui les ont élus et devant qui ils sont ultimement responsables » : par. 19.

[55] Dans ce contexte, la LSBC n'était pas tenue d'expliquer par écrit les raisons pour lesquelles la décision de refuser d'agréer la faculté de droit proposée par TWU constituait une mise en balance proportionnée de la liberté de religion et des objectifs visés par la *LPA*. Il ressort clairement des discours prononcés par les conseillers de la LSBC lors des réunions tenues les 11 avril 2014 et 26 septembre 2014 que ceux-ci étaient conscients de l'équilibre qu'il fallait établir entre la liberté de religion et leurs obligations en vertu de la loi.

[56] Comme les conseillers étaient conscients de ce qui était en jeu, nous devons alors apprécier le caractère raisonnable de leur décision. L'examen du caractère raisonnable nécessite « une attention respectueuse aux motifs donnés ou qui pourraient être donnés à l'appui d'une décision » (*Dunsmuir*, par. 48 (nous soulignons); voir également *Newfoundland and Labrador Nurses' Union c. Terre-Neuve-et-Labrador (Conseil du Trésor)*, 2011 CSC 62, [2011] 3 R.C.S. 708, par. 11). La cour de révision « peut [. . .], si elle le juge nécessaire, examiner le dossier pour apprécier le caractère raisonnable du résultat » (*Agraira c. Canada (Sécurité publique et Protection civile)*, 2013 CSC 36, [2013] 2 R.C.S. 559, par. 52, citant l'arrêt *Newfoundland Nurses*, par. 15). Comme nous l'expliquerons plus loin, les conseillers sont arrivés à une décision qui est le fruit d'une mise en balance proportionnée.

E. *Review of the LSBC's Decision Under the Doré/Loyola Framework*

[57] Having concluded that the LSBC had authority to consider factors outside of the competence of individual law graduates of TWU's proposed law school, the question now becomes whether the LSBC's decision to deny approval to TWU's proposed law school was reasonable. Discretionary administrative decisions that engage the *Charter* are reviewed based on the administrative law framework set out by this Court in *Doré* and *Loyola*. Delegated authority must be exercised "in light of constitutional guarantees and the values they reflect" (*Doré*, at para. 35). In *Loyola*, this Court explained that under the *Doré* framework, *Charter* values are "those values that underpin each right and give it meaning" and which "help determine the extent of any given infringement in the particular administrative context and, correlatively, when limitations on that right are proportionate in light of the applicable statutory objectives" (para. 36, citing *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 88). The *Doré*/*Loyola* framework is concerned with ensuring that *Charter* protections are upheld to the fullest extent possible given the statutory objectives within a particular administrative context. In this way, *Charter* rights are no less robustly protected under an administrative law framework.

[58] Under the precedent established by this Court in *Doré* and *Loyola*, the preliminary question is whether the administrative decision engages the *Charter* by limiting *Charter* protections — both rights and values (*Loyola*, at para. 39). If so, 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* protections at play" (*Doré*, at para. 57; *Loyola*, at para. 39). The extent of the impact on the

E. *Le contrôle judiciaire de la décision de la LSBC selon le cadre d'analyse établi dans les arrêts Doré et Loyola*

[57] Vu la conclusion selon laquelle la LSBC avait le pouvoir de tenir compte de facteurs étrangers à la compétence de chaque diplômé de la faculté de droit proposée par TWU, il s'agit maintenant de savoir si la décision de la LSBC de refuser d'agréer cette faculté de droit était raisonnable. Les décisions administratives de nature discrétionnaire qui font intervenir la *Charte* sont examinées selon le cadre d'analyse de droit administratif qu'a établi la Cour dans les arrêts *Doré* et *Loyola*. Le pouvoir délégué doit être exercé « à l'aune des garanties constitutionnelles et des valeurs que comportent celles-ci » (*Doré*, par. 35). Dans l'arrêt *Loyola*, la Cour a expliqué que, suivant le cadre d'analyse établi dans l'arrêt *Doré*, les valeurs consacrées par la *Charte* sont « les valeurs qui sous-tendent chaque droit et qui leur donnent un sens » et qui « aident à préciser l'ampleur d'une atteinte à un droit donné dans le contexte administratif en cause et, corrélativement, à savoir dans quels cas les restrictions à ce droit sont proportionnées compte tenu des objectifs légaux applicables » (par. 36, citant *Alberta c. Hutterian Brethren of Wilson Colony*, 2009 CSC 37, [2009] 2 R.C.S. 567, par. 88). Le cadre d'analyse établi dans les arrêts *Doré* et *Loyola* vise à faire en sorte que les protections conférées par la *Charte* soient respectées le plus possible compte tenu des objectifs visés par la loi dans un contexte administratif particulier. De cette manière, les droits garantis par la *Charte* ne sont pas moins vigoureusement protégés dans un cadre d'analyse de droit administratif.

[58] Suivant le précédent établi par la Cour dans *Doré* et *Loyola*, la question préliminaire qui se pose est de savoir si la décision administrative fait intervenir la *Charte* en restreignant les protections que confère cette dernière — qu'il s'agisse de droits ou de valeurs (*Loyola*, par. 39). Dans l'affirmative, il faut se demander « 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 en cause protégés par la

Charter protection must be proportionate in light of the statutory objectives.

[59] *Doré* and *Loyola* are binding precedents of this Court. Our reasons explain why and how the *Doré*/*Loyola* framework applies here. Since *Charter* protections are implicated, the reviewing court must be satisfied that the decision reflects a proportionate balance between the *Charter* protections at play and the relevant statutory mandate. This is the analysis we adopt.

(1) Whether Freedom of Religion Is Engaged

[60] In this case, the first issue is whether, in applying its statutory public interest mandate — including the goals of equal access to and diversity within the legal profession — to the approval of TWU's proposed law school, the LSBC engaged the religious freedom of the TWU community.

[61] TWU is a private religious institution created to support the collective religious practices of its members. For the reasons set out below, we find that the religious freedom of members of the TWU community is limited by the LSBC's decision. It is unnecessary to determine whether TWU, as an institution, possesses rights under s. 2(*a*) of the *Charter*.

[62] This Court has adopted a broad and purposive approach to interpreting freedom of religion under the *Charter*. This encompasses "the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination" (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 336).

Charter » (*Doré*, par. 57; *Loyola*, par. 39). L'incidence sur la protection conférée par la *Charte* doit être proportionnée eu égard aux objectifs visés par la loi.

[59] Les arrêts *Doré* et *Loyola* sont des précédents de la Cour qui nous lient. Dans ces motifs, nous expliquons pourquoi et comment le cadre d'analyse établi dans les arrêts *Doré* et *Loyola* s'applique en l'espèce. Étant donné que les protections conférées par la *Charte* sont mises en cause, la cour de révision doit être convaincue que la décision est le fruit d'une mise en balance proportionnée des protections en cause conférées par la *Charte* et du mandat pertinent prévu par la loi. C'est l'analyse que nous adoptons.

(1) Question de savoir si la liberté de religion est en cause

[60] En l'espèce, il s'agit d'abord de savoir si la LSBC a mis en cause la liberté de religion des membres de la communauté de TWU lorsqu'elle a tenu compte du mandat de protection de l'intérêt public que lui confie la loi — notamment en ce qui a trait aux objectifs visant à assurer un accès égal à la profession juridique et la diversité au sein de celle-ci — dans l'analyse de la reconnaissance de la faculté de droit proposée par TWU.

[61] TWU est une institution religieuse privée créée pour appuyer les pratiques religieuses collectives de ses membres. Pour les motifs exposés ci-après, nous concluons que la décision de la LSBC restreint la liberté de religion des membres de la communauté de TWU. Il n'est pas nécessaire de trancher la question de savoir si cette université, en tant qu'institution, jouit des droits garantis à l'al. 2*a*) de la *Charte*.

[62] La Cour a adopté une interprétation large et téléologique à l'égard de la liberté de religion garantie par la *Charte*. Cette liberté englobe « le droit de croire ce que l'on veut en matière religieuse, le droit de professer ouvertement des croyances religieuses sans crainte d'empêchement ou de représailles et le droit de manifester ses croyances religieuses par leur mise en pratique et par le culte ou par leur enseignement et leur propagation » (*R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, p. 336).

[63] Section 2(*a*) of the *Charter* is limited when the claimant demonstrates two things: first, that he or she sincerely believes in a practice or belief that has a nexus with religion; and second, that the impugned state conduct interferes, in a manner that is more than trivial or insubstantial, with his or her ability to act in accordance with that practice or belief (*Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, at para. 65; *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 S.C.R. 386, at para. 68). If, based on this test, s. 2(*a*) is not engaged, there is nothing to balance.

[64] Although this Court's interpretation of freedom of religion reflects the notion of personal choice and individual autonomy and freedom, religion is about both religious beliefs and religious relationships (*Amselem*, at para. 40; *Loyola*, at para. 59, quoting Justice LeBel in *Hutterian Brethren*, at para. 182). The protection of individual religious rights under s. 2(*a*) must therefore account for the socially embedded nature of religious belief, as well as the "deep linkages between this belief and its manifestation through communal institutions and traditions" (*Loyola*, at para. 60). In other words, religious freedom is individual, but also "profoundly communitarian" (*Hutterian Brethren*, at para. 89). The ability of religious adherents to come together and create cohesive communities of belief and practice is an important aspect of religious freedom under s. 2(*a*).

[65] On the sincerity of the belief, the respondents have articulated the religious interest at stake in various ways. In their factum, they contend that "[t]he sincere beliefs of evangelical Christians include 'the belief in the importance of being in an institution with others who either share that belief or are prepared to honour it in their conduct'" (para. 96, quoting *Trinity Western University v. Nova Scotia Barristers' Society*, 2015 NSSC 25, 381 D.L.R. (4th) 296, at para. 235). Elsewhere they argue that evangelicals believe "they should carry their beliefs into educational communities" and in the value of

[63] L'alinéa 2*a*) de la *Charte* est restreint lorsque le demandeur démontre deux choses : premièrement, qu'il croit sincèrement à une pratique ou à une croyance ayant un lien avec la religion, et, deuxièmement, que la conduite qu'il reproche à l'État limite d'une manière plus que négligeable ou insignifiante sa capacité de se conformer à cette pratique ou croyance (*Syndicat Northcrest c. Amselem*, 2004 CSC 47, [2004] 2 R.C.S. 551, par. 65; *Ktunaxa Nation c. Colombie-Britannique (Forests, Lands and Natural Resource Operations)*, 2017 CSC 54, [2017] 2 R.C.S. 386, par. 68). Si, selon ce critère, l'al. 2*a*) n'est pas en cause, il n'y a rien à mettre en balance.

[64] Bien que l'interprétation qu'a donnée la Cour à la liberté de religion reflète les notions de choix personnel, d'autonomie et de liberté de l'individu, la religion a trait à la fois aux croyances religieuses et aux rapports religieux (*Amselem*, par. 40; *Loyola*, par. 59, citant le juge LeBel dans *Hutterian Brethren*, par. 182). La protection des droits religieux individuels en vertu de l'al. 2*a*) 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 » (*Loyola*, par. 60). En d'autres termes, la liberté de religion est de nature individuelle, mais aussi « profondément communautaire » (*Hutterian Brethren*, par. 89). La capacité des fidèles de se rassembler et de créer des communautés de croyance et de pratique qui se caractérisent par leur cohésion est un aspect important de la liberté de religion garantie par l'al. 2*a*).

[65] En ce qui concerne la sincérité de la croyance, les intimés ont formulé de diverses façons l'intérêt religieux qui est en jeu. Dans leur mémoire, ils soutiennent que [TRADUCTION] « [l]es croyances sincères des chrétiens évangéliques comprennent "la croyance en l'importance du fait de se trouver dans une institution avec d'autres personnes qui partagent cette croyance ou qui sont disposées à se conduire de manière à respecter cette croyance" » (par. 96, citant *Trinity Western University c. Nova Scotia Barristers' Society*, 2015 NSSC 25, 381 D.L.R. (4th) 296, par. 235). Ils font également

educating the whole person with a Christian ethos (para. 113).

[66] The affidavit evidence from TWU students focusses primarily on the spiritual growth that is engendered by studying law in a religious learning environment.

[67] There is no doubt evangelical Christians believe that studying in a religious environment can help them grow spiritually. Evangelical Christians carry their religious beliefs and values beyond their private lives and into their work, education, and politics.

[68] TWU seeks to foster this spiritual growth. It was founded on religious principles and was intended to be a religious community, primarily serving Christians. Indeed, the university teaches from a Christian perspective and aims to develop "godly Christian leaders" (R.R., vol. I, at p. 119). TWU's purpose statement further provides that TWU seeks to promote "total student development through . . . deepened commitment to Jesus Christ and a Christian way of life" (p. 120).

[69] Several alumni of TWU emphasized the spiritual benefits of receiving an education from a Christian perspective in an environment infused with evangelical Christian values. According to Mr. Volkenant, completing his undergraduate studies at TWU gave him "an appreciation for the importance of integrating [his] Christian faith into all areas of [his] life" (R.R., vol. I, at p. 68). For another alumna, Ms. Jody Winter, attending TWU was about more than obtaining a university education; it was a time of spiritual formation.

[70] Because s. 2(*a*) protects beliefs which are sincerely held by the claimant, the court must "ensure that a presently asserted religious belief is in

valoir que les évangéliques croient [TRADUCTION] « qu'ils doivent porter leurs croyances dans les milieux d'enseignement » et en la valeur consistant à éduquer l'ensemble de la personne selon une philosophie chrétienne (par. 113).

[66] La preuve constituée des affidavits souscrits par des étudiants de TWU porte principalement sur la croissance spirituelle qu'engendre l'étude du droit dans un milieu d'apprentissage religieux.

[67] Il ne fait aucun doute que les chrétiens évangéliques croient que le fait d'étudier dans un milieu religieux peut les aider à croître spirituellement. Les chrétiens évangéliques portent leurs croyances et valeurs religieuses au-delà de leur vie privée et jusque dans leur travail, leur éducation et leurs activités politiques.

[68] TWU vise à favoriser cette croissance spirituelle. Elle a été fondée sur des principes religieux et se voulait une communauté religieuse principalement au service des chrétiens. En effet, cette université dispense un enseignement s'inscrivant dans une perspective chrétienne et vise à former des [TRADUCTION] « chefs de file chrétiens pieux » (d.i., vol. I, p. 119). L'énoncé de mission de TWU indique également que TWU vise à promouvoir « le développement complet des étudiants par [. . .] un engagement plus profond envers Jésus-Christ et le mode de vie chrétien » (p. 120).

[69] Plusieurs anciens de TWU ont souligné les bienfaits spirituels du fait de recevoir un enseignement s'inscrivant dans une perspective chrétienne dans un milieu imprégné des valeurs chrétiennes évangéliques. Selon M. Volkenant, terminer ses études de premier cycle à TWU lui a permis de [TRADUCTION] « bien comprendre l'importance de l'intégration de [sa] foi chrétienne dans toutes les sphères de [sa] vie » (d.i., vol. I, p. 68). Pour une autre ancienne, M^me^ Jody Winter, fréquenter TWU ne s'est pas résumé à l'obtention d'une formation universitaire; ce fut une époque de formation spirituelle.

[70] Comme l'al. 2*a*) protège les croyances sincères du demandeur, la cour doit « s'assurer que la croyance religieuse invoquée est avancée de

good faith, neither fictitious nor capricious, and that it is not an artifice" (*Amselem*, at para. 52; see also *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256, at para. 35). It is clear from the record that evangelical members of TWU's community sincerely believe that studying in a community defined by religious beliefs in which members follow particular religious rules of conduct contributes to their spiritual development. In our view, this is the religious belief or practice implicated by the LSBC's decision.

[71] This belief is, in turn, supported through the universal adoption of the Covenant. The Covenant "reflects both historic patterns of evangelical practice and widely accepted contemporary evangelical theological convictions" (R.R., vol. IV, at p. 89). A core value at TWU is "obeying the Authority of Scripture" (R.R., vol. I, at p. 121), and the Covenant promotes this compliance. Specifically, it requires TWU community members to "encourage and support other members of the community in their pursuit of these values and ideals" (A.R., vol. III, at p. 402). Thus, the mandatory Covenant helps create an environment in which TWU students can grow spiritually. According to the Covenant:

> The University is an interrelated academic community rooted in the evangelical Protestant tradition; it is made up of Christian administrators, faculty and staff who, along with students choosing to study at TWU, covenant together to form a community that strives to live according to biblical precepts, believing that this will optimize the University's capacity to fulfil its mission and achieve its aspirations. [Emphasis added.]

(A.R., vol. III, at p. 401)

[72] Members of the TWU community have noted that the mandatory Covenant "makes it easier" for them to adhere to their faith, and it creates an

bonne foi, qu'elle n'est ni fictive ni arbitraire et qu'elle ne constitue pas un artifice » (*Amselem*, par. 52; voir également *Multani c. Commission scolaire Marguerite-Bourgeoys*, 2006 CSC 6, [2006] 1 R.C.S. 256, par. 35). Il ressort clairement du dossier que les membres évangéliques de la communauté de TWU croient sincèrement que le fait d'étudier au sein d'une communauté définie par des croyances religieuses où les membres suivent certaines règles de conduite à caractère religieux contribue à leur développement spirituel. À notre avis, il s'agit de la croyance ou de la pratique religieuse que met en cause la décision de la LSBC.

[71] Cette croyance est par ailleurs appuyée par l'adoption universelle du *Covenant*. Ce dernier [TRADUCTION] « reflète à la fois les modes traditionnels de pratique évangélique et les convictions théologiques évangéliques contemporaines largement reconnues » (d.i., vol. IV, p. 89). L'une des valeurs fondamentales véhiculées à TWU consiste à [TRADUCTION] « obéir aux commandements des Écritures » (d.i., vol. I, p. 121) et le *Covenant* prône cette obéissance. Plus précisément, il oblige les membres de la communauté de TWU à [TRADUCTION] « encourager et à soutenir les autres membres de la communauté dans la poursuite de ces valeurs et idéaux » (d.a., vol. III, p. 402). Le *Covenant* obligatoire contribue donc à créer un milieu dans lequel les étudiants de TWU peuvent croître spirituellement. Aux termes du *Covenant :*

> [TRADUCTION] TWU est une communauté universitaire formée d'éléments interreliés qui tire son origine de la tradition protestante évangélique; elle se compose d'administrateurs, de professeurs et d'employés chrétiens qui, à l'instar des étudiants qui choisissent d'y étudier, s'engagent ensemble à former une communauté qui s'efforce de vivre selon les préceptes bibliques, croyant que cela permettra d'améliorer au maximum la capacité de l'université de remplir sa mission et de réaliser ses aspirations. [Nous soulignons.]

(d.a., vol. III, p. 401)

[72] Les membres de la communauté de TWU ont souligné que le *Covenant* obligatoire [TRADUCTION] « fait en sorte qu'il est plus facile » pour eux de rester

environment where their moral discipline is not constantly tested. The relationship between the Covenant and the religious environment at TWU is succinctly set out by Ms. Winter:

> I am grateful that students at TWU were asked to refrain from behaviour that was against my religious beliefs. It was easier for me to remain committed to my religious values living in a community like TWU's, where guidelines were put in place in respect to student behaviour.

(R.R., vol. I, at pp. 59-60)

[73] To summarize, it is clear from this evidence that evangelical Christians believe that studying in an environment defined by religious beliefs in which members follow particular religious rules of conduct enhances the spiritual growth of members of that community. And the Covenant supports the practice of studying in an environment infused with evangelical beliefs.

[74] The next question is whether the LSBC's decision not to approve TWU's law school limits the ability of TWU's community members to act in accordance with these beliefs and practices in a manner that is more than trivial or insubstantial (*Amselem*, at para. 74; *Ktunaxa*, at para. 68). Was this decision "capable of interfering with religious belief or practice" (*R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 759; *Hutterian Brethren*, at para. 34)? This is an objective analysis that looks at the impact on the claimants, rather than the impact of the implicated practices or beliefs *on others* (*S.L. v. Commission scolaire des Chênes*, 2012 SCC 7, [2012] 1 S.C.R. 235, at paras. 23-24; *Ktunaxa*, at para. 70).

[75] By interpreting the public interest in a way that precludes the approval of TWU's law school governed by the mandatory Covenant, the LSBC has interfered with TWU's ability to maintain an approved law school as a religious community defined by its own religious practices. The effect is a limitation on the right of TWU's community members to

fidèles à leur foi et crée un milieu où leur discipline morale n'est pas constamment mise à l'épreuve. Le rapport entre cet engagement et le milieu religieux à TWU est énoncé succinctement par M[me] Winter :

> [TRADUCTION] Je suis heureuse qu'on ait demandé aux étudiants de TWU de s'abstenir d'un comportement qui allait à l'encontre de mes croyances religieuses. Ce fut plus facile pour moi de rester fidèle à mes valeurs religieuses en vivant dans une communauté comme celle de TWU, où des directives ont été mises en place pour ce qui est du comportement des étudiants.

(d.i., vol. I, p. 59-60)

[73] En résumé, il ressort clairement de ces éléments de preuve que les chrétiens évangéliques croient que le fait d'étudier dans un milieu défini par des croyances religieuses où les membres suivent certaines règles de conduite à caractère religieux favorise la croissance spirituelle des membres de cette communauté. De plus, le *Covenant* soutient la pratique consistant à étudier dans un milieu imprégné des croyances évangéliques.

[74] Il faut se demander ensuite si la décision de la LSBC de ne pas agréer la faculté de droit de TWU limite d'une façon plus que négligeable ou insignifiante la capacité des membres de la communauté de TWU de se conformer à ces croyances et pratiques (*Amselem*, par. 74; *Ktunaxa*, par. 68). Cette décision était-elle « susceptible de porter atteinte à une croyance ou pratique religieuse » (*R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713, p. 759; *Hutterian Brethren*, par. 34)? Il s'agit d'une analyse objective qui s'attache à l'incidence sur les demandeurs, plutôt qu'à l'incidence des pratiques ou croyances en jeu *sur autrui* (*S.L. c. Commission scolaire des Chênes*, 2012 CSC 7, [2012] 1 R.C.S. 235, par. 23-24; *Ktunaxa*, par. 70).

[75] En interprétant l'intérêt public de manière à empêcher la reconnaissance de la faculté de droit de TWU régie par le *Covenant* obligatoire, la LSBC a limité la capacité de TWU de maintenir une faculté de droit agréée en tant que communauté religieuse définie par ses propres pratiques religieuses, ce qui a eu pour effet de restreindre le droit des membres

enhance their spiritual development through studying law in an environment defined by their religious beliefs in which members follow certain religious rules of conduct. Accordingly, their religious rights were engaged by the decision.

(2) Overlapping *Charter* Protections

[76] Three other *Charter* protections are potentially implicated in this case, namely free expression (s. 2(*b*)); free association (s. 2(*d*)); and equality (s. 15).

[77] The factual matrix underpinning a *Charter* claim in respect of any of these protections is largely indistinguishable. Further, the parties themselves have almost exclusively framed the dispute as centring on religious freedom. In our view, the religious freedom claim is sufficient to account for the expressive, associational, and equality rights of TWU's community members in the analysis.

[78] Put differently, whether the *Charter* protections of prospective students of TWU's proposed law school are articulated in terms of their freedom to engage in the religious practice of studying law in a learning environment that is infused with the community's religious beliefs, their freedom to express and associate in a community infused with those beliefs, or their protection from discrimination based on the enumerated ground of religion, such limitations were, as we explain next, proportionately balanced against the LSBC's critical public interest mandate.

(3) Proportionate Balancing

[79] In *Doré* and *Loyola*, this Court held that where an administrative decision engages a *Charter* protection, the reviewing court should apply "a *robust* proportionality analysis consistent with administrative law principles" instead of "a literal s. 1 approach"

de la communauté de TWU d'accroître leur développement spirituel en étudiant le droit dans un milieu défini par leurs croyances religieuses où les membres suivent certaines règles de conduite à caractère religieux. La décision mettait donc en cause leurs droits religieux.

(2) Chevauchement de protections conférées par la *Charte*

[76] Trois autres protections conférées par la *Charte* sont susceptibles d'être en cause dans cette affaire, à savoir la liberté d'expression (al. 2*b*)), la liberté d'association (al. 2*d*)) et l'égalité (art. 15).

[77] Les faits qui sous-tendent une demande fondée sur la *Charte* à l'égard de chacune de ces protections sont en grande partie identiques. De plus, les parties ont elles-mêmes presque exclusivement énoncé le différend comme étant axé sur la liberté de religion. À notre avis, la prétention fondée sur le droit à la liberté de religion suffit pour permettre la prise en compte des droits à la liberté d'expression, à la liberté d'association et à l'égalité des membres de la communauté de TWU dans l'analyse.

[78] Autrement dit, que les protections garanties par la *Charte* aux étudiants éventuels de la faculté de droit proposée par TWU soient formulées sous l'angle de leur liberté de se livrer à la pratique religieuse consistant à étudier le droit dans un milieu d'apprentissage imprégné des croyances religieuses de la communauté, sous l'angle de leur liberté de s'exprimer et de s'associer à une communauté imprégnée de ces croyances ou sous l'angle de leur protection contre la discrimination fondée sur le motif énuméré de la religion, les restrictions en cause, comme nous l'expliquerons, ont été mises en balance de manière proportionnée avec le mandat crucial de protection de l'intérêt public conféré à la LSBC.

(3) Mise en balance proportionnée

[79] Dans les arrêts *Doré* et *Loyola*, la Cour a statué que, lorsqu'une décision administrative fait intervenir une protection conférée par la *Charte*, la cour de révision doit procéder à « une analyse *robuste* de la proportionnalité compatible avec les principes de

(*Loyola*, at para. 3). Under the *Doré* framework, the administrative decision will be reasonable if it reflects a proportionate balancing of the *Charter* protection with the statutory mandate (see *Doré*, at para. 7; *Loyola*, at para. 32). *Doré*'s approach recognizes that an administrative decision-maker, exercising a discretionary power under his or her home statute, typically brings expertise to the balancing of a *Charter* protection with the statutory objectives at stake (*Loyola*, at para. 42; *Doré*, at para. 54). Consequently, the decision-maker is generally in the best position to weigh the *Charter* protections with his or her statutory mandate in light of the specific facts of the case (*Doré*, at para. 54). It follows that deference is warranted when a reviewing court is determining whether the decision reflects a proportionate balance. *Doré* recognizes that there may be more than one outcome that strikes a proportionate balance between *Charter* protections and statutory objectives (*Loyola*, at para. 41). As long as the decision "falls within a range of possible, acceptable outcomes", it will be reasonable (*Doré*, at para. 56). As this Court noted in *Doré*, "there is . . . 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" (para. 57).

[80] The framework set out in *Doré* and affirmed in *Loyola* is not a weak or watered-down version of proportionality — rather, it is a robust one. As this Court explained in *Loyola*, at para. 38:

> The *Charter* enumerates a series of guarantees that can only be limited if the government can justify those limitations as proportionate. As a result, in order to ensure that decisions accord with the fundamental values of the

droit administratif » au lieu d'adopter une « approche fondée sur l'art. 1 prise littéralement » (*Loyola*, par. 3). Selon le cadre d'analyse établi dans *Doré*, la décision administrative sera raisonnable si elle est le fruit d'une mise en balance proportionnée de la protection conférée par la *Charte* et du mandat confié par la loi (voir *Doré*, par. 7; *Loyola*, par. 32). La démarche que la Cour a appliquée dans *Doré* reconnaît que le décideur administratif qui exerce un pouvoir discrétionnaire en vertu de sa loi constitutive apporte généralement une expertise au processus de mise en balance de la protection conférée par la *Charte* et des objectifs en cause prévus par la loi (*Loyola*, par. 42; *Doré*, par. 54). En conséquence, le décideur est généralement le mieux placé pour mettre en balance les protections conférées par la *Charte* et le mandat que lui confie la loi au regard des faits précis de l'affaire (*Doré*, par. 54). Il s'ensuit que la déférence est justifiée lorsqu'une cour de révision est appelée à décider si la décision est le fruit d'une mise en balance proportionnée. De plus, l'arrêt *Doré* reconnaît qu'il peut y avoir plus d'une issue qui représente une mise en balance proportionnée des protections conférées par la *Charte* et des objectifs visés par la loi (*Loyola*, par. 41). Tant que la décision « [appartient] aux issues possibles acceptables », elle est raisonnable (*Doré*, par. 56). Comme l'a souligné la Cour dans *Doré*, « il existe [. . .] 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 » (par. 57).

[80] Le cadre d'analyse établi dans *Doré* et confirmé dans *Loyola* ne constitue pas une version atténuée ou édulcorée de l'analyse de la proportionnalité — il s'agit plutôt d'une version robuste de cette analyse. Comme l'a expliqué la Cour dans *Loyola*, par. 38 :

> La *Charte* énumère une série de garanties qui ne peuvent être restreintes que si le gouvernement peut démontrer que ces restrictions sont proportionnées. En conséquence, pour qu'une telle décision soit conforme aux

Charter in contexts where *Charter* rights are engaged, reasonableness requires proportionality: *Doré*, at para. 57. As Aharon Barak noted, "Reasonableness in [a strong] sense strikes a proper balance among the relevant considerations, and it does not differ substantively from proportionality". [Emphasis added; text in brackets in original.]

For a decision to be proportionate, it is not enough for the decision-maker to simply balance the statutory objectives with the *Charter* protection in making its decision. Rather, the reviewing court must be satisfied that the decision *proportionately* balances these factors, that is, that it "gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate" (*Loyola*, at para. 39). Put another way, the *Charter* protection must be "affected as little as reasonably possible" in light of the applicable statutory objectives (*Loyola*, at para. 40). When a decision engages the *Charter*, reasonableness and proportionality become synonymous. Simply put, a decision that has a disproportionate impact on *Charter* rights is not reasonable.

[81] The reviewing court must consider whether there were other reasonable possibilities that would give effect to *Charter* protections more fully in light of the objectives. This does not mean that the administrative decision-maker must choose the option that limits the *Charter* protection *least*. The question for the reviewing court is always whether the decision falls within a range of reasonable outcomes (*Doré*, at para. 57; *Loyola*, at para. 41, citing *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160). However, if there was an option or avenue *reasonably* open to the decision-maker that would reduce the impact on the protected right while still permitting him or her to sufficiently further the relevant statutory objectives, the decision would not fall within a range of reasonable outcomes. This is a highly contextual inquiry.

valeurs fondamentales consacrées par la *Charte* lorsque sont en cause des droits que protègent cette dernière, la raisonnabilité commande la proportionnalité : *Doré*, par. 57. Comme l'a souligné Aharon Barak, [TRADUCTION] « [l]a raisonnabilité [au sens fort du terme] établit un juste équilibre entre les considérations pertinentes, et ne diffère pas substantiellement de la proportionnalité ». [Nous soulignons; texte entre crochets dans l'original.]

Pour qu'une décision soit proportionnée, il ne suffit pas que le décideur se contente de mettre en balance les objectifs de la loi et la protection conférée par la *Charte* en rendant sa décision. Il faut plutôt que la cour de révision soit convaincue que la décision met en balance *de manière proportionnée* ces facteurs, c'est-à-dire qu'elle « donne effet autant que possible aux protections en cause conférées par la *Charte* compte tenu du mandat législatif particulier en cause » (*Loyola*, par. 39). Autrement dit, la protection conférée par la *Charte* doit être restreinte « aussi peu que cela est raisonnablement possible » eu égard aux objectifs de la loi applicables (*Loyola*, par. 40). Lorsqu'une décision fait intervenir la *Charte*, les concepts de raisonnabilité et de proportionnalité deviennent synonymes. En clair, une décision qui a une incidence disproportionnée sur des droits garantis par la *Charte* n'est pas raisonnable.

[81] La cour de révision doit se demander s'il existait d'autres possibilités raisonnables qui donneraient davantage effet aux protections conférées par la *Charte* eu égard aux objectifs applicables. Cela ne veut pas dire que le décideur administratif doit choisir la possibilité qui restreint *le moins* la protection conférée par la *Charte*. La question que doit se poser la cour de révision est toujours de savoir si la décision se situe à l'intérieur d'une gamme d'issues raisonnables (*Doré*, par. 57; *Loyola*, par. 41, citant *RJR-MacDonald Inc. c. Canada (Procureur général)*, [1995] 3 R.C.S. 199, par. 160). Toutefois, si le décideur disposait *raisonnablement* d'une possibilité ou d'une solution susceptible de réduire l'incidence sur le droit protégé tout en lui permettant de favoriser suffisamment la réalisation des objectifs pertinents en vertu de la loi, la décision ne se situerait pas à l'intérieur d'une gamme d'issues raisonnables. Il s'agit d'une analyse hautement contextuelle.

[82] The reviewing court must also consider how substantial the limitation on the *Charter* protection was compared to the benefits to the furtherance of the statutory objectives in this context (*Loyola*, at para. 68; *Doré*, at para. 56). The *Doré* framework therefore finds "analytical harmony with the final stages of the *Oakes* framework used to assess the reasonableness of a limit on a *Charter* right under s. 1: minimal impairment and balancing" (*Loyola*, at para. 40). In working "the same justificatory muscles" as the *Oakes* test (*Doré*, at para. 5), the *Doré* analysis ensures that the pursuit of objectives is proportionate. In the context of a challenge to an administrative decision where the constitutionality of the statutory mandate itself is not at issue, the proper inquiry is whether the decision-maker has furthered his or her statutory mandate in a manner that is proportionate to the resulting limitation on the *Charter* right.

[83] We now turn to whether the limitation on the religious freedom of the members of the TWU community is a proportionate one in light of the LSBC's statutory mandate.

[84] The LSBC was faced with only two options — to approve or reject TWU's proposed law school. Given the LSBC's interpretation of its statutory mandate, approving TWU's proposed law school would not have advanced the relevant statutory objectives, and therefore was not a reasonable possibility that would give effect to *Charter* protections more fully in light of the statutory objectives.

[85] The LSBC's decision also reasonably balanced the severity of the interference with the *Charter* protection against the benefits to its statutory objectives. To begin, the LSBC's decision did not limit religious freedom to a significant extent. The LSBC did not deny approval to TWU's proposed law school in the abstract; rather, it denied a specific proposal that included the mandatory Covenant. Indeed, when the LSBC asked TWU whether it would "consider" amendments to its Covenant, TWU expressed no

[82] La cour de révision doit aussi se pencher sur l'importance de la restriction de la protection conférée par la *Charte* par rapport aux avantages qu'il y a à favoriser la réalisation des objectifs de la loi dans ce contexte (*Loyola*, par. 68; *Doré*, par. 56). En conséquence, le cadre d'analyse établi dans l'arrêt *Doré* « s'harmonise avec les étapes finales du cadre d'analyse énoncé dans *Oakes* qui sert pour déterminer si une restriction à un droit garanti par la *Charte* est raisonnable au regard de l'article premier : atteinte minimale et équilibre » (*Loyola*, par. 40). En faisant intervenir « les mêmes réflexes justificateurs » que ceux que fait intervenir le test énoncé dans *Oakes* (*Doré*, par. 5), l'analyse prescrite dans *Doré* fait en sorte que la poursuite des objectifs est proportionnée. Dans le cadre de la contestation d'une décision administrative où la constitutionnalité du mandat même confié par la loi n'est pas en cause, la question qu'il convient de se poser est de savoir si le décideur s'est acquitté de ce mandat d'une manière qui est proportionnée à la restriction au droit garanti par la *Charte* qui s'en est suivie.

[83] Passons maintenant à la question de savoir si la restriction de la liberté de religion des membres de la communauté de TWU est proportionnée eu égard au mandat que la loi confie à la LSBC.

[84] Seules deux possibilités s'offraient à la LSBC — agréer ou ne pas agréer la faculté de droit proposée par TWU. Compte tenu de l'interprétation par la LSBC du mandat que lui confère la loi, reconnaître la faculté de droit proposée par TWU n'aurait pas favorisé la réalisation des objectifs de la loi pertinents et ne constituait donc pas une possibilité raisonnable qui donnerait davantage effet aux protections conférées par la *Charte* eu égard aux objectifs de la loi.

[85] La décision de la LSBC a également mis en balance de façon raisonnable la gravité de l'atteinte à la protection conférée par la *Charte* et les avantages qu'il y a à favoriser la réalisation de ses objectifs en vertu de la loi. D'abord, la décision de la LSBC ne restreignait pas de manière importante la liberté de religion. La LSBC n'a pas refusé d'agréer la faculté de droit proposée par TWU dans l'abstrait; elle a plutôt refusé une proposition particulière qui comprenait le *Covenant* obligatoire. En effet, quand la LSBC a

willingness to compromise on the mandatory nature of the Covenant. The decision therefore only prevents TWU's community members from attending an approved law school at TWU that is governed by a *mandatory* covenant.

[86] The Court of Appeal described the limitation in this case as "severe" because it precludes graduates of TWU's proposed law school from practising law in British Columbia (para. 168). However, the LSBC's decision does not prevent any graduates from being able to practise law in British Columbia. Furthermore, it does not prohibit any evangelical Christians from adhering to the Covenant or associating with those who do. The interference is limited to preventing prospective students from studying law at TWU with a mandatory covenant.

[87] First, the limitation in this case is of minor significance because a mandatory covenant is, on the record before us, not absolutely required for the religious practice at issue: namely, to study law in a Christian learning environment in which people follow certain religious rules of conduct. The decision to refuse to approve TWU's proposed law school with a mandatory covenant only prevents prospective students from studying law in their *optimal* religious learning environment where everyone has to abide by the Covenant.

[88] Second, the interference in this case is limited because the record makes clear that prospective TWU law students view studying law in a learning environment infused with the community's religious beliefs as preferred (rather than necessary) for their spiritual growth. As McLachlin C.J. explained in *Hutterian Brethren*, at para. 89:

> There is no magic barometer to measure the seriousness of a particular limit on a religious practice. Religion is a matter of faith, intermingled with culture. It is individual,

demandé à TWU si elle était disposée à [TRADUCTION] « envisager » d'apporter des modifications à son *Covenant*, TWU n'a montré aucune volonté de faire des compromis sur le caractère obligatoire de celui-ci. La décision empêche donc uniquement les membres de la communauté de TWU de fréquenter une faculté de droit agréée de TWU qui est régie par un covenant *obligatoire*.

[86] La Cour d'appel a qualifié de [TRADUCTION] « grave » la restriction en cause en l'espèce parce que celle-ci empêche les diplômés de la faculté de droit proposée par TWU de pratiquer le droit en Colombie-Britannique (par. 168). Cependant, la décision de la LSBC ne prive aucun diplômé de la possibilité de pratiquer le droit en Colombie-Britannique. De plus, elle n'interdit à aucun chrétien évangélique d'adhérer au *Covenant* ou de s'associer à ceux qui le font. L'atteinte se limite à empêcher les étudiants éventuels d'étudier le droit à TWU dans une faculté assujettie à un covenant obligatoire.

[87] Premièrement, la restriction en l'espèce est d'importance mineure parce que, selon le dossier dont nous disposons, il n'est pas absolument nécessaire d'adhérer à un covenant obligatoire pour se livrer à la pratique religieuse en cause, à savoir étudier le droit dans un milieu d'apprentissage chrétien où les gens suivent certaines règles de conduite à caractère religieux. La décision de refuser d'agréer la faculté de droit proposée par TWU régie par un covenant obligatoire ne fait qu'empêcher les étudiants éventuels d'étudier le droit dans leur milieu d'apprentissage religieux *optimal* où tout le monde doit respecter cet engagement.

[88] Deuxièmement, l'atteinte en l'espèce est limitée parce qu'il ressort clairement du dossier que les éventuels étudiants en droit de TWU considèrent qu'il est préférable (plutôt que nécessaire) pour leur croissance spirituelle d'étudier le droit dans un milieu d'apprentissage imprégné des croyances religieuses de la communauté. Comme l'a expliqué la juge en chef McLachlin dans l'arrêt *Hutterian Brethren*, par. 89 :

> Aucune recette magique ne permet de mesurer la gravité d'une restriction particulière à la pratique religieuse. La religion est une question de foi, intimement liée à

yet profoundly communitarian. Some aspects of a religion, like prayers and the basic sacraments, may be so sacred that any significant limit verges on forced apostasy. Other practices may be optional or a matter of personal choice. Between these two extremes lies a vast array of beliefs and practices, more important to some adherents than to others. [Emphasis added.]

la culture. Elle est de nature individuelle, quoique profondément communautaire. Certains aspects de la religion, comme les prières et les sacrements fondamentaux, peuvent être sacrés au point où leur assujettissement à une limite appréciable, quelle qu'elle soit, équivaudrait presque à l'apostasie forcée. D'autres pratiques peuvent être facultatives ou relever d'un choix personnel. Une multitude de croyances et de pratiques se situent entre ces deux extrêmes, certains fidèles leur accordant plus d'importance que d'autres. [Nous soulignons.]

[89] Attending TWU's proposed law school is said to make it "easier" to practise evangelical beliefs. That attending law at TWU, with a mandatory covenant, is a preference is clear from TWU's own affiants who, like Mr. Volkenant, expressed a desire to attend TWU's proposed law school:

[89] On affirme que fréquenter la faculté de droit proposée par TWU rend [TRADUCTION] « plus facile » la pratique des croyances évangéliques. Il ressort clairement des affidavits souscrits par les propres témoins de TWU — qui, à l'instar de M. Volkenant, ont exprimé un désir de fréquenter la faculté de droit proposée — que le fait d'étudier le droit à TWU, régie par un covenant obligatoire, constitue une préférence :

I do not know if I would have chosen to attend TWU law school, but I certainly would have appreciated the option. [Emphasis added.]

(R.R., vol. II, at p. 154)

[TRADUCTION] Est-ce que j'aurais choisi de fréquenter la faculté de droit de TWU? Je ne sais pas, mais j'aurais certainement apprécié avoir cette possibilité. [Nous soulignons.]

(d.i., vol. II, p. 154)

I am familiar with TWU's proposal for its School of Law. Had this option existed when I was considering law schools, I likely would have applied to it. [Emphasis added.]

(R.R., vol. I, at p. 7)

[TRADUCTION] Je connais bien la formule que propose TWU pour sa faculté de droit. Si cette possibilité avait existé lorsque j'examinais les différentes facultés de droit, j'y aurais probablement présenté une demande d'admission. [Nous soulignons.]

(d.i., vol. I, p. 7)

. . . I am familiar with the proposal put forward by TWU in respect to its School of Law and believe I would have considered attending had this option been available to me. [Emphasis added.]

(R.R., vol. I, at p. 143)

[TRADUCTION] . . . Je connais bien la formule que propose TWU en ce qui concerne sa faculté de droit et je crois que j'aurais envisagé de la fréquenter si cette possibilité m'avait été offerte. [Nous soulignons.]

(d.i., vol. I, p. 143)

[90] Our point is that, on the record before us, prospective TWU law students effectively admit that they have much less at stake than claimants in many other cases that have come before this Court (see e.g. *Multani*, at para. 3; *Amselem*, at para. 6; and *Hutterian Brethren*, at para. 7; and *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698, at para. 58). Put otherwise, denying someone an option they would merely appreciate certainly

[90] Ce que nous voulons dire, c'est que, selon le dossier dont nous disposons, les éventuels étudiants en droit de TWU reconnaissent effectivement avoir beaucoup moins à perdre que les demandeurs dans nombre d'autres affaires dont la Cour a été saisie (voir, p. ex., *Multani*, par. 3; *Amselem*, par. 6; *Hutterian Brethren*, par. 7; *Renvoi relatif au mariage entre personnes du même sexe*, 2004 CSC 79, [2004] 3 R.C.S. 698, par. 58). Autrement dit, le fait de

falls short of "forced apostasy" (*Hutterian Brethren*, at para. 89).

[91] On the other side of the scale is the extent to which the LSBC's decision furthered its statutory objectives. As the regulator of the legal profession in British Columbia, its decision must represent a reasonable balance between the benefits to its statutory objectives and the severity of the limitation on *Charter* rights at stake.

[92] It is clear that the decision not to approve TWU's proposed law school significantly advanced the LSBC's statutory objectives — to promote and protect the public interest in the administration of justice by preserving and protecting the rights and freedoms of all persons and ensuring the competence of the legal profession (see *LPA*, ss. 3(a) and 3(b)).

[93] First, the decision advances the LSBC's relevant statutory objectives by maintaining equal access to and diversity in the legal profession. While TWU submits that it "is open to all academically qualified people wishing to live and learn in its religious community" (R.F., at para. 10), the reality is that most LGBTQ people will be deterred from applying to its proposed law school because of the Covenant's prohibition on sexual activity outside marriage between a man and a woman. As this Court acknowledged in *TWU 2001*, "[a]lthough the Community Standards are expressed in terms of a code of conduct rather than an article of faith, we conclude that a homosexual student would not be tempted to apply for admission, and could only sign the so-called student contract at a considerable personal cost" (para. 25). It follows that the 60 law school seats created by TWU's proposed law school will be effectively closed to the vast majority of LGBTQ students. This barrier to admission may discourage qualified candidates from gaining entry to the legal profession.

refuser à quelqu'un une possibilité qu'il aurait simplement apprécié avoir n'équivaut pas véritablement à l'« apostasie forcée » (*Hutterian Brethren*, par. 89).

[91] Sur l'autre plateau de la balance, il y a la mesure dans laquelle la décision de la LSBC a favorisé la réalisation des objectifs que lui confie la loi. La décision de la LSBC — en tant qu'organisme chargé de réglementer la profession juridique en Colombie-Britannique — doit représenter une mise en balance raisonnable des avantages qu'il y a à réaliser les objectifs que lui confie la loi et de la gravité de la restriction aux droits garantis par la *Charte* en cause.

[92] Il est clair que la décision de ne pas agréer la faculté de droit proposée par TWU a nettement favorisé la réalisation des objectifs que la loi confie à la LSBC — favoriser et protéger l'intérêt public dans l'administration de la justice en préservant et en protégeant les droits et libertés de chacun et en assurant la compétence des membres de la profession juridique (voir al. 3(a) et 3(b) de la *LPA*).

[93] Premièrement, la décision favorise la réalisation des objectifs pertinents que la loi confie à la LSBC en maintenant un accès égal à la profession juridique et une diversité au sein de celle-ci. Bien que TWU soutienne qu'elle [TRADUCTION] « est ouverte à toutes les personnes ayant les diplômes nécessaires qui souhaitent vivre et apprendre dans sa communauté religieuse » (m.i., par. 10), en réalité, la plupart des personnes LGBTQ seront dissuadées de présenter une demande d'admission à sa faculté de droit proposée en raison de l'interdiction que contient le *Covenant* quant aux activités sexuelles en dehors du mariage entre un homme et une femme. Comme l'a reconnu la Cour dans *TWU 2001*, « [b]ien que les normes communautaires soient énoncées sous la forme d'un code de conduite plutôt que sous celle d'un article de foi, nous concluons qu'un étudiant homosexuel ne serait pas tenté de présenter une demande d'admission et qu'il ne pourrait signer le prétendu contrat d'étudiant qu'à un prix très élevé sur le plan personnel » (par. 25). Il s'ensuit que les 60 places créées par la faculté de droit proposée par TWU seront, dans les faits, fermées à la grande majorité des étudiants LGBTQ. Cette barrière à l'admission peut décourager des candidats qualifiés de faire leur entrée dans la profession juridique.

[94] TWU submits that even if LGBTQ people are deterred from attending TWU's law school, there are many other options open to LGBTQ people who wish to attend law school (R.F., at para. 175). Even further, TWU asserts that its law school will result in an overall increase in law school seats, which expands choices for all students (para. 138). The British Columbia Court of Appeal accepted this argument, finding that the negative impact on access to law school by LGBTQ students would be "insignificant in real terms" (para. 179).

[95] Such arguments fail to recognize that even if the net result of TWU's proposed law school is that more options and opportunities are available to LGBTQ people applying to law school in Canada — which is certainly not a guarantee — this does not change the fact that an entire law school would be closed off to the vast majority of LGBTQ individuals on the basis of their sexual identity. Those who are able to sign the Covenant will be able to apply to 60 *more* law school seats per year, whereas those 60 seats remain effectively *closed* to most LGBTQ people. In short, LGBTQ individuals would have fewer opportunities relative to others. This undermines true equality of access to legal education, and by extension, the legal profession. Substantive equality demands more than just the availability of options and opportunities — it prevents "the violation of essential human dignity and freedom" and "eliminate[s] any possibility of a person being treated in substance as 'less worthy' than others" (*Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61, at para. 138). The public confidence in the administration of justice may be undermined if the LSBC is seen to approve a law school that effectively bars many LGBTQ people from attending.

[96] Second, the decision furthers the statutory objective — protecting the public interest in the

[94] TWU fait valoir que, même si les personnes LGBTQ sont dissuadées de fréquenter la faculté de droit de TWU, bien d'autres possibilités s'offrent aux personnes LGBTQ qui souhaitent étudier le droit (m.i., par. 175). TWU va jusqu'à affirmer que sa faculté de droit entraînera une augmentation globale des places disponibles dans les facultés de droit, ce qui élargit l'éventail des possibilités qui s'offre à tous les étudiants (par. 138). La Cour d'appel de la Colombie-Britannique a retenu cet argument, concluant que l'incidence défavorable sur l'accès des personnes LGBTQ aux études de droit serait [TRADUCTION] « concrètement négligeable » (par. 179).

[95] Ces arguments ne reconnaissent pas que, même si le résultat net de la faculté de droit proposée par TWU était de faire en sorte que plus de possibilités et d'occasions s'offrent aux personnes LGBTQ qui présentent des demandes d'admission dans les facultés de droit au Canada — résultat qui n'est certes pas garanti —, cela ne change rien au fait qu'une faculté de droit entière serait fermée à la grande majorité des personnes LGBTQ en raison de leur identité sexuelle. Ceux qui sont en mesure de signer le *Covenant* pourraient présenter une demande d'admission dans une faculté de droit offrant 60 places *de plus* par année, tandis que ces 60 places demeureraient dans les faits *fermées* à la plupart des personnes LGBTQ. Bref, les personnes LGBTQ disposeraient de moins d'occasions par rapport aux autres, ce qui met en péril la réalisation d'une véritable égalité d'accès à la formation juridique et, par extension, à la profession juridique. L'égalité réelle exige davantage que la simple existence de possibilités et d'occasions — elle empêche « toute atteinte à la dignité et à la liberté humaines essentielles » et « élimin[e] toute possibilité qu'une personne soit réellement traitée comme "une personne de moindre valeur" » (*Québec (Procureur général) c. A*, 2013 CSC 5, [2013] 1 R.C.S. 61, par. 138). La confiance du public dans l'administration de la justice peut être compromise si la LSBC donne l'impression d'approuver une faculté de droit qui, dans les faits, empêche de nombreuses personnes LGBTQ de la fréquenter.

[96] Deuxièmement, la décision favorise la réalisation de l'objectif de la loi —protéger l'intérêt public

administration of justice by preserving rights and freedoms — by preventing the risk of significant harm to LGBTQ people who attend TWU's proposed law school. The British Columbia Court of Appeal accepted that if LGBTQ students signed the Covenant to gain access to TWU "they would have to either 'live a lie to obtain a degree' and sacrifice important and deeply personal aspects of their lives, or face the prospect of disciplinary action including expulsion" (para. 172). TWU's Covenant prevents students who are not married to members of the opposite sex from engaging in sexual activity in the privacy of their own bedrooms. It requires non-evangelical LGBTQ students, whom TWU welcomes to its school, to comply with conduct requirements even when they are off-campus, in the privacy of their own homes. Attending TWU's law school would mean that LGBTQ students would have to deny a crucial component of their identity in the most private and personal of spaces for three years in order to receive a legal education (I.F., Egale Canada Human Rights Trust (file No. 37318), at para. 14; Start Proud and OUTlaws (file No. 37209), at para. 6).

[97] Despite this, TWU asserts that LGBTQ students will suffer no harm to their dignity or personal identity while enrolled at TWU because the Covenant requires all members of TWU's community to "treat all persons with dignity, respect and equality, regardless of personal differences" (R.F., at para. 92). However, as this Court recognized in *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467, it is not possible "to condemn a practice so central to the identity of a protected and vulnerable minority without thereby discriminating against its members and affronting their human dignity and personhood" (para. 123, quoting L'Heureux-Dubé J. in *TWU 2001* in dissent (though not on this point), at para. 69).

dans l'administration de la justice en préservant les droits et libertés de chacun — parce qu'elle prévient le risque que soit causé un préjudice important aux personnes LGBTQ qui fréquentent la faculté de droit proposée par TWU. La Cour d'appel de la Colombie-Britannique a reconnu que les étudiants LGBTQ ayant signé le *Covenant* afin d'être admis à TWU [TRADUCTION] « seraient obligés soit de "vivre dans le mensonge pour obtenir un diplôme" et de sacrifier des aspects importants et profondément personnels de leur vie, soit de s'exposer à des mesures disciplinaires, dont le renvoi » (par. 172). Le *Covenant* de TWU empêche les étudiants qui ne sont pas mariés à des personnes du sexe opposé de se livrer à une activité sexuelle dans l'intimité de leur chambre à coucher. Il oblige les étudiants LGBTQ non évangéliques, que TWU accueille à sa faculté, à se plier à des exigences de conduite même lorsqu'ils se trouvent à l'extérieur du campus, dans l'intimité de leur foyer. Fréquenter la faculté de droit de TWU signifierait, pour les étudiants LGBTQ, qu'ils devraient pendant trois ans renier un élément essentiel de leur identité dans leur espace le plus intime et le plus personnel afin de pouvoir recevoir une formation juridique (m.i., Égale Canada Human Rights Trust (dossier nº 37318), par. 14; Fier départ et OUTlaws (dossier nº 37209), par. 6).

[97] Malgré cela, TWU affirme que les étudiants LGBTQ ne subiront aucune atteinte à leur dignité ou à leur identité personnelle pendant qu'ils seront inscrits à TWU parce que le *Covenant* oblige tous les membres de la communauté de TWU à [TRADUCTION] « traiter toutes les personnes avec dignité, avec respect et sur un pied d'égalité, indépendamment des différences personnelles » (m.i., par. 92). Cependant, comme l'a reconnu la Cour dans l'arrêt *Saskatchewan (Human Rights Commission) c. Whatcott*, 2013 CSC 11, [2013] 1 R.C.S. 467, il n'est pas possible « de condamner une pratique si essentielle à l'identité d'une minorité vulnérable et protégée sans pour autant faire preuve de discrimination à l'égard de ses membres ni porter atteinte à leur dignité humaine et à leur personnalité » (par. 123, citant la juge L'Heureux-Dubé dans *TWU 2001*, dissidente (mais non sur ce point), par. 69).

[98] LGBTQ students enrolled at TWU's law school may suffer harm to their dignity and self-worth, confidence and self-esteem, and may experience stigmatization and isolation (see evidence of Dr. Ellen Faulkner in A.R., vol. V, at pp. 828-29 and 834; Dr. Catherine Taylor in A.R., vol. V, at p. 904; Dr. Mary Bryson in A.R., vol. V, at pp. 967-68). The public confidence in the administration of justice may be undermined by the LSBC's decision to approve a law school that forces some to deny a crucial component of their identity for three years in order to receive a legal education.

[99] The TWU community has the right to determine the rules of conduct which govern its members. Freedom of religion protects the rights of religious adherents to hold and express beliefs through both individual and communal practices. Where a religious practice impacts others, however, this can be taken into account at the balancing stage. The Covenant is a commitment to *enforcing* a religiously based code of conduct, not just in respect of one's own behaviour, but also in respect of other members of the TWU community (D. Pothier, "An Argument Against Accreditation of Trinity Western University's Proposed Law School" (2014), 23:1 *Const. Forum Const.* 1, at p. 2). The effect of the mandatory Covenant is to restrict the conduct of others.

[100] The limitation on religious freedom in this case must be understood in light of the reality that conflict between the pursuit of statutory objectives and individual freedoms may be inevitable. As this Court has held, state interferences with religious freedom "must be considered in the context of a multicultural, multi-religious society where the duty of state authorities to legislate for the general good inevitably produces conflicts with individual beliefs" (*Hutterian Brethren*, at para. 90; see also *Loyola*, at para. 47). Accordingly, minor limits on religious freedom are often an unavoidable reality of a decision-maker's pursuit of its statutory mandate in a multicultural and democratic society.

[98] Les étudiants LGBTQ inscrits à la faculté de droit de TWU peuvent subir une atteinte à leur dignité et à leur valorisation personnelle ainsi qu'à leur confiance en soi et à leur estime d'eux-mêmes, et connaître la stigmatisation et l'isolement (voir le témoignage des D^res^ Ellen Faulkner dans d.a., vol. V, p. 828-829 et 834, Catherine Taylor dans d.a., vol. V, p. 904, et Mary Bryson dans d.a., vol. V, p. 967-968). La confiance du public dans l'administration de la justice peut être compromise par la décision de la LSBC d'agréer une faculté de droit qui force certaines personnes à renier un élément essentiel de leur identité pendant trois ans afin de pouvoir recevoir une formation juridique.

[99] La communauté de TWU a le droit de déterminer les règles de conduite qui régissent ses membres. La liberté de religion protège les droits des fidèles d'avoir des croyances et de les exprimer au moyen de pratiques tant individuelles que collectives. Cependant, lorsqu'une pratique religieuse a une incidence sur autrui, on peut en tenir compte à l'étape de la mise en balance. Le *Covenant* est un engagement à *assurer le respect* d'un code de conduite fondé sur des croyances religieuses, à l'égard non seulement de son propre comportement, mais aussi de celui des autres membres de la communauté de TWU (D. Pothier, « An Argument Against Accreditation of Trinity Western University's Proposed Law School » (2014), 23:1 *Const. Forum Const.* 1, p. 2). Le *Covenant* obligatoire a pour effet de limiter la conduite d'autrui.

[100] La restriction à la liberté de religion dans cette affaire doit être interprétée eu égard à la réalité selon laquelle le conflit entre la poursuite des objectifs visés par la loi et le respect des libertés individuelles soit peut-être inévitable. Comme l'a statué la Cour, les atteintes de l'État à la liberté de religion doivent être examinées « dans le contexte d'une société multiculturelle où se côtoient une multitude de religions et dans laquelle l'accomplissement par l'État de son devoir de légiférer pour le bien commun heurte inévitablement les croyances individuelles » (*Hutterian Brethren*, par. 90; voir également *Loyola*, par. 47). En conséquence, les restrictions d'importance mineure à la liberté de religion constituent souvent une réalité incontournable pour le décideur dans le cadre de l'exercice du mandat que lui confie la loi dans une société multiculturelle et démocratique.

[101] In saying this, we do not dispute that "[d]isagreement and discomfort with the views of others is unavoidable in a free and democratic society" (C.A. reasons, at para. 188), and that a secular state cannot interfere with religious freedom unless it conflicts with or harms overriding public interests (para. 131, citing *Loyola*, at para. 43). But more is at stake here than simply "disagreement and discomfort" with views that some will find offensive. This Court has held that religious freedom can be limited where an individual's religious beliefs or practices have the effect of "injur[ing] his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own" (*Big M*, at p. 346). Likewise, in *Multani*, the Court held that state interference with religious freedom can be justified "when a person's freedom to act in accordance with his or her beliefs may cause harm to or interfere with the rights of others" (para. 26). Being required by someone else's religious beliefs to behave contrary to one's sexual identity is degrading and disrespectful. Being required to do so offends the public perception that freedom of religion includes freedom from religion.

[101] En disant cela, nous ne contestons pas le fait que [TRADUCTION] « [l]e désaccord et le malaise à l'égard des opinions d'autrui sont inévitables dans une société libre et démocratique » (motifs de la C.A., par. 188), et qu'un État laïque ne peut porter atteinte à la liberté de religion à moins qu'elle ne soit contraire ou ne porte atteinte à des intérêts publics prépondérants (par. 131, citant *Loyola*, par. 43). Mais il ne s'agit pas ici d'un simple « désaccord ou malaise » à l'égard d'opinions que certains jugeront offensantes. La Cour a statué que la liberté de religion peut être restreinte lorsque les croyances ou pratiques religieuses d'une personne ont pour effet de « [léser] [. . .] ses semblables ou leur propre droit d'avoir et de manifester leurs croyances et opinions personnelles » (*Big M*, p. 346). De la même façon, dans l'arrêt *Multani*, la Cour a statué que l'atteinte par l'État à la liberté de religion peut être justifiée « lorsque la liberté d'une personne d'agir suivant ses croyances est susceptible de causer préjudice aux droits d'autrui ou d'entraver l'exercice de ces droits » (par. 26). Être tenu par les croyances religieuses de quelqu'un d'autre de se conduire d'une manière qui va à l'encontre de son identité sexuelle est dégradant et irrespectueux. Être tenu de le faire heurte la perception du public selon laquelle la liberté de religion comprend la liberté de ne pas être contraint d'observer une religion.

[102] In the end, it cannot be said that the denial of approval is a serious limitation on the religious rights of members of the TWU community. The LSBC's decision does not suppress TWU's religious difference. Except for the limitation we have identified, no evangelical Christian is denied the right to practise his or her religion as and where they choose.

[102] En fin de compte, on ne peut pas dire que le refus de reconnaître la faculté de droit proposée constitue une restriction sérieuse aux droits religieux des membres de la communauté de TWU. La décision de la LSBC n'a pas pour effet de supprimer la différence religieuse à TWU. Exception faite de la restriction que nous avons dégagée, aucun chrétien évangélique n'est privé de son droit de pratiquer sa religion comme et où il l'entend.

[103] The refusal to approve the proposed law school means that members of the TWU religious community are not free to impose those religious beliefs on fellow law students, since they have an inequitable impact and can cause significant harm. The LSBC chose an interpretation of the public interest in the administration of justice which mandates access to law schools based on merit and diversity, not exclusionary religious practices. The refusal to approve

[103] Le refus d'agréer la faculté de droit proposée signifie que les membres de la communauté religieuse de TWU ne sont pas libres d'imposer leurs croyances religieuses à leurs condisciples étudiant le droit, car elles ont des conséquences inéquitables et peuvent causer un préjudice important. La LSBC a retenu une interprétation de l'intérêt public dans l'administration de la justice qui prescrit un accès aux facultés de droit fondé sur le mérite et la diversité,

TWU's proposed law school prevents *concrete*, not abstract, harms to LGBTQ people and to the public in general. The LSBC's decision ensures that equal access to the legal profession is not undermined and prevents the risk of significant harm to LGBTQ people who feel they have no choice but to attend TWU's proposed law school. It also maintains public confidence in the legal profession, which could be undermined by the LSBC's decision to approve a law school that forces LGBTQ people to deny who they are for three years to receive a legal education.

et non sur des pratiques religieuses d'exclusion. Le refus de reconnaître la faculté de droit proposée par TWU empêche que des préjudices *concrets*, et non abstraits, soient causés aux personnes LGBTQ et aux membres du public en général. La décision de la LSBC permet, d'une part, de faire en sorte que l'égalité d'accès à la profession juridique ne soit pas compromise et, d'autre part, de prévenir le risque que soit causé un préjudice important aux personnes LGBTQ qui ont l'impression de n'avoir d'autre choix que de fréquenter la faculté de droit proposée par TWU. Elle permet aussi de maintenir la confiance du public dans la profession juridique, laquelle pourrait être compromise par une décision de la LSBC d'agréer une faculté de droit qui force les personnes LGBTQ à renier ce qu'elles sont pendant trois ans afin de pouvoir recevoir une formation juridique.

[104] Given the significant benefits to the relevant statutory objectives and the minor significance of the limitation on the *Charter* rights at issue on the facts of this case, and given the absence of any reasonable alternative that would reduce the impact on *Charter* protections while sufficiently furthering those same objectives, the decision to refuse to approve TWU's proposed law school represents a proportionate balance. In other circumstances, a more serious limitation may be entitled to greater weight in the balance and change the outcome. But that is not this case.

[104] Compte tenu des avantages importants qu'il y a à favoriser la réalisation des objectifs pertinents visés par la loi et de l'importance mineure de la restriction aux droits garantis par la *Charte* en cause eu égard aux faits de l'espèce, et compte tenu de l'absence de solution de rechange raisonnable susceptible de réduire l'incidence sur les protections conférées par la *Charte* tout en favorisant suffisamment la réalisation de ces objectifs, la décision de refuser d'agréer la faculté de droit proposée par TWU représente une mise en balance proportionnée. Dans d'autres circonstances, une restriction plus sérieuse pourrait peser plus lourd dans la balance et donner lieu à un résultat différent. Mais ce n'est pas le cas en l'espèce.

[105] In our view, the decision made by the LSBC "gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate" (*Loyola*, at para. 39). Therefore, the decision amounted to a proportionate balancing and was reasonable.

[105] À notre avis, la décision prise par la LSBC « donne effet autant que possible aux protections en cause conférées par la *Charte* compte tenu du mandat législatif particulier en cause » (*Loyola*, par. 39). En conséquence, la décision constituait une mise en balance proportionnée et était raisonnable.

V. Disposition

[106] The resolution of the LSBC to declare that TWU's proposed law school not be approved is restored. As a result, the appeal from the Court of Appeal for British Columbia is allowed, with costs.

V. Dispositif

[106] La résolution par laquelle la LSBC déclare que la faculté de droit proposée par TWU n'est pas une faculté de droit agréée est rétablie. Le pourvoi interjeté à l'encontre de l'arrêt de la Cour d'appel de la Colombie-Britannique est donc accueilli, avec dépens.

The following are the reasons delivered by

[107] The Chief Justice — Can a law society deny students from a religious-based law school the right to practise law, on the basis that the school discriminates against same-sex LGBTQ couples by requiring students to sign the Community Covenant Agreement ("Covenant") prohibiting sexual intimacy except between married heterosexual couples? That is the issue in this appeal.

[108] I agree with the majority, Abella, Moldaver, Karakatsanis, Wagner and Gascon JJ., that the decision of the Law Society of British Columbia ("LSBC") to deny accreditation to Trinity Western University's ("TWU") proposed law school represents a proportionate balancing of freedom of religion, on the one hand, and the avoidance of discrimination, on the other. I would therefore allow the appeal. I differ from the majority, however, on certain aspects of the analysis.

1. *Standard of Review*

[109] The LSBC was exercising power delegated by the Province under the *Legal Profession Act*, S.B.C. 1998, c. 9. As such, it is a state actor, and its decisions, if challenged, are subject to judicial review.

[110] I agree with the majority that the jurisdiction and decision-making process of the LSBC are reviewable on a standard of reasonableness. Where legislatures delegate regulation of the legal profession to a law society, the law society's interpretation of the public interest is owed deference. This reflects the legislature's intent that the LSBC decide, on its behalf, who should be admitted to the practice of law. The LSBC has made graduation from an accredited law school one of the conditions of admission to the

Version française des motifs rendus par

[107] La juge en chef — Un barreau peut-il priver les étudiants d'une faculté de droit confessionnelle du droit de pratiquer le droit au motif que la faculté fait preuve de discrimination envers les couples de même sexe issus de la communauté LGBTQ en obligeant les étudiants à signer un engagement — le *Community Covenant Agreement* (« *Covenant* »), l'accord constatant le *Covenant* communautaire — qui prohibe toute intimité sexuelle à l'extérieur des liens du mariage entre un homme et une femme? Voilà la question que soulève le présent pourvoi.

[108] Je souscris à la conclusion des juges majoritaires, les juges Abella, Moldaver, Karakatsanis, Wagner et Gascon, portant que la décision du barreau de la Colombie-Britannique, la Law Society of British Columbia (« LSBC »), de refuser d'agréer la faculté de droit proposée par Trinity Western University (« TWU ») représente une mise en balance proportionnée de la liberté de religion, d'une part, et de la volonté d'éviter la discrimination, d'autre part. En conséquence, je suis d'avis d'accueillir le pourvoi. Toutefois, je ne partage pas l'opinion de mes collègues majoritaires quant à certains éléments de l'analyse.

1. *La norme de contrôle*

[109] La LSBC exerçait un pouvoir qui lui a été délégué par la province dans la *Legal Profession Act*, S.B.C. 1998, c. 9. Pour cette raison, elle est un acteur étatique et ses décisions, en cas de contestation, sont susceptibles de contrôle judiciaire.

[110] À l'instar de mes collègues de la majorité, j'estime que la norme de la décision raisonnable est la norme applicable à l'égard des décisions sur la compétence et le processus décisionnel de la LSBC. Lorsqu'un législateur délègue à un barreau la tâche de réglementer la profession juridique, l'interprétation que donne le barreau de l'intérêt public commande la déférence. Cette situation reflète l'intention du législateur de laisser la LSBC décider, pour lui, qui peut pratiquer le droit dans la province. La LSBC

practice of law. That choice was within its delegated power.

2. *Judicial Review of Charter-Infringing Administrative Decisions*

[111] I agree with the majority that discretionary administrative decisions that engage the *Canadian Charter of Rights and Freedoms* are reviewed on the framework set out in *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, and *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613. However, the framework's contours continue to elicit comment from scholars and judges.[1] In what follows, I suggest how to address some of the gaps and omissions in the framework set out in those decisions.

[112] This framework has two discrete steps, in my view. The reviewing court must: (1) determine if the decision limits a *Charter* right; and (2) determine whether the limitation of the right is proportionate in light of the state's objective, and hence is justified as a reasonable measure in a free and democratic society under s. 1 of the *Charter*.

[113] Judicial review of the justifiability of a rights-infringing administrative decision will often

[1] *E.T. v. Hamilton-Wentworth District School Board*, 2017 ONCA 893, 140 O.R. (3d) 11, at paras. 108-25; E. Fox-Decent and A. Pless, "The Charter and Administrative Law: Cross-Fertilization or Inconstancy?", in C. M. Flood and L. Sossin, eds., *Administrative Law in Context* (2nd ed. 2013), 407; H. L. Kong, "*Doré*, Proportionality and the Virtues of Judicial Craft" (2013), 63 *S.C.L.R.* (2d) 501; P. Daly, "Prescribing Greater Protection for Rights: Administrative Law and Section 1 of the *Canadian Charter of Rights and Freedoms*" (2014), 65 *S.C.L.R.* (2d) 249; C. D. Bredt and E. Krajewska, "*Doré*: All That Glitters Is Not Gold" (2014), 67 *S.C.L.R.* (2d) 339; A. Macklin, "Charter Right or Charter-Lite? Administrative Discretion and the Charter" (2014), 67 *S.C.L.R.* (2d) 561; T. Hickman, "Adjudicating Constitutional Rights in Administrative Law" (2016), 66 *U.T.L.J.* 121; M. Liston, "Administering the *Charter*, Proportioning Justice: Thirty-five Years of Development in a Nutshell" (2017), 30 *Can. J. Admin. L. & Prac.* 211, at pp. 242-46.

a décidé que l'une des conditions d'admission à la pratique du droit était l'obtention d'un diplôme décerné par une faculté de droit agréée. Une telle décision relevait du pouvoir qui lui a été délégué.

2. *Le contrôle judiciaire de décisions administratives portant atteinte à la Charte*

[111] Tout comme la majorité, je suis d'avis que le contrôle des décisions administratives de nature discrétionnaire qui font intervenir la *Charte canadienne des droits et libertés* s'effectue selon le cadre d'analyse établi dans les arrêts *Doré c. Barreau du Québec*, 2012 CSC 12, [2012] 1 R.C.S. 395, et *École secondaire Loyola c. Québec (Procureur général)*, 2015 CSC 12, [2015] 1 R.C.S. 613. Toutefois, les contours de ce cadre continuent de susciter des commentaires parmi les auteurs et les juges[1]. Dans les paragraphes qui suivent, je suggère des moyens de combler certaines des lacunes et omissions du cadre d'analyse énoncé dans ces arrêts.

[112] À mon avis, ce cadre d'analyse comporte deux étapes distinctes. La cour de révision doit (1) décider si la décision restreint un droit garanti par la *Charte*, et (2) juger si cette restriction est proportionnée eu égard aux objectifs de l'État et si, de ce fait, elle constitue une mesure raisonnable qui se justifie dans le cadre d'une société libre et démocratique conformément à l'article premier de la *Charte*.

[113] Le contrôle judiciaire du caractère justifiable d'une décision administrative attentatoire s'attachera

[1] *E.T. c. Hamilton-Wentworth District School Board*, 2017 ONCA 893, 140 O.R. (3d) 11, par. 108-125; E. Fox-Decent et A. Pless, « The Charter and Administrative Law : Cross-Fertilization or Inconstancy? », dans C. M. Flood et L. Sossin, dir., *Administrative Law in Context* (2e éd. 2013), 407; H. L. Kong, « *Doré*, Proportionality and the Virtues of Judicial Craft » (2013), 63 *S.C.L.R.* (2d) 501; P. Daly, « Prescribing Greater Protection for Rights : Administrative Law and Section 1 of the *Canadian Charter of Rights and Freedoms* » (2014), 65 *S.C.L.R.* (2d) 249; C. D. Bredt et E. Krajewska, « *Doré* : All That Glitters Is Not Gold » (2014), 67 *S.C.L.R.* (2d) 339; A. Macklin, « Charter Right or Charter-Lite? Administrative Discretion and the Charter » (2014), 67 *S.C.L.R.* (2d) 561; T. Hickman, « Adjudicating Constitutional Rights in Administrative Law » (2016), 66 *U.T.L.J.* 121; M. Liston, « Administering the *Charter*, Proportioning Justice : Thirty-five Years of Development in a Nutshell » (2017), 30 *Can. J. Admin. L. & Prac.* 211, p. 242-246.

put the emphasis on the later stages of the test set out in *R. v. Oakes*, [1986] 1 S.C.R. 103. In *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256, LeBel J. stated that not all its steps must be followed when reviewing an individualized decision. Rather, "[t]he issue becomes one of proportionality or, more specifically, minimal limitation of the guaranteed right, having regard to the context in which the right has been infringed" (para. 155). In the same vein, the majority of this Court wrote in *Loyola*: "A *Doré* proportionality analysis finds analytical harmony with the final stages of the *Oakes* framework used to assess the reasonableness of a limit on a *Charter* right under s. 1: minimal impairment and balancing" (para. 40). In short, if *Oakes* continues to inspire the framework, *Doré* and *Loyola* tell us that there may be a greater emphasis on later steps of the analysis in the administrative context.

[114] I agree with the majority that on judicial review of a rights-infringing administrative decision, the analysis usually comes down to proportionality, and particularly the final stage of weighing the benefit achieved by the infringing decision against its negative impact on the right (para. 58). Proportionality requires that the state objective capable of overriding a right be rationally connected to the decision; in the administrative context, where the decision falls within the scope of an unchallenged law, usually this is the case. Minimal impairment — whether the administrative decision infringes a *Charter* right more than necessary or is broader than reasonably required — arises, but the question is not whether "the law" catches more conduct than it should, as under *Oakes*, but whether an alternative less-infringing decision was possible. Particularly where the decision is a choice between only two options (for example, to accredit or not), this step will also easily be met. This leaves the final stage of the proportionality inquiry — assessing the actual impact of the decision. It follows that in reviewing administrative decisions, the analysis almost invariably comes down to looking at the effects of the decision and asking whether the

souvent davantage aux dernières étapes de l'analyse énoncée dans *R. c. Oakes*, [1986] 1 R.C.S. 103. Dans l'arrêt *Multani c. Commission scolaire Marguerite-Bourgeoys*, 2006 CSC 6, [2006] 1 R.C.S. 256, le juge LeBel a déclaré qu'il n'était pas nécessaire de suivre toutes les étapes de l'analyse lors du contrôle d'une décision individualisée. Plutôt, dans un tel cas, « [l]a question se réduit à un problème de proportionnalité ou, plus précisément, de restriction minimale du droit garanti, compte tenu du contexte dans lequel survient l'atteinte à ce droit » (par. 155). Dans le même ordre d'idées, dans *Loyola* les juges majoritaires de notre Cour ont écrit ce qui suit : « L'analyse de la proportionnalité prescrite par l'arrêt *Doré* s'harmonise avec les étapes finales du cadre d'analyse énoncé dans *Oakes* qui sert pour déterminer si une restriction à un droit garanti par la *Charte* est raisonnable au regard de l'article premier : atteinte minimale et équilibre » (par. 40). Bref, bien que l'arrêt *Oakes* continue d'inspirer le cadre d'analyse, les arrêts *Doré* et *Loyola* nous enseignent qu'il est possible qu'une plus grande importance soit accordée aux dernières étapes de l'analyse en contexte administratif.

[114] Je suis d'accord avec la majorité pour dire que, en cas de contrôle judiciaire d'une décision administrative attentatoire, l'analyse se résume habituellement à la question de la proportionnalité et, plus particulièrement, à la dernière étape de l'analyse, soit la mise en balance des effets bénéfiques de la décision attentatoire et des effets négatifs de celle-ci sur le droit touché (par. 58). Pour qu'il y ait proportionnalité, il faut être en présence d'un objectif étatique susceptible de l'emporter sur un droit présentant un lien rationnel avec la décision contestée; en contexte administratif, c'est généralement le cas si la décision a été prise en vertu d'une loi qui n'est pas contestée. Le critère de l'atteinte minimale — c'est-à-dire la question de savoir si la décision administrative porte atteinte au droit garanti par la *Charte* au-delà de ce qui est nécessaire ou si elle a une portée plus vaste que ce qui est raisonnablement requis — entre en ligne de compte, mais il ne s'agit pas de déterminer si « la loi » vise plus de conduites qu'elle ne devrait le faire, comme le prévoit l'arrêt *Oakes*, mais plutôt de déterminer si une autre décision, moins attentatoire, était possible. Particulièrement dans les cas où la décision se limite

negative impact on the right imposed by the decision is proportionate to its objective.

[115] However, I would add four comments. First, to adequately protect the right, the initial focus must be on whether the claimant's constitutional right has been infringed. *Charter* values may play a role in defining the scope of rights; it is the right itself, however, that receives protection under the *Charter*.

[116] Second, the scope of the guarantee of the *Charter* right must be given a consistent interpretation regardless of the state actor, and it is the task of the courts on judicial review of a decision to ensure this. A decision based on an erroneous interpretation of a *Charter* right will be unreasonable. Canadians should not have to fear that their rights will be given different levels of protection depending on how the state has chosen to delegate and wield its power.

[117] Third, since this is a matter of justification of a rights infringement under s. 1 of the *Charter*, the onus is on the state actor that made the rights-infringing decision (in this case the LSBC) to demonstrate that the limits their decisions impose on the rights of the claimants are reasonable and demonstrably justifiable in a free and democratic society.

[118] Finally, I would note that relying on the language of "deference" and "reasonableness" in this context may be unhelpful. Quite simply, where an administrative decision-maker renders a decision that has an unjustified and disproportionate impact on a *Charter* right, it will always be unreasonable.

à un choix entre deux possibilités (par exemple, accorder ou non l'agrément), cette étape sera elle aussi facilement franchie. Ce qui conduit à l'ultime étape de l'examen de la proportionnalité — l'appréciation de l'effet concret de la décision. Il s'ensuit que, lors du contrôle d'une décision administrative, l'analyse se résume presque invariablement à l'examen des effets de la décision et à la question de savoir si les effets négatifs de la décision sur le droit touché sont proportionnés aux objectifs de celle-ci.

[115] J'ajouterais toutefois quatre commentaires. Premièrement, pour protéger adéquatement le droit en cause, il faut s'attacher au départ à la question de savoir s'il y a eu atteinte au droit constitutionnel du demandeur. Il est possible que les valeurs consacrées par la *Charte* jouent un rôle dans la définition de la portée des droits en cause garantis par celle-ci; cependant, c'est le droit lui-même qui est protégé par la *Charte*.

[116] Deuxièmement, l'interprétation de la portée du droit garanti par la *Charte* doit être la même, peu importe l'identité de l'acteur étatique concerné, et il incombe aux tribunaux de veiller à ce que ce soit le cas à l'occasion d'un contrôle judiciaire. Une décision fondée sur une interprétation erronée d'un droit garanti par la *Charte* sera déraisonnable. Les Canadiens ne devraient pas craindre de voir les protections dont ils bénéficient varier selon la façon dont l'État a choisi de déléguer son pouvoir et de l'exercer.

[117] Troisièmement, comme il s'agit d'une affaire de justification d'une atteinte au regard de l'article premier de la *Charte*, il incombe à l'acteur étatique qui a pris la décision attentatoire (en l'occurrence la LSBC) de démontrer que les limites que sa décision impose aux droits des demandeurs sont raisonnables et que leur justification peut se démontrer dans le cadre d'une société libre et démocratique.

[118] Enfin, je tiens à préciser qu'il pourrait ne pas être utile dans un tel contexte de s'appuyer sur les notions de « déférence » et de « raisonnabilité ». Pour dire les choses simplement, dans les cas où un décideur administratif prend une décision dont les effets sur un droit garanti par la *Charte* sont injustifiés et disproportionnés, une telle décision sera toujours déraisonnable.

[119] To summarize, in judicial review of administrative decisions for compliance with the *Charter*, the focus is on proportionality. The first question is whether the decision infringes a *Charter* right. If so, the state actor that made the infringing decision bears the onus of showing that the infringement is justified under s. 1 of the *Charter*. In most cases, the ultimate question will be whether the decision under review in the particular case balances the negative effects on the right against the benefits derived from the decision in a proportionate way.

3. *Does the Decision of the LSBC Limit Charter Rights?*

[120] I agree with the majority that the LSBC's decision not to approve TWU's proposed law school limits the freedom of religion of members of the Trinity Western community (paras. 60-75). TWU bore the onus of satisfying the two-part test of a sincere religious belief or practice that has a nexus with religion and that is more than trivially or insubstantially interfered with by the impugned state conduct (*Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, at para. 65; *Multani*, at para. 34; *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 S.C.R. 386, at para. 68). This test is met.

[121] The question at the second stage of the test is whether the LSBC's decision was "capable" of interfering with religious belief or practice (*R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 759). At the stage of defining the right, we are not concerned with cataloguing the severity of the detrimental impact on the religious right of the challenged decisions; that is for the s. 1 analysis. The task at this stage is to determine whether the claims fall within the scope of the right.

[119] En résumé, le contrôle judiciaire de la conformité à la *Charte* des décisions administratives s'attache principalement à la question de la proportionnalité. Il faut d'abord se demander si la décision porte atteinte à un droit garanti par la *Charte*. Dans l'affirmative, l'acteur étatique à l'origine de la décision attentatoire doit démontrer que l'atteinte est justifiée au regard de l'article premier de la *Charte*. La plupart du temps, il s'agira en définitive de décider si la décision faisant l'objet du contrôle judiciaire représente une mise en balance proportionnée des effets négatifs de la décision sur les droits touchés et des avantages qui découlent de celle-ci.

3. *La décision de la LSBC restreint-elle des droits garantis par la Charte?*

[120] Tout comme les juges majoritaires, j'estime que la décision de la LSBC de refuser d'agréer la faculté de droit proposée par TWU restreint la liberté de religion des membres de la communauté de TWU (par. 60-75). Il incombait à TWU de satisfaire à l'analyse à deux volets consistant à démontrer, d'une part, que ses membres croient sincèrement à une croyance ou pratique ayant un lien avec la religion, et, d'autre part, que la conduite étatique contestée porte atteinte à cette croyance ou pratique d'une manière plus que négligeable ou insignifiante (*Syndicat Northcrest c. Amselem*, 2004 CSC 47, [2004] 2 R.C.S. 551, par. 65; *Multani*, par. 34; *Ktunaxa Nation c. Colombie-Britannique (Forests, Lands and Natural Resource Operations)*, 2017 CSC 54, [2017] 2 R.C.S. 386, par. 68). TWU a satisfait à cette analyse en l'espèce.

[121] Au deuxième volet de l'analyse, il faut se demander si la décision de la LSBC était « susceptible » de porter atteinte à une croyance ou pratique religieuse (*R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713, p. 759). À l'étape de la définition du droit, il n'est pas question d'examiner la gravité des effets négatifs de la décision contestée sur les droits religieux; cette question sera examinée lors de l'analyse fondée sur l'article premier. À la présente étape, il s'agit de décider si les demandes relèvent du champ d'application du droit en cause.

[122] I agree with the majority that the LSBC decision limits, or infringes, the s. 2(*a*) *Charter* guarantee of freedom of religion. I would add this, however. The majority finds it unnecessary to consider the guarantees of freedom of expression and freedom of association. While it may not be necessary to conduct a separate analysis of these guarantees, the Court must, in my view, include them in the ambit of the guarantee of freedom of religion. TWU's insistence on its Community Covenant Agreement *expresses* its believers' religious commitment and their desire *to associate* with people who commit to practices that accord with their religious beliefs. In *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772 ("*TWU 2001*"), this Court held that a decision not to approve TWU's teacher training program limited expressive and associational freedoms which may receive separate protection in the *Charter* but are also part of freedom of religion (paras. 34 and 93). The same is true here.

[123] TWU also advances a s. 15(1) *Charter* equality claim. The majority does not decide this question. On the record before us, I would reject this claim. Even if members of the TWU community could show that the LSBC's decision creates a distinction on the enumerated ground of religion, it does not arise from any prejudice or stereotype and effects no discrimination on religious grounds but, rather, ensures equal access to all prospective law students (*Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 108). Ultimately, the substance of TWU's claim is better dealt with as an infringement of its members' freedom of religion.

[124] At this point, one must define the claim to freedom of religion. TWU says the LSBC's denial of accreditation limits its right to freedom of religion:

[122] Tout comme les juges de la majorité, j'estime que la décision de la LSBC restreint la liberté de religion garantie par l'al. 2*a*) de la *Charte* ou y porte atteinte. Cependant, j'ajouterais ce qui suit. Les juges majoritaires estiment qu'il n'est pas nécessaire d'examiner les garanties de liberté d'expression et de liberté d'association. Bien qu'il ne soit peut-être pas nécessaire d'analyser séparément ces garanties, la Cour se doit, à mon avis, d'inclure ces garanties dans le champ d'application de la garantie de liberté de religion. L'insistance manifestée par TWU à l'égard du maintien de l'accord constatant son *Covenant* communautaire *exprime* l'engagement religieux de ses croyants et du désir de ceux-ci de *s'associer* avec des personnes qui s'engagent à adhérer à des pratiques conformes à leurs croyances religieuses. Dans l'arrêt *Université Trinity Western c. British Columbia College of Teachers*, 2001 CSC 31, [2001] 1 R.C.S. 772 (« *TWU 2001* »), notre Cour a conclu que le refus d'agréer le programme de formation des enseignants de TWU avait pour effet de restreindre la liberté d'expression et la liberté d'association, libertés qui jouissent de leur propre protection sous le régime de la *Charte*, mais font également partie de la liberté de religion (par. 34 et 93). La même conclusion s'applique en l'espèce.

[123] TWU a également avancé un argument fondé sur le droit à l'égalité garanti par le par. 15(1) de la *Charte*. Les juges de la majorité ne tranchent pas cette question. À la lumière du dossier dont nous disposons, je rejetterais cet argument. Même si les membres de la communauté de TWU étaient en mesure de démontrer que la décision de la LSBC crée une distinction fondée sur le motif énuméré que constitue la religion, cette décision ne découle pas d'un préjugé ou d'un stéréotype et elle n'entraîne aucune discrimination fondée sur la religion; au contraire, elle assure l'égalité d'accès à toutes les personnes qui aspirent à étudier le droit (*Alberta c. Hutterian Brethren of Wilson Colony*, 2009 CSC 37, [2009] 2 R.C.S. 567, par. 108). En définitive, il est plus approprié d'examiner l'essence de l'argument de TWU en considérant qu'elle reproche une atteinte à la liberté de religion de ses membres.

[124] Il convient, à ce stade-ci, de préciser l'argument fondé sur la liberté de religion. TWU prétend que la décision de la LSBC de refuser sa demande

(1) by impinging on its beliefs and practices; (2) by limiting its expression of its religious beliefs and practices; and (3) by limiting its right to associate as required by its religious beliefs and practices. I will briefly describe each of these claims.

[125] First, the alleged limit on belief and practice. TWU says that as a community of evangelical Christians, it adheres to "the belief in the importance of being in an institution with others who either share [its beliefs on the wrongness of sex outside heterosexual marriage] or are prepared to honour it in their conduct" (R.F., at para. 96, quoting *Trinity Western University v. Nova Scotia Barristers' Society*, 2015 NSSC 25, 381 D.L.R. (4th) 296, at para. 235). TWU concedes that eliminating the mandatory Covenant, which is the basis of the LSBC decision, would not prevent any believing member of the community from adhering to his or her beliefs. But, it alleges that the LSBC's insistence that it withdraw the Covenant is an interference in its members' belief that they must be in an institution with others who share or respect their practices on sexual relations. For TWU, providing education in this environment is a practice required by that belief. It says this is "core to [its] 'religious beliefs and way of life . . . and its community of evangelical Christians'" (R.F., at para. 96, quoting C.A. reasons, 2016 BCCA 423, 405 D.L.R. (4th) 16, at para. 103). Requiring TWU to withdraw the mandatory Covenant would not prevent the TWU community members from believing in and practising their sexual mores. But it would prevent them from carrying out a practice flowing from that belief about the environment in which TWU would offer a legal education.

[126] The limits on expression of religious beliefs and practices and on associational values flow from

d'agrément restreint son droit à la liberté de religion pour les motifs suivants : (1) elle porte atteinte aux croyances et pratiques de ses membres; (2) elle restreint leur capacité d'exprimer leurs croyances et pratiques religieuses; (3) elle restreint leur droit de s'associer comme l'exigent ces croyances et pratiques. Je vais décrire brièvement chacune de ces prétentions.

[125] Examinons d'abord l'allégation de restriction des croyances et des pratiques. TWU affirme qu'elle forme une communauté de chrétiens évangéliques qui adhèrent à [TRADUCTION] « la croyance en l'importance de fréquenter un établissement avec d'autres personnes qui partagent [leurs convictions quant au caractère condamnable du sexe en dehors des liens du mariage hétérosexuel] ou qui sont disposées à se conduire de manière à respecter cette croyance » (m.i., par. 96, citant *Trinity Western University c. Nova Scotia Barristers' Society*, 2015 NSSC 25, 381 D.L.R. (4th) 296, par. 235). TWU concède que l'élimination du *Covenant* obligatoire, qui est à la base de la décision de la LSBC, n'empêcherait aucun des croyants de sa communauté de se conformer à ses propres croyances. Toutefois, elle prétend que, en insistant pour qu'elle élimine le *Covenant*, la LSBC fait entrave au respect de la croyance de ses membres selon laquelle ils doivent fréquenter un établissement regroupant des personnes qui partagent ou respectent leurs pratiques pour ce qui concerne les relations sexuelles. Pour TWU, offrir son enseignement dans un tel environnement constitue une pratique requise par cette croyance. Elle affirme qu'il s'agit là d'un [TRADUCTION] « élément central de [ses] croyances religieuses et [de son] mode de vie [. . .] et [des croyances religieuses et mode de vie] de sa communauté de chrétiens évangéliques » (m.i., par. 96, citant les motifs de la C.A., 2016 BCCA 423, 405 D.L.R. (4th) 16, par. 103). Obliger TWU à éliminer le *Covenant* obligatoire n'empêcherait pas les membres de sa communauté de se conformer à leurs croyances et pratiques en matière de mœurs sexuelles. Cependant, cela les empêcherait de mettre en œuvre une pratique découlant de leur croyance concernant l'environnement dans lequel la formation juridique devrait être offerte par TWU.

[126] Cette description des croyances fait ressortir les restrictions imposées à l'expression des

this description of beliefs. The Covenant expresses to the community and the public TWU's beliefs on sexual practices. And it reflects its religious-based belief that education should be conducted in a community of people, joined together in association, who accept these beliefs and practices or are prepared to respect and conform to them.

croyances et pratiques religieuses et aux valeurs liées à la liberté d'association. Le *Covenant* exprime à la communauté et au public les croyances de TWU en matière de pratiques sexuelles, en plus de refléter la conviction religieuse de celle-ci selon laquelle l'enseignement devrait être offert dans une communauté de personnes, associées ensemble, qui acceptent ces croyances et pratiques ou qui sont disposées à les respecter et à s'y conformer.

4. *The Negative Impact of the Denial of Accreditation on Freedom of Religion*

4. *Les effets négatifs sur la liberté de religion du refus de l'agrément*

[127] Having established that the LSBC decision limits TWU's freedom of religion, we come to the question of whether the LSBC has shown its infringement of that right to be justified under s. 1 of the *Charter*. In this case, no one suggests that there was not an objective capable of overriding the *Charter* right to freedom of religion. Moreover, I agree with the majority that the decision was minimally impairing. The LSBC was faced with the choice of either accrediting the law school or denying that accreditation. The central question, therefore, is whether, at the final stage of the proportionality analysis, the negative impacts on the *Charter* right are proportionate to the positive benefits flowing from the impugned decision.

[127] Après avoir déterminé que la décision de la LSBC restreint la liberté de religion de TWU, je vais maintenant examiner la question de savoir si la LSBC est parvenue à démontrer que l'atteinte portée à ce droit était justifiée au regard de l'article premier de la *Charte*. En l'espèce, personne ne met en doute l'existence d'un objectif susceptible de l'emporter sur le droit à la liberté de religion protégé par la *Charte*. Qui plus est, tout comme mes collègues majoritaires, je suis d'avis que la décision constituait une atteinte minimale. La LSBC devait choisir entre soit agréer la faculté de droit, soit refuser la demande d'agrément. La question centrale consiste donc à décider si, à l'étape finale de l'analyse de la proportionnalité, les effets négatifs de la décision contestée sur le droit garanti par la *Charte* sont proportionnés aux avantages en découlant.

[128] The majority concludes that the negative impact on the freedom of religion of members of the TWU community is "of minor significance", for two reasons: (1) the Covenant is "not absolutely required for the religious practice at issue" (para. 87); and (2) TWU students view the environment created by the Covenant as "preferred (rather than necessary) for their spiritual growth" (para. 88).

[128] Les juges de la majorité arrivent à la conclusion que l'incidence négative de la décision sur la liberté de religion des membres de la communauté de TWU est « d'importance mineure », et ce, pour deux raisons : (1) le *Covenant* n'est « pas absolument nécessaire [. . .] pour se livrer à la pratique religieuse en cause » (par. 87); et (2) les étudiants de TWU considèrent que l'environnement créé par le *Covenant* est « préférable (plutôt que nécessaire) pour leur croissance spirituelle » (par. 88).

[129] With respect, I cannot agree that the impact of the decision on the freedom of religion of members of the TWU community is "of minor significance". The decision places a burden on the TWU community's freedom of religion: (1) by interfering with a religious practice (a learning environment that

[129] Avec égards, je ne saurais qualifier « d'importance mineure » l'incidence de la décision sur la liberté de religion des membres de la communauté de TWU. Cette décision porte atteinte à la liberté de religion de cette communauté : (1) en perturbant une pratique religieuse (la mise en place d'un

conforms to its members' beliefs); (2) by restricting their right to express their beliefs through that practice; and (3) by restricting their ability to associate as required by their beliefs.

[130] These are not minor matters. Canada has a tradition dating back at least four centuries of religious schools which are established to allow people to study at institutions that reflect their faith and their practices. To say, as the majority does at para. 87, that the infringement is of minor significance because it "only prevents prospective students from studying law in their *optimal* religious learning environment" (emphasis in original), is to deny this lengthy and passionately held tradition. The majority seems to characterize the religious practice at issue in this case narrowly as "studying in a religious environment" (para. 67). In my view, the religious right at issue in this case is broader than that. It is not about merely studying in a religious environment — it is about studying in a religious environment where all members of the community have agreed, through the Covenant, to live in a certain way.

[131] The first reason the majority says the impact on the religious right is of minor significance is that the mandatory Covenant is "not absolutely required for the religious practice at issue" (para. 87). The issue here is that the majority fails to acknowledge the significance that all members abiding by the same code of conduct has for a religious community. Moreover, the majority's argument amounts to saying that where, in the view of a reviewing judge, it seems practically possible to give up a religious practice but an adherent refuses to do so, it will only be a minor infringement. We cannot, on the one hand, acknowledge the deep sincerity of the belief in a religious practice and then, on the other, doubt that sincerity by calling the practice relatively insignificant.

milieu d'apprentissage conforme aux croyances des membres de la communauté); (2) en restreignant le droit de ceux-ci d'exprimer leurs croyances par cette pratique; et (3) en restreignant leur capacité de s'associer comme l'exigent leurs croyances.

[130] Il ne s'agit pas d'aspects d'importance mineure. Suivant une tradition qui date d'au moins quatre siècles, il existe au Canada des écoles confessionnelles où les gens sont à même d'étudier dans des établissements qui reflètent leur foi et leurs pratiques. Affirmer, comme le font les juges majoritaires au par. 87, que l'atteinte portée en l'espèce est de peu d'importance, au motif qu'elle « ne fait qu'empêcher les étudiants éventuels d'étudier le droit dans leur milieu d'apprentissage religieux *optimal* » (en italique dans l'original) revient à renier cette tradition de longue date, défendue avec passion. Les juges majoritaires semblent qualifier étroitement la pratique religieuse visée en l'espèce, la décrivant comme étant « le fait d'étudier dans un milieu religieux » (par. 67). Selon moi, le droit religieux en cause dans la présente affaire est plus large que cela. Il ne s'agit pas simplement du fait d'étudier dans un milieu religieux — il s'agit du fait d'étudier dans un milieu religieux où tous les membres de la communauté ont convenu, par l'adhésion au *Covenant*, de vivre d'une certaine façon.

[131] La première raison qu'invoquent les juges majoritaires pour affirmer que l'atteinte portée au droit à la religion est d'importance mineure est que le *Covenant* obligatoire n'est « pas absolument nécessaire [. . .] pour se livrer à la pratique religieuse en cause » (par. 87). La difficulté que soulève cet argument de mes collègues majoritaires est qu'il ne reconnaît pas l'importance que revêt pour une communauté religieuse le fait que tous ses membres adhèrent au même code de conduite. De plus, l'argument de mes collègues revient à dire que dans les cas où, de l'avis du juge de révision, un adepte refuse de renoncer à sa pratique religieuse alors qu'il semble possible en pratique de le faire, il en découlera uniquement une atteinte de peu d'importance. On ne peut, d'une part, admettre la profonde sincérité de la croyance exprimée à l'égard d'une pratique religieuse et, d'autre part, mettre en doute cette sincérité en disant que la pratique en question est relativement insignifiante.

[132] The second reason the impact on the right is said to be of minor significance is that it is optional (majority's reasons, at para. 88). I accept that optional practices, which allow the individual to *stay true to his or her religious practices* by adopting a different course, may reduce the degree of impairment of the right. This was the case in *Hutterian Brethren.* But the argument put forward by the majority would require members of the TWU community to *give up* the expressive and associational aspects of the religious practice. The fact that some individuals may be prepared to give up the religious practice does not make it a minor infringement.

[133] Finally, I cannot accept that the mandatory Covenant should be devalued because it compels non-believers to follow TWU's practices. There is a deep tradition in religious schools of welcoming non-adherents as students, provided they agree to abide by the norms of the community. This has been the case at least since the Jesuits opened their first institutions more than four centuries ago. Students who do not agree with the religious practices do not need to attend these schools. But if they want to attend, for whatever reason, and agree to the practices required of students, it is difficult to speak of compulsion.

[134] In my view, the limits the LSBC's decision imposes on the freedom of religion of members of the TWU community cannot be characterized as minor. I acknowledge that it does not prevent members from believing in, and themselves following, the Covenant. But, it precludes members of the TWU community from engaging in the practice of providing legal education in an environment that conforms to their religious beliefs, deprives them of the ability to express those beliefs in institutional form, and prevents them from associating in the manner they believe their faith requires.

[132] La deuxième raison pour laquelle l'atteinte portée au droit serait d'importance mineure est le fait que la pratique est facultative (motifs de la majorité, par. 88). Je reconnais que des pratiques facultatives, qui permettent à une personne de *demeurer fidèle à ses pratiques religieuses* en adoptant une façon de faire différente, peuvent réduire l'ampleur de l'atteinte au droit en cause. C'était le cas dans l'affaire *Hutterian Brethren*. Cependant, l'argument des juges majoritaires obligerait les membres de la communauté de TWU à *renoncer* aux aspects expressifs et associatifs de la pratique religieuse. Le fait que certaines personnes puissent être disposées à renoncer à la pratique religieuse ne signifie pas que l'atteinte en cause est d'importance mineure.

[133] Enfin, je ne puis accepter l'idée que le *Covenant* obligatoire devrait se voir reconnaître une valeur moindre du fait qu'il contraint des incroyants à se conformer aux pratiques de TWU. Il existe, au sein des écoles confessionnelles, une tradition profondément ancrée consistant à accueillir des étudiants qui ne sont pas des adeptes de leur religion, à la condition que ceux-ci acceptent d'observer les normes de la communauté. Il en est ainsi au moins depuis que les Jésuites ont ouvert leurs premiers établissements, il y a plus de quatre cents ans de cela. Les étudiants qui sont en désaccord avec les pratiques religieuses d'une école ne sont pas tenus de la fréquenter. Mais si, pour quelque raison que ce soit, ils souhaitent le faire, et ils consentent aux pratiques qui sont exigées des élèves, il est alors difficile de parler de contrainte.

[134] À mon avis, on ne saurait qualifier d'importance mineure les restrictions que la décision de la LSBC impose à la liberté de religion des membres de la communauté de TWU. Je reconnais que la décision ne les empêche pas d'adhérer eux-mêmes au *Covenant* et de s'y conformer. Par contre, elle les empêche de mettre en œuvre la pratique consistant à enseigner et apprendre le droit dans un environnement conforme à leurs croyances religieuses, en plus de les priver de la possibilité d'exprimer leurs croyances à l'échelle institutionnelle et de s'associer d'une façon qui, selon eux, respecte les exigences de leur foi.

5. *The Objectives of the LSBC*

[135] The majority states that the decision advances the LSBC's statutory objectives (1) by maintaining equal access and diversity in the legal profession (paras. 93-95) and (2) by preventing significant harm to LGBTQ people who might attend TWU's proposed law school (paras. 96-99).

[136] I agree that the decision of the LSBC may advance these objectives. That said, questions arise as to how much more diversity will be obtained as a result of refusal to accredit a TWU law school (particularly given its comparatively high tuition fees), and how many, if any, LGBTQ students will be forced to go to TWU as a school of last resort.

[137] In my view, the most compelling law society objective is the imperative of refusing to condone discrimination against LGBTQ people, pursuant to the LSBC's statutory obligation to protect the public interest.

[138] Because TWU is a private institution, the *Charter* does not apply and the Covenant does not constitute legally actionable discrimination. However, TWU's insistence on the mandatory Covenant is a discriminatory practice. It imposes burdens on LGBTQ people on the sole basis of their sexual orientation. Married heterosexual law students can have sexual relations, while married LGBTQ students cannot. The Covenant singles out LGBTQ people as less worthy of respect and dignity than heterosexual people, and reinforces negative stereotypes against them. It puts them to a choice — attend TWU or enjoy equal treatment. Those LGBTQ students who insist on equal treatment will have less access to law school and hence the practice of law than heterosexual students — heterosexual students can choose from all law schools without discrimination, while one law school, the TWU law school, would only

5. *Les objectifs de la LSBC*

[135] Les juges majoritaires affirment que la décision en cause favorise la réalisation par la LSBC des objectifs que lui confie la loi (1) en assurant l'égalité d'accès à la profession juridique et la diversité au sein de celle-ci (par. 93-95) et (2) en prévenant l'infliction d'un préjudice grave aux membres de la communauté LGBTQ qui pourraient fréquenter la faculté de droit proposée par TWU (par. 96-99).

[136] Je reconnais que la décision de la LSBC peut contribuer à la réalisation de ces objectifs. Cela dit, il est permis de se demander dans quelle mesure le refus d'agréer la faculté de droit à TWU permettra d'accroître la diversité (compte tenu, particulièrement, des droits de scolarité comparativement élevés de la faculté), et combien d'étudiants issus de la communauté LGBTQ, s'il en est, seront forcés de fréquenter TWU, parce qu'il s'agira de la dernière faculté qui leur sera ouverte.

[137] À mon avis, de tous les objectifs poursuivis par la LSBC, le plus impérieux est son devoir de refuser de cautionner des actes discriminatoires à l'endroit de la communauté LGBTQ, conformément à l'obligation que lui fait la loi de protéger l'intérêt public.

[138] TWU étant une institution privée, la *Charte* n'est pas applicable en l'espèce, et le *Covenant* ne constitue pas une mesure discriminatoire conférant un droit d'action. Toutefois, le fait que TWU insiste pour maintenir son *Covenant* obligatoire représente une pratique discriminatoire; il impose aux membres de la communauté LGBTQ certains fardeaux, et ce, uniquement en raison de leur orientation sexuelle. Des étudiants en droit qui sont mariés et hétérosexuels peuvent avoir des relations sexuelles, alors que des étudiants mariés issus de la communauté LGBTQ ne sont pas autorisés à en avoir. Le *Covenant* traite différemment la communauté LGBTQ, comme si les membres de celle-ci avaient moins droit au respect et à la dignité que les hétérosexuels, et il renforce des stéréotypes négatifs à leur endroit. Le *Covenant* oblige les membres de la communauté LGBTQ à choisir — soit fréquenter TWU, soit jouir

be available to LGBTQ students willing to endure discrimination.

[139] In determining who should be admitted to the practice of law and thus whether a particular law school should be accredited, the LSBC is required by statute to consider the public interest. Section 3 of British Columbia's *Legal Profession Act* states that "[i]t is the object and duty of the society to uphold and protect the public interest" and subsection (a) states that it must do so by "preserving and protecting the rights and freedoms of all persons". The LSBC is also bound to consider the *Charter* and provincial human rights laws (*TWU 2001*, at para. 27) and to promote diversity within the legal profession.

[140] The LSBC is under a duty to protect the public interest and preserve and protect the rights and freedoms of everyone, including LGBTQ people. As the collective face of a profession bound to respect the law and the values that underpin it, it is entitled to refuse to condone practices that treat certain groups as less worthy than others.

[141] TWU seeks to counter this valid justification by arguing that it is beyond the statutory mandate of the LSBC to consider the effect the Covenant would have on the LGBTQ community. It argues that the public interest mandate of law societies is limited to ensuring that law students meet standards of learning and competence, and does not extend to the policies of a private institution. This ignores the broad public interest mandate the legislature has conferred on the LSBC, for reasons explored by the majority.

d'un traitement égal. Les étudiants issus de la communauté LGBTQ qui tiennent à un traitement égal auront donc un accès moins grand que les hétérosexuels aux études de droit et, en conséquence, à la pratique de cette discipline — en effet, les étudiants hétérosexuels peuvent choisir parmi toutes les facultés de droit, sans crainte de discrimination, tandis qu'une faculté de droit, celle de TWU, représenterait une possibilité uniquement pour les étudiants issus de la communauté LGBTQ qui seraient prêts à endurer la discrimination.

[139] La loi oblige la LSBC à tenir compte de l'intérêt public lorsqu'elle décide qui peut être admis à la pratique du droit et, par conséquent, s'il y a lieu d'agréer une faculté de droit donnée. L'article 3 de la *Legal Profession Act* de la Colombie-Britannique énonce que [TRADUCTION] « [l]e Barreau a pour objet et devoir de défendre et de protéger l'intérêt public », et l'al. (a) précise qu'il doit le faire « en préservant et en protégeant les droits et les libertés de chacun ». La LSBC est également tenue de prendre en compte la *Charte* et la législation provinciale en matière de droits de la personne (*TWU 2001*, par. 27), et de favoriser la diversité au sein de la profession juridique.

[140] La LSBC a le devoir de protéger l'intérêt public et de préserver et protéger les droits et libertés de tous, y compris les membres de la communauté LGBTQ. En tant que visage collectif d'une profession tenue de respecter le droit et les valeurs qui le sous-tendent, la LSBC a le droit de refuser de cautionner des pratiques qui traitent certains groupes comme ayant moins de valeur que d'autres.

[141] TWU oppose à cette justification par ailleurs valide l'argument selon lequel la prise en compte des effets du *Covenant* sur la communauté LGBTQ déborde le cadre du mandat qui est confié à la LSBC par la loi. Elle fait valoir que le mandat de protection de l'intérêt public dont sont investis les barreaux se limite à veiller à ce que les étudiants en droit respectent certaines normes au titre des connaissances et des compétences, mais ne vise pas les politiques des institutions privées. Un tel argument fait abstraction du vaste mandat de protection de l'intérêt public que le législateur a confié à la LSBC, pour les raisons examinées par les juges majoritaires.

[142] I add that a broad public interest mandate finds support in this Court's decision in *TWU 2001*. Although the Court found in favour of TWU in that case, it did not hesitate to acknowledge that the British Columbia College of Teachers did not err "in considering equality concerns pursuant to its public interest jurisdiction" (para. 26).

6. *Are the Negative Impacts on the Right Proportionate to the Statutory Objective of the LSBC?*

[143] This brings me to the ultimate question: Was the decision of the LSBC to deny accreditation to the proposed TWU law faculty unreasonable because it fails to reflect a proportionate balancing of the respective interests?

[144] The LSBC bears the onus of showing that the negative impacts on the *Charter* rights of the TWU community are proportionate to the benefits secured by its decision. At the same time, the Court must approach this question with deference to the LSBC's interpretation of its broad duty to protect the public interest and in light of the legislature's choice to confer on it the mandate to decide who should be admitted to the practice of law.

[145] The negative impacts of the LSBC's denial of accreditation on the religious, expressive and associational rights of the TWU community are not of minor significance. If the community wishes to operate a law school, it must relinquish the mandatory Covenant it says is core to its religious beliefs, with the attendant ramifications on religious practices.

[146] On the other hand, there is great force in the LSBC's contention that it cannot condone a practice that discriminates by imposing burdens on LGBTQ people on the basis of sexual orientation, with negative consequences for the LGBTQ community, diversity

[142] Je tiens à ajouter que l'existence d'un vaste mandat de protection de l'intérêt public trouve appui dans l'arrêt de notre Cour *TWU 2001*. Bien que la Cour ait donné raison à TWU dans cette affaire, elle n'a pas hésité à reconnaître que le British Columbia College of Teachers n'avait pas eu tort « de prendre en considération des préoccupations d'égalité conformément à sa compétence en matière d'intérêt public » (par. 26).

6. *Les effets négatifs sur le droit touché sont-ils proportionnés à l'objectif poursuivi par la LSBC en vertu de la loi?*

[143] Je dois maintenant répondre à la question ultime : Est-ce que la décision de la LSBC refusant d'agréer la faculté de droit proposée par TWU est déraisonnable, au motif qu'elle ne constitue pas une mise en balance proportionnée des intérêts respectifs des parties?

[144] Il incombe à la LSBC de prouver que les effets négatifs de sa décision sur les droits garantis par la *Charte* à la communauté de TWU sont proportionnés aux avantages en découlant. Par ailleurs, la Cour doit pour sa part examiner cette question en faisant montre de déférence à l'égard de l'interprétation que fait la LSBC de son vaste devoir de protection de l'intérêt public, et en tenant compte de la décision du législateur de confier à cet organisme le mandat de déterminer qui peut être admis à pratiquer le droit.

[145] Les effets négatifs du refus de la LSBC d'accorder l'agrément sur les droits à la liberté de religion, d'expression et d'association de la communauté de TWU ne peuvent être qualifiés d'importance mineure. Si cette communauté souhaite se doter d'une faculté de droit, elle doit renoncer au *Covenant* obligatoire, qui prétend-elle constitue un élément fondamental de ses croyances religieuses, en plus de devoir composer avec les conséquences qui en résultent au chapitre des pratiques religieuses.

[146] En revanche, la LSBC avance un argument très solide lorsqu'elle affirme qu'elle ne saurait cautionner une pratique qui crée de la discrimination à l'endroit des membres de la communauté LGBTQ en leur imposant certains fardeaux en raison de leur

and the enhancement of equality in the profession. It was faced with an either-or decision on which compromise was impossible — either allow the mandatory Covenant in TWU's proposal to stand, and thereby condone unequal treatment of LGBTQ people, or deny accreditation and limit TWU's religious practices. In the end, after much struggle, the LSBC concluded that the imperative of refusing to condone discrimination and unequal treatment on the basis of sexual orientation outweighed TWU's claims to freedom of religion.

[147] In a case like *Multani*, the claimant was vindicated because the school board could not show that it would be unable to ensure its mandate of public safety. In *Loyola*, we found that the limitation at issue did nothing to advance the ministerial objectives of instilling understanding and respect for other religions. This case is very different. The LSBC cannot abide by its duty to combat discrimination and accredit TWU at the same time.

[148] The question we must answer is whether the decision of the LSBC was proportionate, and therefore reasonable. Despite the forceful claims made by TWU, I cannot conclude that the decision of the LSBC was unreasonable.

[149] In arriving at this conclusion, I am mindful of the fact that this Court has held that a decision to deny accreditation to TWU's school of education was unreasonable: *TWU 2001*. That case, however, is distinguishable from the one before us. There, the College of Teachers based its claim on the concern that teachers trained at TWU would bring discrimination into the classroom. The LSBC here has not impugned the competence of potential graduates from TWU. Instead, it is concerned with upholding its own mandate by seeking to avoid

orientation sexuelle, avec tout ce que cela implique de répercussions négatives pour cette communauté, ainsi que pour la diversité et pour l'amélioration de l'égalité au sein de la profession. La LSBC n'avait le choix qu'entre deux possibilités, aucun compromis n'était possible — soit elle autorisait le maintien du *Covenant* obligatoire dans la proposition de TWU et cautionnait ainsi le traitement inégal de la communauté LGBTQ, soit elle refusait l'agrément demandé et limitait les pratiques religieuses de TWU. Après moult questionnements, la LSBC a en définitive conclu que la nécessité de refuser de cautionner toute discrimination et inégalité de traitement fondées sur l'orientation sexuelle l'emportait sur les prétentions de TWU fondées sur la liberté de religion.

[147] Dans l'affaire *Multani*, le demandeur a eu gain de cause parce que le conseil scolaire n'a pas été en mesure de prouver qu'il serait incapable de s'acquitter de sa mission en matière de sécurité publique. Dans l'arrêt *Loyola*, la Cour a conclu que la restriction en cause ne favorisait en rien la réalisation des objectifs ministériels consistant à promouvoir la compréhension et le respect d'autres religions. Nous sommes saisis d'une affaire très différente. La LSBC ne peut s'acquitter de son devoir de lutter contre la discrimination tout en accordant l'agrément demandé par TWU.

[148] La question à laquelle il nous faut répondre consiste à déterminer si la décision de la LSBC était proportionnée et, par conséquent, raisonnable. Malgré les solides arguments présentés par TWU, je ne peux conclure que cette décision était déraisonnable.

[149] En arrivant à cette conclusion, je suis consciente que notre Cour a jugé antérieurement que la décision ayant refusé la demande d'agrément du programme de formation des enseignants de TWU était déraisonnable : *TWU 2001*. Toutefois, cette affaire peut être distinguée de la présente espèce. Dans l'arrêt *TWU 2001*, la demande du College of Teachers reposait sur la préoccupation selon laquelle les enseignants formés à TWU feraient preuve de discrimination en salle de classe. Dans la présente affaire, la LSBC ne met pas en doute la compétence des

condoning or even appearing to condone discrimination.

[150] On judicial review, each decision must be assessed for reasonableness (and where a *Charter* right is at issue — proportionality) on its own merits. This is a different case than *TWU 2001*, involving different state regulators weighing different arguments and considerations. The LSBC operates under a unique statutory mandate — a mandate that imposes a heightened duty to maintain equality and avoid condoning discrimination.

7. *Conclusion*

[151] I would allow the appeal.

The following are the reasons delivered by

ROWE J. —

I. Introduction

[152] This appeal concerns the decision of the Law Society of British Columbia ("LSBC") to withdraw its approval of the proposed law program at Trinity Western University ("TWU"). Along with Brayden Volkenant — a prospective student of the proposed law school — TWU sought judicial review of this decision before the British Columbia courts. The applicants argued, *inter alia*, that the decision was based on considerations outside the mandate of the LSBC and that the LSBC had failed to consider a number of relevant rights under the *Canadian Charter of Rights and Freedoms*. The British Columbia Supreme Court and the Court of Appeal agreed with TWU and held that the decision of the LSBC was unreasonable.

[153] This appeal is not about whether TWU can establish a law school with a mandatory covenant

éventuels diplômés de TWU. Elle s'attache plutôt à la réalisation de son propre mandat en s'efforçant d'éviter de cautionner — et même de donner l'impression de cautionner — la discrimination.

[150] En cas de contrôle judiciaire, le caractère raisonnable de la décision (et lorsqu'un droit garanti par la *Charte* est en cause — la proportionnalité de ses effets) doivent être examinés au regard des faits particuliers de l'instance. La présente affaire diffère de l'affaire *TWU 2001*, où différents organismes étatiques de réglementation soupesaient des arguments et des facteurs différents. La loi confie à la LSBC un mandat unique — un mandat qui lui impose le lourd devoir de veiller à assurer l'égalité et d'éviter de cautionner la discrimination.

7. *Conclusion*

[151] J'accueillerais le pourvoi.

Version française des motifs rendus par

LE JUGE ROWE —

I. Introduction

[152] Le présent pourvoi porte sur la décision de la Law Society of British Columbia (« LSBC ») — le barreau de la Colombie-Britannique — de retirer son agrément à l'égard du programme d'études en droit proposé par Trinity Western University (« TWU »). TWU et Brayden Volkenant, un étudiant qui aurait souhaité s'inscrire à la faculté de droit proposée, ont demandé aux tribunaux de la Colombie-Britannique de procéder au contrôle judiciaire de cette décision. Les demandeurs ont notamment fait valoir que la décision reposait sur des considérations qui ne relevaient pas du mandat de la LSBC, et que certains droits pertinents qui sont garantis par la *Charte canadienne des droits et libertés* n'avaient pas été pris en compte par la LSBC. La Cour suprême de la Colombie-Britannique et la Cour d'appel ont toutes deux donné raison à TWU et conclu que la décision de la LSBC était déraisonnable.

[153] La question que soulève le pourvoi ne consiste pas à décider si TWU peut créer une faculté

like the Community Covenant Agreement at issue in this case. Rather, the question is whether the LSBC infringed the *Charter* by withdrawing its accreditation of the proposed law school at TWU because of the effect of the Covenant on prospective law students. For the reasons that follow, I conclude that it did not.

[154] First, I adopt the statement of facts set out by my colleagues in the majority, Abella, Moldaver, Karakatsanis, Wagner and Gascon JJ., as well as their account of the decisions below: Majority Reasons ("M.R."), at paras. 4-26.

[155] Second, I agree with the majority and with the Chief Justice that it was within the statutory mandate of the LSBC to consider the effect of the Covenant on prospective law students as part of its accreditation decision. The LSBC has a broad mandate to regulate the legal profession in the public interest: M.R., at para. 31. As this Court has affirmed on numerous occasions, deference is called for when courts review the decisions of law societies as they self-regulate in the public interest: *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at pp. 187-88; *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869, at p. 887; *Green v. Law Society of Manitoba*, 2017 SCC 20, [2017] 1 S.C.R. 360, at paras. 24-25. The LSBC was justified in considering the impact of the Covenant on prospective applicants to the proposed law school and, more generally, in considering the role of law schools as the first point of entry to the legal profession.

[156] Third, I respectfully differ from the majority in its approach to assessing whether *Charter* rights have been infringed by the decision of the LSBC. In my view, this appeal raises issues that call for clarification of the framework set out in *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, and *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613. I agree with the majority that this analysis has two steps, but, like the

de droit dotée d'un engagement obligatoire tel le *Community Covenant Agreement* (« *Covenant* ») en cause dans la présente affaire. Il s'agit plutôt de déterminer si la LSBC a contrevenu à la *Charte* en retirant son agrément à l'égard de la faculté de droit proposée par TWU en raison des effets du *Covenant* sur d'éventuels étudiants en droit. Pour les motifs qui suivent, je conclus que non.

[154] Premièrement, je fais mien l'exposé que font mes collègues majoritaires, les juges Abella, Moldaver, Karakatsanis, Wagner et Gascon, des faits de l'espèce et des décisions des juridictions inférieures : Motifs de la majorité (« M.M. »), par. 4-26.

[155] Deuxièmement, à l'instar des juges majoritaires et de la juge en chef, j'estime que la LSBC a agi dans le cadre du mandat que lui confie la loi lorsqu'elle a pris en considération les effets du *Covenant* sur les étudiants éventuels pour décider si elle devait agréer ou non la faculté de droit. La LSBC est investie d'un large mandat lui confiant la responsabilité de réglementer la profession juridique dans l'intérêt public : M.M., par. 31. Et comme l'a maintes fois réitéré notre Cour, les décisions prises par les barreaux aux fins d'autoréglementation de la profession dans l'intérêt public commandent la déférence en cas de contrôle judiciaire : *Andrews c. Law Society of British Columbia*, [1989] 1 R.C.S. 143, p. 187-188; *Pearlman c. Comité judiciaire de la Société du Barreau du Manitoba*, [1991] 2 R.C.S. 869, p. 887; *Green c. Société du Barreau du Manitoba*, 2017 CSC 20, [2017] 1 R.C.S. 360, par. 24-25. La LSBC était justifiée d'examiner l'incidence du *Covenant* sur les éventuels candidats de la faculté de droit proposée et, de façon plus générale, sur le rôle que jouent les facultés de droit en tant que porte d'entrée initiale dans la profession juridique.

[156] Troisièmement, soit dit en tout respect, je ne peux souscrire à l'approche appliquée par mes collègues de la majorité pour décider si la décision de la LSBC a porté atteinte à des droits garantis par la *Charte*. À mon avis, la présente affaire soulève des questions requérant que soient apportées des précisions au cadre d'analyse énoncé dans les arrêts *Doré c. Barreau du Québec*, 2012 CSC 12, [2012] 1 R.C.S. 395, et *École secondaire Loyola c.*

Chief Justice and Côté and Brown JJ., I would offer precisions to this approach.

[157] Fourth, I disagree with the analysis of my colleagues relative to s. 2(*a*) of the *Charter*. Rather than accepting the infringement as alleged at face value and proceeding to the balancing analysis, a review of the jurisprudence leads me to the conclusion that s. 2(*a*) is not infringed in this case. I also conclude that no other *Charter* infringements have been made out on the record in this appeal.

[158] Finally, given the absence of a *Charter* infringement, the decision of the LSBC must be reviewed under the usual principles of judicial review rather than the framework set out in *Doré* and *Loyola*. In this case, the standard of review is reasonableness, as the decision under review falls within the category of cases where deference is presumptively owed to decision-makers who interpret and apply their home statutes: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 54; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 34; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 46.

[159] The decision of the LSBC will call for deference if it meets the criteria set out in *Dunsmuir*. In my view, the decision of the LSBC was reasonable. Accordingly, I would allow the appeal and affirm the decision of the LSBC.

II. The Jurisdiction of the Law Societies

[160] I agree with the majority and the Chief Justice that the LSBC acted within its jurisdiction when it considered the discriminatory effect of the Covenant on prospective law students at TWU. With the privilege of self-government granted to the LSBC comes a corresponding duty to self-regulate in the

Québec (Procureur général), 2015 CSC 12, [2015] 1 R.C.S. 613. Je suis d'accord avec les juges majoritaires pour dire que l'analyse établie par ces arrêts comporte deux volets, mais, à l'instar de la juge en chef et des juges Côté et Brown, j'y apporterais des précisions.

[157] Quatrièmement, je suis en désaccord avec l'analyse de mes collègues quant à l'al. 2*a*) de la *Charte*. Au lieu d'accepter telles qu'elles sont énoncées les allégations d'atteinte et de procéder à l'analyse relative à la mise en balance, l'examen de la jurisprudence applicable m'amène à conclure qu'il n'y a pas eu violation de l'al. 2*a*) de la *Charte* en l'espèce. Je conclus également que le dossier soumis dans le présent pourvoi n'a pas permis d'établir d'atteinte à d'autres droits garantis par la *Charte*.

[158] Enfin, vu l'absence de violation de la *Charte*, la décision de la LSBC doit être contrôlée selon les règles habituelles du contrôle judiciaire et non selon le cadre d'analyse établi dans les arrêts *Doré* et *Loyola*. La norme de contrôle applicable en l'espèce est celle de la décision raisonnable, puisque la décision considérée fait partie de celles où il y a présomption de déférence en faveur du décideur qui interprète et applique sa loi habilitante : *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, par. 54; *Alberta (Information and Privacy Commissioner) c. Alberta Teachers' Association*, 2011 CSC 61, [2011] 3 R.C.S. 654, par. 34; *Mouvement laïque québécois c. Saguenay (Ville)*, 2015 CSC 16, [2015] 2 R.C.S. 3, par. 46.

[159] La décision de la LSBC commandera la déférence si elle satisfait aux critères énoncés dans l'arrêt *Dunsmuir*. À mon avis, la décision de la LSBC était raisonnable. En conséquence, j'accueillerais le pourvoi et je confirmerais la décision de la LSBC.

II. La compétence des barreaux

[160] Tout comme mes collègues majoritaires et la juge en chef, je reconnais que la LSBC n'a pas outrepassé sa compétence en considérant les effets discriminatoires du *Covenant* sur d'éventuels étudiants en droit de TWU. Le privilège d'autoréglementation qui est accordé à la LSBC est assorti du devoir pour

public interest: *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, at para. 36. In carrying out this duty, the LSBC was entitled to interpret its public interest mandate as including consideration of practices that are discriminatory in nature. For this reason, it was open to the LSBC to take the view that the "public interest in the administration of justice" (*Legal Profession Act*, S.B.C. 1998, c. 9 ("*LPA*"), s. 3) included consideration of the effect of the Covenant on prospective law students at TWU. The fact that the Covenant is a statement of religious rules and principles does not insulate it from such scrutiny.

[161] Given that the LSBC acted within its jurisdiction in considering the effect of the Covenant, the next step is to ascertain whether its decision infringes any of the *Charter* rights raised by the applicants. Before proceeding to the *Charter* analysis, I would note that TWU has raised several concerns relating to the proper approach to adjudicating *Charter* claims in the administrative context. What follows in the next section is my response to these concerns.

III. The Proper Approach to *Charter* Rights

[162] This Court employs a structured analysis for adjudicating *Charter* claims: see *R. v. Oakes*, [1986] 1 S.C.R. 103. This analysis has two steps. The first is to determine whether the government has infringed any rights guaranteed by the *Charter*. The claimant bears the burden of demonstrating such infringement. Once the court is persuaded that a right has been infringed, the second step is to determine whether the government can justify this infringement under s. 1 of the *Charter*. This requires the government to show that the infringement is a reasonable limit that is both prescribed by law and demonstrably justified in a free and democratic society.

[163] This appeal raises issues that call for clarification of the application of this approach to the

cette dernière de l'exercer dans l'intérêt public : *Barreau du Nouveau-Brunswick c. Ryan*, 2003 CSC 20, [2003] 1 R.C.S. 247, par. 36. Dans l'exécution de ce devoir, la LSBC était justifiée de considérer que son mandat de protection de l'intérêt public l'autorisait à prendre en compte l'existence de pratiques de nature discriminatoire. Pour cette raison, il lui était loisible de conclure que la protection de [TRADUCTION] « l'intérêt public dans l'administration de la justice » (*Legal Profession Act*, S.B.C. 1998, c. 9 (« *LPA* »), art. 3) impliquait l'examen des effets du *Covenant* sur d'éventuels étudiants en droit de TWU. Le fait que le *Covenant* constitue un énoncé de règles et principes de nature religieuse n'a pas pour effet de le soustraire à cet examen.

[161] Comme la LSBC a respecté les limites de sa compétence lorsqu'elle a examiné les effets du *Covenant*, il convient maintenant de se demander si sa décision a porté atteinte à l'un ou l'autre des droits garantis par la *Charte* qui sont invoqués par les demandeurs. Avant d'entreprendre mon analyse fondée sur la *Charte*, je tiens à souligner que TWU a soulevé plusieurs préoccupations au sujet de l'approche à adopter pour statuer sur les demandes fondées sur la *Charte* en contexte administratif. Je réponds à ces préoccupations dans la prochaine section.

III. L'approche appropriée à l'égard des droits garantis par la *Charte*

[162] Pour trancher les demandes fondées sur la *Charte*, la Cour procède à une analyse structurée : voir *R. c. Oakes*, [1986] 1 R.C.S. 103. Cette analyse comporte deux étapes. La première consiste à déterminer si l'État a porté atteinte à un droit garanti par la *Charte*. Il incombe à la personne qui revendique le droit de prouver cette atteinte. Si le tribunal est convaincu qu'il y a eu atteinte à un droit, la seconde étape de l'analyse consiste à décider si l'État peut justifier cette atteinte au regard de l'article premier de la *Charte*. Pour ce faire, l'État doit prouver que l'atteinte constitue une limite raisonnable qui est établie par une règle de droit et dont la justification peut se démontrer dans le cadre d'une société libre et démocratique.

[163] Le présent pourvoi soulève des questions qui requièrent des précisions quant à l'application

review of administrative decisions. Since *Doré*, this Court has applied the principles of judicial review to determine whether "the decision-maker has properly balanced the relevant *Charter* value with the statutory objectives": *Doré*, at para. 58. When the decision-maker strikes a proportionate balance, the decision under review is deemed reasonable. The implication is that proportionate balancing justifies the *Charter* infringement arising from the impugned administrative decision.

[164] In this appeal and in its appeal from the decision of the Law Society of Upper Canada, *Trinity Western University v. Law Society of Upper Canada*, 2018 SCC 33, [2018] 2 S.C.R. 453, TWU raised concerns about the application of this framework to the review of the law societies' decisions. TWU questioned, *inter alia*, the applicability of reasonableness review to the adjudication of *Charter* claims. This raises concerns about whether *Doré* provides a similarly rigorous protection of *Charter* rights as does *Oakes*: A.F., file No. 37209, at para. 40. TWU argued that there should be a single framework for examining compliance with the *Charter*, regardless of whether the source of the alleged infringement is a statute, regulation, or discretionary decision: R.F., file No. 37318, at para. 51. To this end, it proposed that the *Doré* framework reflect the more structured *Oakes* analysis, which defines with clarity who bears the burden of justification and what that burden entails: A.F., file No. 37209, at paras. 53-55.

[165] I agree with TWU thus far: the *Doré* framework leaves many questions unanswered. As the Chief Justice notes, "the framework's contours continue to elicit comment from scholars and judges": Chief Justice's Reasons ("C.J.R."), at para. 111 (footnote omitted.) In what follows, I propose three clarifications to the framework.

de cette approche en matière de contrôle des décisions administratives. Depuis l'arrêt *Doré*, la Cour applique les principes du contrôle judiciaire afin de juger si un « décideur a mis en balance comme il se doit la valeur pertinente consacrée par la *Charte* et les objectifs visés par la loi » : *Doré*, par. 58. Lorsque le décideur a procédé à une mise en balance proportionnée, la décision visée par le contrôle est considérée comme raisonnable. Il s'ensuit qu'une mise en balance proportionnée permet de justifier une violation de la *Charte* résultant de la décision administrative contestée.

[164] Tant dans le présent pourvoi que dans celui formé contre la décision du Barreau du Haut-Canada, *Trinity Western University c. Barreau du Haut-Canada*, 2018 CSC 33, [2018] 2 R.C.S. 453, TWU soulève des préoccupations liées à l'application de ce cadre d'analyse au contrôle des décisions prises par les barreaux. Entre autres, TWU remet en question l'applicabilité de la norme de la décision raisonnable à l'examen des demandes fondées sur la *Charte*. Cet argument reflète des inquiétudes relativement à la question de savoir si l'arrêt *Doré* protège de façon aussi rigoureuse que l'arrêt *Oakes* les droits garantis par la *Charte* : m.a., dossier n^{o} 37209, par. 40. TWU a fait valoir qu'il ne devrait exister qu'un seul cadre d'analyse pour l'examen de la conformité à la *Charte*, indépendamment du fait que la source de l'atteinte reprochée soit une loi, un règlement ou une décision de nature discrétionnaire : m.i., dossier n^{o} 37318, par. 51. À cette fin, il est proposé de rapprocher davantage le cadre d'analyse prescrit par l'arrêt *Doré* de l'analyse plus structurée de l'arrêt *Oakes*, laquelle indique clairement à qui incombe le fardeau de la justification et en quoi consiste ce fardeau : m.a., dossier n^{o} 37209, par. 53-55.

[165] Jusqu'ici, je suis d'accord avec les arguments de TWU : le cadre établi dans l'arrêt *Doré* laisse de nombreuses questions sans réponse. Comme le souligne la juge en chef, « les contours de ce cadre continuent de susciter des commentaires parmi les auteurs et les juges » : motifs de la juge en chef (« M.J.C. »), par. 111 (note en bas de page omise). Dans les paragraphes qui suivent, je suggère d'apporter trois précisions à ce cadre.

A. *The Problem With Charter Values*

[166] My first concern relates to the use of *Charter* values in the adjudication of *Charter* claims in the administrative context. In this, I share the view of the Chief Justice (C.J.R., at para. 115) and Justices Côté and Brown (Dissenting Reasons, at para. 307). When courts review administrative decisions for compliance with the *Charter*, *Charter* rights must be the focus of the inquiry — not *Charter* values. While *Doré* was intended to clarify the relationship between the *Charter* and administrative action, its reliance on values rather than rights has muddled the adjudication of *Charter* claims in the administrative context.

[167] The concept of *Charter* values first appears in cases where the *Charter* had no direct application. In *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, this Court held that, by virtue of s. 32 of the *Charter*, the *Charter* did not apply to litigation between private parties. As a limit on "the Parliament and government of Canada" and "the legislature and government of each province", its application was limited to the legislative and executive branches of government, as well as administrative agencies. Nonetheless, the Court held in *Dolphin Delivery* that courts must "apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution" (p. 603). This Court has since had regard to *Charter* values in the development of common law principles in a number of cases: *R. v. Salituro*, [1991] 3 S.C.R. 654; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130; *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157; *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, [2008] 2 S.C.R. 420; *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640.

A. *Le problème lié aux valeurs consacrées par la Charte*

[166] Ma première préoccupation concerne l'utilisation des valeurs consacrées par la *Charte* pour statuer sur les demandes fondées sur ce texte qui sont présentées dans un contexte administratif. À cet égard, je partage l'avis de la juge en chef (M.J.C., par. 115) et des juges Côté et Brown (Motifs dissidents, par. 307). La cour qui contrôle une décision administrative pour s'assurer de sa conformité avec la *Charte* doit centrer son analyse sur les droits garantis par la *Charte* — non sur les valeurs consacrées par celle-ci. Bien que l'arrêt *Doré* ait visé à clarifier les rapports entre la *Charte* et les actes de l'Administration, le fait qu'il s'appuie sur les valeurs plutôt que sur les droits a eu pour effet de semer la confusion dans l'examen des demandes fondées sur la *Charte* en contexte administratif.

[167] Le concept de valeurs consacrées par la *Charte* a été invoqué pour la première fois dans des instances auxquelles la *Charte* ne s'appliquait pas directement. Dans l'arrêt *SDGMR c. Dolphin Delivery Ltd.*, [1986] 2 R.C.S. 573, notre Cour a statué que, par l'effet de son art. 32, la *Charte* ne s'applique pas aux litiges entre plaideurs privés. Étant donné que la *Charte* constitue une limite applicable « au Parlement et au gouvernement du Canada », ainsi qu'à « la législature et au gouvernement de chaque province », son application était limitée aux branches législatives et exécutives du gouvernement, ainsi qu'aux organismes administratifs. Néanmoins, dans *Dolphin Delivery*, la Cour a conclu que les tribunaux doivent « expliquer et développer des principes de *common law* d'une façon compatible avec les valeurs fondamentales enchâssées dans la Constitution » (p. 603). Depuis, dans un certain nombre d'affaires, la Cour a pris en compte les valeurs consacrées par la *Charte* dans l'élaboration des principes de common law : *R. c. Salituro*, [1991] 3 R.C.S. 654; *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835; *Hill c. Église de scientologie de Toronto*, [1995] 2 R.C.S. 1130; *M. (A.) c. Ryan*, [1997] 1 R.C.S. 157; *WIC Radio Ltd. c. Simpson*, 2008 CSC 40, [2008] 2 R.C.S. 420; *Grant c. Torstar Corp.*, 2009 CSC 61, [2009] 3 R.C.S. 640.

[168] This approach makes good sense in cases where the *Charter* has no direct application. Rather than subject common law rules to a s. 1 analysis, the concept of *Charter* values allows the courts to move the common law toward coherence with the *Charter*: M. Horner, "Charter Values: The Uncanny Valley of Canadian Constitutionalism" (2014), 67 *S.C.L.R.* (2d) 361, at p. 365. Where the *Charter* applies by virtue of s. 32, however, there is no need to have recourse to *Charter* values.

[169] *Charter* values — as opposed to *Charter* rights — have no independent function in the administrative context. As some commentators have noted, "it is not clear how consideration of Charter values fits within the constitutional requirements to respect Charter rights": E. Fox-Decent and A. Pless, "The Charter and Administrative Law Part II: Substantive Review", in C. M. Flood and L. Sossin, eds., *Administrative Law in Context* (3rd ed. 2018), 507, at p. 515.

[170] That said, *Charter* values have played a supporting role in the adjudication of *Charter* claims. In *Loyola*, for instance, the majority employed *Charter* values as a guide to *Charter* adjudication. As Justice Abella wrote, "*Charter* values — those values that underpin each right and give it meaning — help determine the extent of any given infringement in the particular administrative context and, correlatively, when limitations on that right are proportionate in light of the applicable statutory objectives": para. 36, citing *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 88; L. Sossin and M. Friedman, "Charter Values and Administrative Justice" (2014), 67 *S.C.L.R.* (2d) 391, at pp. 403-4. This passage suggests that *Charter* values can assist in the adjudication of claims that are based on *Charter* rights.

[168] Cette approche est logique dans les cas où la *Charte* n'est pas directement applicable. Au lieu d'assujettir les règles de common law à une analyse fondée sur l'article premier, le concept de valeurs consacrées par la *Charte* permet aux tribunaux de faire évoluer la common law en conformité avec la *Charte* : M. Horner, « Charter Values : The Uncanny Valley of Canadian Constitutionalism » (2014), 67 *S.C.L.R.* (2d) 361, p. 365. Toutefois, lorsque la *Charte* trouve application par l'effet de l'art. 32, il n'est pas nécessaire d'avoir recours aux valeurs consacrées par celle-ci.

[169] Contrairement aux droits garantis par la *Charte*, les valeurs consacrées par cette dernière ne remplissent pas de fonction indépendante en contexte administratif. Comme l'ont souligné certains auteurs, [TRADUCTION] « réconcilier la prise en considération des valeurs consacrées par la Charte ne cadre pas de façon évidente avec l'obligation que fait la Constitution de respecter les droits garantis par la Charte » : E. Fox-Decent et A. Pless, « The Charter and Administrative Law Part II : Substantive Review », dans C. M. Flood et L. Sossin, dir., *Administrative Law in Context* (3e éd. 2018), 507, p. 515.

[170] Cela dit, les valeurs consacrées par la *Charte* jouent un rôle d'appoint dans l'examen par les tribunaux des demandes fondées sur ce texte. Par exemple, dans l'arrêt *Loyola*, ces valeurs ont guidé les juges majoritaires dans leur décision à l'égard d'une telle demande. Comme l'a écrit la juge Abella, « les valeurs consacrées par la *Charte* — soit les valeurs qui sous-tendent chaque droit et qui leur donnent un sens — aident à préciser l'ampleur d'une atteinte à un droit donné dans le contexte administratif en cause et, corrélativement, à savoir dans quels cas les restrictions à ce droit sont proportionnées compte tenu des objectifs légaux applicables », par. 36, citant *Alberta c. Hutterian Brethren of Wilson Colony*, 2009 CSC 37, [2009] 2 R.C.S. 567, par. 88; L. Sossin et M. Friedman, « Charter Values and Administrative Justice » (2014), 67 *S.C.L.R.* (2d) 391, p. 403-404. Cet extrait tend à indiquer que les valeurs consacrées par la *Charte* peuvent aider les tribunaux à statuer sur des demandes fondées sur des droits garantis par la *Charte*.

[171] Confusion arises, however, when *Charter* values are used as a standalone basis for the adjudication of *Charter* claims. This is because the scope of *Charter* values is often undefined in the jurisprudence. In some cases, a *Charter* value aligns with a particular *Charter* right. In other cases, the value does not line up with earlier *Charter* jurisprudence. This lack of clarity heightens the potential for unpredictable reasoning. As Lauwers and Miller JJ.A. recently noted in their concurring reasons in *Gehl v. Canada (Attorney General)*, 2017 ONCA 319, 138 O.R. (3d) 52, at para. 79:

> *Charter* values lend themselves to subjective application because there is no doctrinal structure to guide their identification or application. Their use injects a measure of indeterminacy into judicial reasoning because of the irremediably subjective — and value laden — nature of selecting some *Charter* values from among others, and of assigning relative priority among *Charter* values and competing constitutional and common law principles. The problem of subjectivity is particularly acute when *Charter* values are understood as competing with *Charter* rights.

(See also *E.T. v. Hamilton-Wentworth District School Board,* 2017 ONCA 893, 140 O.R. (3d) 11, at paras. 103-4.)

[172] This lack of clarity is an impediment to applying a structured and consistent approach to adjudicating *Charter* claims. At the outset, it is more difficult to ascertain whether a *Charter* value has been infringed: see A. Macklin, "Charter Right or Charter-Lite? Administrative Discretion and the Charter" (2014), 67 *S.C.L.R.* (2d) 561, at p. 571. This difficulty extends throughout the analysis. This is because the existence and severity of the infringement are informed by the scope of the value at issue. Without a proper understanding of the scope, it is "difficult if not impossible to apply" the proportionality analysis required by *Doré* and *Loyola*: C. D. Bredt and

[171] Cependant, la situation devient confuse dans les cas où les demandes fondées sur la *Charte* sont décidées sur la seule base des valeurs consacrées par ce texte. Il en est ainsi parce que, souvent, la portée de ces valeurs n'est pas définie dans la jurisprudence. Dans certains cas, une valeur consacrée par la *Charte* correspond directement à un droit garanti par la *Charte*, tandis que dans d'autres la valeur en question ne cadre pas avec la jurisprudence antérieure relative à la *Charte*. Cette absence de clarté accroît le risque de raisonnements imprévisibles. Comme l'ont récemment souligné les juges Lauwers et Miller dans leurs motifs concordants dans l'arrêt *Gehl c. Canada (Attorney General)*, 2017 ONCA 319, 138 O.R. (3d) 52, par. 79 :

> [TRADUCTION] Les valeurs consacrées par la *Charte* sont susceptibles d'être appliquées subjectivement, vu l'absence de structure doctrinale guidant leur identification ou application. Avoir recours à ces valeurs introduit une part d'indétermination dans le raisonnement judiciaire, étant donné la nature irrémédiablement subjective — et marquée par les valeurs du décideur — du processus décisionnel consistant à choisir certaines valeurs fondées sur la *Charte* parmi d'autres, et à leur accorder une priorité relative par rapport aux autres valeurs et aux principes de common law et principes constitutionnels opposés. Ce problème de subjectivité est particulièrement aigu dans les cas où des valeurs consacrées par la *Charte* sont considérées en concurrence avec des droits garantis par celle-ci.

(Voir également *E.T. c. Hamilton-Wentworth District School Board*, 2017 ONCA 893, 140 O.R. (3d) 11, par. 103-104.)

[172] Cette absence de clarté nuit à l'application d'une approche structurée et uniforme à l'examen des demandes fondées sur la *Charte*. D'entrée de jeu, il est plus difficile de déterminer s'il y a atteinte à une valeur consacrée par la *Charte* : voir A. Macklin, « Charter Right or Charter-Lite? Administrative Discretion and the Charter » (2014), 67 *S.C.L.R.* (2d) 561, p. 571. Cette difficulté persiste tout au long de l'analyse, et ce, parce que l'existence et l'ampleur de l'atteinte sont déterminées en fonction de la portée de la valeur touchée. Sans une compréhension adéquate de cette portée, il est [TRADUCTION] « difficile, voire impossible d'appliquer » l'analyse de la

E. Krajewska, "*Doré*: All That Glitters Is Not Gold" (2014), 67 *S.C.L.R.* (2d) 339, at p. 353.

[173] In this appeal, the majority employs the term *Charter* "protections" — meaning "both rights and values" — to refer to the constitutional guarantees of the *Charter*: M.R., at para. 58, citing *Loyola*, at para. 39. With respect, this language does little to clarify the role of *Charter* values in the adjudication of *Charter* claims. By equating "rights and values" under the umbrella term of "*Charter* protections", the majority undermines the view that rights and values are distinct in scope and function.

[174] Where an infringement of *Charter* rights is alleged, there is no reason to depart from an approach based on those *Charter* rights. A claimant bringing a *Charter* challenge is entitled to a determination of whether his or her *Charter* rights have been infringed. If the claimant succeeds, the government then must have the opportunity to argue that this limit on *Charter* rights is justified under s. 1. This follows from the structure of the *Charter* itself.

[175] The point is this. In cases where *Charter* rights are plainly at stake, courts and other decision-makers have a constitutional obligation to address the rights claims as such and to do so explicitly. An analysis based on *Charter* values should not eclipse or supplant the analysis of whether *Charter* rights have been infringed. Where *Charter* rights have been infringed by administrative actors, reviewing courts must determine whether the state meets the burden of justifying the infringement according to s. 1. This is not a matter of doctrinal preference. It is a constitutional obligation imposed by the *Charter*.

proportionnalité requise par les arrêts *Doré* et *Loyola* : C. D. Bredt et E. Krajewska, « *Doré* : All That Glitters Is Not Gold » (2014), 67 *S.C.L.R.* (2d) 339, p. 353.

[173] Dans la présente affaire, pour parler des garanties constitutionnelles prévues par la *Charte*, les juges majoritaires utilisent l'expression « protections » conférées par la *Charte* — expression visant « tant les droits que les valeurs protégés par celle-ci » : M.M., par. 58, citant *Loyola*, par. 39. Soit dit en tout respect, une telle formulation ne précise guère le rôle des valeurs consacrées par la *Charte* dans l'examen des demandes fondées sur celle-ci. En assimilant « les droits et les valeurs » sous la rubrique générale « protections conférées par la *Charte* », les juges de la majorité amoindrissent l'opinion selon laquelle les droits ont une portée et une fonction distinctes de celles des valeurs.

[174] En cas d'allégations d'atteinte à des droits garantis par la *Charte*, aucune raison ne justifie de déroger à l'approche basée sur les droits en question. Le demandeur qui présente une contestation fondée sur la *Charte* est en droit de s'attendre à ce que le tribunal décide s'il y a eu ou non atteinte aux droits que lui garantit la *Charte*. S'il parvient à prouver une telle atteinte, l'État doit ensuite se voir offrir la possibilité de démontrer que cette restriction des droits garantis par la *Charte* est justifiée au regard de l'article premier de la *Charte*. Ceci découle de la structure même de la *Charte*.

[175] Le point essentiel est le suivant. Lorsque des droits garantis par la *Charte* sont clairement en jeu, les tribunaux et autres décideurs ont l'obligation constitutionnelle d'examiner en tant que telles les demandes fondées sur des droits, et de le faire explicitement. Le recours à une analyse basée sur les valeurs consacrées par la *Charte* ne devrait pas avoir pour effet d'éclipser ou de supplanter l'analyse visant à déterminer s'il y a eu atteinte à un droit garanti par la *Charte*. Dans les cas où un acteur administratif a porté atteinte à un tel droit, la cour chargée de la révision doit décider si l'État est en mesure de s'acquitter du fardeau qui lui incombe de justifier l'atteinte au regard de l'article premier. Cette façon de faire ne relève pas d'une préférence doctrinale, mais découle plutôt d'une obligation constitutionnelle imposée par la *Charte*.

B. *The Scope of Charter Rights*

[176] My next concern relates to the interpretation of *Charter* rights. As the majority reasons show, the *Doré*/*Loyola* framework follows a two-step analysis for adjudicating *Charter* claims. Under this approach, the initial burden is on the claimant to demonstrate that the impugned decision infringes his or her *Charter* rights. This requires that the reviewing court possess a proper understanding of the scope of the rights at issue in order to determine whether the *Charter* has been infringed. Accordingly, the proper delineation of the scope of *Charter* rights, based on the purposive approach set out in our jurisprudence, remains an essential step in all *Charter* adjudication, including under the *Doré/Loyola* framework.

[177] This delineation precedes any decision as to whether there has been a limitation of the guaranteed right or freedom: e.g. *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 967; *R. v. Singh*, 2007 SCC 48, [2007] 3 S.C.R. 405, at paras. 42-48; *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 S.C.R. 386, at para. 61. In many cases, this step may be implied or conclusory, especially where the infringement of the right or freedom is evident. In others, an explicit delineation of the right or freedom determines the outcome of the *Charter* claim. In all cases, it remains a logically necessary — if from time to time unspoken — step in the analysis. In plain terms, there is no need for justification if there is no infringement, and there can be no infringement if the claim falls outside the scope of the right at issue.

(1) Purposive Delineation

[178] Like most constitutional documents, the *Charter* is phrased in open-textured terms that allow for adaptation to changing circumstances. Its interpretation calls for a broad and purposive approach: *Hunter v. Southam Inc.*, [1984] 2 S.C.R.

B. *La portée des droits garantis par la Charte*

[176] Ma seconde préoccupation concerne l'interprétation des droits garantis par la *Charte*. Ainsi que l'indiquent les motifs de la majorité, le cadre établi dans les arrêts *Doré* et *Loyola* pour l'examen des demandes fondées sur la *Charte* consiste en une analyse à deux volets. Selon cette approche, il incombe initialement au demandeur de prouver que la décision contestée porte atteinte aux droits que lui garantit la *Charte*. Cette façon de faire exige que la cour de révision possède une compréhension adéquate de la portée des droits en jeu pour décider s'il y a eu atteinte aux droits garantis par la *Charte*. En conséquence, la délimitation appropriée de la portée des droits garantis par la *Charte*, fondée sur la méthode d'interprétation téléologique énoncée dans la jurisprudence de notre Cour, demeure une étape fondamentale dans l'examen de toute demande fondée sur la *Charte*, y compris dans l'application du cadre d'analyse établi dans *Doré* et *Loyola*.

[177] Cette délimitation précède toute décision concernant la question de savoir si le droit ou la liberté garanti a été restreint : p. ex. *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927, p. 967; *R. c. Singh*, 2007 CSC 48, [2007] 3 R.C.S. 405, par. 42-48; *Ktunaxa Nation c. Colombie-Britannique (Forests, Lands and Natural Resource Operations)*, 2017 CSC 54, [2017] 2 R.C.S. 386, par. 61. Dans bien des cas, il est possible que cette étape soit implicite ou conclusive, particulièrement lorsque l'atteinte au droit ou à la liberté en cause est évidente. Dans d'autres cas, l'issue de la demande fondée sur la *Charte* repose sur une délimitation explicite du droit ou de la liberté. Dans tous les cas, elle demeure une étape logiquement nécessaire — quoique tacite à l'occasion — de l'analyse. En clair, une justification n'est pas nécessaire en l'absence d'atteinte, et il ne peut y avoir atteinte si la demande échappe à la portée du droit concerné.

(1) Délimitation téléologique

[178] Comme la plupart des documents constitutionnels, la *Charte* est rédigée en termes larges qui peuvent s'adapter aux circonstances. Elle commande une interprétation large et téléologique, c'est-à-dire fondée sur son objet : *Hunter c. Southam Inc.*, [1984]

145, at p. 156; *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, at p. 509; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 53; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912, at para. 20.

[179] This approach requires courts to favour generous interpretations of the *Charter* and to avoid narrow or technical ones that could "subvert the goal of ensuring that right holders enjoy the full benefit and protection of the *Charter*": *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 23. It also recognizes that the rights and freedoms guaranteed by the *Charter* "must . . . be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers": *Hunter*, at p. 155. As part of this approach, the Court has cautioned against undue attention to the historical meaning of rights and freedoms as understood when the *Charter* was enacted. This allows the *Charter* to keep pace with societal change and ensures that its protections are not "frozen in time": *B.C. Motor Vehicle*, at p. 509; see also *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at paras. 61-62; *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698.

[180] The foundational case in defining this approach is *Big M*, in which Justice Dickson (as he then was) held that the language of the *Charter* must be read with a view to its purpose:

> This Court has already, in some measure, set out the basic approach to be taken in interpreting the *Charter*. In *Hunter v. Southam Inc*., [1984] 2 S.C.R. 145, this Court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the *Charter* was a purposive one. The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the purpose of such a guarantee; it was to be

2 R.C.S. 145, p. 156; *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295; *Renvoi sur la Motor Vehicle Act (C.-B.)*, [1985] 2 R.C.S. 486, p. 509; *Eldridge c. Colombie-Britannique (Procureur général)*, [1997] 3 R.C.S. 624, par. 53; *Vriend c. Alberta*, [1998] 1 R.C.S. 493; *Figueroa c. Canada (Procureur général)*, 2003 CSC 37, [2003] 1 R.C.S. 912, par. 20.

[179] Suivant cette démarche, les tribunaux doivent favoriser les interprétations généreuses de la *Charte* et éviter de lui donner une interprétation étroite ou formaliste « susceptible de contrecarrer l'objectif qui est d'assurer aux titulaires de droits l'entier bénéfice et la pleine protection de la *Charte* » : *Doucet-Boudreau c. Nouvelle-Écosse (Ministre de l'Éducation)*, 2003 CSC 62, [2003] 3 R.C.S. 3, par. 23. Cette démarche tient également compte du fait que les droits et libertés garantis par la *Charte* doivent être en mesure « d'évoluer avec le temps de manière à répondre à de nouvelles réalités sociales, politiques et historiques que souvent [l]es auteurs [de la *Charte*] n'ont pas envisagées » : *Hunter*, p. 155. Dans le cadre de cette démarche, la Cour a indiqué qu'il faut se garder d'accorder une importance excessive au sens historique des droits et libertés, c'est-à-dire celui qu'on leur prêtait au moment de l'édiction de la *Charte*. De cette façon, la *Charte* peut évoluer au rythme des changements sociaux, de telle sorte que les protections qu'elle garantit ne soient pas « figé[e]s dans le temps » : *Renvoi sur la Motor Vehicle Act (C.-B.)*, p. 509; voir aussi *R. c. Tessling,* 2004 CSC 67, [2004] 3 R.C.S. 432, par. 61-62; *Renvoi relatif au mariage entre personnes du même sexe*, 2004 CSC 79, [2004] 3 R.C.S. 698.

[180] L'arrêt fondamental qui a défini cette démarche est *Big M*, dans lequel le juge Dickson (plus tard juge en chef) a conclu que le libellé de la *Charte* doit être interprété en fonction de son objet :

> Cette Cour a déjà, dans une certaine mesure, énoncé la façon fondamentale d'aborder l'interprétation de la *Charte*. Dans l'arrêt *Hunter c. Southam Inc*., [1984] 2 R.C.S. 145, la Cour a exprimé l'avis que la façon d'aborder la définition des droits et des libertés garantis par la *Charte* consiste à examiner l'objet visé. Le sens d'un droit ou d'une liberté garantis par la *Charte* doit être vérifié au moyen d'une analyse de l'objet d'une telle garantie; en

understood, in other words, in the light of the interests it was meant to protect.

In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore, as this Court's decision in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, illustrates, be placed in its proper linguistic, philosophic and historical contexts. [Emphasis added; p. 344.]

[181] Several points can be drawn from this passage. The first is that the purposive approach, like other approaches to constitutional language, creates a framework for elucidating meaning from general wording. Purpose defines the boundaries of this framework and is used to draw the line between valid and invalid interpretation.

[182] The second point is that courts need to be mindful of extending the meaning of constitutional text beyond "the limits of reason" so as not to "overshoot the actual purpose of the right or freedom in question": *Hunter*, at p. 156; *Big M*, at p. 344; *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460, at para. 24; *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47, [2013] 3 S.C.R. 157, at paras. 19-20. Such unreasonable extensions are not hard to envisage. Liberty as guaranteed by s. 7 of the *Charter*, for instance, could be read as barring all restrictions on the free choice of individuals. As one author explains, "[s]uch interpretations may be senseless, in that every law would presumptively violate the Charter and require a section 1 justification, but they are not precluded by the words [of the Charter] as such and are more 'broad' and 'generous' than the interpretations given to these

d'autres termes, ils doivent s'interpréter en fonction des intérêts qu'ils visent à protéger.

À mon avis, il faut faire cette analyse et l'objet du droit ou de la liberté en question 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, s'il y a lieu, en fonction du sens et de l'objet des autres libertés et droits particuliers qui s'y rattachent selon le texte de la *Charte*. Comme on le souligne dans l'arrêt *Southam*, l'interprétation doit être libérale plutôt que formaliste et viser à réaliser l'objet de la garantie et à assurer que les citoyens bénéficient pleinement de la protection accordée par la Charte. En même temps, il importe de ne pas aller au-delà de l'objet véritable du droit ou de la liberté en question et de se rappeler que la *Charte* n'a pas été adoptée en l'absence de tout contexte et que, par conséquent, comme l'illustre l'arrêt de cette Cour *Law Society of Upper Canada c. Skapinker*, [1984] 1 R.C.S. 357, elle doit être située dans ses contextes linguistique, philosophique et historique appropriés. [Je souligne; p. 344.]

[181] Plusieurs éléments ressortent de ce passage. Le premier est que, tout comme d'autres méthodes d'interprétation constitutionnelle, l'approche téléologique crée un cadre d'analyse visant à élucider le sens d'un libellé général. L'objet définit les limites de ce cadre d'analyse et sert à distinguer les interprétations valides des interprétations invalides.

[182] Le deuxième élément est que les tribunaux doivent se garder d'élargir le sens du texte constitutionnel au-delà des « limites raisonnables », et d'« aller au-delà de l'objet véritable du droit ou de la liberté en question » : *Hunter*, p. 156; *Big M*, p. 344; *R. c. Suberu*, 2009 CSC 33, [2009] 2 R.C.S. 460, par. 24; *Divito c. Canada (Sécurité publique et Protection civile)*, 2013 CSC 47, [2013] 3 R.C.S. 157, par. 19-20. Il n'est pas difficile d'imaginer des exemples d'élargissements déraisonnables. La liberté garantie à l'art. 7 de la *Charte* pourrait, par exemple, être considérée comme ayant pour effet d'interdire toute restriction de la liberté de choisir des individus. Comme l'explique un auteur, [TRADUCTION] « [d]e telles interprétations sont absurdes, dans la mesure où il serait possible de présumer que pratiquement toute loi viole la Charte et doit être justifiée au regard de l'article premier, mais les mots mêmes [de la

terms by the courts": B. Oliphant, "Taking Purposes Seriously: The Purposive Scope and Textual Bounds of Interpretation Under the Canadian Charter of Rights and Freedoms" (2015), 65:3 *U.T.L.J.* 239, at p. 253 (emphasis deleted).

[183] This explains the central role of purpose in our interpretive approach. As this Court noted in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at para. 17, "[w]hile the twin principles of purposive and generous interpretation are related and sometimes conflated, they are not the same. The purpose of a right must always be the dominant concern in its interpretation; generosity of interpretation is subordinate to and constrained by that purpose" (citing P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), at pp. 36-30 and 36-31).

[184] The aim of *Charter* interpretation, then, is to define the scope of protected rights and freedoms by reference to their purpose. This requires courts to ascertain the purpose of the *Charter* right or freedom so as to protect activity that comes within that purpose and exclude activity that does not: Hogg, *Constitutional Law of Canada*, at pp. 36-30 and 36-31. As discussed, this does not mean that the historical intention of those who drafted the *Charter* is determinative: *B.C. Motor Vehicle*, at p. 509. Rather, the focus is on the interests the *Charter* is meant to protect: *Big M*, at p. 344. In ascertaining the purpose of a right or freedom, the courts consider a number of indicators, including the text of the *Charter*; the context and overall purpose of the *Charter*; the historical and philosophical roots of the right or freedom, which provide insight into the interests that the *Charter* was intended to protect; the common law and pre-*Charter* jurisprudence dealing with similar rights; and, of course, the *Charter* jurisprudence as it has developed: see e.g. *Hunter*, at pp. 154-60; *Oakes*, at pp. 119-34; *Big M*; *Andrews*; *R. v. Therens*, [1985] 1 S.C.R. 613; *R. v. Smith*, [1987] 1 S.C.R. 1045; *Irwin Toy*; *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141.

Charte] ne s'opposent pas à de telles interprétations, qui sont plus 'larges' et 'généreuses' que celles que leur ont données les tribunaux » : B. Oliphant, « Taking Purposes Seriously : The Purposive Scope and Textual Bounds of Interpretation Under the Canadian Charter of Rights and Freedoms » (2015), 65:3 *U.T.L.J.* 239, p. 253 (italique omis).

[183] Ce qui précède explique le rôle central de l'objet dans notre méthode d'interprétation. Comme l'a noté la Cour dans *R. c. Grant*, 2009 CSC 32, [2009] 2 R.C.S. 353, par. 17, « [b]ien que les principes d'interprétation téléologique et d'interprétation libérale soient apparentés et même parfois confondus, ils ne sont pas identiques. L'objet du droit doit demeurer la principale préoccupation; la libéralité de l'interprétation est restreinte par cet objet et elle y est subordonnée » (citant P. W. Hogg, *Constitutional Law of Canada* (5e éd. suppl.), p. 36-30 et 36-31).

[184] L'interprétation de la *Charte* vise donc à définir la portée des droits et libertés protégés en fonction de leur objet, ce qui oblige les tribunaux à déterminer l'objet du droit ou de la liberté qui est garanti par la *Charte*, afin de protéger l'activité visée par cet objet et d'exclure celle qui ne l'est pas : Hogg, *Constitutional Law of Canada*, p. 36-30 et 36-31. Tel qu'il a été discuté, cela ne signifie pas que l'intention originale des rédacteurs de la *Charte* est déterminante : *Renvoi sur la Motor Vehicle Act (C.-B.)*, p. 509. Il faut plutôt mettre l'accent sur les intérêts que la *Charte* vise à protéger : *Big M*, p. 344. Pour déterminer l'objet d'un droit ou d'une liberté, les tribunaux considèrent un certain nombre de facteurs, notamment le texte de la *Charte*; le contexte et l'objectif général de celle-ci; les bases historiques et philosophiques du droit ou de la liberté, qui peuvent donner une idée des intérêts que la *Charte* visait à protéger; la common law ainsi que la jurisprudence antérieure à la *Charte* portant sur des droits semblables; et, évidemment, l'évolution de la jurisprudence relative à la *Charte* : voir, p. ex., *Hunter*, p. 154-160; *Oakes*, p. 119-134; *Big M*; *Andrews*; *R. c. Therens*, [1985] 1 R.C.S. 613; *R. c. Smith*, [1987] 1 R.C.S. 1045; *Irwin Toy*; *Montréal (Ville) c. 2952-1366 Québec Inc.*, 2005 CSC 62, [2005] 3 R.C.S. 141.

[185] This approach is meant to operate within and give effect to the structure of the *Charter*. Guided by a purposive reading, courts must delineate *Charter* rights based on considerations that are intrinsic to the rights themselves. If a claimant demonstrates an infringement, s. 1 then allows the court to consider extrinsic factors to determine whether the infringement is justified. These extrinsic factors do not affect the scope of the right. These steps — the delineation and infringement analysis, followed by the justification analysis — are conceptually distinct. On occasion, however, this Court has departed from this distinction.

(2) Delineation Through Justification

[186] This Court has from time to time favoured an approach to *Charter* rights that avoids delineation and relies instead on s. 1 to ensure that rights are exercised within proper bounds. The rationale put forward for this approach is that, in contrast to an internal delineation followed by a distinct justification, jumping ahead to an analysis under s. 1 allows the Court to consider the full range of relevant factors, including the context in which the right operates in the circumstances of the case.

[187] A number of cases have followed this approach. One example is the decision of Justice La Forest in *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, who noted that "[t]his Court has consistently refrained from formulating internal limits to the scope of freedom of religion in cases where the constitutionality of a legislative scheme was raised; it rather opted to balance the competing rights under s. 1 of the *Charter*" (para. 109).

[188] There are implications to adopting such an approach, some of which appear advantageous. The most obvious is that it allows claimants to discharge their burden of proof of infringement with relative ease, moving the analysis readily to s. 1. This shifts

[185] Cette démarche est conçue pour s'appliquer à l'intérieur de la structure de la *Charte*, et pour donner effet à cette structure. Guidés par une interprétation téléologique, les tribunaux doivent délimiter les droits garantis par la *Charte* en fonction des considérations intrinsèques aux droits eux-mêmes. Si le demandeur démontre l'existence d'une atteinte, l'article premier permet alors au tribunal de considérer des facteurs extrinsèques pour déterminer si cette atteinte est justifiée. Ces facteurs extrinsèques n'ont pas d'incidence sur la portée du droit en cause. Ces étapes — soit l'analyse relative à la délimitation et à l'atteinte, suivie de l'analyse relative à la justification — sont conceptuellement distinctes. À l'occasion, toutefois, notre Cour a rompu avec cette distinction.

(2) Délimitation dans le cadre de la justification

[186] Il est arrivé à l'occasion que la Cour privilégie, relativement aux droits garantis par la *Charte*, une démarche qui évite la délimitation et se fonde plutôt sur l'article premier pour s'assurer que les droits sont exercés à l'intérieur de limites acceptables. La raison d'être de cette démarche est que le fait de passer directement à l'analyse fondée sur l'article premier, au lieu de procéder à une délimitation interne suivie d'une étape de justification distincte, permet à la Cour de prendre en considération l'éventail complet des facteurs pertinents, y compris le contexte dans lequel le droit s'applique dans les circonstances de l'espèce.

[187] Cette démarche a été suivie dans un certain nombre d'affaires. Un exemple est la décision du juge La Forest dans *B. (R.) c. Children's Aid Society of Metropolitan Toronto*, [1995] 1 R.C.S. 315, dans laquelle ce dernier a souligné que « [n]otre Cour s'est toujours gardée de poser des limites internes à la portée de la liberté de religion dans les cas où la constitutionnalité d'un régime législatif était soulevée; elle a plutôt choisi de soupeser les droits opposés dans le cadre de l'article premier de la *Charte* » (par. 109).

[188] L'adoption de cette démarche a des implications, dont certaines semblent avantageuses. La plus évidente est qu'elle permet aux demandeurs de s'acquitter relativement aisément de leur fardeau de preuve en ce qui concerne l'atteinte, l'analyse

the burden of justification onto the government, which, intuitively, seems fair given its position of power relative to individual claimants. This approach also resolves ambiguity in favour of a broad scope for rights and freedoms. As Justice La Forest explained in *B. (R.)*, "[n]ot only is this consistent with the broad and liberal interpretation of rights favoured by this Court, but s. 1 is a much more flexible tool with which to balance competing rights" (para. 110). Subsequent expressions of this approach have relied primarily on the argument that s. 1, in contrast to "internal limits", allows for a more fulsome consideration of competing rights and interests: *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256, at paras. 24-31.

[189] Whatever the advantages of giving this type of reading to rights and freedoms, an interpretive approach that blurs the distinction between infringement and justification ignores the architecture of the *Charter*. As discussed, the adjudication of *Charter* claims needs to follow a structured two-step process. A preference for reconciling competing rights and interests under s. 1 does not obviate the need for an initial determination of whether a *Charter* right has been infringed in the first place. This step — which requires defining the scope of the particular right — is anterior to and conceptually distinct from the consideration of extrinsic factors that may or may not justify limiting the exercise of that right in the circumstances of the case. These extrinsic factors come into play during the analysis of s. 1. They are, however, not relevant to the delineation of the right itself.

[190] An approach that skims over the proper delineation of rights and freedoms runs the risk of distorting the relationship between s. 1 and the

passant ainsi rapidement à l'étape fondée sur l'article premier. Il s'ensuit que le fardeau de justification incombe alors à l'État, situation qui, intuitivement, semble juste vu la position de pouvoir dans lequel il se trouve par rapport au particulier auteur de la demande. Cette démarche a aussi pour effet de dissiper l'ambiguïté et de reconnaître une large portée aux droits et libertés. Comme l'a expliqué le juge La Forest dans *B. (R.)*, « [n]on seulement cela est-il conforme à l'interprétation large et libérale des droits que préconise notre Cour, mais encore l'article premier est un outil beaucoup plus souple [. . .] pour soupeser des droits opposés » (par. 110). Les énoncés subséquents de cette démarche se sont principalement appuyés sur l'argument voulant que l'article premier, par opposition au concept de « limites internes », permette un examen plus complet des droits et intérêts opposés : *Multani c. Commission scolaire Marguerite-Bourgeoys*, 2006 CSC 6, [2006] 1 R.C.S. 256, par. 24-31.

[189] Quels que soient les avantages associés à ce type d'interprétation des droits et libertés, une méthode d'interprétation qui estompe la distinction entre atteinte et justification fait abstraction de l'architecture de la *Charte*. Comme je l'ai expliqué précédemment, l'examen des demandes fondées sur la *Charte* doit se faire selon un processus structuré comportant deux étapes. Une préférence pour une démarche de conciliation des droits et intérêts opposés par application de l'article premier n'écarte pas le besoin de déterminer d'abord s'il y a eu atteinte à un droit garanti par la *Charte*. Cette étape — qui requiert la délimitation de la portée du droit en question — est réalisée préalablement à l'examen des facteurs extrinsèques qui peuvent, ou non, justifier une limitation de l'exercice de ce droit dans les circonstances de l'espèce, et elle en est distincte sur le plan conceptuel. Ces facteurs extrinsèques entrent en jeu au cours de l'analyse fondée sur l'article premier. Ils ne sont toutefois pas pertinents pour les besoins de la délimitation du droit lui-même.

[190] Une démarche qui ne procède que superficiellement à l'étape de la délimitation adéquate des droits et libertés en cause risque de déformer

protections guaranteed by the *Charter*. As Chief Justice Dickson stated in *Oakes*, at p. 135:

> 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. [Emphasis added.]

[191] The two functions of s. 1 operate in tandem. Because of the seriousness of finding an infringement of a *Charter* right — which, in essence, declares the breach of a constitutional guarantee — the delineation of these rights must be carried out with care corresponding to the gravity of the matter. If infringements are too readily found on the basis of activities that fall outside of the protective scope of the rights, then courts may well too readily find that the government has met the justificatory burden set out in *Oakes*. As Professor Hogg suggests, "[t]here is a close relationship between the standard of justification required under s. 1 and the scope of the guaranteed rights. If the courts give to the guaranteed rights a broad interpretation that extends beyond their purpose, it is inevitable that the court[s] will relax the standard of justification under s. 1 in order to uphold legislation limiting the extended right": *Constitutional Law of Canada*, at p. 38-6 (footnote omitted); see also P. W. Hogg, "Interpreting the Charter of Rights: Generosity and Justification" (1990), 28 *Osgoode Hall L.J.* 817.

[192] This can lead to situations whereby certain rights are routinely said to be infringed only for the claimant to be told that the infringement is justified by any number of countervailing considerations. As Professor Newman puts it, "[t]he situation becomes

le rapport entre l'article premier et les protections garanties par la *Charte*. Comme l'a affirmé le juge en chef Dickson dans l'arrêt *Oakes*, p. 135 :

> 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 libertés qui font partie de la loi suprême du Canada. [Je souligne.]

[191] Les deux fonctions de l'article premier opèrent de concert. En raison de la gravité d'une conclusion portant qu'il y a eu atteinte à un droit garanti par la *Charte* — conclusion qui, essentiellement, constate l'existence d'un manquement à une garantie constitutionnelle — la délimitation de tels droits doit être réalisée avec tout le soin que requiert la gravité de la situation. Si les tribunaux concluent trop aisément à l'existence d'atteintes dans le cadre d'activités qui échappent à la portée de la protection qu'accordent ces droits, ils pourraient en conséquence conclure trop aisément que l'État a satisfait au fardeau de justification énoncée dans *Oakes*. Comme l'affirme le professeur Hogg, [TRADUCTION] « [i]l existe un rapport étroit entre la norme de justification requise par l'article premier et le champ d'application des droits garantis. Si les tribunaux donnent à un droit garanti une interprétation large qui va au-delà de leur objet, ils assoupliront inévitablement la norme de justification au regard de l'article premier afin de valider le texte de la loi qui restreint le droit en question » : *Constitutional Law of Canada*, p. 38-6 (note en bas de page omise); voir aussi P. W. Hogg, « Interpreting the Charter of Rights : Generosity and Justification » (1990), 28 *Osgoode Hall L.J.* 817.

[192] Une telle approche peut mener à des situations où les tribunaux concluraient couramment à l'existence d'atteintes à certains droits, mais se contenteraient en définitive de répondre au demandeur concerné que l'atteinte est justifiée par un

one in which the *prima facie* violation of rights by the state becomes a routine condition precisely because no distinctions are drawn between legitimate and illegitimate claims": D. Newman, "Canadian Proportionality Analysis: 5½ Myths" (2016), 73 *S.C.L.R.* (2d) 93, at p. 99. This has a number of worrisome implications. It erodes the seriousness of finding *Charter* violations. It increases the role of policy considerations in the adjudication of *Charter* claims by shifting the bulk of the analysis to s. 1. And it distorts the proper relationship between the branches of government by unduly expanding the policy-making role of the judiciary.

certain nombre de considérations qui font contrepoids. Comme l'explique le professeur Newman, [TRADUCTION] « [l]a situation deviendrait telle que les conclusions d'atteinte à première vue à des droits par l'État deviendraient des occurrences courantes, précisément parce qu'aucune distinction n'est faite entre prétentions légitimes et prétentions illégitimes » : D. Newman, « Canadian Proportionality Analysis : 5½ Myths » (2016), 73 *S.C.L.R.* (2d) 93, p. 99. De telles situations ont des répercussions préoccupantes. Elles atténuent la gravité d'une conclusion portant qu'il y a eu atteinte à la *Charte*. Elles accroissent le rôle des considérations de politique générale dans l'examen des demandes fondées sur la *Charte* en déplaçant l'essentiel de l'analyse à l'étape fondée sur l'article premier. Et elles déforment le rapport approprié qui doit exister entre les différentes branches de l'État, en élargissant d'une manière excessive le rôle des tribunaux en matière d'établissement de politiques.

[193] Taken to its logical end, this approach pushes the entire adjudication of *Charter* claims towards balancing, whereby rights and justifications are considered in a type of blended analysis. The result is an unstructured, somewhat conclusory exercise that ignores the framing of the *Charter* and departs fundamentally from the foundational *Charter* jurisprudence of this Court.

[193] Poussée à sa logique extrême, cette démarche fait converger l'ensemble des éléments du processus d'examen des demandes fondées sur la *Charte* vers une mise en balance dans le cadre de laquelle les droits et les justifications sont considérés dans une sorte d'analyse mixte. Il en résulte une opération non structurée et plutôt conclusive, qui ne tient pas compte de l'organisation de la *Charte* et qui déroge radicalement à la jurisprudence fondamentale de la Cour concernant ce texte.

[194] The adjudication of *Charter* claims involves questions of constitutional law. The fact that *Charter* rights are implicated in the work of administrative decision-makers on a day-to-day basis does not change this fact. On judicial review, as in other proceedings, *Charter* claims demand analytical rigour. This starts with the correct delineation of the scope of the rights and freedoms at issue. Such delineation provides to the reviewing court the framework within which the *Charter* claim is to be adjudicated. It determines, *inter alia*, the relevance of evidence adduced by the claimant and the standard against which the government conduct is to be evaluated. The aim is not to produce an unduly restrictive reading of the right or freedom at issue. Rather, it is to ensure that the rest of the analysis does not go off the

[194] Trancher des demandes fondées sur la *Charte* implique l'examen de questions de droit constitutionnel. Le fait que des droits garantis par la *Charte* se soulèvent quotidiennement dans les travaux des décideurs administratifs ne change pas ce fait. Lors d'un contrôle judiciaire, comme dans d'autres instances, les demandes fondées sur la *Charte* commandent une analyse rigoureuse. La première étape consiste à délimiter correctement la portée des droits et libertés en jeu. Grâce à une telle délimitation, la cour de révision disposera du cadre à l'intérieur duquel la demande fondée sur la *Charte* doit être tranchée. Elle permet de déterminer, entre autres choses, la pertinence de la preuve présentée par le demandeur et la norme au regard de laquelle la conduite de l'État doit être évaluée. L'objectif n'est pas de produire

rails because the right has been given an erroneous definition.

une interprétation indûment restrictive du droit ou de la liberté en jeu. Il s'agit plutôt de faire en sorte que le reste de l'analyse ne s'écarte pas de la bonne marche à suivre parce que le droit en cause a été défini erronément.

C. *The Burden of Proof in Charter Litigation*

[195] My final concern relates to the burden of proof in *Charter* adjudication and what that burden entails. Under the usual rules of judicial review, it falls to the applicant to demonstrate that the impugned decision should be overturned. By contrast, under the approach set out in *Oakes*, it is government that bears the burden of justification once the claimant has demonstrated an infringement of his or her *Charter* rights. The *Doré*/*Loyola* framework lies at the intersection of administrative and constitutional law but it has remained conspicuously silent on where the burden of proof lies.

[196] It is difficult to conclude that *Doré* changed the burden of proof for the adjudication of *Charter* claims in the administrative context in the absence of an explicit discussion to that effect. Thus, once the claimant has demonstrated that an administrative decision infringes his or her *Charter* rights, it remains incumbent on the state actor to demonstrate that the infringement is justified. In other words, if the claimant can demonstrate that an administrative decision infringes his or her *Charter* rights, the decision is presumptively unreasonable and the state must explain why this infringement is a reasonable limit. The reviewing court must ensure that the state actor has discharged this burden before upholding the impugned decision.

[197] The majority states that "*Charter* rights are no less robustly protected under an administrative law framework": M.R., at para. 57. As discussed, however, the usual rules of administrative law require *the applicant* to demonstrate that an impugned decision should be overturned. It is unclear whether this burden persists under an administrative

C. *Le fardeau de la preuve dans les litiges relatifs à la Charte*

[195] Ma dernière préoccupation concerne le fardeau de la preuve dans les litiges relatifs à la *Charte* ainsi que la teneur de ce fardeau. Selon les règles habituellement applicables en cas de contrôle judiciaire, il incombe au demandeur de prouver que la décision contestée devrait être annulée. En revanche, suivant la démarche établie dans *Oakes*, c'est l'État qui doit prouver la justification une fois que le demandeur a démontré l'existence d'une atteinte aux droits que lui garantit la *Charte*. Le cadre d'analyse énoncé dans les arrêts *Doré* et *Loyola* se situe à l'intersection du droit administratif et du droit constitutionnel, mais il demeure ostensiblement silencieux quant à l'identité de la partie à qui incombe le fardeau de la preuve.

[196] Il est difficile de conclure que l'arrêt *Doré* a modifié le fardeau de la preuve dans l'examen des demandes fondées sur la *Charte* en contexte administratif en l'absence d'un énoncé explicite à cet effet. En conséquence, une fois que le demandeur a démontré qu'une décision administrative porte atteinte aux droits qui lui sont garantis par la *Charte*, il continue d'incomber à l'État de prouver que l'atteinte était justifiée. Autrement dit, si le demandeur peut établir qu'une décision porte atteinte aux droits que lui garantit la *Charte*, la décision est présumée déraisonnable et l'État doit expliquer pourquoi cette atteinte constitue une limite raisonnable. La cour de révision doit s'assurer que l'État s'est acquitté de son fardeau avant de confirmer la décision contestée.

[197] Les juges majoritaires affirment que « les droits garantis par la *Charte* ne sont pas moins vigoureusement protégés dans un cadre d'analyse de droit administratif » : M.M., par. 57. Cependant, comme je l'ai expliqué, suivant les règles habituelles du droit administratif, *le demandeur* est tenu de démontrer que la décision qu'il conteste doit être infirmée.

law framework once *Charter* rights are at stake. The majority is silent on this issue. One could infer from this that an impugned decision should be treated as presumptively reasonable *unless* the claimant demonstrates that the decision is not the result of proportionate balancing. This would provide for less robust protection of *Charter* rights. For the administrative law framework to provide for the *same* protection of *Charter* rights as the *Oakes* framework, the justificatory burden must remain on the government once an infringement of rights is demonstrated.

[198] Such an approach follows from first principles. The administrative state is a statutory creation. As legislation must comply with the *Charter*, it follows that decisions taken pursuant to legislation must also comply with the *Charter*: *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825; *Eldridge*; *Multani*; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134, at para. 117.

[199] The *Constitution Act, 1982* gives normative primacy to the rights and freedoms guaranteed by the *Charter*. By virtue of s. 1, any limit on these guarantees is presumptively unconstitutional. This means that rights infringements can stand *only* if the limit complies with the requirements of s. 1 (or, in some cases, if the government invokes the override provision in s. 33 of the *Charter*). These are the *only* options: the government either justifies the infringement, exempts the infringement from constitutional scrutiny, or the infringement is remedied by the court.

[200] Where the government opts for justification, it faces successive hurdles. Under the *Oakes* framework, to establish that an infringement is reasonable and demonstrably justified in a free and democratic society, the state must, first, identify an objective of sufficient importance to warrant overriding a constitutionally protected right or freedom. Second,

Est-ce que ce fardeau demeure inchangé dans le cadre d'analyse du droit administratif lorsque des droits garantis par la *Charte* sont en jeu? Ce n'est pas clair. Les juges majoritaires sont silencieux sur ce point. Il est possible d'inférer que la décision contestée doit être présumée raisonnable, *sauf* si le demandeur démontre qu'elle ne résulte pas d'une mise en balance proportionnée. Cette situation se traduirait par une protection moins vigoureuse des droits garantis par la *Charte*. Pour que le cadre d'analyse du droit administratif assure la *même* protection à l'égard des droits garantis par la *Charte* que le cadre d'analyse prévu par l'arrêt *Oakes*, le fardeau de justification doit continuer d'incomber à l'État lorsqu'une atteinte à des droits a été établie.

[198] Une telle démarche découle de principes fondamentaux. La branche administrative de l'État est une création de la loi. Comme les lois doivent être conformes à la *Charte*, il s'ensuit que les décisions prises en vertu de celles-ci doivent elles aussi respecter la *Charte* : *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038; *Ross c. Conseil scolaire du district n^o^ 15 du Nouveau-Brunswick*, [1996] 1 R.C.S. 825; *Eldridge*; *Multani*; *Canada (Procureur général) c. PHS Community Services Society*, 2011 CSC 44, [2011] 3 R.C.S. 134, par. 117.

[199] La *Loi constitutionnelle de 1982* confère aux droits et libertés garantis par la *Charte* la primauté sur le plan normatif. Par l'effet de l'article premier, toute limite à ces garanties est présumée inconstitutionnelle. Cela signifie qu'une atteinte à un droit est valide *uniquement* si la limite respecte les exigences de l'article premier (ou, dans certains cas, si l'État invoque l'art. 33 de la *Charte*, la disposition autorisant les dérogations). Il s'agit là des *seules* possibilités : soit l'État justifie l'atteinte, soit il la soustrait au contrôle de sa constitutionnalité, soit le tribunal remédie à l'atteinte.

[200] Lorsque l'État opte pour la justification, il doit alors surmonter successivement différents obstacles. Suivant le cadre d'analyse établi dans *Oakes*, pour établir qu'une atteinte constitue une limite raisonnable dont la justification peut se démontrer dans le cadre d'une société libre et démocratique, l'État doit premièrement invoquer un objectif suffisamment

the state must show that the infringement passes a "proportionality test": *Oakes*, at p. 139. This entails showing that the measure is rationally connected to the identified objective, that the infringement is minimally impairing and that a balance is struck between the infringing effects of the measure and the importance of the objective. The *Oakes* framework expresses constitutional principles of fundamental importance — namely, that the rights and freedoms guaranteed by the *Charter* establish a minimum degree of protection that state actors must respect, and that any violation of these guarantees will be subject to close and serious scrutiny.

[201] There is no question that these principles continue to guide our assessment of state action in the administrative context. Rather, the debate has centred on how to operationalise these principles. In this appeal, the majority explains that once an infringement has been shown, 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* protections at play": M.R., at para. 58, citing *Doré*, at para. 57, and *Loyola*, at para. 39. I do not see this framework as fundamentally deviating from the principles set out in *Oakes*. Indeed, this Court sought in *Doré* to achieve "conceptual harmony between a reasonableness review and the *Oakes* framework" (para. 57). The key to achieving this harmony is not the substitution of the principles of *Charter* review for those of administrative law. Rather, as *Loyola* makes clear, the solution is to infuse judicial review with the considerations that make up the *Oakes* analysis.

[202] All the elements in the *Oakes* test have a role to play in the judicial review of administrative decisions under *Doré*. In *Doré*, this Court said that a decision will be found reasonable if "the decision-maker has properly balanced the relevant *Charter* value with the statutory objectives" that the decision-maker

important pour justifier la suppression d'un droit ou d'une liberté protégé par la Constitution. Deuxièmement, il doit démontrer que l'atteinte satisfait au « critère de proportionnalité » : *Oakes*, p. 139. Cela implique qu'il doit prouver que la mesure possède un lien rationnel avec l'objectif invoqué, que l'atteinte constitue une atteinte minimale aux droits garantis et qu'il y a équilibre entre les effets attentatoires de la mesure et l'importance de l'objectif. Le cadre d'analyse établi dans *Oakes* énonce des principes constitutionnels d'une importance fondamentale — c'est-à-dire que les droits et libertés garantis par la *Charte* établissent des protections minimales que les acteurs gouvernementaux sont tenus de respecter, et que toute violation de ces protections fera l'objet d'un contrôle attentif et rigoureux.

[201] Il ne fait aucun doute que ces principes continuent de guider notre évaluation de l'action étatique en contexte administratif. Les débats ont plutôt porté sur la façon de mettre en œuvre ces principes. Dans le présent pourvoi, les juges majoritaires expliquent que, lorsqu'une atteinte a été démontrée, il s'agit de se demander « 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 en cause protégés par la *Charte* » : M.M., par. 58, citant *Doré*, par. 57, et *Loyola*, par. 39. Je ne considère pas que ce cadre d'analyse s'écarte fondamentalement des principes énoncés dans *Oakes*. D'ailleurs, dans *Doré*, notre Cour s'est efforcée de réaliser l'« harmonie conceptuelle entre l'examen du caractère raisonnable et le cadre d'analyse préconisé dans *Oakes* » (par. 57). La clé pour réaliser cette harmonie ne consiste pas à substituer les principes de l'examen relatif à la *Charte* à ceux du droit administratif. Comme il ressort clairement de l'arrêt *Loyola*, la solution consiste plutôt à intégrer au contrôle judiciaire les considérations qui composent l'analyse énoncée dans *Oakes*.

[202] Tous les éléments de l'analyse établie dans *Oakes* ont un rôle à jouer lors du contrôle judiciaire des décisions administratives conformément à l'arrêt *Doré*. Dans cet arrêt, la Cour a conclu qu'une décision sera jugée raisonnable si « le décideur a mis en balance comme il se doit la valeur pertinente

was bound to carry out (para. 58). This requires an identification of the statutory objective at issue, which corresponds to the first step under *Oakes*. Once a claimant has made out that a decision has infringed a *Charter* right on judicial review, the state must identify a "sufficiently important objective" that could make infringing the *Charter* right reasonable: *Oakes*, at p. 141. The proportionality analysis will then be carried out in relation to *that* objective. This objective must be sufficiently pressing and substantial to justify the infringement of *Charter* rights: *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519, at para. 20; *Hutterian Brethren*, at para. 42.

[203] The state must then show that the decision reflects a "proportionate balancing of the *Charter* protections at play": *Doré*, at para. 57. This corresponds to the "proportionality test" under the second step of *Oakes*, which includes the analysis of rational connection, minimal impairment, and the balance between beneficial and deleterious effects.

[204] First, if the state cannot demonstrate that the decision-maker has rendered a decision that is rationally connected to the identified statutory objective, then the decision, of necessity, cannot be reasonable. In other words, if the decision is not *rationally connected* to the statutory objective, then the decision-maker will have acted outside its mandate. Second, as the majority has stated, the decision will be *minimally impairing* if it affects the right "as little as reasonably possible" in furthering the statutory objectives identified by the state: M.R., at para. 80, citing *Loyola*, at para. 40. Finally, the state must show that the decision strikes "a reasonable balance between the benefits to its statutory objectives and the severity of the limitation on *Charter* rights at stake": M.R., at para. 91. If the state can meet this proportionality test, the decision will be reasonable despite having infringed a *Charter* right.

consacrée par la *Charte* et les objectifs visés par la loi » que le décideur était tenu de réaliser (par. 58). À cette fin, il faut cerner l'objectif visé par la loi qui est en jeu, démarche qui correspond à la première étape de l'analyse établie dans *Oakes*. Une fois qu'un demandeur a démontré, dans le cadre d'un contrôle judiciaire, qu'une décision porte atteinte à un droit protégé par la *Charte*, l'État doit invoquer un « objectif suffisamment important » susceptible de conférer un caractère raisonnable à l'atteinte au droit garanti par la *Charte* : *Oakes*, p. 141. L'analyse de la proportionnalité est ensuite réalisée au regard de *cet* objectif, qui doit être suffisamment urgent et réel pour justifier l'atteinte aux droits garantis par la *Charte* : *Sauvé c. Canada (Directeur général des élections)*, 2002 CSC 68, [2002] 3 R.C.S. 519, par. 20; *Hutterian Brethren*, par. 42.

[203] L'État doit ensuite prouver que la décision « est le fruit d'une mise en balance proportionnée des droits en cause protégés par la *Charte* » : *Doré*, par. 57. Cette démarche correspond au « critère de proportionnalité » de la deuxième étape de l'analyse établie dans *Oakes*, laquelle inclut l'examen du lien rationnel et de l'atteinte minimale, ainsi que la mise en balance des effets bénéfiques et des effets préjudiciables.

[204] Premièrement, si l'État n'est pas en mesure d'établir de lien rationnel entre la décision prise par le décideur et l'objectif législatif identifié, il s'ensuit, nécessairement, que cette décision ne saurait être raisonnable. En d'autres mots, si la décision n'est pas *liée rationnellement* à l'objectif législatif, le décideur a en conséquence agi en dehors du cadre de son mandat. Deuxièmement, comme l'affirment les juges majoritaires, la décision constituera une *atteinte minimale* si elle porte atteinte « aussi peu que cela est raisonnablement possible » aux droits en cause dans la poursuite des objectifs législatifs invoqués par l'État : M.M., par. 80, citant *Loyola*, par. 40. Enfin, l'État doit démontrer que la décision établit « une mise en balance raisonnable des avantages qu'il y a à réaliser les objectifs que lui confie la loi et de la gravité de la restriction aux droits garantis par la *Charte* en cause » : M.M., par. 91. Si l'État satisfait à ce critère de proportionnalité, la décision sera jugée raisonnable même si elle a porté atteinte à un droit garanti par la *Charte*.

[205] I recognize, as does the Chief Justice, that the main hurdle for the state will be the "final stages of the *Oakes* framework used to assess the reasonableness of a limit on a *Charter* right under s. 1: minimal impairment and balancing" (*Loyola*, at para. 40; C.J.R., at para. 113). However, that is not to say that the identification of statutory objectives or the rational connection step cease to be relevant. The fact that most statutes reviewed under the *Oakes* test have failed at the minimal impairment or proportionality stages does not mean that courts have stopped looking to rational connection. Nor does it mean that consideration of the pressing and substantial objective has ceased to be relevant. Similarly, in the administrative context, the fact that most administrative decisions will be rationally connected to an identified statutory objective does not mean that the inquiry need not be carried out. It means only that this component of the analysis will often readily be met.

[206] I add this. While the decision in *Doré* was motivated by a desire to streamline the review of administrative decisions for compliance with the *Charter*, its stated preference for a "robust conception of administrative law" should not have the (unquestionably unintended) effect of diluting the protection afforded to *Charter* rights (para. 34). Nor should it risk shifting the justificatory burden onto claimants once they have demonstrated an infringement of their rights. The justificatory burden must therefore remain where the *Charter* places it; on the government, whenever a claimant demonstrates that his or her *Charter* rights have been infringed. For the administrative state, this is no more than what s. 1 of the *Charter* requires.

[207] As a final point, I do not dispute that *Doré* and *Loyola* are binding precedents: M.R., at para. 59. The suggestion that the *Doré/Loyola* framework requires clarification is in no way inconsistent with

[205] À l'instar de la juge en chef, je reconnais que le principal obstacle pour l'État résidera dans les « étapes finales du cadre d'analyse énoncé dans *Oakes* qui sert pour déterminer si une restriction à un droit garanti par la *Charte* est raisonnable au regard de l'article premier : atteinte minimale et équilibre » (*Loyola*, par. 40; M.J.C., par. 113). Cependant, cela ne veut pas dire que la détermination des objectifs du texte de loi ou l'existence du lien rationnel ne sont plus des éléments pertinents. Le fait que la plupart des lois qui ont été analysées au regard du cadre énoncé dans *Oakes* n'ont pas satisfait aux étapes relatives à l'atteinte minimale ou à la proportionnalité ne signifie pas que les tribunaux ont cessé de considérer la question du lien rationnel. Cela ne veut pas non plus dire que la prise en compte de l'objectif urgent et réel n'est plus une considération pertinente. De même, en contexte administratif, le fait que la majorité des décisions ont un lien rationnel avec l'objectif législatif invoqué à leur égard ne signifie pas qu'il n'est plus nécessaire d'effectuer cet examen. Cela signifie seulement que, bien souvent, cet aspect de l'analyse sera aisément respecté.

[206] J'ajoute le point suivant. Bien que la décision dans *Doré* ait été motivée par la volonté de simplifier le contrôle de décisions administratives pour s'assurer de leur conformité avec la *Charte*, la préférence exprimée dans cet arrêt pour une « conception plus riche du droit administratif » ne devrait pas avoir l'effet (incontestablement non voulu) d'affaiblir la protection dont jouissent les droits garantis par la *Charte* (par. 34). Elle ne devrait pas non plus entraîner le transfert du fardeau de justification sur les épaules des demandeurs une fois que ceux-ci ont démontré l'existence d'une atteinte à leurs droits. Ce fardeau doit en conséquence continuer d'incomber à la partie à qui la *Charte* l'a imposé, c'est-à-dire l'État, dans tous les cas où le demandeur démontre qu'il y a eu atteinte aux droits que lui garantit la *Charte*. Pour les organismes administratifs étatiques, il s'agit de l'obligation imposée par l'article premier de la *Charte*, rien de plus.

[207] Dernière observation, je ne conteste pas le fait que les arrêts *Doré* et *Loyola* sont des précédents d'application obligatoire : M.M., par. 59. La suggestion selon laquelle le cadre d'analyse établi

this. Whether in response to judicial, academic, or other criticism, this Court has on numerous occasions built on its jurisprudence to provide for greater clarity and consistency in the law: see e.g. *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489, at para. 29; *Dunsmuir*, at para. 24; *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585, at para. 39. Indeed, *Doré* itself was an attempt at clarifying confusion in the jurisprudence (para. 23). These developments reflect how the common law works, through the application and, where warranted, the clarification of jurisprudence. On these matters, I can do no better than to quote Lord Denning from his book *The Discipline of Law* (1979), at p. 314:

Let it not be thought from this discourse that I am against the doctrine of precedent. I am not. It is the foundation of our system of case law. This has evolved by broadening down from precedent to precedent. By standing by previous decisions, we have kept the common law on a good course. All that I am against is its too rigid application — a rigidity which insists that a bad precedent must necessarily be followed. I would treat it as you would a path through the woods. You must follow it certainly so as to reach your end. But you must not let the path become too overgrown. You must cut out the dead wood and trim off the side branches, else you will find yourself lost in thickets and brambles. My plea is simply to keep the path to justice clear of obstructions which would impede it.

[208] Having set out what I view as the proper approach to the adjudication of *Charter* rights in the administrative context, I turn now to the main *Charter* right at issue in this appeal: freedom of religion as guaranteed by s. 2(*a*).

IV. Section 2(*a*) of the *Charter*

[209] The "freedom of conscience and religion" guaranteed by s. 2(*a*) is an essential part of life in Canadian society. From the most faithful believer

par les arrêts *Doré* et *Loyola* requiert des précisions n'a rien d'incompatible avec ce fait. Que ce soit à la suite de critiques émanant de sources judiciaires, universitaires ou autres, notre Cour a, à de nombreuses occasions, développé sa jurisprudence pour accroître la clarté et la cohérence du droit : voir, p. ex., *Canada c. Craig*, 2012 CSC 43, [2012] 2 R.C.S. 489, par. 29; *Dunsmuir*, par. 24; *Paul c. Colombie-Britannique (Forest Appeals Commission)*, 2003 CSC 55, [2003] 2 R.C.S. 585, par. 39. De fait, l'arrêt *Doré* constituait lui-même un effort en vue de dissiper la confusion dans la jurisprudence (par. 23). Ces développements reflètent la façon dont fonctionne la common law, à savoir par l'application et, lorsque cela s'impose, la clarification de la jurisprudence. Sur cette question, je ne saurais surpasser les propos suivants de lord Denning dans son ouvrage *The Discipline of Law* (1979), p. 314 :

[TRADUCTION] Je ne voudrais pas qu'on infère de mes propos que je suis opposé à la règle du précédent. Je ne le suis pas. Elle constitue le fondement de notre système de jurisprudence, qui a évolué en s'élargissant au fil des précédents. En suivant les décisions antérieures, nous avons permis à la common law de progresser dans la bonne direction. La seule chose à laquelle je m'oppose, c'est à l'application trop rigide de cette règle — une rigidité qui veut qu'un mauvais précédent doive nécessairement être suivi. Pour moi, cette règle est comme un sentier en forêt. Il faut certes l'emprunter pour se rendre à destination. Mais il faut prendre soin de ne pas laisser la végétation envahir le sentier. Vous devez couper le bois mort ainsi que les branches latérales, sinon vous vous perdrez dans les broussailles et les ronces. Je vous exhorte tout simplement à libérer le chemin qui mène à la justice de tout obstacle susceptible de l'entraver.

[208] Ayant énoncé ce que je considère être la démarche appropriée pour statuer sur les demandes fondées sur la *Charte* en contexte administratif, je vais maintenant examiner le principal droit garanti par la *Charte* qui est en jeu dans le présent pourvoi : la liberté de religion garantie par l'al. 2*a*).

IV. L'alinéa 2*a*) de la *Charte*

[209] La « liberté de conscience et de religion » garantie par l'al. 2*a*) est une partie essentielle de la vie au sein de la société canadienne. Elle protège le droit

to the most convinced atheist, it protects our right to believe in whatever we choose and to manifest those beliefs without fear of hindrance or reprisal. This freedom shields our most personal beliefs — among those that speak to the core of who we are and how we choose to live our lives — from interference by the state. Given the diversity of beliefs in our society and the manner in which those beliefs are manifested, the breadth of this freedom has the potential to create friction. Resolving this friction in a manner that reflects the purpose of s. 2(*a*) is, on occasion, a necessary exercise.

[210] The friction in this case arises between the religious freedom claimed by TWU and the mandate of the LSBC to regulate the legal profession in the public interest. This requires an analysis of s. 2(*a*) and its role in our jurisprudence. In what follows, I canvass the jurisprudence relative to s. 2(*a*) and I delineate the scope of its protection based on the purposive approach described above. I then have regard to the infringement alleged by the claimants. My conclusion is that the alleged infringement does not fall within the scope of freedom of religion.

A. *The Scope of Section 2(a) of the Charter*

[211] The scope of freedom of religion was first set out by Justice Dickson in *Big M*:

> The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.
>
> Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the *Charter* is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as

du plus fidèle des croyants et celui du plus convaincu des athées de croire ce qu'ils veulent et de manifester ces croyances sans crainte d'empêchements ou de représailles. Cette liberté protège nos croyances les plus personnelles — celles qui sont au cœur de notre identité et du mode de vie que nous avons choisi — contre toute ingérence de l'État. Compte tenu de la diversité des croyances au sein de notre société et de la façon dont se manifestent ces croyances, l'étendue de cette liberté est susceptible de causer des frictions. Il s'avère nécessaire, à l'occasion, de résoudre ces frictions d'une façon qui reflète l'objet de l'al. 2*a*).

[210] En l'espèce, il existe de telles frictions entre la liberté de religion revendiquée par TWU et le mandat de la LSBC, qui consiste à réglementer la profession juridique dans l'intérêt public. Une analyse de l'al. 2*a*) et de son rôle dans notre jurisprudence s'imposent. Dans ce qui suit, je vais examiner la jurisprudence relative à l'al. 2*a*) et délimiter l'étendue de sa protection, en fonction de l'interprétation téléologique décrite plus tôt. Je vais ensuite me pencher sur l'atteinte alléguée par les demandeurs. J'arrive à la conclusion que l'atteinte alléguée échappe à la portée de la liberté de religion.

A. *La portée de l'al. 2a) de la Charte*

[211] C'est le juge Dickson, dans l'arrêt *Big M*, qui a énoncé pour la première fois la portée de la liberté de religion :

> Le concept de la liberté de religion se définit essentiellement comme le droit de croire ce que l'on veut en matière religieuse, le droit de professer ouvertement des croyances religieuses sans crainte d'empêchement ou de représailles et le droit de manifester ses croyances religieuses par leur mise en pratique et par le culte ou par leur enseignement et leur propagation. Toutefois, ce concept signifie beaucoup plus que cela.
>
> La liberté peut se caractériser essentiellement par l'absence de coercition ou de contrainte. Si une personne est astreinte par l'État ou par la volonté d'autrui à une conduite que, sans cela, elle n'aurait pas choisi d'adopter, cette personne n'agit pas de son propre gré et on ne peut pas dire qu'elle est vraiment libre. L'un des objectifs importants de la *Charte* est de protéger, dans des limites raisonnables, contre la coercition et la contrainte. La

direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience. [Emphasis added; pp. 336-37.]

[212] We can draw two conclusions with respect to the nature of religious freedom under s. 2(*a*) from this foundational jurisprudence. The first is that religious freedom is based on the exercise of free will. This is because religion, at its core, involves a profoundly personal commitment to a set of beliefs and to various practices seen as following from those beliefs: *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 759; *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, at para. 39. The focus of religious freedom, then, is personal choice: *Amselem*, at para. 43. Whether this choice aligns with an official religion is not relevant. For the purposes of s. 2(*a*), what matters is that this choice is made freely.

[213] The second conclusion is a corollary of the first: religious freedom is also defined by the absence of constraint. From this perspective, religious freedom aims to protect individuals from interference with their religious beliefs and practices. Its character is noncoercive; its antithesis is coerced conformity. This understanding of religious freedom is rooted in the philosophical tradition that conceives of freedom in terms of the absence of interference with individual choice: see e.g. I. Berlin, *Four Essays on Liberty* (1969), at pp. 15-22. In the jurisprudence, this freedom applies to believers and nonbelievers alike as the *Charter* provides both freedom of religion and freedom from it: *Big M*, at p. 347; *Saguenay*, at para. 70.

coercition comprend non seulement la contrainte flagrante exercée, par exemple, sous forme d'ordres directs d'agir ou de s'abstenir d'agir sous peine de sanction, mais également les formes indirectes de contrôle qui permettent de déterminer ou de restreindre les possibilités d'action d'autrui. La liberté au sens large comporte l'absence de coercition et de contrainte et le droit de manifester ses croyances et pratiques. La liberté signifie que, sous réserve des restrictions qui sont nécessaires pour préserver la sécurité, l'ordre, la santé ou les mœurs publics ou les libertés et droits fondamentaux d'autrui, nul ne peut être forcé d'agir contrairement à ses croyances ou à sa conscience. [Je souligne; p. 336-337.]

[212] Cet arrêt de principe nous permet de tirer deux conclusions en ce qui a trait à la nature de la liberté de religion que garantit l'al. 2*a*). La première est que la liberté de religion repose sur l'exercice du libre arbitre. C'est le cas parce que, fondamentalement, la religion implique un engagement profondément personnel envers un ensemble de croyances et envers diverses pratiques considérées comme découlant de ces croyances : *R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713, p. 759; *Syndicat Northcrest c. Amselem*, 2004 CSC 47, [2004] 2 R.C.S. 551, par. 39. L'élément central de la liberté de religion est donc l'exercice du choix personnel : *Amselem*, par. 43. Que ce choix corresponde ou non à une religion officielle n'est pas pertinent. Ce qui importe pour l'application de l'al. 2*a*) est que le choix soit fait librement.

[213] La deuxième conclusion est le corollaire de la première : la liberté de religion se définit également par l'absence de contrainte. Considérée sous cet angle, la liberté de religion vise à protéger les personnes contre les entraves à l'observance de leurs croyances et pratiques religieuses. Elle présente un caractère non coercitif; son antithèse est la conformité par la contrainte. Cette interprétation de la liberté de religion tire son origine de la tradition philosophique qui conçoit la liberté au regard de l'absence d'entraves à la liberté de choisir de l'individu : voir, p. ex., I. Berlin, *Four Essays on Liberty* (1969), p. 15-22. Dans la jurisprudence, cette liberté s'applique aux croyants comme aux incroyants, puisque la *Charte* protège à la fois la liberté de religion et celle de ne pas être contraint d'observer une religion : *Big M*, p. 347; *Saguenay*, par. 70.

[214] This emphasis on the free choice of the believer is reflected in the jurisprudence. In *Amselem*, for instance, the issue was whether Orthodox Jews could build succahs on the balconies of their condominium apartments for the duration of the Jewish holiday of Succot. Those who managed the apartment buildings opposed this on the basis that it violated bylaws of the condominium. While this case was decided under the Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12 — which applies to the conduct of private individuals — the Court was explicit in stating that its decision was equally applicable under the Canadian *Charter* (para. 37). Writing for the majority, Justice Iacobucci explained that, at the first stage of the religious freedom analysis, an individual claimant need only demonstrate a sincere adherence to a belief or practice having a nexus with religion (para. 46). The focus of this approach was on the choice of the believer, regardless of whether the belief or practice was recognized by an official religion. Thus, it did not matter whether Orthodox Judaism objectively required the claimants to build individual succahs on their balconies. All that mattered was the claimants' sincere belief in their religious obligation to do so and their choice to act on that belief.

[214] Cette importance accordée à la liberté de choisir du croyant ressort également de la jurisprudence. Dans *Amselem*, par exemple, la question en litige consistait à décider si des Juifs orthodoxes pouvaient construire des souccahs sur les balcons de leurs condominiums pendant la fête religieuse juive du Souccoth. Les gestionnaires de l'immeuble en question s'opposaient à cette pratique, plaidant qu'elle violait les règlements régissant cet immeuble. Bien que cette affaire ait été tranchée en vertu de la *Charte des droits et libertés de la personne* du Québec, L.R.Q., c. C-12 — qui s'applique à la conduite des particuliers — la Cour a explicitement indiqué que sa décision était également applicable aux affaires relevant de la *Charte* canadienne (par. 37). S'exprimant au nom des juges majoritaires, le juge Iacobucci a expliqué que, à la première étape de l'analyse de la liberté de religion, le demandeur est uniquement tenu de démontrer qu'il adhère sincèrement à des pratiques ou croyances ayant un lien avec une religion (par. 46). Cette démarche est axée sur le choix du croyant, peu importe que la croyance ou la pratique soit reconnue par une religion officielle. Par conséquent, il importait peu que le judaïsme orthodoxe exige objectivement des demandeurs qu'ils construisent des souccahs individuelles sur leur balcon. Tout ce qui importait était l'existence d'une croyance sincère de la part des demandeurs à l'égard de leur obligation religieuse de le faire, ainsi que le choix de ces derniers d'agir conformément à cette croyance.

[215] The majority decision in *Multani* provides a further example. In that case, the issue was whether Gurbaj Singh Multani, a 13-year-old Sikh boy, could bring his kirpan to school notwithstanding the refusal of the school board to grant him an exemption from its prohibition against bringing weapons to school. As the school board had effectively forced him to choose between "leaving his kirpan at home and leaving the public school system", Multani was only required to show that his "personal and subjective belief in the religious significance of the kirpan" was sincere in order to demonstrate that the decision infringed his rights under s. 2(*a*) (paras. 37-41). The fact that other Sikhs might have compromised on their beliefs when faced with the prohibition was not relevant (para. 39). The only

[215] L'opinion majoritaire exprimée dans l'arrêt *Multani* constitue un autre exemple. Dans cette affaire, il s'agissait de décider si Gurbaj Singh Multani, un garçon sikh de 13 ans, pouvait porter son kirpan à l'école malgré le refus de la commission scolaire de lui accorder une exemption à l'égard de la règle prohibant le port d'armes à l'école. Comme la commission scolaire le contraignait effectivement à choisir entre « laisser son kirpan à la maison ou [. . .] quitter l'école publique », pour établir que cette décision portait atteinte aux droits qui lui sont garantis par l'al. 2*a*), M. Multani était uniquement tenu de prouver que sa « croyance personnelle et subjective en la signification religieuse du kirpan » était sincère (par. 37-41). Le fait que d'autres Sikhs aient pu accepter de faire un compromis quant à leurs

relevant factor was the personal choice by Multani to adhere to his beliefs.

[216] As a final example, the decision in *Hutterian Brethren* is illustrative. In that case, the Hutterites of Wilson Colony sought an exemption from an Alberta law that required all drivers' licences to display a photograph of the licensee. The members of the Colony sincerely believed that permitting their photo to be taken violated the Second Commandment. Given this belief, the law forced individual Colony members to choose between their freely held religious beliefs and obtaining drivers' licences. Although a majority of this Court ultimately upheld the provincial law, the entire Bench accepted that it infringed s. 2(*a*).

[217] This focus on the individual choice of believers does not detract from the communal aspect of religion. For many religions, community is critical to manifesting faith. Whether through communal worship, religious education, or good works, the community is often the public face of religion. In other words, it is how the religion engages with the world. To borrow from Justice Sachs then of the South African Constitutional Court:

Certain religious sects do turn their back on the world, but many major religions regard it as part of their spiritual vocation to be active in the broader society. Not only do they proselytise through the media and in the public square, religious bodies play a large part in public life, through schools, hospitals and poverty relief. They command ethical behaviour from their members and bear witness to the exercise of power by State and private agencies; they promote music, art and theatre; they provide halls for community activities, and conduct a great variety of social activities for their members and the general public. They are part of the fabric of public life, and constitute active elements of the diverse and pluralistic nation contemplated by the Constitution. Religion is not just a question of belief

croyances en présence d'une telle interdiction n'était pas pertinent (par. 39). Le seul facteur pertinent était le choix personnel de M. Multani de se conformer à ses croyances.

[216] Comme dernier exemple, l'arrêt *Hutterian Brethren* illustre bien cette question. Dans cette affaire, les huttérites de la colonie Wilson ont demandé à être exemptés de l'application d'une loi albertaine exigeant que tous les permis de conduire comportent la photo de leur titulaire. Les membres de la colonie croyaient sincèrement que la prise de leur photo violait le second commandement. Du fait de cette croyance, la loi contraignait les membres de la colonie, sur une base individuelle, à choisir entre les croyances religieuses auxquelles ils adhéraient librement et l'obtention d'un permis de conduire. Bien que les juges majoritaires de la Cour aient en définitive confirmé la validité de la loi provinciale, tous les membres de la formation s'accordaient pour dire qu'elle portait atteinte à l'al. 2*a*).

[217] Cette importance accordée au libre choix individuel des croyants n'atténue en rien l'aspect collectif de la religion. Dans beaucoup de religions, la communauté est essentielle à la manifestation de la foi. Que ce soit au travers de pratiques de nature collective — culte, éducation religieuse ou bonnes œuvres —, la communauté est souvent le visage public de la religion. Autrement dit, c'est de cette façon que la religion interagit avec le monde. Je me permets de reprendre les propos suivants du juge Sachs, alors membre de la Cour constitutionnelle de l'Afrique du Sud :

[TRADUCTION] Certaines sectes religieuses tournent effectivement le dos au monde, mais bon nombre de grandes religions considèrent que le fait pour leurs membres d'être actifs dans la société en général fait partie intégrante de leur vocation spirituelle. Non seulement des organismes religieux font-ils du prosélytisme dans les médias ou sur les places publiques, mais ils jouent un rôle considérable dans la vie publique, dans les écoles, les hôpitaux et le secteur de la lutte contre la pauvreté. Ils exigent de leurs membres qu'ils aient un comportement éthique et qu'ils respectent l'exercice par les organismes étatiques et privés de leurs pouvoirs; ils font la promotion de la musique, de l'art et du théâtre; ils disposent de salles servant à des activités à caractère social, et organisent un large éventail

or doctrine. It is part of a way of life, of a people's temper and culture. [Footnotes omitted.]

(*Christian Education South Africa v. Minister of Education*, [2000] ZACC 11, 2000 (4) S.A. 757, at para. 33)

[218] This communal aspect of religion is recognized in our jurisprudence. As Justice LeBel stated in *Hutterian Brethren*, "[r]eligion is about religious beliefs, but also about religious relationships" (para. 182). This dimension of religious freedom was central to the decision of this Court in *Loyola*, where the majority held that "[r]eligious 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" (para. 60). In this respect, I agree with the majority that "[t]he ability of religious adherents to come together and create cohesive communities of belief and practice is an important aspect of religious freedom under s. 2(*a*)": M.R., at para. 64.

[219] While acknowledging this communal aspect, I underscore that religious freedom is premised on the personal volition of individual believers. Although religious communities may adopt their own rules and membership requirements, the foundation of the community remains the voluntary choice of individual believers to join together on the basis of their common faith. Therefore, in the context of this appeal, I would decline to find that TWU, as an institution, possesses rights under s. 2(*a*). I note that, even if TWU did possess such rights, these would not extend beyond those held by the individual members of the faith community. For the remainder of the analysis, I will employ the term "claimants"

d'activités sociales à l'intention de leurs membres et du grand public. Ils font partie du tissu des relations sociales et constituent des éléments actifs de la nation diverse et pluraliste envisagée par la Constitution. La religion n'est pas seulement une question de croyances ou de doctrines. Elle fait partie d'un mode de vie, elle est un aspect du tempérament et de la culture d'un peuple. [Notes en bas de page omises.]

(*Christian Education South Africa c. Minister of Education*, [2000] ZACC 11, 2000 (4) S.A. 757, par. 33)

[218] La jurisprudence de la Cour reconnaît cet aspect collectif de la religion. Comme l'a affirmé le juge LeBel dans *Hutterian Brethren*, « [l]a religion a trait aux croyances religieuses, mais aussi [aux] rapports religieux » (par. 182). Cette dimension de la liberté de religion a constitué un aspect central de la décision de la Cour dans *Loyola*, où les juges majoritaires ont conclu que « [l]a 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 » (par. 60). À cet égard, je suis d'accord avec les juges majoritaires pour dire que « [l]a capacité des fidèles de se rassembler et de créer des communautés de croyance et de pratique qui se caractérisent par leur cohésion est un aspect important de la liberté de religion garantie par l'alinéa 2*a*) » : M.M., par. 64.

[219] Quoique je reconnaisse cet aspect collectif, je souligne que la liberté de religion repose sur l'exercice par chaque croyant de sa volonté personnelle. Même si les communautés religieuses peuvent adopter leurs propres règles de fonctionnement et conditions d'adhésion, l'assise de la communauté demeure le choix volontaire que font les croyants, individuellement, de se regrouper sur la base de leur foi commune. Par conséquent, dans le contexte du présent pourvoi, je refuse de conclure que TWU possède, en tant qu'institution, des droits garantis par l'al. 2*a*). Je ferais remarquer que, même si TWU possédait effectivement de tels droits, ceux-ci ne seraient pas plus étendus que ceux que possèdent,

to refer to the individual claimants in this appeal: Mr. Volkenant and other members of the evangelical Christian community at TWU. This excludes TWU as an institution.

[220] To summarize, our jurisprudence defines the protection of s. 2(*a*) as extending to the freedom of individuals to believe in whatever they choose and to manifest those beliefs. While s. 2(*a*) recognizes the communal aspects of religion, its protection remains predicated on the exercise of free will by individuals — namely, the choice of each believer to adhere to the tenets of his or her faith.

B. *The Alleged Infringement of Section 2(a)*

[221] The claimants in this appeal argue that the decision of the LSBC infringes s. 2(*a*) because it interferes with their ability to attend an accredited law school at TWU with its mandatory Covenant. For the claimants, the Covenant is integral to their religious identity; it provides the basis for living and learning within an academic community based on the tenets of evangelical Christianity. The LSBC, however, found that the Covenant's mandatory proscription of certain forms of sexual intimacy conflicted with its mandate to regulate the legal profession in the public interest. The issue is whether the LSBC infringed s. 2(*a*) by refusing to accredit the proposed law school at TWU on this basis.

[222] To establish an infringement of freedom of religion, the claimants must demonstrate that (1) they sincerely believe in a practice or belief that has a nexus with religion, and that (2) the impugned state conduct interferes, in a manner that is nontrivial or not insubstantial, with their ability to act in accordance with that practice or belief: *Amselem*, at para. 62; *Multani*, at para. 34; *Ktunaxa*, at para. 68.

individuellement, les membres de la communauté religieuse. Pour la suite de l'analyse, je vais employer le mot « demandeurs » pour désigner les différents demandeurs au présent pourvoi, soit M. Volkenant et les autres membres de la communauté chrétienne évangélique à TWU. Ce terme exclut TWU en tant qu'institution.

[220] Pour résumer, selon la jurisprudence de notre Cour, l'al. 2*a*) protège la liberté de chaque personne d'adhérer aux croyances de son choix et de les manifester. Bien que l'al. 2*a*) tienne compte des aspects collectifs de la religion, sa protection demeure axée sur l'exercice par chaque individu de son libre arbitre— c'est-à-dire la décision de chaque croyant d'adhérer aux préceptes de sa foi.

B. *L'atteinte à l'al. 2a) reprochée*

[221] Dans le présent pourvoi, les demandeurs soutiennent que la décision de la LSBC porte atteinte à l'al. 2*a*), du fait qu'elle les empêche de fréquenter, à TWU, une faculté de droit agréée dotée du *Covenant* obligatoire. Pour les demandeurs, le *Covenant* fait partie intégrante de leur identité religieuse; il jette les assises de la vie et de l'apprentissage au sein d'une communauté universitaire adhérant aux préceptes du christianisme évangélique. Cependant, la LSBC a conclu que la proscription impérative par le *Covenant* de certaines formes d'intimité sexuelle allait à l'encontre de son propre mandat, qui consiste à réglementer la profession juridique dans l'intérêt public. Il s'agit de savoir si la LSBC a porté atteinte à l'al. 2*a*) en refusant, pour cette raison, d'agréer la faculté de droit proposée par TWU.

[222] Pour démontrer l'existence d'une atteinte à la liberté de religion, les demandeurs doivent établir (1) qu'ils croient sincèrement à une pratique ou à une croyance ayant un lien avec la religion, et (2) que la conduite qu'ils reprochent à l'État entrave d'une manière plus que négligeable ou insignifiante leur capacité de se conformer à cette pratique ou croyance : *Amselem*, par. 62; *Multani*, par. 34; *Ktunaxa*, par. 68.

(1) Sincerity

[223] The first step of the infringement analysis requires the claimant to demonstrate that "he or she sincerely believes in a practice or belief that has a nexus with religion": *Multani*, at para. 34; *Amselem*, at para. 56; *Ktunaxa*, at para. 68. As this Court specified in *Multani*, "[t]he fact that different people practise the same religion in different ways does not affect the validity of the case of a person alleging that his or her freedom of religion has been infringed. What an individual must do is show that he or she sincerely believes that a certain belief or practice is required by his or her religion" (para. 35 (emphasis added)). This religious belief or practice must be asserted in good faith and must not be fictitious, capricious, or an artifice: *Amselem*, at para. 52; *Multani*, at para. 35.

[224] The assessment of sincerity requires a precise understanding of the belief or practice at issue. In this appeal, the belief at issue is grounded in TWU's religious roots. Founded in 1962 by the Evangelical Free Church, TWU has always sought to provide its students with an education grounded in the values and philosophy of evangelical Christianity. Since 1969, the *Trinity Western University Act* has authorized TWU "to provide for young people of any race, colour, or creed university education in the arts and sciences with an underlying philosophy and viewpoint that is Christian": *Trinity Western University Act*, S.B.C. 1969, c. 44, s. 3(2).

[225] Part of the religious philosophy espoused by TWU includes a strong opposition to all forms of sexual intimacy outside of heterosexual marriage. This belief is reflected in the Covenant, which embodies the evangelical Christian values to which TWU is committed. Regardless of their personal beliefs, all TWU students must read and abide by the terms of the Covenant in order to attend the university.

[226] At this point, it is useful to set out which beliefs and practices are clearly *not* at issue. The decision of the LSBC does not interfere with the claimants' freedom to believe that sexual intimacy

(1) Sincérité

[223] À la première étape de l'analyse relative à l'atteinte, le demandeur doit démontrer « qu'il croit sincèrement à une pratique ou à une croyance ayant un lien avec la religion » : *Multani*, par. 34; *Amselem*, par. 56; *Ktunaxa*, par. 68. Comme l'a précisé notre Cour dans l'arrêt *Multani*, « [l]e fait que plusieurs personnes pratiquent la même religion de façon différente n'invalide pas pour autant la demande de celui qui allègue une violation à sa liberté de religion. Ce qui importe, c'est que cette personne démontre qu'elle croit sincèrement que sa religion lui impose une certaine croyance ou pratique » (par. 35 (je souligne)). Cette croyance ou pratique doit être avancée de bonne foi, elle ne doit pas être fictive ou arbitraire, et elle ne doit pas constituer un artifice : *Amselem*, par. 52; *Multani*, par. 35.

[224] Pour évaluer la sincérité, il importe de bien comprendre la croyance ou la pratique en cause. La croyance visée en l'espèce découle des origines religieuses de TWU. Fondée en 1962 par l'Église évangélique libre, TWU a toujours cherché à assurer à ses étudiants un enseignement fondé sur les valeurs et la philosophie du christianisme évangélique. Depuis 1969, TWU est légalement autorisée à [TRADUCTION] « offrir aux jeunes de toute race, couleur ou croyance une formation universitaire dans le domaine des arts et des sciences reposant sur une philosophie et une perspective chrétiennes » : *Trinity Western University Act*, S.B.C. 1969, c. 44, par. 3(2).

[225] La philosophie religieuse adoptée par TWU préconise notamment une vive opposition à toute forme d'intimité sexuelle en dehors du mariage hétérosexuel. Cette croyance est exprimée dans le *Covenant*, lequel incarne les valeurs chrétiennes évangéliques qui sont chères à TWU. Quelles que soient leurs croyances personnelles, tous les étudiants doivent lire et observer les conditions du *Covenant* pour être admis à fréquenter cette université.

[226] À ce stade-ci, il est utile de préciser les croyances et pratiques qui *ne* sont manifestement *pas* en jeu. La décision de la LSBC ne fait pas entrave à la liberté des demandeurs de croire que l'intimité

outside heterosexual marriage "violates the sacredness of marriage between a man and a woman": TWU Covenant, A.R., vol. III, at p. 403. The claimants remain free to hold this belief.

[227] Similarly, the LSBC does not interfere with the claimants' ability to act in accordance with their beliefs about sexual intimacy. Unlike the claimants in *Multani* and *Hutterian Brethren*, for instance, Mr. Volkenant and other members of the evangelical Christian community at TWU remain free to act according to their religious beliefs in that they can personally abide by the Covenant's proscription against sexual intimacy that "violates the sacredness of marriage between a man and a woman".

[228] What, then, is the religious belief or practice at issue? In my view, it relates to the religious proscription of sexual intimacy outside heterosexual marriage and the importance of imposing this proscription on all students attending the proposed law school at TWU. As the majority has stated, by creating an academic environment where their faith is not constantly tested, the mandatory Covenant "makes it easier" for the claimants to act according to their beliefs: M.R., at para. 72. It ensures that all students are obliged to obey "the Authority of Scripture": M.R., at para. 71. This, in turn, "helps create an environment in which TWU students can grow spiritually": M.R., at para. 71.

[229] By virtue of being denied the opportunity of attending an accredited law school with a mandatory covenant, the claimants allege that the LSBC has infringed (1) their belief in the importance of attending an accredited law school with a mandatory covenant and, (2) more importantly, their capacity to act in accordance with that belief by attending the proposed law school at TWU: R.F., at para. 96.

[230] This stage of the analysis therefore turns on the sincerity of the claimants' belief in the importance of attending the proposed law school with its

sexuelle en dehors du mariage hétérosexuel [TRADUCTION] « viole le caractère sacré du mariage entre un homme et une femme » : *Covenant* de TWU, d.a., vol. III, p. 403. Les demandeurs demeurent libres de maintenir une telle croyance.

[227] De même, la LSBC ne fait pas entrave à la capacité des demandeurs de se conformer à leurs croyances en matière d'intimité sexuelle. Contrairement aux demandeurs dans les affaires *Multani* et *Hutterian Brethren*, par exemple, M. Volkenant et les autres membres de la communauté chrétienne évangélique de TWU demeurent libres d'agir selon leurs croyances religieuses en ce qu'ils peuvent personnellement se conformer à la proscription établie par le *Covenant* à l'égard de toute intimité sexuelle qui [TRADUCTION] « viole le caractère sacré du mariage entre un homme et une femme ».

[228] Quelle est donc alors la croyance ou pratique religieuse en cause? Selon moi, il s'agit de la proscription religieuse de toute intimité sexuelle en dehors du mariage hétérosexuel et de l'importance d'imposer cette proscription à tous les éventuels étudiants de la faculté de droit proposée par TWU. Comme l'ont indiqué les juges majoritaires, en créant un milieu universitaire où la foi des demandeurs n'est pas constamment mise à l'épreuve, le *Covenant* obligatoire « fait en sorte qu'il est plus facile » pour ceux-ci d'agir en conformité avec leurs croyances : M.M., par. 72. Il fait en sorte que tous les étudiants sont tenus d'obéir aux « commandements des Écritures » : M.M., par. 71, situation qui « contribue donc à créer un milieu dans lequel les étudiants de TWU peuvent croître spirituellement » : M.M., par. 71.

[229] Les demandeurs prétendent qu'en leur refusant la possibilité de fréquenter une faculté de droit agréée dotée d'un covenant obligatoire la LSBC a porté atteinte (1) à leur croyance en l'importance de fréquenter une faculté de droit dotée d'un tel covenant et (2), plus important encore, à leur capacité d'agir conformément à cette croyance en fréquentant la faculté de droit proposée par TWU : m.i., par. 96.

[230] Par conséquent, cette étape-ci de l'analyse s'attache à la sincérité de la croyance des demandeurs en l'importance de fréquenter la faculté de droit

mandatory Covenant. The majority concludes that it "is clear from the record that evangelical members of TWU's community sincerely believe that studying in a community defined by religious beliefs in which members follow particular religious rules of conduct contributes to their spiritual development": M.R., at para. 70.

[231] With respect, I question whether this conclusion misses the mark. Does it suffice for the purposes of s. 2(*a*) that the claimants sincerely believe that studying in a community defined by religious beliefs *contributes* to their spiritual development (M.R., at para. 70)? Or must the claimants rather show that they sincerely believe that doing so is a practice required by their religion (*Multani*, at para. 35)? The claimants have argued the former on the basis that the jurisprudence only requires that they have a belief that "calls for a particular line of conduct", irrespective of whether that practice is "mandatory or perceived-as-mandatory": R.F., at para. 94, quoting *Amselem*, at paras. 47 and 56.

[232] A careful reading of the jurisprudence does not support the claimants' position in this appeal. As this Court set out in *Amselem*, the question of whether a belief or practice is objectively required by official religious dogma is irrelevant (para. 47). It suffices that the claimant demonstrate a sincere belief, "having a nexus with religion, which calls for a particular line of conduct", irrespective of whether that "practice or belief is required by official religious dogma or is in conformity with the position of religious officials": *Amselem*, at para. 56 (emphasis added). All that matters, then, is that the claimant sincerely believes that their religion compels them to act, regardless of whether that line of conduct is "objectively or subjectively obligatory": *Amselem*, at para. 56. This is reflected in *Multani*, which states that all "an individual must do is show that he or she sincerely believes that a certain belief or practice is required by his or her religion" (para. 35 (emphasis added)).

proposée avec un covenant obligatoire. Les juges majoritaires arrivent à la conclusion qu'il « ressort clairement du dossier que les membres évangéliques de la communauté de TWU croient sincèrement que le fait d'étudier au sein d'une communauté définie par des croyances religieuses où les membres suivent certaines règles de conduite à caractère religieux contribue à leur développement spirituel » : M.M., par. 70.

[231] Avec égards, je me demande si cette conclusion ne rate pas la cible. Est-il suffisant, pour l'application de l'al. 2*a*) de la *Charte*, que les demandeurs croient sincèrement que le fait d'étudier au sein d'une communauté définie par des croyances religieuses *contribue* à leur croissance spirituelle (M.M., par. 70)? Ou est-ce que les demandeurs devraient plutôt être tenus de démontrer qu'ils croient sincèrement qu'étudier dans un tel milieu constitue une pratique que leur religion leur impose (*Multani*, par. 35)? Les demandeurs ont plaidé la première thèse, au motif que, suivant la jurisprudence, il suffit qu'ils adhèrent à une croyance qui « requiert une conduite particulière », peu importe que cette pratique soit « obligatoire ou perçue comme telle » : m.i., par. 94, citant *Amselem*, par. 47 et 56.

[232] Il ressort d'un examen attentif de la jurisprudence que celle-ci n'appuie pas la thèse des demandeurs dans le présent pourvoi. Comme l'a indiqué notre Cour dans l'arrêt *Amselem*, il n'est pas pertinent de savoir si la croyance ou la pratique est objectivement prescrite par un dogme religieux officiel (par. 47). Il suffit que le demandeur prouve qu'il possède une croyance sincère, « qui est liée à la religion et requiert une conduite particulière », et ce, que cette croyance ou pratique « soit ou non requise par un dogme religieux officiel ou conforme à la position de représentants religieux » : *Amselem*, par. 56 (je souligne). À mon avis, la seule chose qui importe est que le demandeur croie sincèrement que sa religion le contraint à agir, indépendamment du fait que cette conduite soit « objectivement ou subjectivement obligatoire » : *Amselem*, par. 56. Cette conclusion est reprise dans l'arrêt *Multani*, où il est écrit que tout « ce qui importe, c'est que [la] personne démontre qu'elle croit sincèrement que sa religion lui impose une certaine croyance ou pratique » (par. 35 (je souligne)).

[233] If this reading is correct, then much of the affidavit evidence relied on by my colleagues undermines the view that the claimants have advanced a sincere belief or practice that is required by their religion. The majority states that "the limitation in this case is of minor significance because a mandatory covenant is, on the record before us, not absolutely required for the religious practice at issue": M.R., at para. 87. It explains that "the interference in this case is limited because the record makes clear that prospective TWU law students view studying law in a learning environment infused with the community's religious beliefs as preferred (rather than necessary) for their spiritual growth": M.R., at para. 88. This evidence should have been considered as part of the infringement analysis because it runs counter to the claimants showing that they sincerely believe that their religious beliefs require a certain practice, per *Multani*, at para. 35.

[233] Si cette interprétation est juste, les témoignages par voie d'affidavit sur lesquels s'appuient mes collègues jettent pour la plupart de sérieux doutes sur l'opinion selon laquelle les demandeurs ont fait valoir une croyance ou une pratique sincère requise par leur religion. Les juges de la majorité affirment que « la restriction en l'espèce est d'importance mineure parce que, selon le dossier dont nous disposons, il n'est pas absolument nécessaire d'adhérer à un covenant obligatoire pour se livrer à la pratique religieuse en cause » : M.M., par. 87. Ils expliquent que « l'atteinte en l'espèce est limitée parce qu'il ressort clairement du dossier que les éventuels étudiants en droit de TWU considèrent qu'il est préférable (plutôt que nécessaire) pour leur croissance spirituelle d'étudier le droit dans un milieu d'apprentissage imprégné des croyances religieuses de la communauté » : M.M., par. 88. Cette preuve aurait dû être prise en compte dans le cadre de l'analyse relative à l'atteinte, puisqu'elle va à l'encontre de la prétention des demandeurs selon laquelle ils croient sincèrement que leurs croyances religieuses commandent l'observance d'une certaine pratique : *Multani*, par. 35.

[234] With respect, I do not see how the majority can have it both ways. The logic of their position seems to come down to this: the claimants have a preference for a practice that is not required, but is nonetheless protected by s. 2(*a*); however, as the practice is not required, but only preferred, its infringement is of little consequence. In my view, this analysis reflects an overbroad delineation of the right, leading to the infringement being justified too readily.

[234] Soit dit en tout respect, je ne vois pas comment les juges majoritaires peuvent affirmer une chose et son contraire. La logique derrière leur raisonnement semble être la suivante : les demandeurs manifestent une préférence pour une pratique qui n'est pas requise, mais qui est néanmoins protégée par l'al. 2*a*) de la *Charte*; toutefois, comme cette pratique n'est pas requise, mais constitue plutôt une préférence, l'atteinte qui y est portée a peu d'incidence. J'estime que cette analyse reflète une délimitation trop large du droit en cause, ce qui amène à conclure trop aisément à la justification de l'atteinte.

[235] Despite this concern, I proceed on the assumption that the claimants sincerely believe in the importance of studying in an environment where all students abide by the Covenant. For the purposes of my analysis, I will assume that the first stage of the analysis is satisfied.

[235] Malgré cette préoccupation, je vais néanmoins poursuivre en supposant que les demandeurs croient sincèrement qu'il est important d'étudier dans un milieu où tous les étudiants se conforment au *Covenant*. Pour les besoins de mon examen, je vais supposer que la première étape de l'analyse est franchie.

(2) Interference

[236] The second stage requires an objective analysis of the interference caused by the impugned state action. This interference must be more than trivial or insubstantial: *R. v. Jones*, [1986] 2 S.C.R. 284, at p. 314; *Edwards Books*, at p. 759; *Saguenay*, at para. 85; *Ktunaxa*, at para. 70. In this case, the claimants must show that the decision of the LSBC is capable of interfering with their belief in the importance of attending law school with a mandatory covenant or with their capacity to act in accordance with that belief by attending the proposed law school at TWU.

[237] In essence, the claimants have argued that the LSBC has interfered with their ability to study law in an academic environment where all students are required to abide by a set religious code of conduct. For the claimants, the rules set out in the Covenant — and, in particular, the proscription against sexual intimacy outside heterosexual marriage — must be applied to all students who attend law school at TWU. Their argument is that the refusal of the LSBC to accredit the proposed law school on this basis infringes their rights under s. 2(*a*). Thus, the claimants seek the protection of s. 2(*a*) not only for their own beliefs and the right to abide by them. They seek the protection of s. 2(*a*) for their effort to ensure that all students attending TWU abide by these beliefs — regardless of whether they personally share them.

[238] The majority implicitly accepts this when it writes that "[t]he Covenant is a commitment to enforcing a religiously-based code of conduct, not just in respect of one's own behaviour, but also in respect of other members of the TWU community. The effect of the mandatory Covenant is to restrict the conduct of others": M.R., at para. 99 (citation omitted; emphasis deleted).

(2) L'entrave

[236] La seconde étape consiste à procéder à une analyse objective de l'entrave causée par la mesure étatique contestée. Cette entrave doit être plus que négligeable ou insignifiante : *R. c. Jones*, [1986] 2 R.C.S. 284, p. 314; *Edwards Books*, p. 759; *Saguenay*, par. 85; *Ktunaxa*, par. 70. Dans l'affaire qui nous intéresse, les demandeurs doivent prouver que la décision de la LSBC est susceptible d'entraver le respect de leur croyance en l'importance de fréquenter une faculté de droit dotée d'un covenant obligatoire ou leur capacité de se conformer à cette croyance en fréquentant la faculté de droit proposée par TWU.

[237] Essentiellement, les demandeurs plaident que la LSBC entrave leur capacité d'étudier le droit dans un milieu d'apprentissage où tous les étudiants sont tenus de respecter un code de conduite religieux déterminé. Les demandeurs estiment que les règles prescrites par le *Covenant* — plus particulièrement la proscription de l'intimité sexuelle en dehors du mariage entre un homme et une femme — doivent s'appliquer à tous les étudiants de la faculté de droit de TWU. Leur argument consiste à dire que la décision de la LSBC de refuser, pour ce motif, d'agréer la faculté de droit proposée par TWU porte atteinte aux droits qui leur sont garantis par l'al. 2*a*) de la *Charte*. Il s'ensuit que les demandeurs n'invoquent pas la protection de l'al. 2*a*) uniquement à l'égard de leurs propres croyances et de leur droit de se conformer à ces croyances. Ils sollicitent également la protection de cet alinéa au soutien de leurs efforts en vue d'assurer l'observance de ces croyances par tous les étudiants fréquentant TWU — que ceux-ci partagent personnellement ou non ces croyances.

[238] Les juges majoritaires reconnaissent implicitement ce qui précède lorsqu'ils écrivent que « [l]e *Covenant* est un engagement à assurer le respect d'un code de conduite fondé sur des croyances religieuses, à l'égard non seulement de son propre comportement, mais aussi de celui des autres membres de la communauté de TWU [. . .] Le *Covenant* obligatoire a pour effet de limiter la conduite d'autrui » : M.M., par. 99 (référence omise; italique omis).

[239] This is where the proper delineation of the scope of s. 2(*a*) comes into play. As discussed, the freedom of religion protected by s. 2(*a*) is premised on two principles: the exercise of free will and the absence of constraint. Where the protection of s. 2(*a*) is sought for a belief or practice that constrains the conduct of nonbelievers — in other words, those who have freely chosen *not* to believe — the claim falls outside the scope of the freedom. In other words, interference with such a belief or practice is not an infringement of s. 2(*a*) because the coercion of nonbelievers is not protected by the *Charter*.

[239] C'est à ce stade-ci que la délimitation adéquate de la portée de l'al. 2*a*) entre en jeu. Comme il a été expliqué plus tôt, la liberté de religion protégée par cet alinéa repose sur deux principes : l'exercice du libre arbitre et l'absence de contrainte. Lorsque la demande sollicite la protection de l'al. 2*a*) de la *Charte* à l'égard d'une croyance ou pratique qui impose des contraintes à la conduite d'incroyants — c'est-à-dire des personnes qui ont délibérément choisi de *ne pas* croire —, cette demande échappe à la portée de la liberté de religion. En d'autres termes, une entrave à l'observance d'une telle croyance ou pratique ne constitue pas une atteinte à l'al. 2*a*), étant donné que le fait d'exercer de la coercition à l'endroit d'incroyants n'est pas protégé par la *Charte*.

[240] On the record before us, the student body at TWU is not coextensive with the religious community of evangelical Christians who attend TWU. Although TWU teaches from a Christian perspective, its statutory mandate requires that its admissions policy not be restricted to Christian students. To the contrary, TWU admits students from all faiths and permits them to hold diverse opinions on moral, ethical, and religious issues. TWU itself states that it is open to "all students who qualify for admission, recognizing that not all affirm the theological views that are vital to the University's Christian identity": TWU Covenant, A.R., vol. III, at p. 405.

[240] Au vu du dossier dont nous disposons, le corps étudiant de TWU n'est pas composé uniquement de chrétiens évangéliques. Bien que TWU offre son enseignement dans une perspective chrétienne, la mission que lui confie la loi lui interdit de limiter l'admission à ses programmes aux seuls étudiants chrétiens. Au contraire, TWU accueille des étudiants de toutes les confessions et leur permet d'avoir des opinions diverses à l'égard de questions morales, éthiques et religieuses. TWU déclare elle-même être ouverte à [TRADUCTION] « tous les étudiants admissibles, tout en reconnaissant que les étudiants ne souscrivent pas tous aux opinions théologiques qui constituent des éléments fondamentaux de l'identité chrétienne de l'université » : *Covenant* de TWU, d.a., vol. III, p. 405.

[241] This speaks to the argument that TWU is not for everyone. To the contrary, TWU, by virtue of its enabling statute, *literally* is for everyone. Its aim is to "provide for young people of any race, colour, or creed university education in the arts and sciences with an underlying philosophy and viewpoint that is Christian": *Trinity Western University Act*, s. 3(2). Accordingly, TWU must open the doors of its proposed law school to members of other religions as well as to nonbelievers.

[241] Voilà qui répond à l'argument selon lequel TWU n'est pas une institution pour tous. Au contraire, de par sa loi constitutive, TWU est *littéralement* ouverte à tous. Elle vise à [TRADUCTION] « offrir aux jeunes de toute race, couleur ou croyance une formation universitaire dans le domaine des arts et des sciences reposant sur une philosophie et une perspective chrétiennes » : *Trinity Western University Act*, par. 3(2). Par conséquent, TWU doit ouvrir les portes de la faculté de droit qu'elle se propose de créer aux adeptes d'autres religions ainsi qu'aux incroyants.

[242] The claimants seek to square this circle by requiring adherence to the Covenant by all who attend the proposed law school. Their attempt to do so is not protected by the *Charter*. This is because — by

[242] Les demandeurs tentent de remédier à ce paradoxe en obligeant tous les éventuels étudiants de la faculté de droit proposée à se conformer au *Covenant*. Ce qu'ils tentent de faire n'est pas protégé

means of the mandatory Covenant — the claimants seek to require others outside their religious community to conform to their religious practices. I can find no decision by this Court to the effect that s. 2(*a*) protects such a right to impose adherence to religious practices on those who do not voluntarily adhere thereto.

[243] Almost every decision of this Court finding an infringement of s. 2(*a*) involves some interference with the *personal* capacity of rights claimants to adhere to their beliefs or practices. In these cases, claimants were either personally compelled to comply with a rule or decision that conflicted with their beliefs, or they were forced to compromise in their personal capacity to act upon them: *Big M*; *Edwards Books*; *Ross*; *Amselem*; *Multani*; *Hutterian Brethren*; *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467; *Saguenay*.

[244] There are three possible exceptions to this, none of which undermine the principles set out above. The first is *B. (R.)*. In that case, a majority found that the decision of parents to prohibit doctors from giving their infant daughter a blood transfusion was protected by s. 2(*a*) because the decision was motivated by their religious beliefs as Jehovah's Witnesses. Writing for the majority, Justice La Forest held that the right of parents to choose the medical treatment of their children in accordance with their religion was a "fundamental aspect of freedom of religion" (para. 105). He consequently found that the statutory procedure that had allowed the doctors to override the parents' wishes infringed s. 2(*a*), only to find that this limit could be justified under s. 1. Writing for themselves and two others, Justices Iacobucci and Major found that the statute did not infringe s. 2(*a*) on the basis that "a parent's freedom of religion does not include the imposition upon the child of religious practices which threaten the safety, health or life of the child" (para. 225).

par la *Charte*, car ils cherchent — au moyen du *Covenant* obligatoire — à contraindre des personnes n'appartenant pas à leur communauté religieuse à se conformer à leurs pratiques religieuses. Je ne trouve aucune décision de la Cour portant que l'al. 2*a*) protège le droit d'imposer l'observance de pratiques religieuses à des personnes qui n'adhèrent pas volontairement aux pratiques en question.

[243] Dans presque tous les arrêts où la Cour a conclu à l'existence d'une atteinte à un droit garanti par l'al. 2*a*), il y avait une forme d'entrave à la capacité *personnelle* des requérants d'observer leurs croyances ou pratiques. Dans ces affaires, ou bien les requérants étaient contraints personnellement de respecter une règle ou une décision contraire à leurs croyances, ou bien ils étaient forcés à faire des compromis relativement à leur capacité personnelle d'agir selon ces croyances : *Big M*; *Edwards Books*; *Ross*; *Amselem*; *Multani*; *Hutterian Brethren*; *Saskatchewan (Human Rights Commission) c. Whatcott*, 2013 CSC 11, [2013] 1 R.C.S. 467; *Saguenay*.

[244] Il existe trois possibles exceptions, mais aucune n'ébranle les principes énoncés précédemment. Dans la première, *B. (R.)*, les juges majoritaires ont conclu que la décision prise par des parents d'interdire aux médecins de procéder à une transfusion sanguine sur leur fille en bas âge était protégée par l'al. 2*a*) de la *Charte* parce que leur décision était motivée par leurs croyances en tant que Témoins de Jéhovah. S'exprimant au nom de la majorité, le juge La Forest a conclu que le droit des parents de choisir les traitements médicaux de leurs enfants conformément à leur religion était un « aspect [. . .] fondamental de la liberté de religion » (par. 105). Il a par conséquent jugé que la procédure prévue par la loi qui avait autorisé les médecins à passer outre à la volonté des parents portait atteinte à l'al. 2*a*) de la *Charte*, concluant toutefois que la limite ainsi imposée à leur droit était justifiée au regard de l'article premier. S'exprimant en leur nom et au nom de deux autres juges, les juges Iacobucci et Major ont pour leur part conclu que la mesure législative en cause ne portait pas atteinte à l'al. 2*a*), puisque « la liberté de religion d'un parent ne l'autorise pas à imposer à son enfant des pratiques religieuses qui menacent sa sécurité, sa santé ou sa vie » (par. 225).

[245] The majority in *B. (R.)* relies on both parental rights and freedom of religion to find an infringement of s. 2(*a*). Unlike the claimants in this appeal, the claimants in *B. (R.)* had an independent legal basis on which they could seek to impose their beliefs on their child — namely, their rights as parents. It goes without saying that the claimants in this appeal have no such rights over those upon whom they seek to impose their beliefs.

[246] The second possible exception is *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772 ("*TWU 2001*"). In that case, the British Columbia College of Teachers ("BCCT") refused to allow TWU to take full responsibility for its teacher education program, which had, until then, been run jointly with Simon Fraser University. In withholding its approval, the BCCT was concerned with the downstream impact of the TWU Community Standards — that is, with the possibility that teachers trained at TWU would perpetuate discriminatory beliefs in the classroom.

[247] For the majority, Justices Iacobucci and Bastarache found that the issue at the heart of the appeal was "how to reconcile the religious freedoms of individuals wishing to attend TWU with the equality concerns of students in B.C.'s public school system": *TWU 2001*, at para. 28. Although they found that "[t]here is no denying that the decision of the BCCT places a burden on members of a particular religious group" (para. 32), they did not expressly find an infringement of ss. 2(*a*) or 15(1) nor did they conduct an analysis under s. 1. Rather, they found that "any potential conflict should be resolved through the proper delineation of the rights and values involved" given that "[n]either freedom of religion nor the guarantee against discrimination based on sexual orientation is absolute" (para. 29). In resolving this conflict, the majority focused on the concern of the BCCT that the beliefs stated in the Community Standards pertaining to homosexuality would be transmitted to the public school system. Absent specific evidence of discrimination by TWU

[245] Dans cet arrêt, les juges majoritaires s'appuient à la fois sur les droits parentaux et sur la liberté de religion pour conclure à l'existence d'une atteinte à l'al. 2*a*). Contrairement aux demandeurs dans le présent pourvoi, les demandeurs dans l'affaire *B. (R.)* disposaient d'un fondement juridique autonome pour tenter d'imposer leurs croyances à leur enfant — à savoir leurs droits en tant que parents. Il va sans dire qu'en l'espèce les demandeurs ne disposent d'aucun droit de la sorte à l'égard des personnes à qui ils tentent d'imposer leurs croyances.

[246] La deuxième exception possible est l'arrêt *Université Trinity Western c. British Columbia College of Teachers*, 2001 CSC 31, [2001] 1 R.C.S. 772 (« *TWU 2001* »), où le British Columbia College of Teachers (« BCCT ») refusait à TWU l'autorisation d'assumer l'entière responsabilité du programme de formation des enseignants qu'elle gérait jusque-là conjointement avec l'université Simon Fraser. Le BCCT a refusé l'autorisation, car il craignait les répercussions en aval des *Community Standards* (« Normes communautaires ») de TWU — c'est-à-dire le risque que les enseignants formés dans cette université perpétuent des croyances discriminatoires en salle de classe.

[247] S'exprimant pour la majorité, les juges Iacobucci et Bastarache sont arrivés à la conclusion que la question litigieuse au cœur du pourvoi consistait à décider « comment concilier les libertés religieuses d'individus qui souhaitent fréquenter [TWU] avec les préoccupations d'égalité des élèves du système scolaire public de la Colombie-Britannique » : *TWU 2001*, par. 28. Bien que les juges aient statué qu'il « est indéniable que la décision du BCCT impose un fardeau aux membres d'un groupe religieux particulier » (par. 32), ils n'ont pas expressément conclu à l'existence d'une atteinte à l'al. 2*a*) ou au par. 15(1) de la *Charte*, et ils n'ont pas procédé à une analyse au regard de l'article premier. Ils ont plutôt jugé qu'il y avait « lieu de régler tout conflit éventuel en délimitant correctement les droits et valeurs en cause », étant donné que « [n]i la liberté de religion ni la protection contre la discrimination fondée sur l'orientation sexuelle ne sont absolues » (par. 29). Pour résoudre le conflit, les juges majoritaires se sont attachés à la préoccupation du BCCT selon laquelle

graduates, however, this concern was deemed insufficient to justify the decision of the BCCT (para. 38).

[248] The alleged interference with religious freedom in *TWU 2001* did not relate to the capacity of rights claimants to adhere to their beliefs. Rather, it concerned the capacity of TWU to transmit its religious values by requiring its education students to adhere to the Community Standards. The Court, however, made no finding as to whether the BCCT had infringed s. 2(*a*) by considering the mandatory nature of the Community Standards; rather, the appeal was resolved based on an absence of evidence regarding possible downstream effects. Thus, I do not share the view that *TWU 2001* stands for the proposition that any adverse consideration of the Community Standards (or the Covenant) by a public decision-maker amounts to an infringement of s. 2(*a*).

[249] The third possible exception is *Loyola*. In that case, Loyola High School applied to the Quebec Minister of Education for an exemption from teaching a compulsory "Ethics and Religious Culture" course on the basis that its own curriculum offered an equivalent course — albeit one taught from a Catholic perspective. The Minister denied the exemption on the basis that the equivalent course could only be taught from a neutral perspective. This Court found that the Minister's insistence that Loyola teach Catholicism and Catholic ethics from a neutral perspective amounted to a serious infringement of s. 2(*a*).

[250] In *Loyola*, the infringement of s. 2(*a*) did not relate to personal capacity of rights claimants — the parents of students attending Loyola High School — to adhere to their own beliefs. It rather concerned their right to transmit these beliefs to their children

les croyances énoncées dans les Normes communautaires au sujet de l'homosexualité seraient transmises dans le système d'écoles publiques. Cependant, vu l'absence de preuve précise de comportement discriminatoire par des diplômés de TWU, cette préoccupation a été jugée insuffisante pour justifier la décision du BCCT (par. 38).

[248] L'entrave à la liberté de religion qui était alléguée dans l'affaire *TWU 2001* ne se rapportait pas à la capacité des personnes revendiquant le droit de vivre selon leurs croyances. Elle concernait plutôt la capacité de TWU de transmettre ses valeurs religieuses en obligeant les étudiants en enseignement à se conformer aux Normes communautaires. Toutefois, la Cour ne s'est pas prononcée sur la question de savoir si le BCCT avait porté atteinte à l'al. 2*a*) lorsqu'elle a examiné le caractère obligatoire des Normes communautaires; le pourvoi fut plutôt tranché en fonction de l'absence de preuve concernant les possibles effets en aval de ces normes. En conséquence, je ne partage pas l'opinion voulant que l'arrêt *TWU 2001* appuie la thèse selon laquelle tout examen défavorable des Normes communautaires (ou du *Covenant*) par un décideur public constitue une atteinte à l'al. 2*a*).

[249] La troisième exception possible est l'arrêt *Loyola*. Dans cette affaire, l'école secondaire Loyola avait demandé à la ministre de l'Éducation du Québec de l'exempter de l'obligation d'enseigner le cours obligatoire « Éthique et culture religieuse », parce que son programme comportait un cours équivalent — quoiqu'enseigné selon une perspective catholique. La ministre avait refusé la demande d'exemption, au motif que le cours équivalent pourrait être enseigné mais uniquement s'il l'était de façon neutre. Notre Cour a jugé que l'insistance de la ministre sur la nécessité pour l'école secondaire Loyola d'enseigner le catholicisme et les croyances éthiques catholiques de façon neutre représentait une atteinte grave à l'al. 2*a*).

[250] Dans *Loyola*, l'atteinte à l'al. 2*a*) ne concernait pas la capacité personnelle des personnes revendiquant les droits en cause — les parents des étudiants qui fréquentaient l'école secondaire Loyola — de vivre selon leurs croyances. Elle concernait

through religious education. By contrast, the claimants in this appeal do not seek the accreditation of the LSBC to transmit their beliefs through religious education. Rather, they seek accreditation to provide a legal education while compelling the private conduct of adult law students, regardless of their personal beliefs. The religious education of children involves the transmission of religious beliefs; the legal education of adults does not.

[251] In the end, I agree that "a right designed to shield individuals from religious coercion cannot be used as a sword to coerce [conformity to] religious practice": Canadian Secular Alliance, I.F., at para. 11. This follows if we accept that the freedom of religion guaranteed by the *Charter* is "a function of personal autonomy and choice": *Amselem*, at para. 42. It is based on the idea "that no one can be forced to adhere to or refrain from a particular set of religious beliefs": *Loyola*, at para. 59. For this reason, it protects against interference with profoundly personal beliefs and with the voluntary choice to abide by the practices those beliefs require. It does not protect measures by which an individual or a faith community seeks to impose adherence to their religious beliefs or practices on others who do not share their underlying faith. I therefore conclude that what the claimants seek in this appeal falls outside the scope of freedom of religion as guaranteed by the *Charter*.

V. Other *Charter* Claims

[252] In addition to their 2(*a*) claim, the claimants have alleged infringements to their expressive and associate freedom rights under ss. 2(*b*) and 2(*d*) and their equality rights under s. 15 of the *Charter*. They have not discharged their burden with respect to these claims. In this case, the claimants have provided little to go on regarding these subsidiary arguments, nor were these claims argued extensively before

plutôt le droit de ces personnes de transmettre ces croyances à leurs enfants par un enseignement religieux. En l'espèce, par contre, les demandeurs ne sollicitent pas l'agrément de la LSBC dans le but de transmettre leurs croyances dans le cadre d'un enseignement religieux. Ils souhaitent plutôt obtenir l'agrément demandé pour pouvoir offrir une formation juridique tout en dictant la conduite privée de tous les étudiants en droit adultes, indépendamment des croyances personnelles de ces derniers. L'enseignement religieux dispensé à des enfants implique la transmission de croyances religieuses; la formation juridique offerte à des adultes n'en comporte pas.

[251] En définitive, je reconnais qu'[TRADUCTION] « un droit conçu pour servir de bouclier contre la coercition religieuse ne saurait être utilisé comme une épée pour contraindre l'observance d'une pratique religieuse » : mémoire de l'intervenante Canadian Secular Alliance, par. 11. Il en est ainsi si nous acceptons que la liberté de religion garantie par la *Charte* est « fonction des notions de choix personnel et d'autonomie » : *Amselem*, par. 42. Cette liberté repose sur l'idée « que nul ne doit être contraint d'adhérer ou de s'abstenir d'adhérer à un certain ensemble de croyances religieuses » : *Loyola*, par. 59. Voilà pourquoi la liberté de religion protège les gens contre les entraves à l'observance de leurs croyances intimes profondes et à leur capacité de décider librement de se livrer aux pratiques que commandent ces croyances. Elle ne protège pas les mesures par lesquelles une personne ou une communauté religieuse cherche à imposer le respect de ses croyances ou pratiques religieuses à des personnes qui ne partagent pas sa foi. En conséquence, je conclus que ce que les demandeurs sollicitent en l'espèce échappe à la portée de la liberté de religion garantie par la *Charte*.

V. Autres prétentions fondées sur la *Charte*

[252] En plus de leur prétention fondée sur l'al. 2*a*) de la *Charte*, les demandeurs ont allégué des atteintes aux droits à la liberté d'expression et à la liberté d'association qui leur sont garantis par les al. 2*b*) et *d*) de la *Charte*, ainsi qu'à leur droit à l'égalité protégé par l'art. 15. Ils ne se sont pas acquittés du fardeau qui leur incombait à l'égard de ces prétentions. Dans l'affaire qui nous occupe, les demandeurs

the courts below or before this Court. Accordingly, I would say only that their appeal based on these claims cannot succeed on the record before us.

VI. Application

[253] Given the absence of any *Charter* infringement, the decision of the LSBC must be reviewed under the usual principles of judicial review. In this case, the standard of review is reasonableness, as the decision under review falls within the category of cases where deference is presumptively owed to decision-makers who interpret and apply their home statutes: *Dunsmuir*, at para. 54; *Alberta Teachers*, at para. 34; *Saguenay*, at para. 46.

[254] Reviewed under the standard of reasonableness, the decision of the LSBC will command deference if it meets the criteria set out in *Dunsmuir* — namely, if the process by which it was reached provides for "justification, transparency and intelligibility" and if the outcome it provides falls "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, at para. 47.

[255] As indicated by the majority (at para. 34), the LSBC is "the governing body of a self-regulating profession". This means that, with respect to questions of procedure, the LSBC had discretion in determining how to carry out its duty to regulate the legal profession in the public interest. Along with the majority, I agree that the *LPA* does not preclude the Benchers from holding a referendum or choosing to be bound by the results of such a referendum. Rather, it only specifies the circumstances in which the members of the LSBC can bind the Benchers. In this case, the Benchers themselves agreed to be bound by the results of the referendum. Consequently, given the deference owed the LSBC in the interpretation of its home statute, I find that the procedure employed

ont présenté très peu d'éléments à l'appui de ces prétentions subsidiaires, qui n'ont pas fait l'objet de longs débats devant les juridictions inférieures ou devant notre Cour. Par conséquent, je me contenterai de dire que, à la lumière du dossier dont nous disposons, leur pourvoi ne saurait être accueilli sur la base de ces prétentions.

VI. Application

[253] Vu l'absence de toute atteinte à un droit garanti par la *Charte*, la décision de la LSBC doit être examinée selon les principes habituels du contrôle judiciaire. La norme de contrôle applicable en l'espèce est celle de la décision raisonnable, car la décision examinée fait partie de celles où il y a présomption de déférence en faveur du décideur qui interprète et applique sa loi habilitante : *Dunsmuir*, par. 54; *Alberta Teachers*, par. 34; *Saguenay*, par. 46.

[254] Considérée selon la norme de contrôle de la décision raisonnable, la décision de la LSBC commandera la déférence si elle satisfait aux critères énoncés dans *Dunsmuir* — c'est-à-dire les critères indiquant que le caractère raisonnable de la décision tient « à la justification de [celle-ci], à la transparence et à l'intelligibilité du processus décisionnel », ainsi qu'à l'appartenance de cette décision « aux issues possibles acceptables pouvant se justifier au regard des faits et du droit » : *Dunsmuir*, par. 47.

[255] Comme l'indiquent les juges majoritaires (au par. 34), la LSBC est l'« organisme chargé de réglementer une profession autonome ». Cela signifie que, relativement aux questions de procédure, la LSBC disposait du pouvoir discrétionnaire nécessaire pour décider comment s'acquitter de son devoir de réglementer la profession juridique dans l'intérêt public. À l'instar de mes collègues de la majorité, je reconnais que rien dans la *LPA* n'empêche les conseillers de la LSBC de tenir un référendum ou de décider d'être liés par les résultats d'un tel référendum. La *LPA* précise simplement les circonstances dans lesquelles les membres de la LSBC peuvent lier les conseillers. En l'espèce, les conseillers avaient eux-mêmes accepté d'être liés par les résultats du référendum.

by the Benchers is not fatal to the reasonableness of their decision.

[256] I note in passing, however, that had I found a *Charter* infringement, I do not see how it would be possible for the LSBC to proceed by way of a majority vote while upholding its responsibilities under the *Charter*. Is not one of the purposes of the *Charter* to protect against the tyranny of the majority? I fail to see how the LSBC could achieve a "proportionate balancing of the *Charter* protections at play" (M.R., at para. 58) simply by saying that a majority of its members were in favour of denying accreditation.

[257] Turning next to the substance of the decision, the issue becomes whether the decision falls "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law". As explained by the majority (at para. 53), reasonableness does not always require the decision-maker to give formal reasons. The deference owed in applying the standard of reasonableness rather requires "respectful attention to the reasons offered or which could be offered in support of a decision": *Dunsmuir*, at para. 48, citing D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286. Particularly in cases where no reasons are given, a reviewing court may thus look to the record to assess the reasonableness of the decision under review.

[258] In this appeal, the range of possible outcomes was informed by the mandate of the LSBC to regulate the legal profession in the public interest and by the binary choice available to the Benchers. They could either adopt the resolution denying accreditation or not. Given the deference owed to the LSBC, it was open to the LSBC to conclude that it should

Par conséquent, compte tenu de la déférence qui doit être accordée à la LSBC dans l'interprétation de sa loi habilitante, j'arrive à la conclusion que la procédure utilisée par les conseillers n'est pas fatale au caractère raisonnable de leur décision.

[256] Toutefois, je note au passage que si j'avais conclu à l'existence d'une atteinte à un droit garanti par la *Charte*, je ne vois pas comment il aurait été possible à la LSBC de procéder par voie de scrutin majoritaire et, en même temps, de s'acquitter des responsabilités qui lui incombent en vertu de la *Charte*. En effet, un des objectifs de la *Charte* n'est-il pas justement de protéger les gens contre la tyrannie de la majorité? Je ne vois pas comment la LSBC peut réaliser une « mise en balance proportionnée des droits en cause protégés par la *Charte* » (M.M., par. 58) simplement en affirmant que la majorité de ses membres étaient en faveur du refus de la demande d'agrément.

[257] Ensuite, pour ce qui est du fond de la décision, la question consiste à se demander si la décision fait partie des « issues possibles acceptables pouvant se justifier au regard des faits et du droit ». Comme l'expliquent les juges majoritaires (au par. 53), le décideur n'est pas toujours tenu de motiver formellement sa décision pour que celle-ci soit raisonnable. La déférence requise dans l'application de la norme de la décision raisonnable commande plutôt une « attention respectueuse aux motifs donnés ou qui pourraient être donnés à l'appui d'une décision » : *Dunsmuir*, par. 48, citant D. Dyzenhaus, « The Politics of Deference : Judicial Review and Democracy », dans M. Taggart, dir., *The Province of Administrative Law* (1997), 279, p. 286. En conséquence, particulièrement dans les cas où la décision n'est pas accompagnée de motifs, la cour de révision peut consulter le dossier de l'instance pour apprécier le caractère raisonnable de cette décision.

[258] Dans le présent pourvoi, l'éventail des issues possibles découlait du mandat de la LSBC qui consiste à réglementer la profession juridique dans l'intérêt public, ainsi que du choix binaire devant lequel se trouvaient les conseillers de la LSBC. Ces derniers pouvaient soit adopter la résolution refusant l'agrément, soit la rejeter. Compte tenu de la

not accredit the proposed law school at TWU given the Covenant's imposition of discriminatory barriers to admission. It was also reasonable for the LSBC to conclude that its mandate included promoting equal access to the legal profession, supporting diversity within the bar, and preventing harm to LGBTQ law students (M.R., at para. 40). It was in this context that the LSBC declined to accredit the proposed law school. For these reasons, I conclude that the decision of the LSBC was reasonable.

VII. Conclusion

[259] I agree with the majority in the result, in that I would allow the appeal and restore the decision of the LSBC denying its accreditation of the proposed law school at TWU.

The following are the reasons delivered by

Côté and Brown JJ. (dissenting) —

I. Introduction

[260] One way of understanding this appeal and the appeal in *Trinity Western University v. Law Society of Upper Canada*, 2018 SCC 33, [2018] 2 S.C.R. 453 — and reliance was frequently placed upon this metaphor during submissions from both sides at the hearing — is that they call upon this Court to decide who controls the door to "the public square". In other words, accepting that the liberal state must foster pluralism by striving to accommodate difference in the public life of civil society, where does that state obligation — that is, where does that public life — begin? With a private denominational university? Or with a judicially reviewable statutory delegate charged by the provincial legislature to regulate the profession and entry thereto in the public interest?

déférence qui doit être accordée à la LSBC, il était donc loisible à cette dernière de conclure qu'elle ne devait pas agréer la faculté de droit proposée par TWU en raison des obstacles à l'admission de nature discriminatoire qu'imposait le *Covenant*. Il était également raisonnable pour la LSBC de conclure que son mandat consistait également à promouvoir l'égalité d'accès à la profession juridique, à appuyer la diversité au sein du barreau et à prévenir l'infliction de préjudices aux étudiants en droit issus de la communauté LGBTQ (M.M., par. 40). C'est dans ce contexte que la LSBC a refusé d'agréer la faculté de droit proposée. Pour les motifs qui précèdent, j'arrive à la conclusion que la décision de la LSBC était raisonnable.

VII. Conclusion

[259] Je souscris au résultat auquel arrive la majorité, en ce que je suis d'avis d'accueillir le pourvoi et de confirmer la décision de la LSBC refusant l'agrément demandé relativement à la faculté de droit proposée par TWU.

Version française des motifs rendus par

Les juges Côté et Brown (dissidents) —

I. Introduction

[260] Une façon de comprendre le présent pourvoi ainsi que celui dans *Trinity Western University c. Barreau du Haut-Canada*, 2018 CSC 33, [2018] 2 R.C.S. 453 — cette image a d'ailleurs été fréquemment évoquée par les deux parties au cours de leurs plaidoiries à l'audience — est que ces pourvois invitent la Cour à décider qui contrôle la porte de « la place publique ». En d'autres termes, si l'on admet que l'État libéral doit favoriser le pluralisme en s'efforçant de respecter les différences dans la vie publique de la société civile, où cette obligation de l'État — c'est-à-dire cette vie publique — commence-t-elle? Avec une université privée confessionnelle? Ou encore avec un titulaire de pouvoirs délégués statutaires dont les décisions sont susceptibles de contrôle judiciaire et qui a été chargé par l'assemblée législative provinciale de réglementer la profession et l'accès à celle-ci dans l'intérêt public?

[261] In our view, fundamental constitutional principles and the statutory jurisdiction of the Law Society of British Columbia ("LSBC"), properly interpreted, lead unavoidably to the legal conclusion that the public regulator controls the door to the public square and owes that obligation. The private denominational university, which is not subject to the *Canadian Charter of Rights and Freedoms* and is exempt from provincial human rights legislation, does not. And, in conditioning access to the public square as it has, the regulator has — on this Court's own jurisprudence — profoundly interfered with the constitutionally guaranteed freedom of a community of co-religionists to insist upon certain moral commitments from those who wish to join the private space within which it pursues its religiously based practices. While, therefore, the LSBC has purported to act in the cause of ensuring equal access to the profession, it has effectively denied that access to a segment of Canadian society, solely on religious grounds. In our respectful view, this unfortunate state of affairs merits judicial intervention, not affirmation.

[262] We recognize, as has this Court, that "[Trinity Western University] is not for everybody; it is designed to address the needs of people who share a number of religious convictions" (*Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772 ("*TWU 2001*"), at para. 25). Prospective LGBTQ students could only sign the Covenant "at a considerable personal cost" (*TWU 2001*, at para. 25). Further, as the Ontario Divisional Court noted at para. 104, the restrictions contained in the Covenant are such that "those persons . . . who might prefer, for their own purposes, to live in a common law relationship rather than engage in the institution of marriage . . . and . . . those persons who have other religious beliefs" would also not be tempted to apply for admission (*Trinity Western University v. Law Society of Upper Canada*, 2015 ONSC 4250, 126 O.R. (3d) 1).

[261] À notre avis, les principes constitutionnels fondamentaux et la compétence conférée par la loi à la Law Society of British Columbia (« LSBC ») — le Barreau de la Colombie-Britannique —, dûment interprétés, conduisent inévitablement à la conclusion juridique selon laquelle l'organisme de réglementation public contrôle la porte donnant accès à la place publique et est tenu à cette obligation. Ce n'est pas le cas de l'université confessionnelle privée, qui n'est pas assujettie à la *Charte canadienne des droits et libertés* et qui est exemptée de la législation provinciale relative aux droits de la personne. Et, en conditionnant l'accès à la place publique comme il l'a fait, l'organisme de réglementation — suivant la jurisprudence de la Cour — a porté profondément atteinte à la liberté d'une communauté de coreligionnaires, garantie par la Constitution, de pouvoir exiger certains engagements moraux de la part de ceux qui souhaitent se joindre à l'espace privé dans lequel elle se livre à ses pratiques religieuses. Par conséquent, même si la LSBC entendait agir dans le but d'assurer l'égalité d'accès à la profession, elle a, dans les faits, refusé cet accès à une partie de la société canadienne pour des motifs purement religieux. À notre humble avis, cette situation déplorable commande une intervention judiciaire, et non une confirmation.

[262] Nous reconnaissons, comme l'a fait la Cour, que « [Trinity Western University] ne s'adresse pas à tout le monde; elle est destinée à combler les besoins des gens qui ont en commun un certain nombre de convictions religieuses » : *Université Trinity Western c. British Columbia College of Teachers*, 2001 CSC 31, [2001] 1 R.C.S. 772 (« *TWU 2001* »), par. 25. D'éventuels étudiants LGBTQ ne pourraient signer l'engagement moral visé en l'espèce, le « *Covenant* », « qu'à un prix très élevé sur le plan personnel » : *TWU 2001*, par. 25. De plus, comme l'a souligné la Cour divisionnaire de l'Ontario, au par. 104, les restrictions contenues dans le *Covenant* sont telles que [TRADUCTION] « les personnes [. . .] qui, pour répondre à leurs propres besoins, pourraient préférer vivre en union de fait plutôt que de s'engager dans l'institution du mariage [. . .] et [. . .] les personnes qui ont d'autres croyances religieuses » ne seraient pas non plus tentées de présenter une demande d'admission : *Trinity Western University c. Law Society of Upper Canada*, 2015 ONSC 4250, 126 O.R. (3d) 1.

[263] At the same time, qualities that go to a person's self-identity are also at stake for the members of the Trinity Western University ("TWU") community (*R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 759; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at pp. 341 and 346; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 32). Religious freedom cases concern much more than mere belief, as Sachs J. recognized in *Christian Education South Africa v. Minister of Education*, [2000] ZACC 11, 2000 (4) S.A. 757, at para. 33: "Religion is not just a question of belief or doctrine. It is part of a way of life, of a people's temper and culture." In particular, religion is also about religious relationships (*Hutterian Brethren*, at para. 182, per LeBel J., dissenting in the result but agreeing with the majority on this point).

[263] En même temps, des qualités qui touchent le sentiment d'identité d'un individu sont également en jeu pour les membres de la communauté de Trinity Western University (« TWU ») : *R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713, p. 759; *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, p. 341 et 346; *Alberta c. Hutterian Brethren of Wilson Colony*, 2009 CSC 37, [2009] 2 R.C.S. 567, par. 32. Les affaires portant sur la liberté de religion concernent bien davantage que la simple croyance, comme l'a reconnu le juge Sachs dans la décision *Christian Education South Africa c. Minister of Education*, [2000] ZACC 11, 2000 (4) S.A. 757, par. 33 : [TRADUCTION] « La religion n'est pas seulement une question de croyances ou de doctrines. Elle fait partie d'un mode de vie, elle est un aspect du tempérament et de la culture d'un peuple. » Plus particulièrement, la religion concerne aussi les rapports religieux : *Hutterian Brethren*, par. 182, le juge LeBel, dissident quant au résultat, mais d'accord avec les juges majoritaires sur ce point.

[264] These are challenging claims of right for courts to adjudicate, because the stakes for parties are sometimes not fully appreciable by those who do not share their experiences. But this does not mean that we should not try. Indeed, all who occupy judicial office and who assume its responsibilities, as well as lawyers who are called upon to represent members of a diverse public in a pluralistic society, must strive to see claims from the perspectives of all sides, and to "seek to understand groups with which they are unfamiliar" (D. Newman, "Ties That Bind: Religious Freedom and Communities" (2016), 75 *S.C.L.R.* (2d) 3, at p. 16). In a similar vein, McLachlin C.J., speaking extra-judicially, has described the "conscious objectivity" which judges must practise in fulfilling their duty of impartiality, by "recogniz[ing] the legitimacy of diverse experiences and viewpoints", and "systematically attempt[ing] to imagine how each of the contenders sees the situation" ("Judging: the Challenges of Diversity", Judicial Studies Committee Inaugural Annual Lecture (2012) (online), at pp. 10 and 12). For his part, Professor Benjamin L. Berger doubts the possibility of adopting a truly empathetic posture to the unfamiliar, but nonetheless finds "adjudicative virtue" in "stay[ing] the culturally forceful hand of the law" and "expand[ing] the

[264] Il s'agit de revendications de droit difficiles à trancher pour les tribunaux, car les enjeux pour les parties ne peuvent pas toujours être appréciés pleinement par ceux qui ne partagent pas leurs expériences. Mais cela ne veut pas dire que nous ne devons pas essayer. En effet, tous ceux qui occupent une fonction judiciaire et qui en assument les responsabilités, ainsi que les avocats qui sont appelés à représenter les membres d'un public diversifié dans une société pluraliste, sont tenus de s'efforcer de considérer les revendications à la lumière des points de vue de toutes les parties, et de [TRADUCTION] « tenter de comprendre les groupes qu'ils ne connaissent pas bien » : D. Newman, « Ties That Bind : Religious Freedom and Communities » (2016), 75 *S.C.L.R.* (2d) 3, p. 16. Dans la même veine, la juge en chef McLachlin, exprimant une opinion extrajudiciaire, a décrit cette [TRADUCTION] « objectivité consciente » dont doivent faire preuve les juges dans l'exécution de leur devoir d'impartialité, en « reconna[issant] la légitimité des expériences et façons de voir différentes », et en devant « systématiquement tenter d'imaginer comment chacun des adversaires voit la situation » : « Judging : the Challenges of Diversity », Judicial Studies Committee Inaugural Annual Lecture (2012) (en ligne), p. 10 et

margins of legal tolerance" by "furrow[ing one's] brow in non-comprehension of the religious culture [while turning] an unconcerned shoulder, satisfied that the practice or commitment at stake simply does not offend the culture of Canadian constitutionalism" (*Law's Religion: Religious Difference and the Claims of Constitutionalism* (2015), at p. 181).

12. Pour sa part, le professeur Benjamin L. Berger doute qu'il soit possible d'adopter une attitude véritablement empathique à l'égard de ce que l'on ne connaît pas, mais voit néanmoins un [TRADUCTION] « avantage décisionnel » à « cont[enir] la puissance culturelle du droit » et à « éten[dre] les limites de la tolérance juridique » en « pli[ssant] le front d'incompréhension à l'égard de la culture religieuse [tout en haussant] des épaules insouciantes, convaincu que la pratique ou l'engagement en cause ne heurte tout simplement pas la culture du constitutionnalisme canadien » : *Law's Religion : Religious Difference and the Claims of Constitutionalism* (2015), p. 181.

[265] At the end of the day, however, a court of law, particularly when dealing with claims of constitutionally guaranteed rights including freedom of religion, must have regard to the legal principles that guide the relationship between citizen and state, between private and public. And those principles exist to *protect* rights-holders from values which a state actor deems to be "shared", not to give licence to courts to defer to or impose those values. For the same reason, a court of law ought not in our respectful view to be concerned, as the majority (Abella, Moldaver, Karakatsanis, Wagner and Gascon JJ.) is explicitly concerned, with the "public perception" of what freedom of religion entails (Majority Reasons, at para. 101). The role of courts in these cases is "not to produce social consensus, but to protect the democratic commitment to live together in peace" (M. A. Waldron et al., "Developments in law and secularism in Canada", in A. J. L. Menuge, ed., *Religious Liberty and the Law: Theistic and Non-Theistic Perspectives* (2018), 106, at p. 111).

[265] Ultimement, cependant, une cour de justice, surtout lorsqu'elle se penche sur des revendications fondées sur des droits garantis par la Constitution, comme la liberté de religion, doit tenir compte des principes juridiques régissant les rapports entre le citoyen et l'État, entre le privé et le public. Et ces principes visent à *protéger* les titulaires de droits contre les valeurs que l'acteur étatique estime « communes », et non à laisser le champ libre aux tribunaux pour qu'ils s'en remettent à ces valeurs ou les imposent. Pour le même motif, une cour de justice ne doit pas, à notre humble avis, se soucier, comme le font explicitement les juges majoritaires (les juges Abella, Moldaver, Karakatsanis, Wagner et Gascon), de la « perception du public » quant à ce que comporte la liberté de religion : motifs des juges majoritaires, par. 101. Dans ces cas, le rôle des cours de justice n'est pas de [TRADUCTION] « dégager un consensus social, mais de protéger l'engagement démocratique à coexister pacifiquement » : M. A. Waldron et autres, « Developments in law and secularism in Canada », dans A. J. L. Menuge, dir., *Religious Liberty and the Law : Theistic and Non-Theistic Perspectives* (2018), 106, p. 111.

[266] We note the invitation of several intervenors to reconsider the framework of analysis set out in *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, and *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613. In the absence of full submissions on the point, we agree with the majority that this is not an appropriate case in which to reconsider these decisions. That said, we state below certain fundamental concerns

[266] Nous prenons acte de l'invitation de plusieurs intervenants à réexaminer le cadre d'analyse établi dans les arrêts *Doré c. Barreau du Québec*, 2012 CSC 12, [2012] 1 R.C.S. 395, et *École secondaire Loyola c. Québec (Procureur général)*, 2015 CSC 12, [2015] 1 R.C.S. 613. En l'absence d'observations complètes sur ce point, nous convenons avec les juges majoritaires que la présente affaire ne se prête pas au réexamen de ces arrêts. Cela dit,

we have about the *Doré/Loyola* framework which, in our view, betrays the promise of our Constitution that rights limitations must be demonstrably justified.

[267] Irrespective, however, of which analytical framework is applied — the *Doré/Loyola* framework, or the more rigorous analytical framework described in *R. v. Oakes*, [1986] 1 S.C.R. 103, that we suggest the Constitution may actually require — we would dismiss the appeal from the decision of the British Columbia Court of Appeal (2016 BCCA 423, 405 D.L.R. (4th) 16). Under the LSBC's governing statute, the only proper purpose of a law faculty approval decision is to ensure that individual graduates are fit to become members of the legal profession because they meet minimum standards of competence and ethical conduct. As the LSBC conceded that there are no concerns relating to the fitness of prospective TWU law graduates, the only defensible exercise of the LSBC's statutory discretion would have been to approve TWU's proposed law school.

[268] Even if the LSBC's statutory "public interest" mandate were to be interpreted such that it had the authority to take considerations other than fitness into account, the decision not to approve TWU's proposed law faculty unjustifiably limited the TWU community's freedom of religion. The decision not to approve TWU's proposed law faculty because of the restrictions contained in the Covenant — a code of conduct protected by provincial human rights legislation — is a profound interference with religious freedom, and is contrary to the state's duty of religious neutrality.

[269] Further, even were the "public interest" to be understood broadly, as the LSBC contends, accreditation of TWU's proposed law school would

nous formulerons plus loin certaines de nos préoccupations fondamentales au sujet du cadre d'analyse établi dans les arrêts *Doré* et *Loyola*, qui, à notre avis, ne respecte pas la promesse découlant de notre Constitution selon laquelle la justification des restrictions apportées aux droits doit pouvoir se démontrer.

[267] Toutefois, indépendamment du cadre d'analyse applicable — que ce soit le cadre d'analyse énoncé dans les arrêts *Doré* et *Loyola*, ou le cadre d'analyse plus rigoureux qui est décrit dans l'arrêt *R. c. Oakes*, [1986] 1 R.C.S. 103, et que la Constitution pourrait, à notre avis, exiger en réalité — nous rejetterions le pourvoi formé à l'encontre de la décision de la Cour d'appel de la Colombie-Britannique : 2016 BCCA 423, 405 D.L.R. (4th) 16. Selon la loi habilitante de la LSBC, la décision relative à la reconnaissance d'une faculté de droit a pour seule fin légitime de veiller à ce que les diplômés soient individuellement aptes à devenir membres de la profession juridique parce qu'ils respectent des normes minimales en matière de compétence et de déontologie. Comme la LSBC a concédé que l'aptitude des éventuels diplômés en droit de TWU ne soulève aucune préoccupation, le seul exercice justifiable du pouvoir discrétionnaire statutaire de la LSBC aurait été pour elle d'agréer la faculté de droit proposée par TWU.

[268] Même si le mandat de protection de l'« intérêt public » que la loi confère à la LSBC devait être interprété de façon à ce que la LSBC soit habilitée à tenir compte de considérations autres que l'aptitude, la décision de ne pas agréer la faculté de droit proposée par TWU restreignait de manière injustifiée la liberté de religion des membres de la communauté de TWU. La décision de ne pas agréer cette faculté de droit en raison des restrictions prévues dans le *Covenant* — un code de conduite protégé par la législation provinciale relative aux droits de la personne — constitue une atteinte profonde à la liberté de religion et est contraire au devoir de neutralité religieuse de l'État.

[269] De plus, même si l'« intérêt public » devait être interprété largement, comme le prétend la LSBC, la reconnaissance de la faculté de droit

not be inconsistent with the public interest, so understood. Tolerance and accommodation of difference serve the public interest and foster pluralism. Acceptance by the LSBC of the unequal access effected by the Covenant would signify the accommodation of difference and of the TWU community's right to religious freedom, and not condonation of discrimination against LGBTQ persons. Approval of the proposed law school is, therefore, not inconsistent with "public interest" objectives of maintaining equal access and diversity in the legal profession, and indeed, it promotes those objectives. It follows that, in our view, approving TWU's proposed law school was the only decision reflecting a proportionate balancing between *Charter* rights and the LSBC's statutory objectives.

II. Analysis

A. *The LSBC Exercised Its Discretion for an Improper Purpose and Relied on Irrelevant Considerations*

[270] At the outset, we emphasize that neither our interpretation of the LSBC's governing statute nor the majority's suggests that the LSBC's mandate is ambiguous, such that resort to "*Charter* values" is necessary to determine the limits of the LSBC's mandate (*Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 59). We do not dispute that foundational principles underlying the Constitution may aid in *its* interpretation (*Oakes*, at p. 136; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at paras. 64-66; *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 S.C.R. 704, at para. 25; *R. v. Comeau*, 2018 SCC 15, [2018] 1 S.C.R. 342, at para. 52). But with respect, we fail to see what relevance "accepted principles of constitutional interpretation" (Majority Reasons, at para. 41) have to the interpretation of *the LSBC's statutory mandate*. Even accepting, for the sake of argument, that it is "beyond dispute that administrative bodies other than human rights tribunals may consider fundamental shared values, such as equality, when making decisions within their sphere of authority" (Majority Reasons, at para. 46), it is the LSBC's

proposée par TWU ne serait pas incompatible avec l'intérêt public ainsi interprété. La tolérance et le respect de la différence servent l'intérêt public et favorisent le pluralisme. L'acceptation par la LSBC de l'inégalité d'accès engendrée par le *Covenant* dénoterait un respect de la différence et du droit à la liberté de religion des membres de la communauté de TWU et non l'approbation d'actes discriminatoires envers les personnes LGBTQ. Le fait d'agréer la faculté de droit proposée par TWU n'est donc pas incompatible avec les objectifs d'« intérêt public » visant à maintenir l'égalité d'accès à la profession juridique et la diversité au sein de celle-ci, et il favorise même la réalisation de ces objectifs. Il s'ensuit qu'à notre avis la reconnaissance de cette faculté de droit constituait la seule décision représentant une mise en balance proportionnée des droits garantis par la *Charte* et des objectifs statutaires de la LSBC.

II. Analyse

A. *La LSBC a exercé son pouvoir discrétionnaire à une fin illégitime et s'est fondée sur des considérations non pertinentes*

[270] D'entrée de jeu, nous tenons à signaler que ni notre interprétation de la loi habilitante de la LSBC ni celle des juges majoritaires ne suggèrent que le mandat de cet organisme est ambigu de sorte qu'il est nécessaire de faire appel aux « valeurs de la *Charte* » pour circonscrire le mandat de la LSBC : *Bell ExpressVu Limited Partnership c. Rex*, 2002 CSC 42, [2002] 2 R.C.S. 559, par. 59. Nous ne contestons pas que les principes fondamentaux qui sous-tendent la Constitution peuvent servir à *son* interprétation : *Oakes*, p. 136; *Renvoi relatif à la sécession du Québec*, [1998] 2 R.C.S. 217, par. 64-66; *Renvoi relatif à la réforme du Sénat*, 2014 CSC 32, [2014] 1 R.C.S. 704, par. 25; *R. c. Comeau*, 2018 CSC 15, [2018] 1 R.C.S. 342, par. 52. Avec respect, nous ne voyons toutefois pas quelle est la pertinence des « principes d'interprétation constitutionnelle reconnus » (motifs des juges majoritaires, par. 41) pour interpréter *le mandat statutaire de la LSBC*. Même si l'on accepte, pour les fins de la discussion, qu'il ne fait « aucun doute que les organismes administratifs autres que les tribunaux des droits de la personne peuvent tenir compte de valeurs communes

enabling statute, and not "shared values", which delimits the LSBC's sphere of authority.

[271] And, as to that sphere of authority, the majority concludes that the LSBC acted pursuant to the broad statutory object of upholding and protecting the public interest in the administration of justice (para. 32). This object is said to grant the LSBC latitude to uphold a positive public perception of the legal profession (para. 40), to eliminate inequitable barriers to legal education (para. 42), and to consider harms to some communities (para. 44). The majority does not, however, properly account for the statutory limits to the LSBC's public interest mandate.

[272] The importance of recognizing and respecting these limits cannot be overemphasized. This Court has warned against overstating the objective of any measure infringing the *Charter* (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 144). This is especially so when the statutory objective relied upon to justify a *Charter* infringement is a broad mandate to protect the "public interest", a notion that is inherently vague and difficult to characterize (see e.g. *R. v. Morales*, [1992] 3 S.C.R. 711, at pp. 731-32; *R. v. Zundel*, [1992] 2 S.C.R. 731, at p. 762).

[273] In our view, the majority's broad interpretation of the LSBC's public interest mandate eschews this prudent, rights-conscious methodology. It is completely untethered from the express limits to the LSBC's statutory authority found in the *Legal Profession Act*, S.B.C. 1998, c. 9 ("*LPA*"). The LSBC's mandate is limited to the governance of "the society, lawyers, law firms, articled students and applicants" (s. 11). It does not extend to the governance of law schools, which lie outside its statutory authority. It may only act with a view to upholding and protecting the "public interest" within the bounds of this mandate. These express limits to the LSBC's mandate cannot be disregarded in

fondamentales, telle l'égalité, lorsqu'ils rendent des décisions dans leur sphère de compétence » (motifs des juges majoritaires, par. 46), c'est la loi habilitante de la LSBC, et non des « valeurs communes », qui délimite la sphère de compétence de cette dernière.

[271] Qui plus est, concernant cette sphère de compétence, les juges majoritaires arrivent à la conclusion que la LSBC a agi conformément au vaste objet statutaire consistant à défendre et à protéger l'intérêt public dans l'administration de la justice : par. 32. Cet objet donnerait à la LSBC la latitude nécessaire pour préserver une perception publique positive de la profession juridique (par. 40), pour éliminer les barrières inéquitables à la formation juridique (par. 42) et pour tenir compte des préjudices causés à certaines communautés (par. 44). Toutefois, les juges majoritaires ne tiennent pas suffisamment compte des limites que la loi impose au mandat de protection de l'intérêt public de la LSBC.

[272] On ne saurait trop insister sur l'importance de la reconnaissance et du respect de ces limites. La Cour a mis en garde contre le fait de surestimer l'objectif de toute mesure constituant une violation de la *Charte* : *RJR-MacDonald Inc. c. Canada (Procureur général)*, [1995] 3 R.C.S. 199, par. 144. Cela est d'autant plus vrai lorsque l'objectif statutaire invoqué pour justifier une violation de la *Charte* est un vaste mandat de protection de l'« intérêt public », une notion imprécise en soi et difficile à qualifier : voir, p. ex., *R. c. Morales*, [1992] 3 R.C.S. 711, p. 731-732; *R. c. Zundel*, [1992] 2 R.C.S. 731, p. 762.

[273] À notre avis, l'interprétation large que donnent les juges majoritaires au mandat de protection de l'intérêt public qui incombe à la LSBC évite cette méthode prudente et respectueuse des droits. Cette interprétation n'a aucun rapport avec les limites expresses du pouvoir statutaire de la LSBC prévues à la *Legal Profession Act*, S.B.C. 1998, c. 9 (« *LPA* »). Le mandat de la LSBC se limite à la régie [TRADUCTION] « de la [LSBC], des avocats, des cabinets d'avocats, des stagiaires et des demandeurs » : art. 11. Il ne s'étend pas à la régie des facultés de droit, qui échappent au pouvoir statutaire de la LSBC. Elle peut agir en vue de défendre et de protéger l'« intérêt public » uniquement dans les

order to justify the infringement of *Charter* rights. A careful reading of the *LPA* leads us to conclude that the only proper purpose of an approval decision by the LSBC is to ensure that individual licensing applicants are fit for licensing. Given the absence of any concerns relating to the fitness of prospective TWU graduates, the only defensible exercise of the LSBC's statutory discretion for a proper purpose in this case would have been for it to approve TWU's proposed law school.

(1) Limits to the Exercise of Discretion

[274] It is a fundamental principle of administrative law that the exercise of discretion by statutory delegates must conform to the purposes authorized by their enabling statute (G. Cartier, "Administrative Discretion: Between Exercising Power and Conducting Dialogue", in C. M. Flood and L. Sossin, eds., *Administrative Law in Context* (2nd ed. 2013), 381, at p. 391; G. Van Harten et al., *Administrative Law: Cases, Text, and Materials* (7th ed. 2015), at p. 894). "[A] power granted by legislation for one purpose cannot be used by a delegate for another purpose" (D. P. Jones and A. S. de Villars, *Principles of Administrative Law* (6th ed. 2014), at p. 190). Nor may a statutory delegate exercise discretion on the basis of considerations that are, in light of the statute's purpose, improper or irrelevant (Van Harten et al., at p. 895; Cartier, at p. 391; Jones and de Villars, at p. 190).

[275] This same principle lies at the heart of this Court's decision in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, where, despite the Quebec Liquor Commission's broad statutory discretion to cancel permits for the sale of alcoholic liquors, the Commission's decision to revoke Mr. Roncarelli's permit was "beyond the scope of [its] discretion" because the reasons therefor (Mr. Roncarelli's actions in support of Jehovah's Witnesses) were "totally irrelevant to the

limites de son mandat. On ne saurait faire abstraction de ces limites expresses imposées au mandat de la LSBC pour justifier l'atteinte à un droit garanti par la *Charte*. Une lecture attentive de la *LPA* nous amène à conclure que la décision de la LSBC relative à la reconnaissance d'une faculté de droit a pour seule fin légitime de veiller à ce que les demandeurs de permis soient individuellement aptes à accéder à la profession. Vu l'absence de préoccupations à l'égard de l'aptitude des éventuels diplômés de TWU, le seul exercice justifiable du pouvoir discrétionnaire statutaire de la LSBC à une fin légitime en l'espèce aurait été pour elle d'agréer la faculté de droit proposée par TWU.

(1) Limites à l'exercice du pouvoir discrétionnaire

[274] Il est un principe fondamental de droit administratif que l'exercice d'un pouvoir discrétionnaire par les titulaires de pouvoirs délégués par la loi doit être conforme aux fins autorisées par leur loi habilitante : G. Cartier, « Administrative Discretion : Between Exercising Power and Conducting Dialogue », dans C. M. Flood et L. Sossin, dir., *Administrative Law in Context* (2e éd. 2013), 381, p. 391; G. Van Harten et autres, *Administrative Law : Cases, Text, and Materials* (7e éd. 2015), p. 894. [TRADUCTION] « [Un] pouvoir conféré par la loi à une fin ne peut être exercé par un délégataire à une autre fin » : D. P. Jones et A. S. de Villars, *Principles of Administrative Law* (6e éd. 2014), p. 190. Le titulaire d'un pouvoir délégué par la loi ne peut non plus exercer son pouvoir discrétionnaire en se fondant sur des considérations qui sont, à la lumière de l'objet de la loi, illégitimes ou non pertinentes : Van Harten et autres, p. 895; Cartier, p. 391; Jones et de Villars, p. 190.

[275] Ce même principe est au cœur de l'arrêt de la Cour dans l'affaire *Roncarelli c. Duplessis*, [1959] R.C.S. 121, où, malgré le vaste pouvoir discrétionnaire que la loi conférait à la Commission des liqueurs du Québec d'annuler les permis de vente de liqueurs alcooliques, la décision de la Commission de révoquer le permis de M. Roncarelli [TRADUCTION] « excédait [sa] discrétion » parce que les motifs invoqués à l'appui de cette décision (à savoir les

sale of liquor" (p. 141). The Court elaborated by way of a statement which continues to guide administrative decision making to this day:

> In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. . . . "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption. [Emphasis added; p. 140.]

[276] Traditionally, the exercise of discretion taken for an improper purpose or on the basis of irrelevant considerations formed specific grounds for judicial review as an "abuse of discretion" (Cartier, at p. 388). Notably, these grounds were applied by this Court in *Smith & Rhuland Ltd. v. The Queen*, [1953] 2 S.C.R. 95, and *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231. And, they persist under the modern "pragmatic and functional" approach to judicial review. Indeed, this Court, in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 53, reaffirmed that discretionary decisions must "be made within the bounds of the jurisdiction conferred by the statute", and

> in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature, in accordance with the principles of the rule of law (*Roncarelli v. Duplessis*, [1959] S.C.R. 121), in line with general principles of administrative law governing the exercise of discretion, and consistent with the *Canadian Charter of Rights and Freedoms* (*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038).

actions de M. Roncarelli en faveur des Témoins de Jéhovah) n'avaient « absolument rien à voir avec la vente de liqueurs alcooliques » : p. 141. La Cour y a tenu des propos qui guident encore aujourd'hui le processus décisionnel administratif :

> [TRADUCTION] Dans une réglementation publique de cette nature, il n'y a rien de tel qu'une « discrétion » absolue et sans entraves, c'est-à-dire celle où l'administrateur pourrait agir pour n'importe quel motif ou pour toute raison qui se présenterait à son esprit; une loi ne peut, si elle ne l'exprime expressément, s'interpréter comme ayant voulu conférer un pouvoir arbitraire illimité pouvant être exercé dans n'importe quel but, si fantaisiste et hors de propos soit-il, sans avoir égard à la nature ou au but de cette loi. [. . .] La « discrétion » implique nécessairement la bonne foi dans l'exercice d'un devoir public. Une loi doit toujours s'entendre comme s'appliquant dans une certaine optique, et tout écart manifeste de sa ligne ou de son objet est tout aussi répréhensible que la fraude ou la corruption. [Nous soulignons; p. 140.]

[276] L'exercice du pouvoir discrétionnaire visant une fin illégitime ou celui fondé sur des considérations non pertinentes ont toujours constitué des motifs précis de contrôle judiciaire à titre d'[TRADUCTION] « abus de pouvoir discrétionnaire » : Cartier, p. 388. Ces motifs ont notamment été appliqués par la Cour dans les arrêts *Smith & Rhuland Ltd. c. The Queen*, [1953] 2 R.C.S. 95, et *Produits Shell Canada Ltée c. Vancouver (Ville)*, [1994] 1 R.C.S. 231. Et ils continuent d'exister dans le cadre de la démarche moderne « pragmatique et fonctionnelle » en matière de contrôle judiciaire. En effet, dans l'arrêt *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817, par. 53, la Cour a réaffirmé qu'une décision discrétionnaire doit « respecter les limites de la compétence conférée par la loi » et :

> . . . rester dans les limites d'une interprétation raisonnable de la marge de manœuvre envisagée par le législateur, conformément aux principes de la primauté du droit (*Roncarelli c. Duplessis*, [1959] R.C.S. 121), suivant les principes généraux de droit administratif régissant l'exercice du pouvoir discrétionnaire, et de façon conciliable avec la *Charte canadienne des droits et libertés* (*Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038).

To be clear, these "general principles of administrative law governing the exercise of discretion" include the doctrines of improper purpose and irrelevant consideration, which continue to ensure that the bounds of a decision-maker's statutory powers are respected.

[277] Cartier accurately summarizes the courts' task in assessing whether the exercise of discretion was taken for an improper purpose or on the basis of irrelevant considerations, respectively:

In the first case, courts must identify the object authorized by the statute and then determine whether that object or purpose has been followed or not. Similarly, in the second case, the question whether a consideration is relevant or not is usually answered with reference to the object of the statute. [p. 391]

(2) The Purpose of the LSBC's Approval Decision Is to Ensure That Individual Applicants Are Fit for Licensing

[278] In deciding not to approve TWU, the LSBC purported to act under Rule 2-27(4.1) of the *Law Society Rules* (now Rule 2-54(3) of the *Law Society Rules 2015*) ("Rule"), which provides that, to satisfy the academic requirements for licensing, applicants must have a degree from an approved law faculty, a status which the LSBC may, in exercising its discretion, deny.

[279] The Rule sets out no particular criteria for this discretionary decision. Its purpose, and the relevant considerations that may be taken into account in reaching such a decision, must therefore be found in the relevant objectives, duties and powers of the LSBC, as set out by the *LPA* (*Shell Canada*, at pp. 275-79). Further, they must be consistent with a contextual and purposive reading of the Rule (see *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21).

Il importe de préciser que ces « principes généraux de droit administratif régissant l'exercice du pouvoir discrétionnaire » comprennent la doctrine de la fin illégitime et celle des considérations non pertinentes, qui continuent de faire en sorte que les limites des pouvoirs que la loi confère à un décideur soient respectées.

[277] Cartier résume bien la tâche des tribunaux lorsqu'il s'agit de juger si l'exercice du pouvoir discrétionnaire visait une fin illégitime ou était fondé sur des considérations non pertinentes, respectivement :

[TRADUCTION] Dans le premier cas, la cour doit déterminer l'objet autorisé par la loi pour ensuite décider si cet objet (ou cette fin) a été ou non suivi. De la même façon, dans le second cas, la réponse à la question de savoir si une considération est ou non pertinente dépend généralement de l'objet de la loi. [p. 391]

(2) La fin visée par la décision de la LSBC relative à la reconnaissance d'une faculté de droit est de veiller à ce que les demandeurs soient individuellement aptes à accéder à la profession

[278] En décidant de ne pas agréer TWU, la LSBC prétendait agir en vertu du par. 2-27(4.1) des *Law Society Rules* (maintenant le par. 2-54(3) des *Law Society Rules 2015*) (« Règle »), qui prévoit que, pour satisfaire aux exigences académiques relatives à la délivrance de permis, les demandeurs doivent détenir un diplôme délivré par une faculté de droit agréée, statut que la LSBC peut, dans l'exercice de son pouvoir discrétionnaire, refuser.

[279] La Règle n'énonce aucun critère particulier pour cette décision discrétionnaire. La fin visée par cette décision, ainsi que les considérations pertinentes dont il peut être tenu compte en la prenant, doivent donc se trouver dans les objectifs, devoirs et pouvoirs pertinents de la LSBC, tels qu'ils ont été établis par la *LPA* : *Shell Canada*, p. 275-279. Elles doivent en outre être compatibles avec une interprétation contextuelle et téléologique de la Règle : voir *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 21.

[280] A plain reading of the Rule, in its entirety, leads to the obvious conclusion that its purpose is to ensure that individual applicants are fit for licensing. The Rule, which falls under the heading "Enrolment in the admission program", sets out the requirements for an applicant to become licensed, as follows:

2-27

. . .

(3) An applicant may make an application under subrule (1) by delivering to the Executive Director the following:

(a) a completed application for enrolment in a form approved by the Credentials Committee, including a written consent for the release of relevant information to the Society;

(b) proof of academic qualification under subrule (4);

(c) an articling agreement stating a proposed enrolment start date not less than 30 days from the date that the application is received by the Executive Director;

(d) other documents or information that the Credentials Committee may reasonably require;

(e) the application fee specified in Schedule 1.

(4) Each of the following constitutes academic qualification under this Rule:

(a) successful completion of the requirements for a bachelor of laws or the equivalent degree from an approved

[280] La simple lecture de la Règle, dans son entièreté, mène à la conclusion évidente qu'elle vise à faire en sorte que les demandeurs soient individuellement aptes à accéder à la profession. La Règle, qui figure sous la rubrique [TRADUCTION] « Inscription au programme d'admission », énonce ainsi les exigences auxquelles doit satisfaire un demandeur pour se voir délivrer un permis :

[TRADUCTION]

2-27

. . .

(3) Un demandeur peut présenter une demande en vertu du paragraphe (1) en remettant au Directeur exécutif les documents suivants :

(a) une demande d'inscription dûment remplie selon la formule approuvée par le comité d'examen des titres, accompagnée d'un consentement écrit à la communication des renseignements pertinents à la société;

(b) une preuve de qualification académique au sens du paragraphe (4);

(c) une convention de stage indiquant une date de début d'inscription proposée postérieure d'au moins 30 jours à la date à laquelle la demande est reçue par le Directeur exécutif;

(d) les autres documents ou renseignements que le comité d'examen des titres peut raisonnablement exiger;

(e) les frais de demande précisés à l'annexe 1.

(4) Chacun des éléments suivants constitue une qualification académique au sens de la présente règle :

(a) la réussite des exigences nécessaires à l'obtention d'un baccalauréat en droit ou d'un diplôme équivalent délivré par

common law faculty of law in a Canadian university;

(b) a Certificate of Qualification issued under the authority of the Federation of Law Societies of Canada;

(c) approval by the Credentials Committee of the qualifications of a full-time lecturer at the faculty of law of a university in British Columbia.

(4.1) For the purposes of this Rule, a common law faculty of law is approved if it has been approved by the Federation of Law Societies of Canada unless the Benchers adopt a resolution declaring that it is not or has ceased to be an approved faculty of law.

. . .

une faculté de droit de common law agréée d'une université canadienne;

(b) un certificat de qualification délivré sous l'autorité de la Fédération des ordres professionnels de juristes du Canada;

(c) la reconnaissance par le comité d'examen des titres des qualifications d'un chargé de cours à temps plein à la faculté de droit d'une université de la Colombie-Britannique.

(4.1) Pour l'application de la présente Règle, une faculté de droit de common law est agréée si elle l'a été par la Fédération des ordres professionnels de juristes du Canada, à moins que les conseillers n'adoptent une résolution déclarant qu'elle n'est pas une faculté de droit agréée ou qu'elle a cessé de l'être.

. . .

It is readily apparent that the approval of law faculties is tied to the purpose of assessing the fitness of an individual applicant for licensing. And the LSBC had received a legal opinion to this effect. It concludes that "[t]he object of [setting out academic or other qualifications] is that the Benchers are satisfied that candidates are 'of good character and repute and . . . fit to become a barrister and a solicitor of the Supreme Court' (s. 19(1))" (Legal Opinion re Academic Qualifications, May 8, 2013 reproduced in R.R., vol. III, pp. 87-116, at p. 90). Read in its entire context, the LSBC's authority to approve law schools acts only as a proxy for determining whether a law school's graduates, as individual applicants to the LSBC, meet the standards of competence and conduct required to become licensed.

Il est évident que la reconnaissance des facultés de droit est liée à l'objet consistant à apprécier l'aptitude individuelle des demandeurs à accéder à la profession. La LSBC a d'ailleurs reçu un avis juridique en ce sens. On y conclut que [TRADUCTION] « [l']objet visant [l'énonciation de qualifications académiques ou autres] consiste à faire en sorte que les conseillers soient convaincus que les candidats jouissent "d'une bonne moralité et d'une bonne réputation et [. . .] sont aptes à devenir des avocats à la Cour suprême" (par. 19(1)) » : Avis juridique, sous la rubrique [TRADUCTION] « Qualifications académiques », en date du 8 mai 2013, reproduit au d.i., vol. III., p. 87-116, p. 90. Lu dans son contexte global, le pouvoir de la LSBC d'agréer les facultés de droit sert uniquement d'indicateur pour déterminer si les diplômés d'une faculté de droit, en tant que personnes présentant une demande individuelle à la LSBC, respectent les normes de compétence et de conduite requises pour accéder à la profession.

[281] This interpretation respects the express limits to the LSBC's rule-making powers. Section 11 of the *LPA* grants the LSBC rule-making powers "for the governing of the society, lawyers, law firms,

[281] Cette interprétation respecte les limites expresses du pouvoir de la LSBC d'établir des règles. L'article 11 de la *LPA* confère à la LSBC le pouvoir d'établir des règles [TRADUCTION] « concernant la

articled students and applicants, and for the carrying out of [the *LPA*]". The powers are thus limited to the regulation of the legal profession and its constituent parts, extending no further than the licensing process — the doorway to the profession. Any exercise of the LSBC's discretion for a purpose extending beyond the express limits set out by s. 11 would be *ultra vires*.

[282] More particularly, the Rule does not grant the LSBC authority to regulate law schools. Applying the maxim of statutory interpretation *expressio unius est exclusio alterius* ("to express one thing is to exclude another"), we can presume that the legislator did not intend to include the governing of law schools among the LSBC's rule-making powers at s. 11. The scope of its mandate is limited to governance of "the society, lawyers, law firms, articled students and applicants". Had the legislator intended to grant the LSBC supervisory powers over law schools, it would have explicitly provided for such a significant grant of authority.

[283] This leads us to conclude that, in enacting the Rule under its power to make rules for the governing of applicants, the LSBC sought to regulate entrance into the legal profession by ensuring that individual applicants are fit for licensing.

[284] This interpretation is consistent with the purpose of the *LPA* as a whole. A careful reading of the *LPA* reveals that the scope of the LSBC's mandate is limited to the governance of the practice of law. The *LPA*'s provisions only relate to matters relevant to the governance of the legal profession and its constituent parts (the LSBC, lawyers, law firms, articled students and applicants). Even its farthest-reaching provisions confirm its limited mandate. For example, Part 3 of the *LPA* (ss. 26 to 35), concerned with the protection of the public, is limited to allegations regarding the conduct or competence of a law firm, lawyer, former lawyer or articled student (s. 26). Similarly, s. 28, which, under the heading of "Education", empowers Benchers to establish and maintain or otherwise

régie de la [LSBC], des avocats, des cabinets d'avocats, des stagiaires et des demandeurs, et l'application de [la *LPA*] ». Ce pouvoir se limite donc à la réglementation de la profession juridique et de ses éléments constitutifs, et il s'arrête au processus de délivrance de permis — la porte d'entrée de la profession. Tout exercice du pouvoir discrétionnaire de la LSBC à une fin allant au-delà des limites expresses établies par l'art. 11 serait *ultra vires*.

[282] Plus particulièrement, la Règle ne confère pas à la LSBC le pouvoir de réglementer les facultés de droit. Appliquant la maxime d'interprétation des lois *expressio unius est exclusio alterius* (« la mention de l'un implique l'exclusion de l'autre »), nous pouvons présumer que le législateur n'a pas voulu inclure la régie des facultés de droit dans le pouvoir d'établir des règles conféré à la LSBC par l'art. 11. La portée de son mandat se limite à la régie [TRADUCTION] « de la [LSBC], des avocats, des cabinets d'avocats, des stagiaires et des demandeurs ». Si le législateur avait eu l'intention d'investir la LSBC d'un pouvoir de surveillance à l'égard des facultés de droit, il aurait expressément prévu un pouvoir d'une telle importance.

[283] Cela nous amène à conclure que, en adoptant la Règle en vertu de son pouvoir d'établir des règles concernant la régie des demandeurs, la LSBC a voulu réglementer l'entrée dans la profession juridique en veillant à ce que les demandeurs soient individuellement aptes à y accéder.

[284] Cette interprétation est compatible avec l'objet de la *LPA* dans son ensemble. Une lecture attentive de la *LPA* révèle que la portée du mandat de la LSBC se limite à la régie de la pratique du droit. Les dispositions de la *LPA* ne se rapportent qu'à des questions relatives à la régie de la profession juridique et de ses éléments constitutifs (la LSBC, les avocats, les cabinets d'avocats, les stagiaires et les demandeurs). Même ses dispositions dont la portée est la plus grande confirment le mandat limité de la LSBC. Par exemple, la partie 3 de la *LPA* (art. 26 à 35), qui porte sur la protection du public, ne vise que les allégations concernant la conduite ou la compétence d'un cabinet d'avocats, d'un avocat, d'un ancien avocat ou d'un stagiaire

support a system of legal education, grant scholarships, bursaries and loans, establish or maintain law libraries, and to provide for publication of court and other legal decisions, expressly confines these actions to those taken "to promote and improve the standard of practice by lawyers". The LSBC's object, duties and powers are, in short, limited to regulating the legal profession, starting at (but not before) the licensing process — that is, starting at the doorway to the profession.

[285] Section 3 of the *LPA* states the LSBC's overarching object and duty, which includes upholding and protecting the public interest in the administration of justice by "preserving and protecting the rights and freedoms of all persons". It is on this basis that the majority concludes that the LSBC's decision to refuse to approve TWU's proposed law school because of its admissions policy was a valid exercise of its statutory authority. In doing so, it is our respectful view that it misconstrues the purpose underlying the LSBC's discretionary power to approve a law school under the Rule and extends the Rule's scope beyond the limits of the LSBC's mandate.

[286] Section 3 of the *LPA* cannot be understood in isolation. It must be examined "in [its] entire context and . . . harmoniously with the [*LPA*'s] scheme [and] object" (*Rizzo & Rizzo Shoes*, at para. 21, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87). Section 3 does not grant the LSBC the authority to exercise its statutory powers for a purpose lying outside the scope of its mandate under the guise of "preserving and protecting the rights and freedoms of all persons". For example, the LSBC could not take measures to promote rights and freedoms by engaging in the regulation of the courts or bar associations, even though such measures might well impact "the public interest in the administration of justice". These matters fall outside

(art. 26). De la même façon, l'art. 28, qui, sous la rubrique [TRADUCTION] « Éducation », habilite les conseillers à établir et maintenir, ou autrement appuyer, un système d'éducation juridique, à accorder des bourses et des prêts, à établir ou maintenir des bibliothèques de droit et à assurer la publication des décisions judiciaires ou autres décisions juridiques, limite expressément ces mesures à celles prises [TRADUCTION] « pour promouvoir et améliorer la norme de pratique des avocats ». Bref, l'objet, les devoirs et les pouvoirs de la LSBC se limitent à la réglementation de la profession juridique, à partir du processus de délivrance de permis (mais non avant) — c'est-à-dire à partir de la porte d'entrée de la profession.

[285] L'article 3 de la *LPA* énonce l'objet et le devoir primordiaux de la LSBC, qui comprennent le fait de défendre et de protéger l'intérêt public dans l'administration de la justice en [TRADUCTION] « préservant et en protégeant les droits et libertés de chacun ». C'est en se fondant sur cette disposition que les juges majoritaires arrivent à la conclusion que la décision de la LSBC de refuser d'agréer la faculté de droit proposée par TWU en raison de sa politique d'admission constituait un exercice valide du pouvoir que lui confère la loi. Nous estimons en toute déférence qu'en agissant ainsi, ils interprètent mal l'objet qui sous-tend le pouvoir discrétionnaire de la LSBC d'agréer une faculté de droit en vertu de la Règle et étendent la portée de cette dernière au-delà des limites du mandat de la LSBC.

[286] L'article 3 de la *LPA* ne peut être interprété isolément. Il doit être examiné « dans [son] contexte global [d'une manière] qui s'harmonise avec l'esprit [et] l'objet de la [*LPA*] » : *Rizzo & Rizzo Shoes*, par. 21, citant E. A. Driedger, *Construction of Statutes* (2e éd. 1983), p. 87. Cet article 3 ne permet pas à la LSBC d'exercer son pouvoir statutaire à une fin qui outrepasse son mandat sous le couvert de la mission consistant à [TRADUCTION] « préserv[er] et [à] protég[er] les droits et libertés de chacun ». La LSBC ne pourrait pas, par exemple, prendre des mesures visant à favoriser le respect des droits et libertés en se livrant à la réglementation des tribunaux ou des associations juridiques, même si de telles mesures pourraient bien avoir une incidence

of the scope of its statutory mandate, as does the governance of law schools.

[287] It is the scope of the LSBC's statutory authority that defines how it may carry out its public interest mandate, not the other way around. Had the legislator intended otherwise, the rule-making powers at s. 11 would have presumably provided the LSBC with broad discretionary power to make rules "to uphold and protect the public interest in the administration of justice".

[288] This is not to say that public interest considerations are irrelevant to the exercise of the LSBC's discretionary power. The LSBC's duty is to uphold and protect the public interest; however, this duty may only be exercised within the scope of its statutory mandate. The *LPA* does not empower the LSBC to police human rights standards in law schools. Provincial legislatures, including British Columbia's, have conferred that mandate upon provincial human rights tribunals. The LSBC does not enjoy a free-standing power under its "public interest" mandate to seek out conduct which it finds objectionable, howsoever much the "public interest" might thereby be served. Under the Rule, the LSBC can act in the public interest only for the purpose of ascertaining whether individual applicants are fit for licensing.

[289] While ensuring the competence of licensing applicants clearly falls within the LSBC's mandate, this purpose does not rationally extend to guaranteeing equal access to law schools. The fact that the Rule sets out minimum requirements for licensing confirms that the LSBC is properly concerned with competence, not with merit. Setting admissions criteria to select the "best of the best" is up to law schools. To be clear, the selection of law students does not in any way fall within the LSBC's mandate, which is confined to the narrow task of ensuring

sur [TRADUCTION] « l'intérêt public dans l'administration de la justice ». Ces questions ne relèvent pas de son mandat statutaire, pas plus que la régie des facultés de droit.

[287] C'est la portée du pouvoir statutaire de la LSBC qui détermine la façon dont cette dernière peut s'acquitter de son mandat visant la protection de l'intérêt public, et non l'inverse. Si le législateur avait eu l'intention contraire, on peut présumer que le pouvoir d'établir des règles prévu à l'art. 11 aurait conféré à la LSBC un vaste pouvoir discrétionnaire d'établir des règles en vue « de défendre et de protéger l'intérêt public dans l'administration de la justice ».

[288] Cela ne veut pas dire que les considérations d'intérêt public ne sont pas pertinentes pour l'exercice du pouvoir discrétionnaire de la LSBC. Le devoir qui incombe à la LSBC consiste à défendre et à protéger l'intérêt public; toutefois, la LSBC ne peut s'acquitter de ce devoir que dans les limites de son mandat statutaire. La *LPA* n'habilite pas la LSBC à veiller au respect des normes relatives aux droits de la personne dans les facultés de droit. Les assemblées législatives provinciales, y compris celle de la Colombie-Britannique, ont confié ce mandat aux tribunaux provinciaux des droits de la personne. La LSBC ne jouit pas, dans le cadre de son mandat de protection de l'« intérêt public », d'un pouvoir autonome lui permettant de chercher à identifier les conduites qu'elle juge répréhensibles, peu importe la mesure dans laquelle un tel pouvoir servirait l'« intérêt public ». Suivant la Règle, la LSBC ne peut agir dans l'intérêt public que pour déterminer si les demandeurs sont individuellement aptes à accéder à la profession.

[289] Si assurer la compétence des personnes qui demandent un permis relève manifestement du mandat de la LSBC, cet objet ne s'étend pas logiquement au fait de garantir l'égalité d'accès aux facultés de droit. Le fait que la Règle énonce des exigences minimales en matière de délivrance de permis confirme que la LSBC s'intéresse à bon droit à la compétence des candidats et non à leur mérite. C'est aux facultés de droit qu'il revient d'établir des critères permettant de sélectionner « la crème de la crème ». Autrement dit, la sélection des étudiants en droit ne relève pas

that those who have graduated from law school and who apply for licensing meet minimum standards of competence and ethical conduct. Whether or not law schools have themselves selected the "best of the best" has no bearing on the LSBC's task of determining who is fit to practise law in British Columbia. Contrary to what the majority concludes at paras. 42 and 43 of their reasons, equal access to the legal profession and diversity in the legal profession are distinct from the duty to ensure competent practice. Indeed, the facts of this appeal are an example. Despite the unequal access effected by the requirement that applicants to TWU commit to a community covenant, the LSBC concedes its lack of concern regarding the competence or ethical conduct of TWU graduates. Relatedly, and while the majority notes (at para. 45) that "[t]he LSBC did not purport to make any other decision governing TWU's proposed law school or how it should operate", the majority's statement (at para. 39) that "[t]he LSBC was entitled to be concerned that inequitable barriers on entry to law schools would effectively impose inequitable barriers on entry to the profession and risk decreasing diversity within the bar" would logically apply to other aspects of law school admissions which might be said to create inequitable barriers to legal education, such as tuition fees. By the majority's logic, then, the LSBC would be entitled (or indeed, required) to consider such barriers in accrediting law schools in order to promote the competence of the bar as a whole.

[290] At their core, the majority's reasons err by assimilating legal education to the LSBC's mandate. They extend the reach — without any justification grounded in the terms of the *LPA* — of the LSBC's "authority as the gatekeeper to the legal profession" (para. 45 (emphasis added)) all the way back to the

du tout du mandat de la LSBC, qui se limite à la simple tâche de veiller à ce que les diplômés d'une faculté de droit qui demandent un permis de pratique respectent les normes minimales en matière de compétence et de déontologie. La question de savoir si les facultés de droit ont elles-mêmes sélectionné ou non « la crème de la crème » n'a aucune incidence sur la tâche de la LSBC consistant à déterminer qui est apte à pratiquer le droit en Colombie-Britannique. Contrairement à ce que concluent les juges majoritaires aux par. 42 et 43 de leurs motifs, l'égalité d'accès à la profession juridique et la diversité au sein de celle-ci n'ont rien à voir avec le devoir d'assurer la compétence dans la pratique. Les faits du présent pourvoi en sont d'ailleurs un exemple. Malgré l'inégalité d'accès engendrée par l'exigence voulant que les personnes qui présentent une demande d'admission à TWU signent un covenant communautaire, la LSBC concède n'avoir aucune préoccupation à l'égard de la compétence ou de la conduite déontologique des diplômés de TWU. Dans le même ordre d'idées, et même si les juges majoritaires soulignent (au par. 45) que « [l]a LSBC n'entendait prendre aucune autre décision relative à la faculté de droit proposée par TWU ou à la manière dont cette faculté devrait exercer ses activités », leur affirmation (au par. 39) selon laquelle « [l]a LSBC était en droit de craindre que l'imposition de barrières inéquitables à l'entrée aux facultés de droit impose dans les faits des barrières inéquitables à l'entrée dans la profession et risque ainsi de diminuer la diversité au sein du barreau » s'appliquerait logiquement à d'autres aspects des politiques d'admission des facultés de droit dont on pourrait dire qu'ils créent des barrières inéquitables à l'éducation juridique, comme les frais de scolarité. Suivant la logique des juges majoritaires, la LSBC aurait donc le pouvoir, voire l'obligation, de tenir compte de ces barrières lorsqu'elle décide d'agréer ou non une faculté de droit afin de favoriser la compétence au sein du barreau dans son ensemble.

[290] Essentiellement, l'opinion des juges majoritaires est erronée du fait qu'elle assimile la formation juridique au mandat de la LSBC. Sans que cela soit aucunement fondé sur le libellé de la *LPA*, ils étendent la portée « des pouvoirs [que] possède [la LSBC] en tant que gardienne de la profession

law school's threshold. The LSBC must, however, take licensing applicants as they come; its statutory mandate empowers it to control the doorway to the profession, not to decide who knocks on the door. No reference to the LSBC's history — again, unsupported by the actual terms of the *LPA* — can justify the majority's endorsement of such a distension of its mandate (see Majority Reasons, at para. 46). Any measures undertaken by the LSBC to promote diversity in the legal profession must fall within the bounds of its statutory mandate *as expressed at the time those actions are undertaken*. Though the majority denies it, by allowing the LSBC to refuse to accredit a law school solely on the basis of its admissions policies — and in the absence of any concerns relating to the fitness of that school's graduates — it allows the LSBC to do that which it is not statutorily empowered to do — govern law schools by regulating their admissions policies. It does, in effect, tell law schools "how [they] should operate" (Majority Reasons, at para. 45). But so long as a law school's admissions policies do not raise concerns over its graduates' fitness to practise law, the LSBC is simply not statutorily empowered to scrutinize them.

[291] The majority's overextension of the LSBC's mandate is equally apparent in discussing the LSBC's duty to "preven[t] harm to LGBTQ law students" (para. 40). The majority correctly notes that any risk of harm falls on "LGBTQ people who attend TWU's proposed law school" (para. 96 (emphasis added); see also paras. 98 and 103); in other words, the harm occurs in the context of legal education rather than the legal profession. Again, it is conceded by the LSBC that it has no basis for doubting that the graduates of TWU's proposed law school will be competent lawyers that will practise in accordance with human rights codes prohibiting discrimination against LGBTQ persons. There is, therefore, no basis upon which to find that such harms will manifest in the legal profession. Any harms to marginalized

juridique » (par. 45 (nous soulignons)) aussi loin qu'au seuil de la faculté de droit. Or, la LSBC doit recevoir ceux qui sollicitent la délivrance d'un permis comme ils arrivent; son mandat statutaire lui donne le contrôle de l'accession à la profession, non pas celui de décider qui peut frapper à sa porte. Aucune référence à l'histoire de la LSBC — encore une fois, non fondée sur le texte précis de la *LPA* — ne peut justifier l'approbation par les juges majoritaires d'une telle distorsion de son mandat : voir les motifs des juges majoritaires, par. 46. Toutes les mesures mises en place par la LSBC pour promouvoir la diversité dans la profession juridique doivent s'inscrire dans les limites de son mandat statutaire *tel qu'il s'articule au moment où ces mesures sont prises*. Bien que les juges majoritaires le nient, en autorisant la LSBC à refuser d'agréer une faculté de droit uniquement en fonction de ses politiques d'admission — et en l'absence de toute préoccupation quant à l'aptitude des diplômés de cette faculté —, ils lui permettent de faire ce que la loi ne lui donne pas le pouvoir de faire, soit régir les facultés de droit en réglementant leurs politiques d'admission. De fait, l'ordre professionnel signale aux facultés comment elles « devrai[en]t exercer [leurs] activités » : motifs des juges majoritaires, par. 45. Toutefois, dans la mesure où les politiques d'admission d'une faculté de droit ne soulèvent pas de préoccupation quant à l'aptitude des diplômés de celle-ci à pratiquer le droit, la loi ne confère tout simplement pas le pouvoir à la LSBC de les scruter.

[291] L'élargissement injustifié du mandat de la LSBC par les juges majoritaires ressort tout autant lorsqu'il est question de son devoir d'« empêcher qu'un préjudice soit causé aux étudiants en droit LGBTQ » : par. 40. Nos collègues majoritaires soulignent avec raison que ce sont « [les] personnes LGBTQ qui fréquentent à la faculté de droit proposée par TWU » qui risquent de subir un préjudice (par. 96 (nous soulignons); voir également les par. 98 et 103); autrement dit, le préjudice survient dans le contexte de la formation juridique plutôt que dans celui de la profession juridique. Il importe de rappeler que la LSBC concède que rien ne lui permet de douter du fait que les diplômés de la faculté de droit proposée par TWU seront des avocats compétents qui exerceront leur profession conformément aux

communities in the context of legal education must be considered by provincial human rights tribunals, by legislatures, and by members of the executive, which grant such institutions the power to confer degrees. The LSBC is not a roving, free-floating agent of the state. It cannot take it upon itself to police such matters when they lie beyond its mandate.

[292] Finally, as discussed in more detail below, the "imperative of refusing to condone discrimination against LGBTQ people" (McLachlin C.J.'s Reasons, at para. 137; see also Majority Reasons, at paras. 40 and 105), is not a valid basis for the LSBC's decision. This Court has already held that denying accreditation should be based on specific evidence rather than "general perceptions" (*TWU 2001*, at para. 38). As we explain below, the recognition of a private actor by the state cannot be construed as amounting to an endorsement of that actor's religious beliefs or practices.

[293] The only proper purpose for the LSBC's approval decision is to ensure that individual applicants are fit for licensing. Given that the LSBC concedes that there are no concerns relating to the fitness of prospective TWU graduates, the only defensible exercise of the LSBC's statutory discretion for a proper purpose would have been to approve TWU.

B. *The LSBC Benchers Fettered Their Discretion in a Manner Inconsistent With Their Statutory Duty*

[294] We disagree with the majority that the Benchers' decision to bind themselves to the results of a referendum on the approval of TWU's

codes des droits de la personne interdisant les actes discriminatoires à l'égard des personnes LGBTQ. Par conséquent, rien ne permet de conclure que de tels préjudices se manifesteront dans la profession juridique. Tout préjudice causé aux communautés marginalisées dans le contexte de la formation juridique doit être examiné par les tribunaux provinciaux des droits de la personne, par les assemblées législatives et par les membres de l'exécutif, qui confèrent à ces institutions le pouvoir de délivrer des diplômes. La LSBC, en tant que représentante de l'État, n'est pas un électron libre qui peut tout se permettre. Elle ne peut pas décider de veiller au respect de telles questions de son propre chef alors qu'elles outrepassent son mandat.

[292] Enfin, comme nous le verrons plus en détail plus loin, le « devoir de refuser de cautionner des actes discriminatoires à l'endroit de la communauté LGBTQ » (motifs de la juge en chef McLachlin, par. 137; voir également les motifs des juges majoritaires, par. 40 et 105) ne constitue pas un fondement valable pour la décision rendue par la LSBC. La Cour a déjà statué que le rejet d'une demande de reconnaissance devrait reposer sur une preuve particulière, et non sur des « perceptions générales » : *TWU 2001*, par. 38. Comme nous l'expliquerons plus loin, la reconnaissance par l'État d'un acteur privé ne saurait être interprétée comme équivalant à l'approbation des croyances ou pratiques religieuses de cet acteur.

[293] La décision de la LSBC relative à la reconnaissance d'une faculté de droit a pour seule fin légitime de veiller à ce que les demandeurs soient individuellement aptes à accéder à la profession. Étant donné que la LSBC concède qu'il n'existe aucune préoccupation à l'égard de l'aptitude des éventuels diplômés de TWU, le seul exercice justifiable du pouvoir discrétionnaire statutaire de la LSBC à une fin légitime aurait été pour elle d'agréer TWU.

B. *Les conseillers de la LSBC ont entravé leur pouvoir discrétionnaire d'une manière qui contrevient à leur devoir statutaire*

[294] Nous ne partageons pas l'avis des juges majoritaires selon lequel la décision des conseillers de s'en remettre aux résultats d'un référendum sur la

proposed law school did not violate their statutory duties (Majority Reasons, at para. 48). While the Benchers may not have had a duty to provide formal reasons (Majority Reasons, at para. 55), the rationale for deference under *Doré* — expertise in applying the *Charter* to a specific set of facts (paras. 47-48) — requires more engagement and consideration from an administrative decision-maker than simply being "alive to the issues", whatever that may mean (Majority Reasons, at para. 56). Irrespective of whether the Benchers had the authority to be bound by a referendum outside of the circumstances set out in s. 13 of the *LPA*, we agree with the Court of Appeal that, in this case, the Benchers abdicated their duty as administrative decision-makers to properly balance the objectives of the *LPA* with the *Charter* rights implicated by their approval decision.

[295] As the majority recognizes at para. 52 of its reasons, judicial review has always been concerned with both the outcome *and the process* of administrative decision making. We stress that the issue identified by the Court of Appeal was with the lack of reasoning in the process adopted and not the sufficiency of reasons — whether formal or informal — themselves. The majority's reliance on *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, and *Green v. Law Society of Manitoba*, 2017 SCC 20, [2017] 1 S.C.R. 360, elides this issue. Indeed, in *Catalyst Paper*, the Court explicitly relied on the municipal council's rich deliberative process in finding that there was no duty to provide formal reasons when passing a by-law (para. 29). Further, neither *Catalyst Paper* nor *Green* involved the adoption of a by-law that risked infringing the *Charter*. The importance of the reasoning process that must underlie administrative decision making where a *Charter* right is at issue was explicitly stated in *Doré* (at paras. 55-56). Yet, its absence in this case is given no significance whatsoever by the majority.

reconnaissance de la faculté de droit proposée par TWU ne violait pas les devoirs statutaires qui leur incombaient : motifs des juges majoritaires, par. 48. Bien que les conseillers n'aient peut-être pas été tenus de fournir des motifs écrits (motifs des juges majoritaires, par. 55), la raison d'être de la déférence dans le cadre d'analyse énoncé dans l'arrêt *Doré* — l'expertise en matière d'application de la *Charte* à un ensemble précis de faits (par. 47-48) — nécessite une participation et un examen plus actifs de la part du décideur administratif, qui ne saurait simplement être « conscien[t] de ce qui [est] en jeu », quoi que cela puisse signifier (motifs des juges majoritaires, par. 56). Peu importe que les conseillers aient le pouvoir de s'en remettre à un référendum à l'extérieur des circonstances visées par l'art. 13 de la *LPA*, nous convenons avec la Cour d'appel que, en l'espèce, les conseillers ont fait abstraction du devoir qui leur incombait, en tant que décideurs administratifs, de réaliser un juste équilibre entre les objectifs de la *LPA* et les droits garantis par la *Charte* visés par leur décision relative à la reconnaissance de la faculté de droit.

[295] Comme les juges majoritaires le reconnaissent au par. 52 de leurs motifs, le contrôle judiciaire a toujours porté à la fois sur les résultats *et sur le processus* décisionnel administratif. Nous tenons à souligner que, selon la Cour d'appel, le problème résidait dans l'absence de raisonnement plutôt que dans l'insuffisance des motifs — écrits ou non — en tant que tels. En s'appuyant sur les arrêts *Catalyst Paper Corp. c. North Cowichan (District)*, 2012 CSC 2, [2012] 1 R.C.S. 5, et *Green c. Société du Barreau du Manitoba*, 2017 CSC 20, [2017] 1 R.C.S. 360, les juges majoritaires évitent cette question. En effet, dans l'arrêt *Catalyst Paper*, la Cour s'est expressément appuyée sur le riche processus de délibération du conseil municipal pour conclure que celui-ci n'avait pas le devoir de fournir des motifs écrits lors de l'adoption d'un règlement : par. 29. De plus, ni *Catalyst Paper* ni *Green* ne concernaient l'adoption d'un règlement susceptible de porter atteinte à la *Charte*. L'importance du raisonnement qui doit sous-tendre le processus décisionnel administratif lorsqu'un droit garanti par la *Charte* est en cause a été expressément soulignée dans *Doré* : par. 55-56. Or, les juges majoritaires n'accordent aucune importance à l'absence de raisonnement en l'espèce.

[296] The LSBC violated its statutory duty by adopting the results of a referendum affecting *Charter* rights without engaging in the process of balancing *Charter* rights and statutory objectives required by *Doré*. It is plain from an examination of the LSBC's decision-making "process" that any balancing exercise engaged in by the Benchers was disconnected from the outcome the LSBC now seeks to justify, which was merely a rubber stamping of the outcome of a referendum of LSBC members.

[297] As noted by the majority, the Benchers engaged in debate and deliberation on the *Charter* issues during their April 11, 2014 and September 26, 2014 meetings. They decided *against* adopting a resolution declaring TWU's proposed law school to *not* be an approved faculty of law at the conclusion of each of those meetings. But that particular deliberation did not lead to the outcome the LSBC now seeks to justify. Instead, despite having (arguably) twice balanced the *Charter* rights implicated with the LSBC's statutory objectives in fulfilment of their statutory duty, the Benchers — at the conclusion of the September 26, 2014 meeting — opted for a binding referendum on the issue of TWU's approval, with the results of that referendum being adopted with *no further discussion* and therefore no substantive debate on October 31, 2014.

[298] In light of this background, it is, with respect, pure historical revisionism to suggest that the Benchers believed their decision "would benefit from the guidance or support of the membership as a whole" (Majority Reasons, at para. 50). Indeed, at the time of their *actual* deliberations on September 26, 2014, the Benchers *already had* the Resolution of the Special General Meeting of LSBC members adopted on June 10, 2014, and they took this expression of the membership's will into account during that meeting. By then opting for a binding referendum, the Benchers abdicated their duty as administrative decision-makers by deferring to a popular vote. It might, of course, be argued that the

[296] La LSBC a manqué à son devoir statutaire en s'en remettant aux résultats d'un référendum ayant une incidence sur des droits garantis par la *Charte* sans réaliser, comme le requiert l'arrêt *Doré*, un juste équilibre entre ces droits et les objectifs législatifs en cause. Il ressort d'un examen du « processus » décisionnel de la LSBC que tout exercice de mise en balance auquel se sont livrés les conseillers n'avait aucun lien avec le résultat que la LSBC cherche maintenant à justifier, lequel repose uniquement sur l'entérinement d'office du résultat d'un référendum des membres de la LSBC.

[297] Comme le soulignent les juges majoritaires, les conseillers ont entrepris des discussions et ont délibéré sur les questions relatives à la *Charte* lors des réunions du 11 avril et du 26 septembre 2014. À la fin de chacune de ces réunions, ils ont décidé de *ne pas* adopter une résolution déclarant que la faculté de droit proposée par TWU *n*'était *pas* une faculté de droit agréée. Toutefois, ces délibérations n'ont pas donné lieu au résultat que la LSBC cherche maintenant à justifier. Au contraire, même s'ils se sont livrés (pourrait-on prétendre) à deux reprises à la mise en balance des droits en jeu protégés par la *Charte* en jeu et des objectifs statutaires de la LSBC, dans l'accomplissement du devoir que la loi leur confie, les conseillers — à l'issue de leur réunion du 26 septembre 2014 — ont choisi de tenir un référendum exécutoire sur la question de la reconnaissance de TWU, les résultats de ce référendum ayant été entérinés *sans autre discussion*, et sans la tenue d'un débat de fond, le 31 octobre 2014.

[298] Compte tenu de ce contexte, et avec respect, dire que les conseillers croyaient que leur décision « gagnerai[t] à être guidé[e] ou appuyé[e] par l'ensemble des membres » (motifs des juges majoritaires, par. 50) revient selon nous à réécrire l'histoire. En effet, au moment de leurs *véritables* délibérations, le 26 septembre 2014, les conseillers *disposaient déjà* de la résolution adoptée le 10 juin 2014 par les membres de la LSBC lors de leur assemblée générale extraordinaire et, pendant leur réunion, ils ont tenu compte de l'avis ainsi exprimé par les membres. En choisissant par la suite de tenir un référendum exécutoire, les conseillers ont fait abstraction de leur devoir en tant que décideurs administratifs en s'en

Benchers preferred any outcome dictated by popular vote to the outcome flowing from their own reasoning. The flaw, however, of such an approach is that the LSBC membership could never, through means of a referendum, engage in the balancing *process* required by *Doré*.

[299] Such a serious error would normally require that the LSBC's decision be quashed and returned for a proper determination. As counsel for the LSBC conceded before us (Transcript, at p. 341), however, "because of the failure of the [LSBC] to . . . determine the proportionate balancing in this situation" it now falls to this Court to determine the "single answer", which we understand to refer to the proportionate balance between the severity of the limitation on the *Charter* right at issue and the statutory objectives governing the LSBC. The difficulty here is that (as we have already pointed out) the LSBC's decision is completely devoid of any reasoning.

[300] And yet, the majority justifies deferring to that void by reminding us that reviewing courts "may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome" (para. 56). But, for two reasons, this statement is untenable. First, it does not conform to this Court's recent direction, in *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 S.C.R. 6, at para. 27, that "reviewing courts must look at both the reasons *and* the outcome" (emphasis in original). In other words, it is never sufficient to consider the outcome alone. Indeed, the Court in *Delta Air Lines* went on (at para. 27) to caution that "[i]f we allow reviewing courts to replace the reasons of administrative bodies with their own, the outcome of administrative decisions becomes the sole consideration." In our respectful view, the majority does both these things: it replaces the (non-)reasons of the LSBC with its own, and makes the outcome the sole consideration.

remettant au vote populaire. Bien sûr, on pourrait prétendre que les conseillers privilégiaient le résultat, quel qu'il soit, dicté par le vote populaire au résultat découlant de leur propre raisonnement. Toutefois, la lacune d'une telle approche est qu'il était impossible pour les membres de la LSBC, en tenant un référendum, de se livrer au *processus* de mise en balance exigé par l'arrêt *Doré*.

[299] Une erreur aussi grave commanderait normalement que la décision de la LSBC soit annulée et que le dossier lui soit renvoyé pour qu'elle tranche la question adéquatement. Toutefois, comme l'avocat de la LSBC l'a admis devant nous (transcription, p. 341), [TRADUCTION] « en raison du défaut de la [LSBC] de [. . .] déterminer ce qui constituait une mise en balance proportionnée dans cette situation », il revient maintenant à la Cour de déterminer l'« unique réponse » applicable en l'espèce, laquelle, selon nous, concerne la mise en balance proportionnée de la gravité de la restriction imposée au droit en cause garanti par la *Charte* d'une part, et des objectifs statutaires régissant la LSBC d'autre part. La difficulté (comme nous l'avons déjà souligné) est que la décision de la LSBC ne repose sur aucun raisonnement.

[300] Et pourtant, les juges majoritaires justifient leur attitude de réserve à l'égard de cette lacune en nous rappelant que la cour de révision « peut [. . .], si elle le juge nécessaire, examiner le dossier pour apprécier le caractère raisonnable du résultat » : par. 56. Mais cet énoncé est insoutenable pour deux raisons. Premièrement, il ne se conforme pas à la directive récente donnée par la Cour dans l'arrêt *Delta Air Lines Inc. c. Lukács*, 2018 CSC 2, [2018] 1 R.C.S. 6, par. 27, selon laquelle « les cours de révision doivent examiner à la fois les motifs *et* le résultat » (en italique dans l'original). En d'autres mots, il ne suffit jamais d'examiner uniquement le résultat. D'ailleurs, dans *Delta Air Lines*, la Cour a ensuite signalé (par. 27) que « [s]i nous permettions aux cours de révision de remplacer les motifs d'organismes administratifs par les leurs, le résultat des décisions administratives deviendrait la seule considération ». Nous estimons respectueusement que les juges majoritaires font ces deux choses en l'espèce : ils remplacent les motifs (inexistants) de la LSBC par les leurs, et ils font du résultat leur seule considération.

[301] The second objection to the majority's statement that courts "may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome" is that, of course, there is no record in this case of post-referendum deliberation allowing anyone to "ass[ess] the reasonableness of the outcome". Still, the majority, even without the benefit of reasons or a relevant record, assures us that "the Benchers came to a decision that reflects a proportionate balancing" (para. 56). But, and with respect, the majority simply cannot point to *any* basis whatsoever for suggesting that the Benchers conducted any balancing at all, let alone proportionate balancing.

C. *The Doré/Loyola Framework*

[302] Our reasons apply the *Doré/Loyola* framework as we are able to understand it from the jurisprudence, but we note our concerns in relation to this framework for judicial review of *Charter*-infringing administrative decisions. The comments and scholars cited by the Chief Justice (para. 111, fn. 1) are overwhelmingly critical and make clear that the framework's contours are poorly defined. While we welcome the clarification of the framework articulated in the Chief Justice's reasons, we find the lack of rationale for insisting on a distinct framework for administrative decisions troubling, particularly in light of the fact that the application of the stages of the *Oakes* test in our jurisprudence is already context-specific (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *RJR-MacDonald*, at para. 132).

[303] In our view, the suggestion in *Doré* (at para. 4) that "an adjudicated administrative decision is not like a law which can, theoretically, be objectively justified by the state, making the traditional s. 1 analysis an awkward fit" does not account for this Court's statement that, where a *Charter* infringement can be attributed to individualized decisions of state decision-makers, the proportionality test must

[301] La seconde objection à l'énoncé des juges majoritaires selon lequel une cour « peut [. . .], si elle le juge nécessaire, examiner le dossier pour apprécier le caractère raisonnable du résultat » tient au fait qu'évidemment il n'y a pas de dossier en l'espèce portant sur des délibérations postérieures au référendum permettant à quiconque d'« apprécier le caractère raisonnable du résultat ». Néanmoins, les juges majoritaires, même sans bénéficier de motifs ou d'un dossier pertinent, affirment que « les conseillers sont arrivés à une décision qui est le fruit d'une mise en balance proportionnée ». Avec égards, cependant, les juges majoritaires ne disposent tout simplement d'*aucun* fondement pour affirmer que les conseillers ont procédé à une quelconque mise en balance, et encore moins à une mise en balance proportionnée.

C. *Le cadre d'analyse des arrêts Doré et Loyola*

[302] Nos motifs reposent sur l'application du cadre d'analyse prescrit dans les arrêts *Doré* et *Loyola* selon notre compréhension de la jurisprudence, mais nous tenons à souligner certaines préoccupations que nous avons quant à l'application de ce cadre d'analyse au contrôle judiciaire d'une décision administrative attentatoire. Les commentateurs et les universitaires cités par la juge en chef (par. 111, n. 1) sont extrêmement critiques et expliquent clairement que les contours de ce cadre d'analyse sont mal définis. Bien que nous jugions utiles les précisions que la juge en chef apporte au sujet de ce cadre d'analyse dans ses motifs, nous sommes d'avis que le manque de logique quant au fait d'insister pour qu'un cadre d'analyse distinct soit appliqué aux décisions administratives est troublant, d'autant plus que l'application des étapes de l'analyse de l'arrêt *Oakes* dans la jurisprudence de la Cour est déjà contextuelle : *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835; *RJR-MacDonald*, par. 132.

[303] Selon nous, l'énoncé dans l'arrêt *Doré* (par. 4) selon lequel « une décision administrative en matière contentieuse n'est pas assimilable à une loi qui peut, en théorie, être objectivement justifiée par l'État [de sorte] que, dans ce contexte, l'analyse traditionnelle fondée sur l'article premier est boiteuse » ne tient pas compte du fait que la Cour a précisé que, lorsqu'une violation de la *Charte* est

apply (*Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256, at paras. 16 and 21, per Charron J.). Further, it is belied by the application of the *Oakes* test by this Court to administrative decisions in many cases prior to *Doré* (*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483; *Dagenais*; *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; *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295). That suggestion is also doubtful in light of the ambivalent application of *Doré* in *Loyola*, and by its non-application in *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3. Similarly, this Court avoided applying the deferential *Doré* framework when defining the scope of the *Charter* right in *Association of Justice Counsel v. Canada (Attorney General)*, 2017 SCC 55, [2017] 2 S.C.R. 456, and *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 S.C.R. 386.

[304] We acknowledge the majority's insistence (at para. 80) that "[t]he framework set out in *Doré* and affirmed in *Loyola* is not a weak or watered-down version of proportionality". Rather, it maintains, it is "robust". But saying so does not make it so. Indeed, the Chief Justice's attempt to clarify that framework, combined with the majority's continued defence of the "robustness" of proportionality as set out in the *Doré/Loyola* framework, simply reinforce our view that the orthodox test — the *Oakes* test — must apply to justify state infringements of *Charter* rights, regardless of the context in which

attribuable à une décision individualisée d'un décideur qui s'est vu conférer compétence par l'État, il doit être satisfait au critère de la proportionnalité : *Multani c. Commission scolaire Marguerite-Bourgeoys*, 2006 CSC 6, [2006] 1 R.C.S. 256, par. 16 et 21, la juge Charron. De plus, le fait que la Cour ait appliqué l'analyse de l'arrêt *Oakes* à des décisions administratives dans plusieurs arrêts antérieurs à l'arrêt *Doré* contredit cet énoncé : *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038; *Stoffman c. Vancouver General Hospital*, [1990] 3 R.C.S. 483; *Dagenais*; *Ross c. Conseil scolaire du district n^o^ 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; *Greater Vancouver Transportation Authority c. Fédération canadienne des étudiantes et étudiants — Section Colombie-Britannique*, 2009 CSC 31, [2009] 2 R.C.S. 295. Il est également permis de douter de la validité de l'énoncé susmentionné en raison de l'application ambivalente de l'arrêt *Doré* par la Cour dans l'affaire *Loyola*, et du fait que cet arrêt n'a pas été appliqué dans l'affaire *Mouvement laïque québécois c. Saguenay (Ville)*, 2015 CSC 16, [2015] 2 R.C.S. 3. De même, la Cour a évité d'appliquer le cadre d'analyse déférent de l'arrêt *Doré* lorsqu'elle a défini la portée du droit garanti par la *Charte* dans les arrêts *Association des juristes de justice c. Canada (Procureur général)*, 2017 CSC 55, [2017] 2 R.C.S. 456, et *Ktunaxa Nation c. Colombie-Britannique (Forests, Lands and Natural Resource Operations)*, 2017 CSC 54, [2017] 2 R.C.S. 386.

[304] Nous constatons que les juges majoritaires soulignent (par. 80) que « [l]e cadre d'analyse établi dans *Doré* et confirmé dans *Loyola* ne constitue pas une version atténuée ou édulcorée de l'analyse de la proportionnalité ». De fait, ils affirment plutôt qu'il s'agit d'une analyse « robuste ». Mais il ne suffit pas de le dire pour qu'il en soit ainsi. La tentative de la juge en chef de clarifier ce cadre d'analyse, conjuguée au plaidoyer soutenu des juges majoritaires en faveur de la reconnaissance de la « robustesse » de l'analyse de la proportionnalité exposée dans les arrêts *Doré* et *Loyola*, ne fait que confirmer notre opinion selon

they occur. Holding otherwise subverts the promise of our Constitution that the rights and freedoms guaranteed by the *Charter* will be subject only to "such reasonable limits prescribed by law as can be demonstrably justified" (s. 1).

[305] This is evident in the majority's own reasons. The state, it says, need only show that its decision "gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate" (para. 80, quoting *Loyola*, at para. 39 (emphasis added)). Or, "[p]ut another way, the *Charter* protection must be 'affected as little as reasonably possible' in light of the applicable statutory objectives" (para. 80, quoting *Loyola*, at para. 40 (emphasis added)). In other words, under *Doré*, *Charter* rights are guaranteed *only so far as they are consistent with the objectives of the enabling statute*. When push comes to shove, statutory objectives — including, presumably, unconstitutional statutory objectives — trump the right. But s. 52 of the *Constitution Act, 1982*, which provides for the primacy of the Constitution, suggests to us that it should be the other way around — that *rights* trump statutory objectives and decisions taken thereunder. Further, s. 1 of the *Charter* does not guarantee certain rights and freedoms subject only "to the limits imposed by statutory objectives", but to limits that are "demonstrably justified in a free and democratic society". As, therefore, the Court of Appeal for Ontario recently stated, "[a] party bringing a *Charter* challenge is entitled to a judicial determination of whether the *Charter* right has been limited, and the government must have the opportunity to argue that such a limit is justified under s. 1 of the *Charter*: *Symes v. Canada*, [1993] 4 S.C.R. 695, [1993] S.C.J. No. 131, at para. 105 (per Iacobucci J.)" (*Gehl v. Canada (Attorney General)*, 2017 ONCA 319, 138 O.R. (3d) 52, at para. 78).

laquelle l'analyse traditionnelle — celle de l'arrêt *Oakes* — doit s'appliquer aux atteintes par l'État aux droits garantis par la *Charte*, peu importe le contexte dans lequel elles se produisent. Conclure différemment viole la promesse découlant de notre Constitution que les droits et libertés garantis par la *Charte* ne seront assujettis qu'à « des limites qui soient raisonnables et dont la justification puisse se démontrer » : art. 1.

[305] Cela ressort clairement des motifs des juges majoritaires. Il suffit, affirment ces derniers, que l'État démontre que sa décision « donne effet autant que possible aux protections en cause conférées par la *Charte* compte tenu du mandat législatif particulier en cause » : par. 80, citant *Loyola*, par. 39 (nous soulignons). Ou, « [a]utrement dit, la protection conférée par la *Charte* doit être restreinte "aussi peu que cela est raisonnablement possible" eu égard aux objectifs légaux applicables » : par. 80, citant *Loyola*, par. 40 (nous soulignons). Bref, selon l'arrêt *Doré*, les droits garantis par la *Charte* ne sont protégés *que dans la mesure où ils sont compatibles avec les objectifs de la loi habilitante*. Ainsi, dans la pratique, les objectifs statutaires — y compris, vraisemblablement, des objectifs statutaires inconstitutionnels — ont préséance sur le droit. Cependant, l'art. 52 de la *Loi constitutionnelle de 1982*, qui consacre la primauté de la Constitution, indique que ce devrait être le contraire, et donc que les *droits* ont préséance sur les objectifs statutaires et les décisions axées sur ceux-ci. De plus, l'article premier de la *Charte* protège certains droits et libertés non seulement sous réserve [TRADUCTION] « des limites qu'imposent les objectifs visés par la loi », mais sous réserve des limites « dont la justification [peut] se démontrer dans le cadre d'une société libre et démocratique ». Ainsi, comme la Cour d'appel de l'Ontario l'a récemment dit, [TRADUCTION] « [u]ne partie qui intente une contestation fondée sur la *Charte* est en droit de s'attendre à ce que le tribunal juge si un droit protégé par la *Charte* a été restreint et le gouvernement doit se voir accorder la possibilité de faire valoir que cette limite est justifiée au regard de l'article premier : *Symes c. Canada*, [1993] 4 R.C.S. 695, [1993] S.C.J. No. 131, par. 105 (le juge Iacobucci) » : *Gehl c. Canada (Attorney General)*, 2017 ONCA 319, 138 O.R. (3d) 52, par. 78.

[306] The majority's continued reliance on "values" protected by the *Charter* as equivalent to "rights" (Majority Reasons, at para. 58), is similarly troubling. These "values" loom large in the majority's reasons, given its description (at para. 41) of the LSBC's interest in protecting "the values of equality and human rights". On this point, the majority also cites to Abella J.'s reference in *Loyola* (at para. 47) to "shared values — equality, human rights and democracy" as "values the state always has a legitimate interest in promoting and protecting".

[307] We are in agreement with the Chief Justice and our colleague Rowe J. that *Charter* values do not receive independent protection under the *Charter*. In our view, and for several reasons, resorting to *Charter* values as a counterweight to constitutionalized and judicially defined *Charter* rights is a highly questionable practice.

[308] First, *Charter* "values" — unlike *Charter* rights, which are the product of constitutional settlement — are unsourced. They are, therefore, entirely the product of the idiosyncrasies of the judicial mind that pronounces them to be so. And, perhaps one judge's understanding of "equality" might indeed represent a "shared value" with all Canadians, but perhaps another judge's might not. This in and of itself should call into question the legitimacy of judges or other state actors pronouncing certain "values" to be "shared". Canadians are permitted to hold different sets of values. One person's values may be another person's anathema. We see nothing troubling in this, so long as each person agrees to the other's right to hold and act upon those values in a manner consistent with the limits of core minimal civil commitments which are necessary to secure civic order — none of which are implicated here. What *is* troubling, however, is the imposition of judicially preferred "values" to limit constitutionally protected rights, including the right to hold other values. As W. A. Galston observes in *Liberal Pluralism: The*

[306] Le fait que les juges majoritaires utilisent de façon soutenue les « valeurs » consacrées par la *Charte* comme notion équivalant aux « droits » (motifs des juges majoritaires, par. 58) est tout aussi préoccupant. Ces « valeurs » ont un poids important dans les motifs des juges majoritaires étant donné que ces derniers disent de la LSBC (au par. 41) qu'elle a un intérêt dans la protection des « valeurs d'égalité et des droits de la personne ». De plus, sur ce point, les juges majoritaires citent la juge Abella qui mentionnait dans l'arrêt *Loyola* (par. 47) que les « valeurs communes — l'égalité, les droits de la personne et la démocratie — sont des valeurs que l'État a toujours un intérêt légitime à promouvoir et à protéger ».

[307] Nous partageons l'opinion de la juge en chef et de notre collègue le juge Rowe voulant que les valeurs consacrées par la *Charte* ne jouissent pas d'une garantie indépendante sous le régime de la *Charte*. Selon nous, invoquer les valeurs consacrées par la *Charte* pour faire contrepoids aux droits garantis par celle-ci, constitutionnalisés et définis par les tribunaux, est une pratique fort discutable, et ce, pour plusieurs raisons.

[308] Premièrement, les « valeurs » consacrées par la *Charte* — contrairement aux droits garantis par cette dernière, qui sont le fruit d'un accord constitutionnel — ne découlent pas d'une source particulière. Elles sont donc entièrement le produit des idiosyncrasies de l'esprit judiciaire qui les déclare comme telles. Et s'il est possible que, suivant la compréhension qu'en a un juge, l'« égalité » puisse effectivement représenter à ses yeux une « valeur commune » aux Canadiens, il est aussi possible qu'il en soit autrement pour un autre juge. Cela devrait être en soi suffisant pour remettre en question la légitimité de la déclaration par un juge ou par un autre acteur étatique que certaines « valeurs » sont « communes ». Les Canadiens ne sont pas tenus d'adhérer au même ensemble de valeurs. Les valeurs d'une personne peuvent pour une autre être frappées d'anathème. Cela ne pose pas problème dans la mesure où chacun accepte le droit de l'autre de souscrire à ses valeurs et de les afficher d'une manière qui soit compatible avec les limites de l'engagement citoyen minimal qui est essentiel pour

Implications of Value Pluralism for Political Theory and Practice (2002), at p. 131, this risks illiberal outcomes:

> When we are trying to decide what to do, we are typically confronted with a multiplicity of worthy principles and genuine goods that are not neatly ordered and that cannot be translated into a common measure of value. This is not ignorance but, rather, the fact of the matter. That is why practical life is so hard. If we could reduce it to some form of quantitative calculation or resolve its quandaries by bowing to clearly dominant values, it would not be so hard. But we cannot, at least not without oversimplifying moral experience and running grave risks. In practice, in both our personal and our public lives, the pursuit of a single dominant value, whatever the cost, typically produces side consequences . . . that we ought not ignore and that few would willingly accept. . . .
>
> . . . Life would be simpler if there were clear rules to resolve the clashes between politics and its competitors. But there are not. When a parent, or artist, or faith community, or philosopher challenges the political system's right to constrain thought and action, those involved must seek ways of adjudicating the conflict that does not begin by begging the question and does not end in oppression. [Emphasis added.]

[309] Secondly, and relatedly, *Charter* "values", as stated by the majority, are amorphous and, just as importantly, undefined. Lacking the doctrinal structure which courts have carefully crafted over the past 35 years to give substantive meaning to *Charter* rights (including the right to equality) and to guide their application, *Charter* values like "equality", "justice", and "dignity" become mere rhetorical devices by which courts can give priority to particular moral judgments, under the guise of undefined

assurer l'ordre civique — ce qui n'est aucunement en cause en l'espèce. Toutefois, ce qui *est* préoccupant, c'est d'imposer des « valeurs » préférées par les tribunaux pour limiter d'autres droits garantis par la Constitution, dont le droit de souscrire à d'autres valeurs. Comme W. A. Galston le fait remarquer dans *Liberal Pluralism : The Implications of Value Pluralism for Political Theory and Practice* (2002), p. 131, cela risque d'entraîner des résultats qui vont à l'encontre d'une approche libérale :

> [TRADUCTION] Lorsque nous nous demandons ce qu'il convient de faire, nous nous heurtons généralement à une multiplicité de principes valables et de biens véritables ne pouvant être organisés dans un ordre cohérent et se traduire par un jugement de valeur commun. Ce n'est pas de l'ignorance, mais, plutôt, la réalité. C'est pourquoi la vie quotidienne est si difficile. Elle ne le serait pas autant si on la ramenait à une certaine forme de calcul quantitatif ou si les dilemmes qui la jalonnent étaient résolus en obéissant à des valeurs nettement dominantes. Mais cela n'est pas possible, du moins sans simplifier à outrance l'expérience morale et courir de graves risques. En pratique, dans notre vie personnelle et publique, la poursuite d'une valeur dominante unique, quel qu'en soit le coût, produit généralement des conséquences secondaires [. . .] sur lesquelles nous ne devrions pas fermer les yeux et que peu de gens accepteraient de plein gré. . .
>
> . . . La vie serait plus simple s'il y avait des règles claires pour résoudre les conflits entre la politique et ses concurrents. Mais il n'y en a pas. Lorsqu'un parent, un artiste, un groupe confessionnel ou un philosophe conteste le droit du système politique de contraindre la pensée et l'action, les personnes concernées doivent chercher des moyens de régler le conflit sans, dans un premier temps, éluder la question et, en bout de ligne, recourir à l'oppression. [Nous soulignons.]

[309] Deuxièmement, et dans la même veine, les « valeurs » de la *Charte*, comme il ressort des motifs des juges majoritaires, sont floues et, qui plus est, non définies. Ne bénéficiant pas des théories élaborées avec soin par les tribunaux au cours des 35 dernières années pour donner un sens substantiel aux droits garantis par la *Charte* (y compris le droit à l'égalité) et pour guider leur application, les valeurs consacrées par la *Charte*, comme l'« égalité », la « justice » et la « dignité » deviennent de simples

"values", over other values and over *Charter* rights themselves.

[310] Take, for example, the majority's preferred value of "equality". In our view, without further definition this is too vague a notion on which to ground a claim to equal treatment in any and all concrete situations, such as admission to a law school. Of course, as a legal claim, equality relates to differential application of *a specific rule* to a certain group of people in a certain legal context. But the majority does not (and cannot) point to a specific legal rule or right to ground the application of a value of equality here. Rather, it advances "equality" in a purely abstract sense, such that it could mean almost anything. For example, an acceptable legal incarnation of the abstract notion, "equality" is a principle of the rule of law that all are equal before and under the law, such that all have a claim to equal protection and to equal application of the law (T. Bingham, *The Rule of Law* (2010), at pp. 55-59; F. C. DeCoste, *On Coming to Law: An Introduction to Law in Liberal Societies* (3rd ed. 2011), at p. 178). But equality in an absolute sense is also perfectly compatible with a totalitarian state, being easier to impose where freedom is limited. "Equality" as an abstraction could also mean tolerance of difference, as Justice Sachs said in *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, [1998] ZACC 15, 1999 (1) S.A. 6, at para. 132:

> . . . equality should not be confused with uniformity; in fact, uniformity can be the enemy of equality. Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour but an

procédés rhétoriques permettant aux tribunaux de donner priorité à certains jugements moraux, sous le couvert de « valeurs » non définies l'emportant sur d'autres valeurs, et sur les droits garantis par la *Charte* eux-mêmes.

[310] Prenons, par exemple, la valeur de l'« égalité » privilégiée par les juges majoritaires. Selon nous, sans autre définition, cette notion est trop vague pour servir de fondement à une demande portant sur le droit à un traitement égal dans une situation concrète, comme l'admission à une faculté de droit. Évidemment, dans le contexte d'un recours, l'égalité s'intéresse à l'application différente d'*une règle donnée* à un certain groupe de personnes dans un contexte juridique particulier. Mais les juges majoritaires ne relèvent — et ne peuvent relever — ni droit particulier, ni règle juridique précise pour justifier l'application d'une valeur d'égalité en l'espèce. Ils invoquent plutôt l'« égalité » dans un sens purement abstrait de telle sorte que la notion pourrait vouloir dire à peu près n'importe quoi. À titre d'exemple, en tant qu'expression juridique acceptable de la notion au sens abstrait, l'« égalité » est un principe découlant de la primauté du droit selon lequel 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 : T. Bingham, *The Rule of Law* (2010), p. 55-59; F. C. DeCoste, *On Coming to Law : An Introduction to Law in Liberal Societies* (3e éd. 2011), p. 178. Mais la notion d'égalité dans un sens absolu trouve tout autant sa place dans le contexte d'un État totalitaire étant donné qu'il est plus facile d'imposer une norme d'égalité lorsque la liberté est limitée. L'« égalité », en tant que concept abstrait, peut aussi vouloir dire tolérer la différence, comme le juge Sachs l'a dit dans *National Coalition for Gay and Lesbian Equality c. Minister of Justice*, [1998] ZACC 15, 1999 (1) S.A. 6, par. 132 :

> [TRADUCTION] . . . [l']égalité n'est pas synonyme d'uniformité; en fait, l'uniformité peut être l'ennemi de l'égalité. L'égalité suppose que chacun fasse l'objet du même respect et de la même considération malgré la différence. Elle n'implique pas l'élimination ou la suppression de la différence. Le respect des droits de la personne exige l'affirmation et non le déni de soi. L'égalité ne présuppose

acknowledgment and acceptance of difference. [Emphasis added.]

[311] None of these (or innumerable other) meanings of "equality" as an abstraction are relied on by the majority or are evident in its reasons. Rather, by relying on a sweeping abstraction, the majority avoids actually making explicit its moral judgment, its premises and the legal authority on which it rests. A "value" of "equality" is, therefore, a questionable notion against which to balance the exercise by the TWU community of its *Charter*-protected rights.

[312] Finally, we echo McLachlin C.J.'s comment that "the onus is on the state actor that made the rights-infringing decision (in this case the LSBC) to demonstrate that the limits their decisions impose on the rights of the claimants are reasonable and demonstrably justifiable in a free and democratic society" (para. 117). This Court has, however, been silent on who bears this onus in the administrative context, leaving a conspicuous and serious lacuna in the *Doré/Loyola* framework. Inexplicably, and despite the challenge *on this very question* posed by the reasons of the Chief Justice and of Rowe J., the majority maintains this silence, thereby failing to clarify the matter. With respect, this hardly bolsters the credibility of the *Doré/Loyola* framework.

[313] It follows that we reject the majority's claim that its reasons "explain why and how the *Doré/Loyola* framework applies here" (Majority Reasons, at para. 59 (emphasis added)). On the basic question of who bears the onus, the majority explains nothing about *how* that framework applies — whether here, or anywhere else. In particular, the majority's resort to the passive tense ("the reviewing court *must be satisfied* that the decision reflects a proportionate balance") fails to provide the necessary guidance, since it leaves reviewing courts guessing about precisely who must do the "*satisfying*" — the rights-holder,

donc pas un nivellement ou une homogénéisation des comportements, mais plutôt la reconnaissance et l'acceptation de la différence. [Nous soulignons.]

[311] Aucune de ces significations de la notion d'« égalité » (ou de ses innombrables autres significations) dans son acception abstraite n'est invoquée par les juges majoritaires ni ne peut se dégager de leurs motifs. En s'appuyant sur une abstraction d'une large portée, les juges majoritaires évitent plutôt de rendre explicites leur jugement moral, ses fondements et le pouvoir légal sur lesquels il repose. Il est donc discutable de mettre en balance une « valeur » d'« égalité » pour apprécier l'exercice par la communauté de TWU des droits que lui garantit la *Charte*.

[312] Enfin, nous souscrivons au commentaire de la juge en chef McLachlin selon lequel « il incombe à l'acteur étatique qui a pris la décision attentatoire (en l'occurrence la LSBC) de démontrer que les limites que sa décision impose aux droits des demandeurs sont raisonnables et que leur justification peut se démontrer dans le cadre d'une société libre et démocratique » : par. 117. La Cour est toutefois restée muette quant à l'identité de la personne à qui incombe ce fardeau dans le contexte administratif, laissant ainsi une lacune, évidente et grave, dans le cadre d'analyse des arrêts *Doré* et *Loyola*. Malgré les préoccupations que soulèvent les motifs de la juge en chef et ceux du juge Rowe *au sujet de cette question*, les juges majoritaires demeurent inexplicablement silencieux, n'apportant donc aucune précision à cet égard. Avec respect, un tel silence peut difficilement renforcer la crédibilité du cadre d'analyse des arrêts *Doré* et *Loyola*.

[313] Nous rejetons donc l'affirmation des juges majoritaires selon laquelle leurs motifs expliquent « pourquoi et comment le cadre d'analyse établi dans les arrêts *Doré* et *Loyola* s'applique en l'espèce » : motifs des juges majoritaires, par. 59 (nous soulignons). Concernant la question fondamentale de savoir sur qui repose le fardeau, les juges majoritaires n'expliquent aucunement *comment* ce cadre d'analyse s'applique, que ce soit à la présente affaire ou à tout autre contexte. En particulier, l'utilisation de la voix passive par les juges majoritaires (« la cour de révision *doit être convaincue* que la décision

or the state actor. Further, and again with respect, the majority's invocation of *stare decisis* ("*Doré* and *Loyola* are binding precedents") is no answer to good faith attempts in concurring and dissenting judgments to clarify precedent. A precedent of this Court should be strong enough to withstand clarification of who carries the burden of proof.

[314] As to how *we* would resolve the question of onus under *Doré/Loyola*, it is this simple: either the majority's statements about the *Doré/Loyola* framework's equivalency to *Oakes* and about the "same justificatory muscles" being flexed (Majority Reasons, at para. 82) are empty and meaningless words, or they are statements to be taken seriously. And if they are statements to be taken seriously, they must in our view mean that the burden to justify a rights limitation rests with the state actor under *Doré/Loyola*, just as it does when *Oakes* flexes its "justificatory muscles".

D. *The LSBC Benchers' Decision Is an Infringement of TWU's Section 2(a) Charter Rights*

[315] We agree with the majority that the LSBC decision not to approve TWU's proposed law school infringes the religious freedom of members of the TWU community (Majority Reasons, at paras. 60-75). The LSBC was bound to make its accreditation decision regarding TWU's proposed law school in a way that conforms to the *Charter*-protected religious freedom of members of the TWU community who seek to offer and wish to receive a Christian education (*Loyola*, at para. 34). As the majority acknowledges, religious freedom is not just about private and individual beliefs and practices; it has a relational or communal character (*Hutterian Brethren*,

est le fruit d'une mise en balance proportionnée ») n'apporte pas les précisions nécessaires puisqu'elle laisse à ces juridictions le soin de deviner qui doit les « *convaincre* » : le titulaire de droits ou l'acteur étatique. De plus, et toujours avec égards, l'invocation par les juges majoritaires du *stare decisis* (« Les arrêts *Doré* et *Loyola* sont des précédents de la Cour qui nous lient ») ne répond en rien aux motifs concordants ou dissidents qui tentent, de bonne foi, de préciser ces précédents. Un précédent établi par la Cour devrait être assez solide pour résister à une précision comme celle de savoir à qui incombe le fardeau de la preuve.

[314] En ce qui concerne la façon dont *nous* réglerions la question du fardeau pour l'application des arrêts *Doré* et *Loyola*, c'est très simple : ou bien les affirmations des juges majoritaires quant à l'équivalence entre le cadre d'analyse prescrit par les arrêts *Doré* et *Loyola* et celui préconisé dans *Oakes* et quant au fait que « les mêmes réflexes justificateurs » sont appelés à intervenir (motifs des juges majoritaires, par. 82) sont vides et sans signification, ou bien elles sont à prendre au sérieux. Et s'il s'agit d'affirmations à prendre au sérieux, elles ne peuvent que signifier, à notre avis, que le fardeau de justifier une restriction des droits, pour l'application des arrêts *Doré* et *Loyola*, incombe à l'acteur étatique, tout comme c'est le cas lorsque l'arrêt *Oakes* fait intervenir ses « réflexes justificateurs ».

D. *La décision des conseillers de la LSBC porte atteinte aux droits garantis à TWU par l'al. 2a) de la Charte*

[315] À l'instar des juges majoritaires, nous reconnaissons que la décision de la LSBC de ne pas agréer la faculté de droit proposée par TWU porte atteinte à la liberté de religion des membres de la communauté de TWU : motifs des juges majoritaires, par. 60-75. La LSBC était tenue de prendre sa décision quant à la reconnaissance de cette faculté de droit dans le respect de la liberté de religion conférée par la *Charte* aux membres de la communauté de TWU qui veulent offrir ou qui souhaitent recevoir une éducation chrétienne : *Loyola*, par. 34. Comme le reconnaissent les juges majoritaires, la liberté de religion ne se limite pas aux croyances et aux pratiques

at para. 182; *Loyola*, at paras. 59-60, 91 and 96). While it may not be necessary to determine whether TWU, *qua* institution, enjoys a right to religious freedom in its own right for the purposes of this appeal (Majority Reasons, at para. 61), in our view, ensuring full protection for the "constitutionally protected communal aspects of . . . religious beliefs and practice" requires more than simply aggregating individual rights claims under the amorphous umbrella of an institution's "community" (*Loyola*, at paras. 33 and 130). That being said, for the purposes of this appeal we adopt the majority's description of the rights-holder as the "TWU community".

[316] We emphasize, like our colleague McLachlin C.J. (paras. 122 and 124), that freedom of religion under the *Charter*, interpreted broadly and purposively, also captures the freedom of members of the TWU community *to express* their religious beliefs through the Covenant and *to associate* with one another in order to study law in an educational community which reflects their religious beliefs. Religious freedom is "not just about individuals praying alone but about communities of faith living out their traditions and religious lives" (Newman, at p. 9). Freedom of religion is among the "original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order" (*Saumur v. City of Quebec*, [1953] 2 S.C.R. 299, at p. 329, per Rand J.).

[317] It follows, therefore, that we reject our colleague Rowe J.'s proposed narrowing of the scope of activity protected by the right to freedom of religion (paras. 231-34). In our view, looking only to circumstances in which "the claimant sincerely believes that their religion compels them to act" does not begin to account for the scope of activities identified by this

personnelles et individuelles; elle a un aspect relationnel ou communautaire : *Hutterian Brethren*, par. 182; *Loyola*, par. 59-60, 91 et 96. Même si, pour les besoins du présent pourvoi, il n'est peut-être pas nécessaire de décider si TWU, en tant qu'établissement, jouit de son propre droit à la liberté de religion (motifs des juges majoritaires, par. 61), nous sommes d'avis que, pour assurer la pleine sauvegarde des « aspects collectifs, protégés par la Constitution, de [. . .] croyances et pratiques religieuses », il ne convient pas de simplement regrouper toutes les revendications fondées sur des droits individuels sous l'égide de la « communauté » d'un établissement, un concept vague : *Loyola*, par. 33 et 130. Cela dit, pour l'application du présent appel, nous faisons nôtre la description par les juges majoritaires du titulaire de droits en l'espèce comme étant la « communauté de TWU ».

[316] Nous soulignons, comme notre collègue la juge en chef McLachlin (par. 122 et 124), que la liberté de religion garantie par la *Charte*, lorsqu'elle reçoit une interprétation large et téléologique, s'étend également à la liberté des membres de la communauté de TWU *d'exprimer* leurs croyances religieuses au moyen du *Covenant* et de *s'associer* les uns aux autres afin d'étudier le droit dans un milieu d'enseignement qui témoigne de leurs croyances religieuses. La liberté de religion ne vise [TRADUCTION] « pas seulement les personnes qui s'adonnent à la prière individuellement, elle concerne également les communautés religieuses qui perpétuent leurs traditions et qui vivent leur vie religieuse » : Newman, p. 9. La liberté de religion figure parmi les [TRADUCTION] « libertés primordiales qui constituent les attributs essentiels de l'être humain, son mode nécessaire d'expression et la condition fondamentale de son existence au sein d'une collectivité régie par un système juridique » : *Saumur c. City of Quebec*, [1953] 2 R.C.S. 299, p. 329, le juge Rand.

[317] Il s'ensuit donc que nous rejetons l'approche de notre collègue le juge Rowe consistant à limiter les activités protégées par le droit à la liberté de religion : par. 231-234. À notre avis, scruter uniquement les circonstances dans lesquelles « le demandeur croi[t] sincèrement que sa religion le contraint à agir » est loin de suffire pour couvrir le champ

Court in *Big M Drug Mart*, at p. 336. As this Court recognized in *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, at para. 47, "[i]t is the religious or spiritual essence of an action, not any mandatory or perceived-as-mandatory nature of its observance, that attracts protection." Not every adherent will "declare religious beliefs openly" because they feel compelled to do so. Nor will every adherent "teach" or "disseminate" religious belief out of compulsion. Rather, they may freely choose to do so.

[318] We agree with the analytical approach set out in the reasons of the majority (at paras. 62-63) and McLachlin C.J. (at para. 120): a s. 2(*a*) *Charter* infringement is made out where a claimant establishes that impugned state conduct interferes, in a manner that is more than trivial or insubstantial, with their ability to act in accordance with a sincere practice or belief that has a nexus with religion (*Amselem*, at paras. 56 and 65; *Multani*, at para. 34; *Loyola*, at para. 134; *Ktunaxa*, at para. 68).

[319] In this case, it is the TWU community's expression of religious belief through the practice of creating and adhering to a biblically grounded Covenant that is at issue. The Covenant describes TWU as "a community that strives to live according to biblical precepts, believing that this will optimize the University's capacity to fulfill its mission" (TWU Community Covenant Agreement, reproduced in A.R., vol. III, pp. 401-5, at p. 401). For members of the TWU community, religious belief and education are inextricably linked (TWU Mission Statement; TWU Purpose Statement; TWU Core Values, reproduced in R.R., vol. I, at pp. 119-21). As described in the affidavit evidence of TWU students, the Covenant is a key mechanism for facilitating students' spiritual development and growth in the Christian faith so as to engender a personal connection with the divine (Affidavit #1 of Brayden Volkenant, July 30, 2014, reproduced in R.R., vol. V, pp. 42-46, at p. 44). Covenanting assists in the creation and strengthening of a religious community which includes all those

d'activités identifiées par la Cour dans l'arrêt *Big M Drug Mart*, p. 336. Comme la Cour l'a reconnu dans l'arrêt *Syndicat Northcrest c. Amselem*, 2004 CSC 47, [2004] 2 R.C.S. 551, par. 47, « [c]'est le caractère religieux ou spirituel d'un acte qui entraîne la protection, non le fait que son observance soit obligatoire ou perçue comme telle ». Ce ne sont pas tous les adeptes qui choisiront de « professer ouvertement des croyances religieuses » parce qu'ils se sentent contraints de le faire. Et ce ne sont pas tous les adeptes qui décideront de faire l'« enseignement » ou la « propagation » d'une croyance religieuse par compulsion. Il se peut bien qu'ils se sentent libres de le faire.

[318] Nous partageons l'approche analytique exposée dans les motifs des juges majoritaires (aux par. 62-63) et dans ceux de la juge en chef McLachlin (par. 120) : il y a atteinte à l'al. 2*a*) de la *Charte* si le demandeur établit que la conduite qu'il reproche à l'État nuit d'une manière plus que négligeable ou insignifiante à sa capacité de se conformer à une pratique ou une croyance ayant un lien avec la religion et en laquelle il croit sincèrement : *Amselem*, par. 56 et 65; *Multani*, par. 34; *Loyola*, par. 134; *Ktunaxa*, par. 68.

[319] L'enjeu au cœur de la présente affaire est le fait pour la communauté de TWU de manifester sa croyance religieuse au moyen d'une pratique consistant à créer et à respecter un *Covenant* d'inspiration biblique. Le *Covenant* décrit TWU comme [TRADUCTION] « une communauté qui s'efforce de vivre selon les préceptes bibliques, croyant que cela permettra d'améliorer au maximum la capacité de l'université à remplir sa mission » : *Covenant*, reproduit au d.a., vol. III, p. 401-405, p. 401. Pour les membres de la communauté de TWU, croyance religieuse et éducation sont intrinsèquement liées : TWU Mission Statement (énoncé de mission de TWU); TWU Purpose Statement (énoncé de vocation de TWU); TWU Core Values (valeurs fondamentales de TWU), reproduits au d.i., vol. I, p. 119-121. Comme le décrivent les témoignages par affidavit des étudiants de TWU, le *Covenant* représente un mécanisme essentiel permettant de favoriser l'épanouissement et la croissance spirituels des étudiants dans la foi chrétienne, de manière à créer un lien personnel avec

who study and work at TWU. It fosters their moral and spiritual growth in an academic setting. Members of the TWU community sincerely believe that, as a manifestation of their creed, studying, teaching and working in a post-secondary educational environment where all participants covenant with those around them — regardless of their personal beliefs — subjectively engenders their personal connection with the divine.

[320] The LSBC decision was "capable of interfering with religious belief or practice" in a manner that was not trivial or insubstantial (*Edwards Books*, at p. 759; *Amselem*, at para. 60). This assessment is an "objective" one (*Hutterian Brethren*, at para. 89), and the distinction between obligatory and non-obligatory practices is irrelevant to determining whether an interference is more than trivial or insubstantial (*Amselem*, at para. 75). The denial of the benefit of LSBC approval in this case negatively impacts the TWU community's ability to practise its beliefs through the Covenant at an approved law school. As we explain below, not only was this interference not trivial or insubstantial, it violated the state's duty of neutrality and profoundly interfered with the religious freedom of the TWU community.

E. *Proportionality: The Infringement Was Not Proportionate*

(1) The LSBC Approval Decision Does Not Balance the TWU Community's Section 2(*a*) Rights With a Relevant Statutory Objective

[321] In *TWU 2001*, at para. 35, this Court emphasized that a "restriction on freedom of religion must be justified by evidence that the exercise of this freedom . . . will, in the circumstances of [a]

l'être divin : Affidavit nº 1 de Brayden Volkenant, 30 juillet 2014, reproduit au d.i., vol. V, p. 42-46, p. 44. Le *Covenant* aide à créer et à souder les liens dans une communauté religieuse notamment formée de tous ceux qui étudient ou travaillent à TWU, en plus de favoriser leur croissance morale et spirituelle dans un contexte universitaire. Les membres de la communauté de TWU croient sincèrement que, comme manifestation de leur croyance, le fait d'étudier, d'enseigner ou de travailler dans un milieu d'apprentissage postsecondaire où tous les participants adhèrent au même *Covenant* que les personnes qui les entourent — indépendamment de leurs croyances personnelles — crée subjectivement une connexion personnelle entre eux et l'être divin.

[320] La décision de la LSBC était « susceptible de porter atteinte à une croyance ou pratique religieuse » d'une manière plus que négligeable ou insignifiante : *Edwards Books*, p. 759; *Amselem*, par. 60. Cette évaluation est « objective » (*Hutterian Brethren*, par. 89), et il n'est pas pertinent de distinguer les pratiques obligatoires des pratiques non obligatoires pour décider si l'atteinte en question est plus que négligeable ou insignifiante (*Amselem*, par. 75). En l'espèce, le fait pour la LSBC d'avoir privé TWU de sa reconnaissance a une incidence négative sur la capacité de la communauté de TWU de mettre ses croyances en pratique en instaurant le *Covenant* au sein d'une faculté de droit agréée. Comme nous l'expliquons dans les paragraphes qui suivent, non seulement l'atteinte n'était-elle ni négligeable ni insignifiante, elle représentait une violation du devoir de neutralité de l'État et portait profondément atteinte à la liberté de religion de la communauté de TWU.

E. *Proportionnalité : l'atteinte n'était pas proportionnée*

(1) La décision de la LSBC de ne pas reconnaître la faculté de droit ne met pas en balance les droits garantis à la communauté de TWU par l'al. 2*a*) et les objectifs statutaires en cause

[321] Dans l'arrêt *TWU 2001*, par. 35, la Cour a insisté sur le fait que la « restriction de la liberté de religion doit être justifiée par la preuve que l'exercice de cette liberté aura, dans les circonstances de

case, have a detrimental impact" on the statutory decision-maker's ability to fulfill its statutory mandate. Just as justifying the infringement in *TWU 2001* required a detrimental impact on the school system to be demonstrated, justification in this case requires evidence of a detrimental impact in the form of the unfitness of future graduates of TWU's proposed law school's to practise law.

[322] At the justification stage, care must be taken not to overstate the objective of any measure infringing the *Charter*: "The objective relevant to the s. 1 analysis is the objective of the infringing measure, since it is the infringing measure and nothing else which is sought to be justified. If the objective is stated too broadly, its importance may be exaggerated and the analysis compromised" (*RJR-MacDonald*, at para. 144 (emphasis deleted)). We accept that in the administrative law context, judicial review of individualized decisions made pursuant to statutory authority which is not itself challenged may not require the objectives of the legislation to be reviewed at the justification stage (*Multani*, at para. 155, per LeBel J.). Even, however, where a decision-maker's authority is not challenged (and particularly where a decision-maker does not provide any formal reasons whatsoever), we think it is worth emphasizing the importance of a reviewing court carefully ensuring that the objectives put forward by the state actor find their source in the actual grant of authority. Doing so avoids the danger that objectives said to advance a statutory mandate might be invented holus-bolus after an infringement is claimed. This is precisely the risk that materialized here: while the majority refers to the LSBC's "interpretation of its statutory mandate", the decision-making process adopted by the LSBC did not, at the time of the decision, involve *any* delineation or articulation of any particular statutory objectives.

[323] As we have already recounted, the LSBC's statutory objective in rendering an approval decision is to ensure that individual applicants are fit for licensing. And, as the fitness of future graduates

[l']affaire, une incidence préjudiciable » sur la capacité du décideur établi par la loi de s'acquitter de son mandat statutaire. Tout comme dans l'arrêt *TWU 2001*, où il était nécessaire, pour justifier l'atteinte, de prouver une incidence préjudiciable sur le système scolaire, la justification de l'atteinte en l'espèce exige que soit démontrée une incidence préjudiciable prenant la forme de l'inaptitude à pratiquer le droit des éventuels diplômés de la faculté de droit proposée par TWU.

[322] À l'étape de la justification, il faut se garder de surestimer l'objectif d'une mesure attentatoire : « Aux fins d'une analyse fondée sur l'article premier, l'objectif pertinent est l'objectif de la mesure attentatoire puisque c'est cette dernière et rien d'autre que l'on cherche à justifier. Si l'on formule l'objectif d'une façon trop large, on risque d'en exagérer l'importance et d'en compromettre l'analyse » : *RJR-MacDonald*, par. 144 (soulignement omis). Nous convenons que, dans le contexte du droit administratif, le contrôle judiciaire de décisions individualisées prises en vertu d'un pouvoir d'origine statutaire — qui, lui, n'est pas contesté — pourrait ne pas exiger l'examen des objectifs de la mesure législative à l'étape de la justification : *Multani*, par. 155, le juge LeBel. Toutefois, même lorsque le pouvoir du décideur n'est pas contesté (et surtout lorsque ce dernier ne motive pas sa décision par écrit), nous croyons utile de souligner l'importance pour une cour de révision de veiller soigneusement à ce que les objectifs invoqués par l'acteur étatique émanent véritablement du pouvoir conféré. Cela permet d'écarter le risque que les objectifs qui favorisent prétendument la réalisation du mandat statutaire ne soient inventés tout bonnement une fois l'atteinte alléguée. C'est exactement ce risque qui s'est concrétisé en l'espèce : bien que les juges majoritaires renvoient à « l'interprétation par la LSBC du mandat que lui confère la loi », le processus décisionnel de la LSBC, au moment où la décision a été prise, ne faisait état d'*aucune* définition ou formulation d'un quelconque objectif statutaire.

[323] Comme nous l'avons signalé précédemment, l'objectif statutaire vers lequel la LSBC doit tendre lorsqu'elle décide de l'opportunité d'agréer une faculté de droit est celui de veiller à ce que les

of TWU's proposed law school was not in dispute, this statutory objective cannot justify any limitations on the TWU community's s. 2(*a*) rights. But as we will explain (under heading (3) "Approving TWU's Proposed Law School Is Not Against the LSBC's Public Interest Mandate"), *even if* the LSBC's statutory mandate had permitted the consideration of broader "public interest" concerns invoked by the LSBC and the majority, the LSBC's decision would not be justified, since withholding approval substantially interferes with the TWU community's freedom of religion and approving TWU's proposed law school was not against the public interest, so understood.

(2) The LSBC Approval Decision Substantially Interferes With Freedom of Religion

[324] In our view, the LSBC approval decision represents a profound interference with religious freedom: it is a measure that undermines the core character of a lawful religious institution and disrupts the vitality of the TWU community (*Loyola*, at para. 67). While the approval decision under review may appear to be facially neutral (as it denies a benefit and does not purport to directly compel or prohibit a religious practice), it is substantively coercive in nature. As the majority recognizes, at para. 99 of its reasons, "[t]he TWU community has the right to determine the rules of conduct which govern its members" through its Covenant. Indeed, the TWU Covenant is protected by British Columbia's *Human Rights Code*, R.S.B.C. 1996, c. 210, s. 41(1). Yet, notwithstanding that right and that statutory protection, the LSBC approval decision makes state acceptance contingent upon the TWU community manifesting its beliefs *in a particular way*. That this is so is, on this record, beyond dispute. As noted by the British Columbia Court of Appeal, "[t]he Law Society was prepared to approve the law school if TWU agreed to remove the offending portions of the

candidats soient individuellement aptes à accéder à la profession. Et étant donné que l'aptitude des éventuels diplômés de la faculté de droit proposée par TWU n'a pas été remise en question, cet objectif statutaire ne saurait justifier une restriction apportée aux droits de la communauté de TWU garantis par l'al. 2*a*) de la *Charte*. Toutefois, comme nous l'expliquons plus loin (sous l'intertitre (3), « Le fait de reconnaître la faculté de droit proposée par TWU ne va pas à l'encontre du mandat de protection de l'intérêt public de la LSBC »), *même si* le mandat que lui confère la loi avait autorisé la LSBC à prendre en considération les questions plus vastes d'« intérêt public » invoquées par elle et par les juges majoritaires, sa décision ne serait pas justifiée parce que le refus d'agréer la faculté de droit constitue une entrave substantielle à la liberté de religion de la communauté de TWU, et que le fait d'agréer la faculté de droit proposée par l'université n'était pas contraire à l'intérêt public, comme il faut l'entendre.

(2) La décision de la LSBC de ne pas reconnaître la faculté de droit constitue une entrave substantielle à la liberté de religion

[324] À notre avis, la décision de la LSBC de ne pas agréer la faculté de droit représente une entrave fondamentale à la liberté de religion : elle porte atteinte à l'essence même d'un établissement confessionnel légitime et compromet la vitalité de la communauté de TWU : *Loyola*, par. 67. Bien que la décision faisant l'objet du contrôle en l'espèce puisse paraître neutre à première vue (puisqu'elle prive la communauté d'un avantage et qu'elle n'entendait pas imposer ou interdire une pratique religieuse), elle est de nature hautement coercitive. Comme les juges majoritaires le reconnaissent au par. 99 de leurs motifs, « [l]a communauté de TWU a le droit de déterminer les règles de conduite qui régissent ses membres » au moyen de son *Covenant*. Ce dernier est effectivement protégé par le *Human Rights Code* de la Colombie-Britannique, R.S.B.C. 1996, c. 210, par. 41(1). Et, malgré ce droit et cette protection législative, la décision de la LSBC quant à la reconnaissance de la faculté de droit fait en sorte que la communauté de TWU, pour obtenir la reconnaissance de l'État, doit manifester ses croyances *d'une certaine façon*. Cela est incontestable au vu du dossier dont nous

Covenant requiring students to abstain from 'sexual intimacy that violates the sacredness of marriage between a man and a woman" (para. 176; see also the respondents' Judicial Review Petition, reproduced in A.R., vol. I, pp. 125-55, at p. 136, at para. 45). This is highly intrusive conduct by a state actor into the religious practices of the TWU community. That conduct, like the ensuing LSBC decision to deny accreditation, contravened the state's duty of religious neutrality: each represented an expression by the state of religious preference which promotes the participation of non-believers, or believers of a certain kind, to the exclusion of the community of believers found at TWU (*Mouvement laïque*, at paras. 74-78).

[325] The majority concludes that the infringement in this case was "limited" and "of minor significance" (paras. 86-90). We agree with the Chief Justice (at paras. 128-32) that the fact the Covenant is not "absolutely required" and "preferred (rather than necessary)" does not diminish the severity of the infringement in this case.

(3) Approving TWU's Proposed Law School Is Not Against the LSBC's Public Interest Mandate

[326] In our view, even were the majority's overbroad interpretation of the LSBC's statutory mandate to apply, approving TWU's proposed law school would not undermine the statutory objectives which the majority identifies as relevant to deciding whether or not to approve TWU's proposed law school. Accommodating religious diversity *is* in "the public interest", broadly understood, and approving the proposed law school does not condone discrimination against LGBTQ persons.

disposons. Comme l'a souligné la Cour d'appel de la Colombie-Britannique, [TRADUCTION] « [l]a LSBC était disposée à agréer la faculté de droit si TWU acceptait de retirer les passages reprochés qui exigeaient des étudiants qu'ils s'abstiennent de toute "intimité sexuelle qui viole le caractère sacré du mariage entre un homme et une femme" » : par. 176; voir également la requête en contrôle judiciaire des intimés, reproduite au d.i., vol. I, p. 125-155, p. 136, par. 45. Une telle conduite par un acteur étatique empiète grandement sur les pratiques religieuses de la communauté de TWU. Cette conduite, tout comme le refus d'agréer par la LSBC qui en a découlé, constituait un manquement au devoir de neutralité religieuse de l'État : la conduite et le refus en cause représentaient tous deux l'expression par l'État d'une préférence religieuse, à savoir favoriser la participation des non-croyants, ou d'un certain type de croyants, à l'exclusion de la communauté de croyants qui forment TWU : *Mouvement laïque*, par. 74-78.

[325] Les juges majoritaires arrivent à la conclusion que l'atteinte en l'espèce était « limitée » ou « d'importance mineure » : par. 86-90. À l'instar de la juge en chef (aux par. 128-132), nous convenons que le fait pour le *Covenant* de ne pas être « absolument nécessaire » et d'être « préférable (plutôt que nécessaire) » ne diminue pas la gravité de l'atteinte en l'espèce.

(3) Le fait de reconnaître la faculté de droit proposée par TWU ne va pas à l'encontre du mandat de protection de l'intérêt public de la LSBC

[326] Même si l'interprétation trop généreuse que donnent les juges majoritaires au mandat que la loi confère à la LSBC s'appliquait, nous estimons que la reconnaissance de la faculté de droit proposée par TWU ne compromettrait pas la réalisation des objectifs statutaires qui, de l'avis des juges majoritaires, sont pertinents lorsqu'il s'agit de décider de l'opportunité d'agréer la faculté. Respecter la diversité religieuse *est* dans « l'intérêt public » au sens large, et le fait d'agréer la faculté de droit proposée ne revient pas à approuver des actes discriminatoires à l'égard des personnes LGBTQ.

[327] The majority states that the decision not to approve TWU's proposed law school furthers its public interest objective by "maintaining equal access to and diversity in the legal profession" (Majority Reasons, at paras. 93-95). We recognize, as this Court has previously recognized, that while there is evidence before us that some LGBTQ persons do attend TWU, the vast majority of LGBTQ students "would not be tempted to apply for admission, and could only sign the so-called student contract at a considerable personal cost. TWU is not for everybody; it is designed to address the needs of people who share a number of religious convictions" (*TWU 2001*, at para. 25). In our view, however, the majority fails to appreciate that the unequal access resulting from the Covenant is a function of accommodating religious freedom, which itself advances the public interest by promoting diversity in a liberal, pluralist society.

[328] The rights recognized in the *Charter* and the enshrinement of multiculturalism therein reflect the premise of our constitutional law and history that pluralism is intrinsically valuable. Our colleague McLachlin C.J. notes Canada's long history of religious schools (para. 130). Similarly, and writing extra-judicially, our colleague Karakatsanis J. has observed that, "[i]n a global environment where religious accommodation is sometimes seen as a detriment, Canada has found a way to welcome difference" (quoted in H. MacIvor and A. H. Milnes, eds., *Canada at 150: Building a Free and Democratic Society* (2017), at p. 9; see also M. A. Yahya, "Traditions of Religious Liberty in Early Canadian History", in D. Newman, ed., *Religious Freedom and Communities* (2016), 49, at p. 49).

[329] But this generous and historically Canadian posture towards religious accommodation stands in stark contrast to the majority's view of the pursuit of statutory objectives as "unavoidabl[y]" limiting

[327] Les juges majoritaires affirment que la décision de ne pas agréer la faculté de droit proposée par TWU permet à la LSBC de réaliser son objectif visant la protection de l'intérêt public en « maintenant un accès égal à la profession juridique et une diversité au sein de celle-ci » : motifs des juges majoritaires, par. 93-95. Nous reconnaissons, comme la Cour l'a déjà fait, que même si la preuve qui nous a été présentée laisse entendre qu'un certain nombre de personnes LGBTQ fréquentent bel et bien TWU, la vaste majorité des étudiants LGBTQ « ne serait pas tenté[e] de présenter une demande d'admission et [elle] ne pourrait signer le prétendu contrat d'étudiant qu'à un prix très élevé sur le plan personnel. [TWU] ne s'adresse pas à tout le monde; elle est destinée à combler les besoins des gens qui ont en commun un certain nombre de convictions religieuses » : *TWU 2001*, par. 25. Toutefois, nous croyons que les juges majoritaires ne tiennent pas compte du fait que l'inégalité d'accès que cause le *Covenant* découle directement du respect de la liberté de religion, qui en soi permet de promouvoir l'intérêt public en favorisant la diversité au sein d'une société libérale et pluraliste.

[328] Les droits reconnus par la *Charte* et l'enchâssement du multiculturalisme dans celle-ci témoignent de l'origine de notre droit constitutionnel et de notre passé, qui accorde une valeur intrinsèque au pluralisme. Notre collègue la juge en chef McLachlin rappelle d'ailleurs la longue tradition du Canada en matière d'écoles religieuses : par. 130. De la même façon, notre collègue la juge Karakatsanis, exprimant une opinion extrajudiciaire, a fait remarquer que [TRADUCTION] « [d]ans un environnement mondialisé où les accommodements religieux sont parfois perçus comme un désavantage, le Canada a trouvé une façon d'accueillir la différence » : citée dans H. MacIvor et A. H. Milnes, dir., *Canada at 150 : Building a Free and Democratic Society* (2017), p. 9; voir également M. A. Yahya, « Traditions of Religious Liberty in Early Canadian History », dans D. Newman, dir., *Religious Freedom and Communities* (2016), 49, p. 49.

[329] Mais cette approche généreuse et historiquement canadienne aux accommodements religieux contraste nettement avec l'opinion des juges majoritaires, qui prétendent que les atteintes aux droits

the individual freedoms protected by the *Charter* (Majority Reasons, at para. 100). This view fundamentally misconceives the role of the state in a multicultural and democratic society. As described by W. A. Galston, "[i]n a liberal pluralist regime, a key end is the creation of social space within which individuals and groups can freely pursue their distinctive visions of what gives meaning and worth to human existence" (*The Practice of Liberal Pluralism* (2005), at p. 3). Or as Sachs J. said in *Christian Education South Africa* (at paras. 23-24), "if society is to be open and democratic in the fullest sense it needs to be tolerant and accepting of cultural pluralism" and allow "individuals and communities . . . to enjoy what has been called the 'right to be different'".

individuels garantis par la *Charte* sont une « réalité incontournable » de la réalisation des objectifs conférés par la loi : motifs des juges majoritaires, par. 100. Un tel point de vue conçoit de façon erronée le rôle que joue l'État dans une société multiculturelle et démocratique. Comme le décrit W. A. Galston, [TRADUCTION] « [d]ans un régime libéral pluraliste, l'un des principaux objectifs est la création d'un espace social où les personnes et les groupes peuvent librement tenter de concrétiser leurs visions respectives de ce qui donne un sens et une valeur à l'existence humaine » : *The Practice of Liberal Pluralism* (2005), p. 3. Ou, comme l'a indiqué le juge Sachs dans l'arrêt *Christian Education South Africa* (aux par. 23-24), [TRADUCTION] « pour que la société soit la plus ouverte et démocratique possible, elle se doit d'être tolérante et d'accepter le pluralisme culturel » en plus de permettre que « les personnes et les communautés [jouissent] de ce qu'on a appelé le "droit à la différence" ».

[330] We emphasize that it is the state and state actors — not private institutions like TWU — which are constitutionally bound to accommodate difference in order to foster pluralism in public life.

[330] Il nous faut souligner que seuls l'État et les acteurs étatiques — et non les établissements privés comme TWU — sont constitutionnellement tenus de respecter la différence de sorte à promouvoir le pluralisme dans la sphère publique.

[331] This is entirely consistent with this Court's jurisprudence. In *Big M Drug Mart*, this Court recognized (at p. 336) that "[a] truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct." It is therefore not open to the state to impose values that it deems to be "shared" upon those who, for religious reasons, take a contrary view. The *Charter* protects the rights of religious adherents, among others, to participate in Canadian public life in a way that is consistent with *their own* values. By accommodating diverse beliefs and values, the state protects and promotes the *Charter* rights of all Canadians. As the five-member panel of the British Columbia Court of Appeal noted, where it attempts to do more, it risks "impos[ing] its views on the minority in a manner that is in itself intolerant and illiberal" (C.A. Reasons, at para. 193).

[331] Une telle approche est tout à fait conforme avec la jurisprudence de la Cour. Dans l'arrêt *Big M Drug Mart*, la Cour a reconnu (p. 336) qu'une « société vraiment libre peut accepter une grande diversité de croyances, de goûts, de visées, de coutumes et de normes de conduite ». L'État ne peut donc pas imposer des valeurs qu'il estime « communes » à ceux qui, pour des motifs religieux, ont une autre vision des choses. La *Charte* protège le droit des croyants, entre autres, de participer à la vie publique canadienne d'une manière qui est compatible avec *leurs propres* valeurs. En respectant les diverses croyances et valeurs, l'État protège et favorise les droits garantis par la *Charte* de tous les Canadiens. Comme l'a souligné la formation de cinq juges de la Cour d'appel de la Colombie-Britannique, lorsqu'il cherche à faire davantage, l'État risque [TRADUCTION] « d'imposer ses opinions à la minorité d'une manière qui est, en soi, tout sauf tolérante et libérale » : motifs de la Cour d'appel, par. 193.

[332] In *TWU 2001*, this Court held (at para. 35) that "freedom of religion is not accommodated if the consequence of its exercise is the denial of the right of full participation in society". This is, of course, consistent with the majority's acknowledgment (at para. 101) that "a secular state cannot interfere with religious freedom unless it conflicts with or harms overriding public interests". The majority then goes on to observe, correctly, that this Court in *Big M Drug Mart* (at p. 346) noted that a secular state can act to limit religious freedom "where an individual's religious beliefs or practices have the effect of 'injur[ing] his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own"' (para. 101). But, and with respect, the majority points to no legally cognizable injury here. Rather, it affirms the LSBC decision which undermines secularism itself. Properly understood, secularism connotes pluralism and respect for diversity, not the suppression of full participation in society by imposing a forced choice between conformity with a single majoritarian norm and withdrawal from the public square. Secularism does not exclude religious beliefs, even discriminatory religious beliefs, from the public square. Rather, it guarantees an inclusive public square by neither privileging nor silencing any single view.

[333] Simply put, the secular state is a neutral state, which refrains from espousing "values" that undermine or go beyond what is necessary for the civic participation of all. As Iacobucci J. recognized in *Amselem*, at para. 50, "the State is in no position to be, nor should it become, the arbiter of religious dogma". We agree, and would add that the state is equally unfit to be the arbiter of *ir*religious dogma (see *Mouvement laïque*, at para. 70). As this Court said in *Mouvement laïque*, "[state] neutrality requires that the state neither favour nor hinder any particular belief, and the same holds true for non-belief" (para. 72 (emphasis added)). Either way, state neutrality must prevail.

[332] Dans l'arrêt *TWU 2001*, la Cour a statué (au par. 35) que la « liberté de religion n'est pas respectée si son exercice entraîne le déni du droit à une participation pleine et entière dans la société ». Cette conclusion va dans le même sens que les propos des juges majoritaires (au par. 101) lorsqu'ils affirment qu'un « État laïque ne peut porter atteinte à la liberté de religion à moins qu'elle ne soit contraire ou ne porte atteinte à des intérêts publics prépondérants ». Les juges majoritaires poursuivent en faisant remarquer, à juste titre, que dans l'arrêt *Big M Drug Mart* (p. 346) la Cour a souligné qu'un État laïque peut agir de manière à restreindre la liberté de religion « lorsque les croyances ou pratiques religieuses d'une personne ont pour effet de "[léser] [. . .] ses semblables ou leur propre droit d'avoir et de manifester leurs croyances et opinions personnelles" » (par. 101). Avec égards, toutefois, les juges majoritaires ne mentionnent en l'espèce aucun préjudice reconnu en droit. Ils confirment plutôt la décision de la LSBC, qui elle-même mine la notion de laïcité. Bien interprétée, cette notion suppose le pluralisme et le respect de la diversité et non l'élimination de la possibilité d'une participation pleine et entière dans la société pour certaines personnes à qui l'on impose de choisir entre se conformer à la norme de la majorité ou se retirer de la place publique. La laïcité ne bannit pas de l'espace public les croyances religieuses, même les croyances religieuses discriminatoires. Elle assure plutôt le caractère inclusif de cette place publique puisqu'elle ne favorise ni défavorise aucune opinion.

[333] En clair, l'État laïque est un État neutre, qui se garde d'adopter des « valeurs » qui nuisent à la participation citoyenne de tous ou qui vont au-delà de ce qui est nécessaire à une telle participation. Comme le juge Iacobucci l'a reconnu dans l'arrêt *Amselem*, au par. 50, « l'État n'est pas en mesure d'agir comme arbitre des dogmes religieux, et il ne devrait pas le devenir ». Nous sommes d'accord et nous ajouterions que l'État n'est pas plus en mesure d'être l'arbitre des dogmes *non* religieux : voir *Mouvement laïque*, par. 70. Comme la Cour l'a affirmé dans l'arrêt *Mouvement laïque*, la « neutralité [de l'État] exige qu'il ne favorise ni ne défavorise aucune croyance, pas plus du reste que l'incroyance » (par. 72 (nous soulignons)). Dans tous les cas, la neutralité de l'État doit primer.

[334] It follows from the foregoing that accommodating diverse beliefs and values is a precondition to secularism and pluralism. Further, it is necessary to ensure that the dignity of all members of society is protected. "Tolerance", then, means forbearing, and allowing for difference. "[I]t is a feeble notion of pluralism that transforms 'tolerance' into 'mandated approval or acceptance'" (*Chamberlain v. Surrey School District No. 36*, 2002 SCC 86, [2002] 4 S.C.R. 710, at para. 132, per Gonthier J., dissenting in the result but agreeing with the majority on this point).

[335] The "public interest", broadly understood, is therefore served by accommodating TWU's religious practices, including the Covenant. That this is so is confirmed by provincial and federal legislation. Contrary to the LSBC decision under review, the Legislative Assembly of British Columbia has already determined that the public interest is served by accommodating religious communities by providing that they do not contravene provincial human rights law when they grant a preference to members of their own group (*Human Rights Code*, s. 41). This provision was described by this Court in *TWU 2001*, at para. 28, as "accommodat[ing] religious freedoms by allowing religious institutions to discriminate in their admissions policies on the basis of religion". The practical exclusion of LGBTQ individuals from attending TWU's proposed law school is therefore a direct result of *the Legislature's accommodation of the TWU community*. Further, that exclusion — which expresses a community code of conduct in conformity with orthodox evangelical beliefs — is not directed to LGBTQ persons; no one group is singled out, and many others (notably unmarried heterosexual persons) would be bound by it. The purpose of TWU's admissions policy is not to exclude LGBTQ persons, or anybody else, but to establish a code of conduct which ensures the vitality of its religious community.

[336] In addition, the holding and expression of the moral views of marriage which underpin the portions

[334] Il s'ensuit donc que le respect de la diversité de croyances et de valeurs est une condition préalable à la laïcité et au pluralisme. En outre, il est essentiel de veiller à la protection de la dignité de tous les membres de la société. Ainsi, « tolérance » signifie faire preuve de patience et accueillir la différence. « [C]'est une piètre conception du pluralisme que de voir dans la "tolérance" une "approbation ou acceptation obligatoire" » : *Chamberlain c. Surrey School District No. 36*, 2002 CSC 86, [2002] 4 R.C.S. 710, par. 132, le juge Gonthier, dissident quant au résultat, mais d'accord avec les juges majoritaires sur ce point.

[335] Par conséquent, respecter les pratiques religieuses de TWU, dont le *Covenant*, sert l'« intérêt public » au sens large. Les législations provinciale et fédérale le confirment. Contrairement à la décision de la LSBC examinée dans le cadre du présent pourvoi, l'Assemblée législative de la Colombie-Britannique a déjà établi qu'il est dans l'intérêt public d'accommoder les communautés religieuses, en prévoyant que ces dernières ne contreviennent pas à la législation provinciale en matière de droits de la personne lorsqu'elles accordent un traitement préférentiel à leurs membres : *Human Rights Code*, art. 41. La Cour a décrit la disposition en question au par. 28 de l'arrêt *TWU 2001*, statuant qu'elle « respecte les libertés religieuses en permettant aux établissements confessionnels de faire preuve de discrimination fondée sur la religion dans leur politique d'admission ». Le fait pour les personnes LGBTQ d'être pratiquement exclues de la faculté de droit proposée par TWU est donc le résultat direct du *respect dont fait preuve l'Assemblée législative envers la communauté de TWU*. De plus, cette exclusion, qui prend la forme d'un code de conduite communautaire conforme aux croyances évangéliques orthodoxes, ne vise pas directement les personnes LGBTQ; elle ne concerne pas un seul groupe de personnes, et bien d'autres groupes (notamment les personnes hétérosexuelles non mariées) y seraient assujettis. La politique d'admission de TWU n'a pas pour objet d'exclure les personnes LGBTQ — ni personne d'autre, d'ailleurs —, mais bien d'établir un code de conduite qui assure la vitalité de la communauté religieuse de l'université.

[336] Qui plus est, le fait d'avoir et d'exprimer à l'égard du mariage les opinions morales sur lesquelles

of TWU's Covenant that are at issue here have been expressly recognized by Parliament as being not inconsistent with the public interest and worthy of accommodation (*Civil Marriage Act*, S.C. 2005, c. 33, preamble and s. 3.1):

. . .

WHEREAS it is not against the public interest to hold and publicly express diverse views on marriage;

. . .

3.1 For greater certainty, no person or organization shall be deprived of any benefit, or be subject to any obligation or sanction, under any law of the Parliament of Canada solely by reason of their exercise, in respect of marriage between persons of the same sex, of the freedom of conscience and religion guaranteed under the *Canadian Charter of Rights and Freedoms* or the expression of their beliefs in respect of marriage as the union of a man and woman to the exclusion of all others based on that guaranteed freedom.

[337] That federal and provincial legislators alike have taken this view should not surprise. Pluralism, and the religious accommodation necessary to secure it, is inherently valuable. In a country whose people sometimes harbour conflicting moral values that cannot be reconciled to a single conception of how one should live life, there is wisdom in the idea that the public sphere is for all to share, even where beliefs differ. Hence this Court's statement in *TWU 2001*, at para. 33, that "[t]he diversity of Canadian society is partly reflected in the multiple religious organizations that mark the societal landscape and this diversity of views should be respected." It follows that, while the public interest is served by the state's enforcement of minimal, core civil commitments which are necessary to secure civic order, legislators have also recognized that the public interest is also served by promoting the accommodation of difference. The LSBC's decision repudiates this wisdom and is unworthy of this Court's affirmation.

reposent les portions du *Covenant* de TWU qui sont en cause en l'espèce a été expressément reconnu par le Parlement comme n'étant pas incompatible avec l'intérêt public et comme étant digne de respect (*Loi sur le mariage civil*, L.C. 2005, c. 33, préambule et art. 3.1) :

Attendu

. . .

qu'il n'est pas contraire à l'intérêt public d'avoir des opinions variées sur le mariage et de les exprimer publiquement;

. . .

3.1 Il est entendu que nul ne peut être privé des avantages qu'offrent les lois fédérales ni se voir imposer des obligations ou des sanctions au titre de ces lois pour la seule raison qu'il exerce, à l'égard du mariage entre personnes de même sexe, la liberté de conscience et de religion garantie par la *Charte canadienne des droits et libertés*, ou qu'il exprime, sur la base de cette liberté, ses convictions à l'égard du mariage comme étant l'union entre un homme et une femme à l'exclusion de toute autre personne.

[337] Que le législateur fédéral et le législateur provincial aient tous deux adopté ce point de vue n'a rien de surprenant. Le pluralisme, tout comme le respect de la religion qui s'impose pour l'atteindre, est intrinsèquement valable. Dans un pays formé de gens qui prônent parfois des valeurs morales contradictoires qui ne peuvent être conciliées dans une seule et même façon de vivre la vie, il y a une certaine sagesse dans l'idée que tous doivent se partager la sphère publique, même en cas de divergences de croyances. Partant, la Cour a conclu dans l'arrêt *TWU 2001*, par. 33, que « [l]a diversité de la société canadienne se reflète en partie dans les multiples organisations religieuses qui caractérisent le paysage social et il y a lieu de respecter cette diversité d'opinions ». Par conséquent, même s'il est dans l'intérêt public pour l'État d'assurer le respect d'un certain nombre d'engagements, essentiels et minimaux, qui sont nécessaires à l'ordre civique, les législateurs ont reconnu que cet intérêt public peut également être servi par le respect de la différence. La décision de la LSBC répudie telle sagesse et ne mérite pas d'être confirmée par la Cour.

[338] Finally, and contrary to our colleague McLachlin C.J.'s view (at paras. 137, 145-46 and 149-50), we see no basis for concern that approval by the LSBC would amount to "condoning" the content of the Covenant or discrimination against LGBTQ persons. As previously explained, the LSBC does not govern law schools. There is no basis upon which to conclude that law schools exercise a public function on behalf of the LSBC. It therefore cannot be said that the LSBC would, by accrediting TWU, condone discrimination indirectly. Nor, for that matter, can it be said that other provincial law societies (which decided to accredit TWU's law school on the recommendation of the Federation of Law Societies of Canada), or the Federation itself, condoned discrimination indirectly. State recognition of the rights of a private actor does not amount to an endorsement of that actor's beliefs, whether that recognition takes the form of an approval decision of the LSBC, or the Legislature's enactment of s. 41 of the *Human Rights Code*, or Parliament's inclusion of the preamble and s. 3.1 of the *Civil Marriage Act*. Equating approval to condonation turns the protective shield of the *Charter* into a sword by effectively imposing *Charter* obligations on private actors. And, it operates to exclude religious institutions, and therefore, religious communities, from the public sphere solely because they choose to exercise their *Charter*-protected religious beliefs. As noted by V. M. Muñiz-Fraticelli, "if every accrediting decision implies complicity with the values of the program that is licensed, then there is no possibility for diversity of values in any field that requires state approval. Religious education, for instance, would be permitted only when religious doctrine is perfectly congruent with the ethos of the state" ("The (Im)possibility of Christian Education" (2016), 75 *S.C.L.R.* (2d) 209, at p. 220).

[338] Enfin, et contrairement à ce qu'avance notre collègue la juge en chef McLachlin (aux par. 137, 145-146 et 149-150), nous ne voyons aucune raison de croire que la reconnaissance de la faculté de droit par la LSBC reviendrait à « cautionner » le contenu du *Covenant* ou des actes discriminatoires envers les personnes LGBTQ. Comme nous l'avons expliqué précédemment, la LSBC ne régit pas les facultés de droit. Il n'y a aucune raison de conclure que les facultés de droit exercent une fonction publique pour le compte de la LSBC. Il n'y a donc pas lieu d'affirmer que la LSBC, en acceptant d'agréer TWU, approuverait indirectement des actes discriminatoires. Il n'y a pas lieu d'affirmer non plus que les barreaux d'autres provinces (qui ont fait le choix d'agréer la faculté de droit de TWU suivant la recommandation de la Fédération des ordres professionnels de juristes du Canada) ou la Fédération elle-même ont approuvé indirectement des actes discriminatoires. La reconnaissance par l'État des droits d'un acteur privé n'équivaut pas à l'entérinement des croyances de cet acteur, que cette reconnaissance prenne la forme d'une décision de la LSBC sur l'opportunité d'agréer une faculté de droit, de l'adoption par l'Assemblée législative de l'art. 41 du *Human Rights Code*, ou de l'inclusion par le Parlement du préambule et de l'art. 3.1 de la *Loi sur le mariage civil*. Assimiler ainsi reconnaissance et approbation fait du rempart qu'est la *Charte* une arme qui impose à des acteurs privés des obligations découlant de la *Charte*. Cela a également pour effet d'exclure de la sphère publique les institutions religieuses, et par conséquent les communautés religieuses, pour la seule et unique raison qu'elles choisissent de manifester leurs croyances religieuses protégées par la *Charte*. Comme le souligne V. M. Muñiz-Fraticelli, [TRADUCTION] « si toutes les décisions en matière de reconnaissance sous-entendent qu'il y a complicité à l'égard des valeurs du programme ainsi reconnu, il serait impossible pour la diversité de valeurs de régner dans les domaines assujettis à l'approbation de l'État. L'enseignement religieux, par exemple, ne serait permis que dans les cas d'harmonie totale entre la doctrine religieuse et la philosophie de l'État » : « The (Im)possibility of Christian Education » (2016), 75 *S.C.L.R.* (2d) 209, p. 220.

[339] The implications of this logic are pernicious and potentially far-reaching. Even if, for example, the portion of the Covenant which pertains to sexual relations outside of traditional marriage were removed, on the Chief Justice's reasoning the LSBC *could not* approve the proposed law school, since the admissions policy would still exclude persons who could not agree to live by the tenets of the evangelical Christian faith as expressed by the Covenant. This, even though the LSBC's overtures to TWU (see para. 324, above) suggest that it found that particular part of the Covenant to be unobjectionable. This logic also runs counter to this Court's decision in the *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698, which found that the state could not compel religious officials or houses of worship to perform civil or religious same-sex marriages contrary to their religious beliefs, even though the marriages performed by these officials are ultimately recognized by the state (paras. 59-60). The Court, in that instance, properly distinguished between endorsement by the state, and *Charter*-compliant accommodation of s. 2(*a*) rights by the neutral, secular state.

[339] Une telle logique a des conséquences pernicieuses et potentiellement de trop grande portée. Par exemple, même si la partie du *Covenant* qui porte sur les relations sexuelles en dehors du mariage traditionnel était retirée, la LSBC ne *pourrait pas*, suivant le raisonnement de la juge en chef, agréer la faculté de droit proposée étant donné que la politique d'admission de celle-ci aurait quand même pour effet d'exclure des personnes qui ne pourraient accepter de vivre selon les principes de la foi chrétienne évangélique énoncés dans le *Covenant*. Il en serait ainsi même si l'ouverture dont fait preuve la LSBC envers TWU (voir le par. 324 de nos motifs) donne à penser qu'elle trouvait cette partie du *Covenant* acceptable. Cette logique va également à l'encontre de la décision de la Cour dans le *Renvoi relatif au mariage entre personnes du même sexe*, 2004 CSC 79, [2004] 3 R.C.S. 698, dans laquelle il est établi que l'État ne peut contraindre les autorités religieuses ou les lieux de culte à procéder à des mariages civils ou religieux entre personnes du même sexe contrairement à leurs croyances religieuses, même si les mariages célébrés par ces autorités sont ultimement reconnus par l'État (par. 59-60). Dans cette affaire, la Cour a très justement établi la distinction entre, d'une part, l'approbation de l'État et, d'autre part, le respect — conformément à la *Charte* — des droits garantis par l'al. 2*a*) par un État neutre et laïque.

[340] In short, both Parliament and British Columbia's Legislature have recognized the so-called "discriminatory" (McLachlin C.J.'s Reasons, at para. 138), "degrading and disrespectful" (Majority Reasons, at para. 101) practices represented by the TWU Covenant as consistent with the public interest, legal and worthy of accommodation. Such legislatively accommodated and *Charter*-protected religious practices, once exercised, cannot be cited by a state-actor as a reason justifying the exclusion of a religious community from public recognition. Approval of TWU's proposed law school would not represent a state preference for evangelical Christianity, but rather a recognition of the state's duty — which the LSBC failed to observe — to accommodate diverse religious beliefs without scrutinizing their content.

[340] Bref, tant le Parlement que l'Assemblée législative de la Colombie-Britannique ont reconnu que les pratiques soi-disant « discriminatoire[s] » (motifs de la juge en chef McLachlin, par. 138), « dégradant[es] et irrespectueu[ses] » (motifs des juges majoritaires, par. 101) qu'incarne le *Covenant* de TWU sont conformes à l'intérêt public en plus d'être légales et dignes de respect. Une fois exercées, de telles pratiques religieuses, trouvant appui dans la législation et protégées par la *Charte*, ne peuvent servir à un acteur étatique pour justifier de ne pas accorder à une communauté religieuse la reconnaissance de l'État. Le fait d'agréer la faculté de droit proposée par TWU ne témoignerait pas d'une préférence de l'État pour le christianisme évangélique, mais bien de la reconnaissance du devoir incombant à l'État — devoir auquel la LSBC a manqué — de respecter les diverses croyances religieuses sans scruter leur contenu.

III. Conclusion

[341] Under the LSBC's governing statute, the only proper purpose of a law faculty approval decision is to ensure the fitness of individual graduates to become members of the legal profession. The LSBC's decision denying approval to TWU's proposed law school has a profound impact on the s. 2(*a*) rights of the TWU community. Even if the LSBC's statutory "public interest" mandate were to be interpreted such that it had the authority to take considerations other than fitness into account, approving the proposed law school is not contrary to the public interest objectives of maintaining equal access and diversity in the legal profession. Nor does it condone discrimination against LGBTQ persons. In our view, then, the only decision reflecting a proportionate balancing between *Charter* rights and the LSBC's statutory objectives would be to approve TWU's proposed law school.

[342] The appeal should be dismissed. We therefore dissent.

Appeal allowed with costs, Côté *and* Brown JJ. *dissenting.*

Solicitors for the appellant: Gall Legge Grant & Munroe, Vancouver; Law Society of British Columbia, Vancouver.

Solicitors for the respondents: Kuhn, Abbotsford, British Columbia.

Solicitors for the intervener Lawyers' Rights Watch Canada: Grey, Casgrain, Montréal; Lawyers' Rights Watch Canada, Vancouver.

Solicitors for the intervener the National Coalition of Catholic School Trustees' Associations: Supreme Advocacy, Ottawa; Doucette Santoro Furgiuele, Toronto.

III. Conclusion

[341] Suivant la loi habilitante de la LSBC, la décision relative à la reconnaissance d'une faculté de droit a pour seule fin légitime de s'assurer de l'aptitude individuelle des diplômés à devenir membres de la profession juridique. Le refus par la LSBC d'agréer la faculté de droit proposée par TWU a une incidence considérable sur les droits garantis à la communauté de TWU par l'al. 2*a*) de la *Charte*. Même si le mandat légal de la LSBC de protéger [TRADUCTION] « l'intérêt public » était interprété de façon à ce qu'elle soit habilitée à tenir compte de considérations n'ayant rien à voir avec l'aptitude, le fait d'agréer la faculté de droit proposée n'est pas contraire aux objectifs d'intérêt public visant le maintien de l'égalité d'accès dans la profession juridique et de la diversité au sein de celle-ci. Cela ne revient pas non plus à approuver des actes discriminatoires envers les personnes LGBTQ. Nous sommes donc d'avis que la seule décision qui représenterait une mise en balance proportionnée des droits garantis par la *Charte* et des objectifs statutaires de la LSBC serait pour cette dernière d'agréer la faculté de droit proposée par TWU.

[342] Le pourvoi devrait être rejeté. Par conséquent, nous devons exprimer notre dissidence.

Pourvoi accueilli avec dépens, les juges Côté *et* Brown *sont dissidents.*

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Procureurs des intimés : Kuhn, Abbotsford, Colombie-Britannique.

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Procureurs de l'intervenante BC LGBTQ Coalition : JFK Law Corporation, Vancouver; Mandell Pinder, Vancouver.

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Solicitors for the intervener the British Columbia Humanist Association: Hakemi & Ridgedale, Vancouver.

Solicitors for the intervener Egale Canada Human Rights Trust: Goldblatt Partners, Toronto.

Solicitors for the intervener the Faith, Fealty & Creed Society: Michael Sobkin, Ottawa; Benefic Law Corporation, Vancouver.

Solicitors for the interveners the Roman Catholic Archdiocese of Vancouver, the Catholic Civil Rights League and the Faith and Freedom Alliance: Foy Allison Law, West Vancouver; Philip H. Horgan Law Office, Toronto.

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Procureurs de l'intervenante World Sikh Organization of Canada : Nanda & Company, Edmonton; World Sikh Organization of Canada, Newmarket, Ontario.

TAB 3

David Dunsmuir *Appellant*

v.

Her Majesty the Queen in Right of the Province of New Brunswick as represented by Board of Management *Respondent*

INDEXED AS: DUNSMUIR *v.* NEW BRUNSWICK

Neutral citation: 2008 SCC 9.

File No.: 31459.

2007: May 15; 2008: March 7.

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

ON APPEAL FROM THE COURT OF APPEAL FOR NEW BRUNSWICK

Administrative law — Judicial review — Standard of review — Proper approach to judicial review of administrative decision makers — Whether judicial review should include only two standards: correctness and reasonableness.

Administrative law — Judicial review — Standard of review — Employee holding office "at pleasure" in provincial civil service dismissed without alleged cause with four months' pay in lieu of notice — Adjudicator interpreting enabling statute as conferring jurisdiction to determine whether discharge was in fact for cause — Adjudicator holding employer breached duty of procedural fairness and ordering reinstatement — Whether standard of reasonableness applicable to adjudicator's decision on statutory interpretation issue — Public Service Labour Relations Act, R.S.N.B. 1973, c. P-25, ss. 97(2.1), 100.1(5) — Civil Service Act, S.N.B. 1984, c. C-5.1, s. 20.

Administrative law — Natural justice — Procedural fairness — Dismissal of public office holders — Employee holding office "at pleasure" in provincial civil service dismissed without alleged cause with four months' pay in lieu of notice — Employee not informed of reasons for termination or provided with opportunity to respond — Whether employee entitled to procedural fairness — Proper approach to dismissal of public employees.

David Dunsmuir *Appelant*

c.

Sa Majesté la Reine du chef de la province du Nouveau-Brunswick, représentée par le Conseil de gestion *Intimée*

RÉPERTORIÉ : DUNSMUIR *c.* NOUVEAU-BRUNSWICK

Référence neutre : 2008 CSC 9.

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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 DU NOUVEAU-BRUNSWICK

Droit administratif — Contrôle judiciaire — Norme de contrôle — Démarche appropriée pour le contrôle judiciaire d'une décision administrative — Le contrôle judiciaire devrait-il s'effectuer au regard de deux normes seulement : celle de la décision correcte et celle de la raisonnabilité?

Droit administratif — Contrôle judiciaire — Norme de contrôle — Fonctionnaire provincial amovible congédié sans motif avec indemnité de quatre mois de salaire tenant lieu de préavis — Arbitre concluant que sa loi habilitante l'autorisait à déterminer si le congédiement constituait en fait un congédiement pour motif — Arbitre statuant que l'employeur avait manqué à son obligation d'équité procédurale et ordonnant la réintégration de l'employé — La norme de la décision raisonnable s'appliquait-elle à l'interprétation de la loi par l'arbitre? — Loi relative aux relations de travail dans les services publics, L.R.N.-B. 1973, ch. P-25, art. 97(2.1), 100.1(5) — Loi sur la Fonction publique, L.N.-B. 1984, ch. C-5.1, l'art. 20.

Droit administratif — Justice naturelle — Équité procédurale — Congédiement d'un titulaire de charge publique nommé à titre amovible — Congédiement sans motif avec indemnité de quatre mois de salaire tenant lieu de préavis — Employeur n'ayant pas précisé les motifs du congédiement ni donné à l'employé la possibilité d'y répondre — L'employé avait-il droit à l'équité procédurale? — Démarche appropriée pour le congédiement d'un fonctionnaire.

D was employed by the Department of Justice for the Province of New Brunswick. He held a position under the *Civil Service Act* and was an office holder "at pleasure". His probationary period was extended twice and the employer reprimanded him on three separate occasions during the course of his employment. On the third occasion, a formal letter of reprimand was sent to D warning him that his failure to improve his performance would result in further disciplinary action up to and including dismissal. While preparing for a meeting to discuss D's performance review the employer concluded that D was not right for the job. A formal letter of termination was delivered to D's lawyer the next day. Cause for the termination was explicitly not alleged and D was given four months' pay in lieu of notice.

D commenced the grievance process under s. 100.1 of the *Public Service Labour Relations Act* ("*PSLRA*"), alleging that the reasons for the employer's dissatisfaction were not made known, that he did not receive a reasonable opportunity to respond to the concerns, that the employer's actions in terminating him were without notice, due process or procedural fairness, and that the length of the notice period was inadequate. The grievance was denied and then referred to adjudication. A preliminary issue of statutory interpretation arose as to whether, where dismissal was with notice or pay in lieu thereof, the adjudicator was authorized to determine the reasons underlying the province's decision to terminate. The adjudicator held that the referential incorporation of s. 97(2.1) of the *PSLRA* into s. 100.1(5) of that Act meant that he could determine whether D had been discharged or otherwise disciplined for cause. Ultimately, the adjudicator made no finding as to whether the discharge was or was not for cause. In his decision on the merits, he found that the termination letter effected termination with pay in lieu of notice and that the termination was not disciplinary. As D's employment was hybrid in character, the adjudicator held that D was entitled to and did not receive procedural fairness in the employer's decision to terminate his employment. He declared that the termination was void *ab initio* and ordered D reinstated as of the date of dismissal, adding that in the event that his reinstatement order was quashed on judicial review, he would find the appropriate notice period to be eight months.

On judicial review, the Court of Queen's Bench applied the correctness standard and quashed the adjudicator's preliminary decision, concluding that the adjudicator did not have jurisdiction to inquire into the

D travaillait pour le ministère de la Justice du Nouveau-Brunswick. Il occupait un poste suivant la *Loi sur la Fonction publique* et était titulaire d'une charge à titre amovible. Sa période d'essai a été prolongée deux fois, et l'employeur l'a réprimandé à trois occasions distinctes en cours d'emploi. La troisième réprimande a pris la forme d'une lettre officielle l'informant que s'il n'améliorait pas son rendement, il s'exposait à de nouvelles mesures disciplinaires pouvant aller jusqu'au congédiement. Lors d'une rencontre préalable à l'évaluation du rendement de D, l'employeur a conclu que ce dernier ne répondait pas aux exigences du poste. Le lendemain, un avis de cessation d'emploi a été transmis à l'avocat de D. Nul motif de congédiement n'était expressément invoqué, et D avait droit à une indemnité de quatre mois de salaire tenant lieu de préavis.

D a présenté un grief sur le fondement de l'art. 100.1 de la *Loi relative aux relations de travail dans les services publics* (« *LRTSP* »), alléguant que l'employeur n'avait pas précisé ses motifs d'insatisfaction, qu'il ne lui avait pas donné la possibilité raisonnable de répondre aux reproches, que les mesures pour mettre fin à l'emploi avaient été prises sans préavis, sans application régulière de la loi et au mépris de l'équité procédurale et que l'indemnité versée était insuffisante. Le grief a été rejeté, puis renvoyé à l'arbitrage. Une question préalable d'interprétation législative s'est alors posée : dans le cas d'un congédiement avec préavis ou indemnité en tenant lieu, l'arbitre est-il autorisé à déterminer les raisons de la décision de la province de mettre fin à l'emploi? L'arbitre a estimé que l'incorporation par renvoi du par. 97(2.1) de la *LRTSP* au par. 100.1(5) de la même loi l'autorisait à déterminer si D avait été congédié ou avait autrement fait l'objet d'une mesure disciplinaire, pour motif. Finalement, il n'a pas conclu qu'il s'agissait ou non d'un congédiement pour motif. Dans sa décision au fond, il a statué que l'avis de cessation d'emploi opérait un congédiement avec indemnité tenant lieu de préavis et que la cessation d'emploi n'était pas de nature disciplinaire. Vu la nature hybride de l'emploi, il a conclu que D avait droit au respect de l'équité procédurale, mais que l'employeur ne s'était pas acquitté de son obligation à cet égard en mettant fin à l'emploi. Il a déclaré nulle *ab initio* la cessation d'emploi et ordonné la réintégration de D dans ses fonctions à compter de la date du congédiement et, pour le cas où son ordonnance de réintégration serait annulée à l'issue d'un contrôle judiciaire, il a ajouté qu'un préavis de huit mois lui paraissait indiqué.

Saisie d'une demande de contrôle judiciaire, la Cour du Banc de la Reine a appliqué la norme de la décision correcte et annulé la décision sur la question préalable, arrivant à la conclusion que l'arbitre n'avait pas

reasons for the termination, and that his authority was limited to determining whether the notice period was reasonable. On the merits, the court found that D had received procedural fairness by virtue of the grievance hearing before the adjudicator. Concluding that the adjudicator's decision did not stand up to review on a reasonableness *simpliciter* standard, the court quashed the reinstatement order but upheld the adjudicator's provisional award of eight months' notice. The Court of Appeal held that the proper standard with respect to the interpretation of the adjudicator's authority under the *PSLRA* was reasonableness *simpliciter*, not correctness, and that the adjudicator's decision was unreasonable. It found that where the employer elects to dismiss with notice or pay in lieu of notice, s. 97(2.1) of the *PSLRA* does not apply and the employee may only grieve the length of the notice period. It agreed with the reviewing judge that D's right to procedural fairness had not been breached.

Held: The appeal should be dismissed.

Per McLachlin C.J. and Bastarache, LeBel, Fish and Abella JJ.: Despite its clear, stable constitutional foundations, the system of judicial review in Canada has proven to be difficult to implement. It is necessary to reconsider both the number and definitions of the various standards of review, and the analytical process employed to determine which standard applies in a given situation. Notwithstanding the theoretical differences between the standards of patent unreasonableness and reasonableness *simpliciter*, any actual difference between them in terms of their operation appears to be illusory. There ought to be only two standards of review: correctness and reasonableness. [32] [34] [41]

When applying the correctness standard in respect of jurisdictional and some other questions of law, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question and decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable. Reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process and with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law. It is a deferential standard which requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations

compétence pour s'enquérir des motifs de la cessation d'emploi et qu'il lui était seulement permis de déterminer si le préavis était raisonnable. Sur le fond, elle a statué que D avait bénéficié de l'équité procédurale du fait de l'audition de son grief par l'arbitre. Comme la décision de ce dernier ne satisfaisait pas à la norme de la raisonnabilité *simpliciter*, elle a annulé l'ordonnance de réintégration, mais confirmé la décision subsidiaire portant le préavis à huit mois. La Cour d'appel a estimé que la norme de contrôle applicable à l'interprétation des pouvoirs conférés à l'arbitre par la *LRTSP* était celle de la raisonnabilité *simpliciter*, et non celle de la décision correcte, et que la décision de l'arbitre était déraisonnable. Elle a conclu que lorsque l'employeur opte pour le congédiement avec préavis ou indemnité en tenant lieu, le par. 97(2.1) de la *LRTSP* ne s'applique pas et le seul recours dont dispose l'employé réside dans la contestation du préavis par voie de grief. Elle a convenu avec la cour de révision qu'il n'y avait pas eu d'atteinte au droit de D à l'équité procédurale.

Arrêt : Le pourvoi est rejeté.

La juge en chef McLachlin et les juges Bastarache, LeBel, Fish et Abella : Malgré ses assises constitutionnelles claires et stables, le mécanisme canadien de contrôle judiciaire se révèle difficile à appliquer. Il faut repenser tant le nombre que la teneur des normes de contrôle, ainsi que la démarche analytique qui préside à la détermination de la norme applicable dans un cas donné. Malgré ce qui distingue théoriquement la norme du manifestement déraisonnable et celle du raisonnable *simpliciter*, toute différence réelle d'application paraît illusoire. Il ne devrait y avoir que deux normes de contrôle, celle de la décision correcte et celle de la décision raisonnable. [32] [34] [41]

La cour de révision qui applique la norme de la décision correcte relativement à certaines questions de droit, y compris une question de compétence, n'acquiesce pas au raisonnement du décideur; elle entreprend plutôt sa propre analyse au terme de laquelle elle décide si elle est d'accord ou non avec la conclusion du décideur. En cas de désaccord, elle substitue sa propre conclusion et rend la décision qui s'impose. La cour de révision qui applique la norme de la décision raisonnable se demande si la décision contestée possède les attributs de la raisonnabilité. Le caractère raisonnable tient principalement à la justification de la décision, à la transparence et à l'intelligibilité du processus décisionnel, ainsi qu'à l'appartenance de la décision aux issues possibles acceptables pouvant se justifier au regard des faits et du droit. Empreinte de déférence, la norme de la raisonnabilité commande le respect de la volonté du législateur de s'en remettre, pour certaines choses, à des décideurs

that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system. [47-50]

An exhaustive analysis is not required in every case to determine the proper standard of review. Courts must first ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded to a decision maker with regard to a particular category of question. If the inquiry proves unfruitful, courts must analyze the factors making it possible to identify the proper standard of review. The existence of a privative clause is a strong indication of review pursuant to the reasonableness standard, since it is evidence of Parliament or a legislature's intent that an administrative decision maker be given greater deference and that interference by reviewing courts be minimized. It is not, however, determinative. Where the question is one of fact, discretion or policy, or where the legal issue is intertwined with and cannot be readily separated from the factual issue, deference will usually apply automatically. Deference will usually result where a decision maker is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity. While deference may also be warranted where an administrative decision maker has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context, a question of law that is of central importance to the legal system as a whole and outside the specialized area of expertise of the administrative decision maker will always attract a correctness standard. So will a true question of *vires*, a question regarding the jurisdictional lines between two or more competing specialized tribunals, and a constitutional question regarding the division of powers between Parliament and the provinces in the *Constitution Act, 1867*. [52-62]

The standard of reasonableness applied on the issue of statutory interpretation. While the question of whether the combined effect of ss. 97(2.1) and 100.1 of the *PSLRA* permits the adjudicator to inquire into the employer's reason for dismissing an employee with notice or pay in lieu of notice is a question of law, it is not one that is of central importance to the legal system and outside the specialized expertise of the adjudicator, who was in fact interpreting his enabling statute. Furthermore, s. 101(1) of the *PSLRA* includes a full privative clause, and the nature of the regime favours the standard of reasonableness. Here, the adjudicator's

administratifs, de même que le respect des raisonnements et des décisions fondés sur une expertise et une expérience dans un domaine particulier, ainsi que de la différence entre les fonctions d'une cour de justice et celles d'un organisme administratif dans le système constitutionnel canadien. [47-50]

Il n'est pas toujours nécessaire de se livrer à une analyse exhaustive pour arrêter la bonne norme de contrôle. Premièrement, la cour de révision vérifie si la jurisprudence établit déjà de manière satisfaisante le degré de déférence correspondant à une catégorie de questions en particulier. En second lieu, lorsque cette démarche se révèle infructueuse, elle entreprend l'analyse des éléments qui permettent d'arrêter la bonne norme de contrôle. L'existence d'une clause privative milite clairement en faveur d'un contrôle suivant la norme de la raisonnabilité, car elle atteste la volonté du législateur que la décision du décideur administratif fasse l'objet de plus de déférence et que le contrôle judiciaire demeure minimal. Cependant, elle n'est pas déterminante. En présence d'une question touchant aux faits, au pouvoir discrétionnaire ou à la politique, ou lorsque le droit et les faits s'entrelacent et ne peuvent aisément être dissociés, la retenue s'impose habituellement d'emblée. Lorsqu'un décideur 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. Elle peut également s'imposer lorsque le décideur administratif a acquis une expertise dans l'application d'une règle générale de common law ou de droit civil dans son domaine spécialisé, mais la question de droit qui revêt une importance capitale pour le système juridique dans son ensemble et qui est étrangère au domaine d'expertise du décideur administratif appelle toujours la norme de la décision correcte. Il en va de même pour une question touchant véritablement à la compétence, une question liée à la délimitation des compétences respectives de tribunaux spécialisés concurrents et une question constitutionnelle touchant au partage des pouvoirs entre le Parlement et les provinces dans la *Loi constitutionnelle de 1867*. [52-62]

La question de l'interprétation législative était assujettie à la norme de la raisonnabilité. Bien que la question de savoir si, ensemble, le par. 97(2.1) et l'art. 100.1 de la *LRTSP* autorisent l'arbitre à s'enquérir des motifs d'un congédiement avec préavis ou indemnité en tenant lieu constitue une question de droit, elle ne revêt pas une importance capitale pour le système juridique et elle n'est pas étrangère au domaine d'expertise de l'arbitre, lequel a en fait interprété sa loi habilitante. En outre, le par. 101(1) de la *LRTSP* constitue une clause privative absolue et la nature du régime milite en faveur de la norme de la raisonnabilité. En l'espèce, l'interprétation

interpretation of the law was unreasonable and his decision does not fall within the range of acceptable outcomes that are defensible in respect of the facts and the law. The employment relationship between the parties in this case was governed by private law. The combined effect of ss. 97(2.1) and 100.1 of the *PSLRA* cannot, on any reasonable interpretation, remove the employer's right, under the ordinary rules of contract, to discharge an employee with reasonable notice or pay in lieu thereof without asserting cause. By giving the *PSLRA* an interpretation that allowed him to inquire into the reasons for discharge, the adjudicator adopted a reasoning process that was fundamentally inconsistent with the employment contract and, thus, fatally flawed. [66-75]

On the merits, D was not entitled to procedural fairness. Where a public employee is employed under a contract of employment, regardless of his or her status as a public office holder, the applicable law governing his or her dismissal is the law of contract, not general principles arising out of public law. Where a dismissal decision is properly within the public authority's powers and is taken pursuant to a contract of employment, there is no compelling public law purpose for imposing a duty of fairness. The principles expressed in *Knight v. Indian Head School Division No. 19* in relation to the general duty of fairness owed by public authorities when making decisions that affect the rights, privileges or interests of individuals are valid and important. However, to the extent that *Knight* ignored the important effect of a contract of employment, it should not be followed. In the case at bar, D was a contractual employee in addition to being a public office holder. Section 20 of the *Civil Service Act* provided that as a civil servant he could only be dismissed in accordance with the ordinary rules of contract. To consider a public law duty of fairness issue where such a duty exists falls squarely within the adjudicator's task to resolve a grievance. Where, as here, the relationship is contractual, it was unnecessary to consider any public law duty of procedural fairness. By imposing procedural fairness requirements on the respondent over and above its contractual obligations and ordering the full "reinstatement" of D, the adjudicator erred and his decision was therefore correctly struck down. [76-78] [81] [84] [106] [114] [117]

Per Binnie J.: The majority reasons for setting aside the adjudicator ruling were generally agreed with, however the call of the majority to re-evaluate the pragmatic and functional test and to re-assess "the structure and characteristics of the system of judicial review as a whole" and to develop a principled framework that is

du droit par l'arbitre était déraisonnable et sa décision ne faisait pas partie des issues acceptables au regard des faits et du droit. Le lien d'emploi entre les parties ressortissait au droit privé. L'application concomitante du par. 97(2.1) et de l'art. 100.1 de la *LRTSP* ne saurait donc raisonnablement supprimer le droit de l'employeur, suivant les règles contractuelles ordinaires, de congédier un employé avec préavis raisonnable ou indemnité en tenant lieu et sans invoquer de motif. En concluant que la *LRTSP* lui permettait de rechercher les motifs du congédiement, l'arbitre a tenu un raisonnement foncièrement incompatible avec le contrat d'emploi et, de ce fait, entaché d'un vice fatal. [66-75]

Sur le fond, D n'avait pas droit à l'équité procédurale. En présence d'un contrat d'emploi, le renvoi d'un fonctionnaire, que ce dernier soit ou non titulaire d'une charge publique, est régi par le droit contractuel, et non par les principes généraux du droit public. Lorsqu'un organisme public prend la décision de congédier une personne conformément à ses pouvoirs et à un contrat d'emploi, nulle considération supérieure du droit public ne justifie l'imposition d'une obligation d'équité. Les principes formulés dans l'arrêt *Knight c. Indian Head School Division No. 19* relativement à l'obligation générale d'équité à laquelle est tenu l'organisme public dont la décision touche les droits, les privilèges ou les biens d'une personne demeurent valables et importants. Toutefois, dans la mesure où cet arrêt n'a pas tenu compte de l'effet déterminant d'un contrat d'emploi, il ne devrait pas être suivi. Dans la présente affaire, D était à la fois titulaire d'une charge publique et employé contractuel. L'article 20 de la *Loi sur la Fonction publique* prévoyait qu'à titre de fonctionnaire, il ne pouvait être congédié que suivant les règles contractuelles ordinaires. L'examen d'une question touchant à l'obligation d'équité en droit public, lorsqu'une telle obligation existe, ressortit clairement au mandat de l'arbitre chargé du règlement d'un grief. Lorsque, comme en l'espèce, le lien est contractuel, il n'est pas nécessaire de tenir compte de quelque obligation d'équité procédurale en droit public. En assujettissant l'intimée à l'obligation d'équité procédurale en sus de ses obligations contractuelles et en ordonnant la réintégration de D, l'arbitre a commis une erreur, et sa décision a été annulée à bon droit. [76-78] [81] [84] [106] [114] [117]

Le juge Binnie : Malgré l'accord général avec les motifs invoqués par les juges majoritaires pour annuler la décision de l'arbitre, l'invitation à réévaluer l'analyse pragmatique et fonctionnelle ainsi qu'à revoir « l'architecture et les caractéristiques du mécanisme de contrôle judiciaire dans son ensemble » et à « établir

"more coherent and workable" invites a broader reappraisal. Judicial review is an idea that has lately become unduly burdened with law office metaphysics. Litigants find the court's attention focussed not on their complaints, or the government's response, but on lengthy and arcane discussions of something they are told is the pragmatic and functional test. The Court 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. [119-122] [133] [145]

The distinction between "patent unreasonableness" and reasonableness *simpliciter* is now to be abandoned. The repeated attempts to explain the difference between the two, was in hindsight, unproductive and distracting. However, a broad reappraisal of the system of judicial review should explicitly address not only administrative tribunals but issues related to other types of administrative bodies and statutory decision makers including mid-level bureaucrats and, for that matter, Ministers. If logic and language cannot capture the distinction in one context, it must equally be deficient elsewhere in the field of judicial review. [121-123] [134-135] [140]

It should be presumed that the standard of review of an administrative outcome on grounds of substance is reasonableness. In accordance with the ordinary rules of litigation, it should also be presumed that the decision under review is reasonable until the applicant shows otherwise. An applicant urging the non-deferential "correctness" standard should be required to demonstrate that the decision rests on an error in the determination of a legal issue not confided (or which constitutionally could not be confided) to the administrative decision maker to decide, whether in relation to jurisdiction or the general law. The logic of the constitutional limitation is obvious. If the limitation did not exist, the government could transfer the work of the courts to administrative bodies that are not independent of the executive and by statute immunize the decisions of these bodies from effective judicial review. Questions of law outside the administrative decision maker's home statute and closely related rules or statutes which require his or her expertise should also be reviewable on a "correctness" standard whether or not it meets the majority's additional requirement that it be "of central importance to the legal system as a whole". The standard of correctness should also apply to the requirements of "procedural fairness", which will vary with the type of decision maker and the type of decision under review. Nobody should have his or her rights,

un cadre d'analyse rationnel qui soit plus cohérent et fonctionnel » appelle un réexamen plus large. Ces dernières années, des débats métaphysico-juridiques ont indûment embrouillé la notion de contrôle judiciaire. La cour de révision ne met l'accent ni sur la prétention du justiciable ni la mesure prise par l'État, mais arbitre plutôt un long et mystérieux débat sur une méthode dite « pragmatique et fonctionnelle ». La Cour devrait 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. [119-122] [133] [145]

La distinction entre le « manifestement déraisonnable » et le raisonnable *simpliciter* doit désormais être abandonnée. Avec le recul, les tentatives répétées d'expliquer la différence entre les deux étaient vaines et importunes. Cependant, la réévaluation globale du mécanisme de contrôle judiciaire devrait explicitement viser non seulement les tribunaux administratifs, mais aussi d'autres types d'organisme administratif et de décideur d'origine législative, y compris des fonctionnaires de rang moyen, voire des ministres. Lorsque ni la logique ni la langue ne peuvent saisir la distinction dans un contexte, elles ne peuvent non plus le faire par ailleurs dans le domaine du contrôle judiciaire. [121-123] [134-135] [140]

Il devrait être présumé que la norme de contrôle d'une décision administrative sur le fond est celle de la raisonnabilité. Conformément aux règles qui régissent habituellement les litiges, on devrait aussi présumer que la décision visée par le contrôle est raisonnable, sauf preuve contraire du demandeur. Celui qui préconise l'application de la norme de la décision correcte — soit l'absence de déférence — devrait être tenu de prouver que la décision contestée résulte du règlement erroné d'une question juridique ne relevant pas (ou ne pouvant pas constitutionnellement relever) du décideur administratif, qu'elle ait trait à la compétence ou au droit en général. La raison d'être de l'obstacle constitutionnel est manifeste. S'il n'existait pas, l'État pourrait confier la tâche des tribunaux judiciaires à des organismes administratifs qui ne sont pas indépendants de l'exécutif et, par voie législative, soustraire les décisions de ces organismes à un véritable contrôle judiciaire. Les questions de droit ne relevant pas de la loi constitutive du décideur administratif ou de quelque règle ou loi très connexe faisant appel à son expertise devraient aussi être assujetties à la norme de la décision correcte, qu'elles satisfassent ou non à l'exigence de l'« importance capitale pour le système juridique dans son ensemble » formulée par les juges majoritaires. Cette norme devrait également s'appliquer à l'obligation d'« équité procédurale », qui varie selon la catégorie à laquelle appartient le décideur et la

interests or privileges adversely dealt with by an unjust process. [127-129] [146-147]

On the other hand when the application for judicial review challenges the substantive outcome of an administrative action, the judge is invited to cross the line into second-guessing matters that lie within the function of the administrator. This is controversial because it is not immediately obvious why a judge's view of the reasonableness of an administrative policy or the exercise of an administrative discretion should be preferred to that of the administrator to whom Parliament or a legislature has allocated the decision, unless there is a full statutory right of appeal to the courts, or it is otherwise indicated in the conferring legislation that a "correctness" standard is intended. [130]

Abandonment of the distinction between reasonableness *simpliciter* and patent unreasonableness has important implications. The two different standards addressed not merely "the magnitude or the immediacy of the defect" in the administrative decision but recognized that different administrative decisions command different degrees of deference, depending on who is deciding what. [135]

"Contextualizing" a single standard of "reasonableness" review will shift the courtroom debate from choosing between two standards of reasonableness that each represented a different level of deference to a debate within a single standard of reasonableness to determine the appropriate level of deference. [139]

Thus a single "reasonableness" standard will now necessarily incorporate both the degree of deference owed to the decision maker formerly reflected in the distinction between patent unreasonableness and reasonableness *simpliciter*, and an assessment of the range of options reasonably open to the decision maker in the circumstances. The judge's role is to identify the outer boundaries of reasonable outcomes within which the administrative decision maker is free to choose. [141] [149]

A single "reasonableness" standard is a big tent that will have to accommodate a lot of variables that inform and limit a court's review of the outcome of administrative decision making. "Contextualizing" the reasonableness standard will require a reviewing court to consider the precise nature and function of the decision maker including its expertise, the terms and objectives

nature de la décision en cause. Nul ne devrait voir ses droits, ses intérêts ou ses privilèges faire l'objet d'une décision défavorable à l'issue d'une procédure injuste. [127-129] [146-147]

Par contre, lorsque le demandeur conteste la mesure administrative quant au fond, la cour de révision est invitée à faire un pas de plus et à remettre en question une décision relevant du décideur administratif. Cela prête à controverse, car en ce qui concerne la raisonnabilité d'une politique administrative ou de l'exercice d'un pouvoir discrétionnaire administratif, il n'y a pas de raison évidente de préférer l'appréciation judiciaire à celle du décideur administratif auquel le législateur a attribué le pouvoir de trancher, sauf lorsque la loi prévoit un droit d'appel devant une cour de justice ou que l'intention du législateur d'assujettir le décideur à la norme de la décision correcte ressort par ailleurs de la loi habilitante. [130]

L'abandon de la distinction entre la norme de la décision raisonnable *simpliciter* et celle de la décision manifestement déraisonnable a d'importantes répercussions. Les deux normes ne s'intéressaient pas seulement à « l'importance du défaut » entachant la décision administrative ou à son « caractère flagrant », mais reconnaissaient aussi le fait que différentes décisions administratives appellent différents degrés de déférence, selon l'identité du décideur et la nature de la décision. [135]

L'application d'une norme unique en fonction du contexte transforme le débat : il ne s'agit plus de choisir entre deux normes de raisonnabilité correspondant chacune à un degré de déférence distinct, mais bien de déterminer le bon degré de déférence à l'intérieur d'une seule norme de raisonnabilité. [139]

Ainsi, dorénavant, une norme de « raisonnabilité » unique englobera nécessairement le degré de déférence auquel a droit le décideur et que traduisait auparavant la distinction entre le manifestement déraisonnable et le raisonnable *simpliciter*, et la prise en considération des décisions qui auraient pu raisonnablement être rendues dans les circonstances. Le rôle de la cour de révision est de délimiter les résultats raisonnables parmi lesquels le décideur administratif est libre de choisir. [141] [149]

La notion de « raisonnabilité » est vaste et l'application d'une norme unique devra prendre en compte un grand nombre de variables qui délimitent le contrôle judiciaire d'une décision administrative. Appliquer la norme de la raisonnabilité en fonction du contexte exige de la cour de révision qu'elle tienne compte de la nature et de la fonction précises du décideur, y compris

of the governing statute (or common law) conferring the power of decision including the existence of a privative clause and the nature of the issue being decided. Careful consideration of these matters will reveal the extent of the discretion conferred. In some cases the court will have to recognize that the decision maker was required to strike a proper balance (or achieve proportionality) between the adverse impact of a decision on the rights and interests of the applicant or others directly affected weighed against the public purpose which is sought to be advanced. In each case careful consideration will have to be given to the reasons given for the decision. This list of "contextual" considerations is non-exhaustive. A reviewing court ought to recognize throughout the exercise that fundamentally the "reasonableness" of the administrative outcome is an issue given to another forum to decide. [144] [151-155]

Per Deschamps, Charron and Rothstein JJ.: Any review starts with the identification of the questions at issue as questions of law, questions of fact or questions of mixed fact and law. In the adjudicative context, decisions on questions of fact, whether undergoing appellate review or administrative law review, always attract deference. When there is a privative clause, deference is owed to the administrative body that interprets the legal rules it was created to interpret and apply. If the body oversteps its delegated powers, if it is asked to interpret laws in respect of which it does not have expertise or if Parliament or a legislature has provided for a statutory right of review, deference is not owed to the decision maker. Finally, when considering a question of mixed fact and law, a reviewing court should show an adjudicator the same deference as an appeal court would show a lower court. [158-164]

Here, the employer's common law right to dismiss without cause was the starting point of the analysis. Since the adjudicator does not have specific expertise in interpreting the common law, the reviewing court can proceed to its own interpretation of the applicable rules and determine whether the adjudicator could enquire into the cause of the dismissal. The applicable standard of review is correctness. The distinction between the common law rules of employment and the statutory rules applicable to a unionized employee is essential if s. 97(2.1) of the *PSLRA* is to be applied *mutatis mutandis* to the case of a non-unionized employee as required by s. 100.1(5) of the *PSLRA*. The adjudicator's failure to inform himself of this crucial difference led him to look for a cause for the dismissal, which was not relevant. Even if deference had been owed to the adjudicator, his interpretation could not have stood. Employment security is so fundamental to an employment relationship

son expertise, du libellé et des objectifs de la loi (ou de la common law) conférant le pouvoir décisionnel, y compris la présence d'une clause privative, et de la nature de la question à trancher. L'examen attentif de ces éléments révélera l'étendue du pouvoir discrétionnaire. La cour de révision devra parfois reconnaître que le décideur devait établir un juste équilibre (ou une proportionnalité) entre, d'une part, les répercussions défavorables de la décision sur les droits et les intérêts du demandeur ou d'autres personnes directement touchées et, d'autre part, l'objectif public poursuivi. Elle devra toujours considérer attentivement les motifs de la décision. D'autres éléments « contextuels » pourront s'ajouter. Tout au long de la démarche, la cour de révision doit se rappeler que, fondamentalement, ce n'est pas à elle de juger de la « raisonnabilité » de la décision administrative. [144] [151-155]

Les juges Deschamps, Charron et Rothstein : Lors de toute révision, il faut d'abord déterminer si la question en litige est une question de droit, de fait ou mixte de fait et de droit. Dans le contexte juridictionnel, qu'elle fasse l'objet d'un appel ou d'un contrôle judiciaire, la décision sur une question de fait commande toujours la déférence. En présence d'une clause privative, la déférence s'impose à l'égard de l'organisme administratif qui interprète les règles juridiques pour l'interprétation et l'application desquelles il a été créé. La déférence ne s'impose pas lorsque l'organisme administratif outrepasse ses pouvoirs délégués, qu'il interprète des dispositions législatives ne relevant pas de son expertise ou que la loi prévoit expressément un droit de révision. Enfin, la cour de révision qui se penche sur une question mixte de fait et de droit devrait manifester autant de déférence envers le décideur que le ferait une cour d'appel vis-à-vis d'une cour inférieure. [158-164]

En l'espèce, le droit que la common law confère à l'employeur de congédier un employé sans invoquer de motif était le point de départ de l'analyse. Comme l'arbitre ne possède aucune expertise particulière dans l'interprétation de la common law, la cour de révision peut s'en remettre à sa propre interprétation des règles applicables et déterminer si l'arbitre pouvait ou non s'enquérir du motif du congédiement. La norme de contrôle applicable est celle de la décision correcte. La distinction entre les règles de la common law régissant l'emploi et celles d'origine législative applicables à l'employé syndiqué est essentielle à l'application du par. 97(2.1) de la *LRTSP* à un employé non syndiqué, avec les adaptations nécessaires, conformément au par. 100.1(5) de la même loi. L'omission de tenir compte de cette différence cruciale a amené l'arbitre à rechercher un motif de congédiement, ce qui était hors de propos. Même si l'arbitre avait eu droit à la déférence, son interprétation

that it could not have been granted by the legislature by providing only that the *PSLRA* was to apply *mutatis mutandis* to non-unionized employees. [168-171]

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n'aurait pu être retenue. La sécurité d'emploi est si fondamentale à la relation de travail que le législateur n'a pu l'accorder en prévoyant seulement l'application de la *LRTSP* aux employés non syndiqués, compte tenu des adaptations nécessaires. [168-171]

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APPEAL from a judgment of the New Brunswick Court of Appeal (Turnbull, Daigle and Robertson JJ.A.) (2006), 297 N.B.R. (2d) 151, 265 D.L.R. (4th) 609, 44 Admin. L.R. (4th) 92, 48 C.C.E.L. (3d) 196, 2006 CLLC ¶220-030, [2006] N.B.J. No. 118 (QL), 2006 CarswellNB 155, 2006 NBCA 27, affirming a judgment of Rideout J. (2005), 293 N.B.R. (2d) 5, 43 C.C.E.L. (3d) 205, [2005] N.B.J. No. 327 (QL), 2005 CarswellNB 444, 2005 NBQB 270, quashing a preliminary ruling and quashing in part an award made by an adjudicator. Appeal dismissed.

J. Gordon Petrie, *Q.C.*, and *Clarence L. Bennett*, for the appellant.

C. Clyde Spinney, *Q.C.*, and *Keith P. Mullin*, for the respondent.

The judgment of McLachlin C.J. and Bastarache, LeBel, Fish and Abella JJ. was delivered by

BASTARACHE AND LEBEL JJ. —

I. Introduction

[1] This appeal calls on the Court to consider, once again, the troubling question of the approach to be taken in judicial review of decisions of administrative tribunals. The recent history of judicial review in Canada has been marked by ebbs and flows of deference, confounding tests and new words for old problems, but no solutions that provide real guidance for litigants, counsel, administrative decision

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POURVOI contre un arrêt de la Cour d'appel du Nouveau-Brunswick (les juges Turnbull, Daigle et Robertson) (2006), 297 R.N.-B. (2e) 151, 265 D.L.R. (4th) 609, 44 Admin. L.R. (4th) 92, 48 C.C.E.L. (3d) 196, 2006 CLLC ¶220-030, [2006] A.N.-B. no 118 (QL), 2006 CarswellNB 156, 2006 NBCA 27, qui a confirmé la décision du juge Rideout (2005), 293 R.N.-B. (2e) 5, 43 C.C.E.L. (3d) 205, [2005] A.N.-B. no 327 (QL), 2005 CarswellNB 444, 2005 NBBR 270, qui a annulé la décision de l'arbitre sur la question préalable et annulé en partie sa sentence. Pourvoi rejeté.

J. Gordon Petrie, *c.r.*, et *Clarence L. Bennett*, pour l'appelant.

C. Clyde Spinney, *c.r.*, et *Keith P. Mullin*, pour l'intimée.

Version française du jugement de la juge en chef McLachlin et des juges Bastarache, LeBel, Fish et Abella rendu par

LES JUGES BASTARACHE ET LEBEL —

I. Introduction

[1] Une fois de plus, la Cour est appelée à se pencher sur l'épineuse question de la démarche qu'il convient d'adopter pour le contrôle judiciaire des décisions des tribunaux administratifs. Au Canada, l'évolution récente du contrôle judiciaire a été marquée par une déférence variable, l'application de critères déroutants et la qualification nouvelle de vieux problèmes, sans qu'une solution n'offre de vérita-

makers or judicial review judges. The time has arrived for a reassessment of the question.

A. *Facts*

[2] The appellant, David Dunsmuir, was employed by the Department of Justice for the Province of New Brunswick. His employment began on February 25, 2002, as a Legal Officer in the Fredericton Court Services Branch. The appellant was placed on an initial six-month probationary term. On March 14, 2002, by Order-in-Council, he was appointed to the offices of Clerk of the Court of Queen's Bench, Trial Division, Administrator of the Court of Queen's Bench, Family Division, and Clerk of the Probate Court of New Brunswick, all for the Judicial District of Fredericton.

[3] The employment relationship was not perfect. The appellant's probationary period was extended twice, to the maximum 12 months. At the end of each probationary period, the appellant was given a performance review. The first such review, which occurred in August 2002, identified four specific areas for improvement. The second review, three months later, cited the same four areas for development, but noted improvements in two. At the end of the third probationary period, the Regional Director of Court Services noted that the appellant had met all expectations and his employment was continued on a permanent basis.

[4] The employer reprimanded the appellant on three separate occasions during the course of his employment. The first incident occurred in July 2002. The appellant had sent an email to the Chief Justice of the Court of Queen's Bench objecting to a request that had been made by the judge of the Fredericton Judicial District for the preparation of a practice directive. The Regional Director issued a reprimand letter to the appellant, explaining that the means he had used to raise his concerns were inappropriate and exhibited serious error in judgment. In the event that a similar concern arose in the future, he was directed to discuss the matter

bles repères aux parties, à leurs avocats, aux décideurs administratifs ou aux cours de justice saisies de demandes de contrôle judiciaire. Le temps est venu de réévaluer la question.

A. *Les faits*

[2] Le 25 février 2002, l'appelant, David Dunsmuir, est entré en fonction au ministère de la Justice du Nouveau-Brunswick à titre de conseiller juridique de la Division des services aux tribunaux. Il était à l'essai pour une période de six mois. Par décret daté du 14 mars 2002, il a été nommé, pour la circonscription judiciaire de Fredericton, greffier de la Division de première instance et administrateur de la Division de la famille de la Cour du Banc de la Reine, de même que greffier de la Cour des successions.

[3] La relation d'emploi entre l'appelant et son employeur n'a pas été sans heurts. La période d'essai de l'appelant a été prolongée deux fois, atteignant la durée maximale de douze mois. À la fin de chacune des périodes d'essai, le rendement de l'appelant a été évalué. Au mois d'août 2002, la première évaluation faisait état de quatre points à améliorer. Trois mois plus tard, la deuxième évaluation relevait les mêmes quatre points, mais signalait des améliorations à l'égard de deux d'entre eux. Au terme de la troisième période d'essai, la directrice régionale des services aux tribunaux indiquait que l'appelant avait répondu à toutes les attentes, et ce dernier a été titularisé.

[4] L'employeur a réprimandé l'appelant à trois occasions distinctes en cours d'emploi, la première fois en juillet 2002. L'appelant avait communiqué par courriel au Juge en chef de la Cour du Banc de la Reine son opposition à une demande formulée par les juges de la circonscription judiciaire de Fredericton pour la préparation d'une directive en matière de procédure. La directrice régionale lui avait fait parvenir une lettre de réprimande lui expliquant que le moyen employé pour exprimer ses préoccupations était inopportun et qu'il avait commis une grave erreur de jugement. Elle lui avait précisé qu'il devrait à l'avenir s'adresser d'abord au

first with the Registrar or the Regional Director. The letter warned that failure to comply would lead to additional disciplinary measures and, if necessary, to dismissal.

[5] A second disciplinary measure occurred when, in April 2004, it came to the attention of the Assistant Deputy Minister that the appellant was being advertised as a lecturer at legal seminars offered in the private sector. The appellant had inquired previously into the possibility of doing legal work outside his employment. In February 2004, the Assistant Deputy Minister had informed him that lawyers in the public service should not practise law in the private sector. A month later, the appellant wrote a letter to the Law Society of New Brunswick stating that his participation as a non-remunerated lecturer had been vetted by his employer, who had voiced no objection. On June 3, 2004, the Assistant Deputy Minister issued to the appellant written notice of a one-day suspension with pay regarding the incident. The letter also referred to issues regarding the appellant's work performance, including complaints from unnamed staff, lawyers and members of the public regarding his difficulties with timeliness and organization. This second letter concluded with the statement that "[f]uture occurrences of this nature and failure to develop more efficient organized work habits will result in disciplinary action up to and including dismissal."

[6] Third, on July 21, 2004, the Regional Director wrote a formal letter of reprimand to the appellant regarding three alleged incidents relating to his job performance. This letter, too, concluded with a warning that the appellant's failure to improve his organization and timeliness would result in further disciplinary action up to and including dismissal. The appellant responded to the letter by informing the Regional Director that he would be seeking legal advice and, until that time, would not meet with her to discuss the matter further.

[7] A review of the appellant's work performance had been due in April 2004 but did not take place. The appellant met with the Regional Director on a

registraire ou à elle, faute de quoi il s'exposerait à d'autres mesures disciplinaires, voire au congédiement.

[5] La deuxième mesure disciplinaire a été prise après que le sous-ministre adjoint eut pris connaissance, en avril 2004, de l'annonce de séminaires juridiques organisés par le secteur privé présentant l'appelant comme un conférencier invité. L'appelant s'était auparavant renseigné sur la possibilité d'exercer le droit après ses heures de travail. Au mois de février 2004, le sous-ministre adjoint lui avait fait savoir que les avocats de la fonction publique ne devaient pas exercer leur profession dans le secteur privé. Un mois plus tard, l'appelant avait écrit au Barreau du Nouveau-Brunswick qu'après s'être penché sur la question, son employeur ne s'opposait pas à sa participation à titre de conférencier non rémunéré. Le 3 juin 2004, le sous-ministre adjoint l'avait informé par écrit de sa suspension d'un jour avec traitement. La lettre faisait également état de problèmes liés à son rendement au travail, y compris de plaintes anonymes de collègues, d'avocats et de citoyens lui reprochant de ne pas respecter les délais et de manquer d'organisation. Le sous-ministre adjoint concluait : [TRADUCTION] « Si d'autres incidents de cette nature se produisent ou si vous ne faites pas preuve de plus d'efficacité et d'organisation dans votre travail, vous vous exposez à des mesures disciplinaires pouvant aller jusqu'au congédiement. »

[6] La troisième fois, le 21 juillet 2004, la directrice régionale a rédigé une lettre de réprimande officielle concernant trois incidents liés au rendement de l'appelant. Elle aussi concluait par une mise en garde — s'il n'organisait pas mieux son travail ni ne respectait pas davantage les délais, il s'exposait à de nouvelles mesures disciplinaires pouvant aller jusqu'au congédiement. L'appelant lui a répondu qu'il consulterait un avocat et que, dans l'intervalle, il s'abstiendrait de la rencontrer pour discuter plus avant de la question.

[7] L'évaluation du rendement de l'appelant n'a pas eu lieu en avril 2004 comme prévu. La directrice régionale a rencontré l'appelant à quelques reprises

couple of occasions to discuss backlogs and organizational problems. Complaints were relayed to her by staff but they were not documented and it is unknown how many complaints there had been. The Regional Director notified the appellant on August 11, 2004, that his performance review was overdue and would occur by August 20. A meeting had been arranged for August 19 between the appellant, the Regional Director, the Assistant Deputy Minister and counsel for the appellant and the employer. While preparing for that meeting, the Regional Director and the Assistant Deputy Minister concluded that the appellant was not right for the job. The scheduled meeting was cancelled and a termination notice was faxed to the appellant. A formal letter of termination from the Deputy Minister was delivered to the appellant's lawyer the next day. The letter terminated the appellant's employment with the Province of New Brunswick, effective December 31, 2004. It read, in relevant part:

I regret to advise you that I have come to the conclusion that your particular skill set does not meet the needs of your employer in your current position, and that it is advisable to terminate your employment on reasonable notice, pursuant to section 20 of the *Civil Service Act*. You are accordingly hereby advised that your employment with the Province of New Brunswick will terminate on December 31, 2004. Cause for termination is not alleged.

To aid in your search for other employment, you are not required to report to work during the notice period and your salary will be continued until the date indicated or for such shorter period as you require either to find a job with equivalent remuneration, or you commence self-employment.

. . .

In the circumstances, we would request that you avoid returning to the workplace until your departure has been announced to staff, and until you have returned your keys and government identification to your supervisor, Ms. Laundry as well as any other property of the employer still in your possession . . . .

[8] On February 3, 2005, the appellant was removed from his statutory offices by order of the Lieutenant-Governor in Council.

pour discuter de dossiers en retard et d'organisation. Des plaintes lui avaient été transmises par des employés, mais elles n'étaient pas étayées et leur nombre demeure inconnu. Le 11 août 2004, elle a informé l'appelant que son rendement serait évalué au plus tard le 20 août. Une rencontre était prévue le 19 août entre l'appelant, la directrice générale, le sous-ministre adjoint, l'avocat de l'appelant et celui de l'employeur. En s'y préparant, la directrice régionale et le sous-ministre adjoint sont arrivés à la conclusion que l'appelant ne répondait pas aux exigences du poste. La rencontre a été annulée et un avis de cessation d'emploi a été télécopié à l'appelant. Le lendemain, un avis de cessation d'emploi a été transmis par le sous-ministre à l'avocat de l'appelant. Il mettait fin à l'emploi de l'appelant par la province du Nouveau-Brunswick en date du 31 décembre 2004. En voici les passages pertinents :

[TRADUCTION] J'ai le regret de vous informer que je suis arrivé à la conclusion que vos compétences particulières ne correspondent pas aux exigences de votre poste actuel déterminées par l'employeur et qu'il convient de mettre fin à votre emploi moyennant un préavis raisonnable, conformément à l'article 20 de la *Loi sur la Fonction publique*. Vous êtes donc informé par la présente que votre emploi par la province du Nouveau-Brunswick prendra fin le 31 décembre 2004. Aucun motif de congédiement n'est invoqué.

Afin que vous puissiez trouver un nouvel emploi, vous n'aurez pas à vous présenter au travail pendant le délai de préavis. Vous toucherez votre traitement jusqu'à la date mentionnée ou celle, antérieure, à laquelle vous trouverez un emploi offrant une rémunération équivalente ou deviendrez travailleur autonome.

. . .

Dans les circonstances, nous vous demandons de bien vouloir vous abstenir de revenir sur le lieu de travail avant que votre départ n'ait été annoncé au personnel et que vous n'ayez remis à votre supérieure immédiate, M^me^ Laundry, vos clés et votre carte d'identité ainsi que tout autre bien de l'employeur en votre possession . . .

[8] Le 3 février 2005, un décret du lieutenant-gouverneur en conseil a destitué l'appelant de ses charges créées par la loi.

[9] The appellant commenced the grievance process under s. 100.1 of the *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P-25 ("*PSLRA*"; see Appendix), by letter to the Deputy Minister on September 1, 2004. That provision grants non-unionized employees of the provincial public service the right to file a grievance with respect to a "discharge, suspension or a financial penalty" (s. 100.1(2)). The appellant asserted several grounds of complaint in his grievance letter, in particular, that the reasons for the employer's dissatisfaction were not made known; that he did not receive a reasonable opportunity to respond to the employer's concerns; that the employer's actions in terminating him were without notice, due process or procedural fairness; and that the length of the notice period was inadequate. The grievance was denied. The appellant then gave notice that he would refer the grievance to adjudication under the *PSLRA*. The adjudicator was selected by agreement of the parties and appointed by the Labour and Employment Board.

[10] The adjudication hearing was convened and counsel for the appellant produced as evidence a volume of 169 documents. Counsel for the respondent objected to the inclusion of almost half of the documents. The objection was made on the ground that the documents were irrelevant since the appellant's dismissal was not disciplinary but rather was a termination on reasonable notice. The preliminary issue therefore arose of whether, where dismissal was with notice or pay in lieu thereof, the adjudicator was authorized to assess the reasons underlying the province's decision to terminate. Following his preliminary ruling on that issue, the adjudicator heard and decided the merits of the grievance.

B. *Decisions of the Adjudicator*

(1) Preliminary Ruling (January 10, 2005)

[11] The adjudicator began his preliminary ruling by considering s. 97(2.1) of the *PSLRA*. He reasoned that because the appellant was not included in a bargaining unit and there was no collective agreement or arbitral award, the section ought to be

[9] Dans une lettre au sous-ministre datée du 1er septembre 2004, l'appelant s'est prévalu de l'art. 100.1 de la *Loi relative aux relations de travail dans les services publics*, L.R.N.-B. 1973, ch. P-25 (« *LRTSP* »; voir l'annexe), qui confère à l'employé non syndiqué d'un service public provincial le droit de présenter un grief à l'égard « du congédiement, de la suspension ou d'une peine pécuniaire » (par. 100.1(2)). Il invoquait plusieurs raisons à l'appui, notamment que l'employeur n'avait pas précisé ses motifs d'insatisfaction, qu'il ne lui avait pas donné la possibilité raisonnable de répondre aux reproches, que les mesures pour mettre fin à l'emploi avaient été prises sans préavis, sans application régulière de la loi et au mépris de l'équité procédurale et que l'indemnité versée était insuffisante. Le grief a été rejeté. L'appelant a alors donné avis qu'il demandait le renvoi à l'arbitrage sous le régime de la *LRTSP*. L'arbitre a été choisi de concert par les parties, puis nommé par la Commission du travail et de l'emploi.

[10] À l'audience d'arbitrage, l'avocat de l'appelant a déposé en preuve un classeur renfermant 169 documents. L'avocat de l'intimée a contesté la mise en preuve de près de la moitié d'entre eux, soutenant qu'ils n'étaient pas pertinents puisqu'il n'y avait pas eu congédiement de nature disciplinaire, mais cessation d'emploi avec préavis raisonnable. S'est alors posé la question préalable de savoir si, dans le cas d'un congédiement avec préavis ou indemnité en tenant lieu, l'arbitre était autorisé à déterminer les raisons de la décision de la province de mettre fin à l'emploi. Après avoir tranché la question, l'arbitre a entendu le grief et statué au fond.

B. *Les décisions de l'arbitre*

(1) La décision sur la question préalable (10 janvier 2005)

[11] L'arbitre a entrepris l'examen de la question préalable en se penchant sur le libellé du par. 97(2.1) de la *LRTSP*. Étant donné que l'appelant n'appartenait pas à une unité de négociation et n'était pas visé par une convention collective ou

interpreted to mean that where an adjudicator determines that an employee has been discharged for cause, the adjudicator may substitute another penalty for the discharge as seems just and reasonable in the circumstances. The adjudicator considered and relied on the decision of the New Brunswick Court of Appeal in *Chalmers (Dr. Everett) Hospital v. Mills* (1989), 102 N.B.R. (2d) 1.

[12] Turning to s. 100.1 of the *PSLRA*, he noted the referential incorporation of s. 97 in s. 100.1(5). He stated that such incorporation "necessarily means that an adjudicator has jurisdiction to make the determination described in s. 97(2.1), i.e. that an employee has been discharged or otherwise disciplined for cause" (p. 5). The adjudicator noted that an employee to whom s. 20 of the *Civil Service Act*, S.N.B. 1984, c. C-5.1 (see Appendix), applies may be discharged for cause, with reasonable notice or with pay in lieu of reasonable notice. He concluded by holding that an employer cannot avoid an inquiry into its real reasons for dismissing an employee by stating that cause is not alleged. Rather, a grieving employee is entitled to an adjudication as to whether a discharge purportedly with notice or pay in lieu thereof was in fact for cause. He therefore held that he had jurisdiction to make such a determination.

(2) Ruling on the Merits (February 16, 2005)

[13] In his decision on the merits, released shortly thereafter, the adjudicator found that the termination letter of August 19 effected termination with pay in lieu of notice. The employer did not allege cause. Inquiring into the reasons for dismissal the adjudicator was satisfied that, on his view of the evidence, the termination was not disciplinary. Rather, the decision to terminate was based on the employer's concerns about the appellant's work performance and his suitability for the positions he held.

[14] The adjudicator then considered the appellant's claim that he was dismissed without procedural fairness in that the employer did not inform him of the reasons for its dissatisfaction and did not give him an opportunity to respond. The adjudicator

une sentence arbitrale, il a conclu que cette disposition devait être interprétée comme l'autorisant, s'il estimait que l'employé avait été congédié pour motif, à substituer au congédiement la peine qui lui paraissait juste et raisonnable dans les circonstances. Il s'est fondé sur l'arrêt *Chalmers (Dr. Everett) Hospital c. Mills* (1989), 102 R.N.-B. (2e) 1, de la Cour d'appel du Nouveau-Brunswick.

[12] En ce qui concerne l'art. 100.1 de la *LRTSP*, comme le par. 100.1(5) incorporait l'art. 97 par renvoi, il a estimé [TRADUCTION] « que l'arbitre a nécessairement compétence pour décider, suivant le par. 97(2.1), qu'un employé a été congédié ou qu'une mesure disciplinaire a été autrement prise contre lui "pour motif" » (p. 5). Il a fait observer que l'employé visé à l'art. 20 de la *Loi sur la Fonction publique*, L.N.-B. 1984, ch. C-5.1 (voir l'annexe), pouvait être congédié pour motif avec préavis raisonnable ou indemnité en tenant lieu, pour conclure que l'employeur ne pouvait se soustraire à l'examen des véritables raisons du congédiement en s'abstenant d'invoquer un motif. L'employé qui présentait un grief avait droit selon lui à une décision quant à savoir si son congédiement avec préavis ou indemnité en tenant lieu constituait en fait un congédiement pour motif. L'arbitre a donc conclu qu'il avait compétence pour rendre pareille décision.

(2) La décision au fond (16 février 2005)

[13] Dans la décision au fond rendue peu après, l'arbitre a statué que l'avis de cessation d'emploi du 19 août opérait un congédiement avec indemnité tenant lieu de préavis. L'employeur n'invoquait aucun motif. S'interrogeant sur les raisons du congédiement, l'arbitre s'est dit convaincu au vu de la preuve que la cessation d'emploi n'était pas de nature disciplinaire, mais découlait plutôt des préoccupations de l'employeur concernant le rendement de l'appelant et son aptitude à s'acquitter de ses fonctions.

[14] L'arbitre s'est ensuite penché sur l'allégation selon laquelle l'employeur avait manqué à son obligation d'équité procédurale en omettant de communiquer à l'appelant les raisons de son insatisfaction et de lui donner la possibilité d'y répondre. Il

placed some responsibility on the employer for cancelling the performance review scheduled for August 19. He also opined that the employer was not so much dissatisfied with the appellant's quality of work as with his lack of organization.

[15] The adjudicator's decision relied on *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, for the relevant legal principles regarding the right of "at pleasure" office holders to procedural fairness. As the appellant's employment was "hybrid in character" (para. 53) — he was both a Legal Officer under the *Civil Service Act* and, as Clerk, an office holder "at pleasure" — the adjudicator held that the appellant was entitled to procedural fairness in the employer's decision to terminate his employment. He declared that the termination was void *ab initio* and ordered the appellant reinstated as of August 19, 2004, the date of dismissal.

[16] The adjudicator added that in the event that his reinstatement order was quashed on judicial review, he would find the appropriate notice period to be eight months.

C. *Judicial History*

(1) Court of Queen's Bench of New Brunswick (2005), 293 N.B.R. (2d) 5, 2005 NBQB 270

[17] The Province of New Brunswick applied for judicial review of the adjudicator's decision on numerous grounds. In particular, it argued that the adjudicator had exceeded his jurisdiction in his preliminary ruling by holding that he was authorized to determine whether the termination was in fact for cause. The Province further argued that the adjudicator had acted incorrectly or unreasonably in deciding the procedural fairness issue. The application was heard by Rideout J.

[18] The reviewing judge applied a pragmatic and functional analysis, considering the presence of a full privative clause in the *PSLRA*, the

a attribué une certaine responsabilité à l'employeur pour l'annulation de l'évaluation du rendement censée avoir lieu le 19 août. Il a aussi estimé que ce n'était pas tant la qualité du travail de l'appelant que son manque d'organisation qui était à l'origine de l'insatisfaction de l'employeur.

[15] Pour ce qui est des principes juridiques permettant de statuer sur le droit à l'équité procédurale d'un titulaire de charge « à titre amovible », l'arbitre s'est reporté à l'arrêt *Knight c. Indian Head School Division No. 19*, [1990] 1 R.C.S. 653. Vu la nature [TRADUCTION] « hybride » de l'emploi (par. 53) — conseiller juridique soumis à la *Loi sur la Fonction publique* et greffier nommé à titre amovible —, il a conclu que la décision de l'employeur de mettre fin à l'emploi de l'appelant devait respecter l'équité procédurale. Il a déclaré nulle *ab initio* la cessation d'emploi et ordonné la réintégration de l'appelant dans ses fonctions à compter du 19 août 2004, date du congédiement.

[16] Pour le cas où son ordonnance de réintégration serait annulée à l'issue d'un contrôle judiciaire, il a ajouté qu'un préavis de huit mois lui paraissait indiqué.

C. *Historique des procédures judiciaires*

(1) Cour du Banc de la Reine du Nouveau-Brunswick (2005), 293 R.N.-B. (2e) 5, 2005 NBBR 270

[17] La province du Nouveau-Brunswick a demandé le contrôle judiciaire de la décision de l'arbitre. Elle a invoqué de nombreux motifs, dont le suivant : dans sa décision sur la question préalable, l'arbitre avait outrepassé sa compétence en s'estimant fondé à déterminer si le congédiement était en fait un congédiement pour motif. La province a également prétendu que l'arbitre avait adopté une démarche incorrecte ou déraisonnable pour statuer sur l'équité procédurale. Le juge Rideout a entendu la demande.

[18] Recourant à l'analyse pragmatique et fonctionnelle, le juge a pris en compte la clause privative absolue de la *LRTSP*, l'expertise relative de

relative expertise of adjudicators appointed under the *PSLRA*, the purposes of ss. 97(2.1) and 100.1 of the *PSLRA* as well as s. 20 of the *Civil Service Act*, and the nature of the question as one of statutory interpretation. He concluded that the correctness standard of review applied and that the court need not show curial deference to the decision of an adjudicator regarding the interpretation of those statutory provisions.

[19] Regarding the preliminary ruling, the reviewing judge noted that the appellant was employed "at pleasure" and fell under s. 20 of the *Civil Service Act*. In his view, the adjudicator had overlooked the effects of s. 20 and had mistakenly given ss. 97(2.1) and 100.1 of the *PSLRA* a substantive, rather than procedural, interpretation. Those sections are procedural in nature. They provide an employee with a right to grieve his or her dismissal and set out the steps that must be followed to pursue a grievance. The adjudicator is bound to apply the contractual provisions as they exist and has no authority to change those provisions. Thus, in cases in which s. 20 of the *Civil Service Act* applies, the adjudicator must apply the ordinary rules of contract. The reviewing judge held that the adjudicator had erred in removing the words "and the collective agreement or arbitral award does not contain a specific penalty for the infraction that resulted in the employee being discharged or otherwise disciplined" from s. 97(2.1). Those words limit s. 97(2.1) to employees who are not employed "at pleasure". In the view of the reviewing judge, the adjudicator did not have jurisdiction to inquire into the reasons for the termination. His authority was limited to determining whether the notice period was reasonable. Having found that the adjudicator had exceeded his jurisdiction, the reviewing judge quashed his preliminary ruling.

[20] With respect to the adjudicator's award on the merits, the reviewing judge commented that some aspects of the decision are factual in nature and should be reviewed on a patent unreasonableness standard, while other aspects involve questions

l'arbitre nommé sous son régime, l'objet de son par. 97(2.1) et de son art. 100.1 ainsi que de l'art. 20 de la *Loi sur la Fonction publique*, et la nature de la question en litige — s'agissait-il d'interpréter une disposition législative? Il a conclu que la norme de contrôle applicable était celle de la décision correcte et que l'interprétation de ces dispositions législatives par l'arbitre ne commandait pas la déférence judiciaire.

[19] Au sujet de la question préalable, le juge de révision a signalé que l'appelant avait occupé une charge « à titre amovible » et qu'il était régi par l'art. 20 de la *Loi sur la Fonction publique*. Selon lui, l'arbitre n'avait pas tenu compte de la portée de cette disposition et avait considéré à tort le par. 97(2.1) et l'art. 100.1 de la *LRTSP* comme des dispositions substantielles plutôt que procédurales. Ces dispositions confèrent à l'employé le droit de présenter un grief à l'égard de son congédiement et établissent les étapes à suivre pour le faire. L'arbitre a l'obligation d'appliquer une clause contractuelle telle qu'elle est stipulée et ne possède pas le pouvoir de la modifier. Par conséquent, dans une affaire relevant de l'art. 20 de la *Loi sur la Fonction publique*, il doit appliquer les règles contractuelles ordinaires. Le juge de révision a estimé que l'arbitre avait eu tort de faire abstraction des mots « et que la convention collective ou la sentence arbitrale ne contient pas une peine spécifique pour l'infraction en raison de laquelle l'employé a été congédié ou s'est vu imposer autrement une mesure disciplinaire » employés au par. 97(2.1). Suivant ce libellé, la disposition ne s'applique qu'aux employés n'occupant pas une charge « à titre amovible ». Selon le juge de révision, l'arbitre n'avait pas compétence pour s'enquérir des motifs de la cessation d'emploi. Il pouvait seulement se prononcer sur le caractère raisonnable du préavis. Après avoir conclu que l'arbitre avait outrepassé sa compétence, le juge de révision a annulé sa décision sur la question préalable.

[20] En ce qui a trait à la sentence arbitrale sur le fond, le juge de révision a indiqué que certains de ses éléments touchaient aux faits et commandaient l'application de la norme de la décision manifestement déraisonnable, mais que d'autres portaient

of mixed fact and law which are subject to a reasonableness *simpliciter* standard. The reviewing judge agreed with the Province that the adjudicator's reasons do not stand up to a "somewhat probing examination" (para. 76). The reviewing judge held that the adjudicator's award of reinstatement could not stand as he was not empowered by the *PSLRA* to make Lieutenant-Governor in Council appointments. In addition, by concluding that the decision was void *ab initio* owing to a lack of procedural fairness, the adjudicator failed to consider the doctrine of adequate alternative remedy. The appellant received procedural fairness by virtue of the grievance hearing before the adjudicator. The adjudicator had provisionally increased the notice period to eight months — that provided an adequate alternative remedy. Concluding that the adjudicator's decision did not stand up to review on a reasonableness *simpliciter* standard, the reviewing judge quashed the reinstatement order but upheld the adjudicator's provisional award of eight months' notice.

(2) Court of Appeal of New Brunswick (2006), 297 N.B.R. (2d) 151, 2006 NBCA 27

[21] The appellant appealed the decision of the reviewing judge. The Court of Appeal, Robertson J.A. writing, held that the proper standard with respect to the interpretation of the adjudicator's authority under the *PSLRA* was reasonableness *simpliciter* and that the reviewing judge had erred in adopting the correctness standard. The court reached that conclusion by proceeding through a pragmatic and functional analysis, placing particular emphasis on the presence of a full privative clause in the *PSLRA* and the relative expertise of an adjudicator in the labour relations and employment context. The court also relied on the decision of this Court in *Alberta Union of Provincial Employees v. Lethbridge Community College*, [2004] 1 S.C.R. 727, 2004 SCC 28. However, the court noted that the adjudicator's interpretation of the *Mills* decision warranted no deference and that "correctness is the proper review standard when it comes to the interpretation and application of caselaw" (para. 17).

à la fois sur les faits et le droit, de sorte qu'il fallait appliquer la norme de la décision raisonnable *simpliciter*. Il a convenu avec la province que les motifs de l'arbitre ne résistaient pas à « un examen assez poussé » (par. 76) et statué que l'arbitre ne pouvait ordonner la réintégration car la *LRTSP* ne l'autorisait pas à effectuer une nomination relevant du lieutenant-gouverneur en conseil. En outre, en concluant que le non-respect de l'équité procédurale rendait la décision nulle *ab initio*, l'arbitre avait omis de tenir compte de l'existence d'un autre recours approprié. L'appelant avait bénéficié de l'équité procédurale du fait de l'audition de son grief par l'arbitre, lequel avait subsidiairement porté le préavis à huit mois, d'où l'existence d'un autre recours approprié. Le juge de révision a conclu que la décision de l'arbitre ne satisfaisait pas à la norme de la raisonnabilité *simpliciter*, de sorte qu'il a annulé l'ordonnance de réintégration, mais confirmé la décision subsidiaire portant à huit mois le préavis requis.

(2) Cour d'appel du Nouveau-Brunswick (2006), 297 R.N.-B. (2e) 151, 2006 NBCA 27

[21] L'appelant a interjeté appel de la décision du juge de révision. Par la voix du juge Robertson, la Cour d'appel a statué que la norme applicable à l'interprétation des pouvoirs conférés à l'arbitre par la *LRTSP* était celle de la raisonnabilité *simpliciter* et que le juge de révision avait eu tort d'appliquer celle de la décision correcte. Elle a conclu ainsi à l'issue d'une analyse pragmatique et fonctionnelle axée sur la clause privative absolue de la *LRTSP* et l'expertise relative de l'arbitre dans le domaine des relations de travail et de l'emploi. Elle s'est également appuyée sur notre arrêt *Alberta Union of Provincial Employees c. Lethbridge Community College*, [2004] 1 R.C.S. 727, 2004 CSC 28. Toutefois, elle a indiqué que l'interprétation de l'arrêt *Mills* par l'arbitre n'appellait pas la déférence et que « la norme de la décision correcte est la norme de contrôle applicable lorsqu'il s'agit de l'interprétation et de l'application de la jurisprudence » (par. 17).

[22] Applying the reasonableness *simpliciter* standard, the court held that the adjudicator's decision was unreasonable. Robertson J.A. began by considering s. 20 of the *Civil Service Act* and noted that under the ordinary rules of contract, an employer holds the right to dismiss an employee with cause or with reasonable notice or with pay in lieu of notice. Section 20 of the *Civil Service Act* limits the Crown's common law right to dismiss its employees without cause or notice. Robertson J.A. reasoned that s. 97(2.1) of the *PSLRA* applies in principle to non-unionized employees, but that it is only where an employee has been discharged or disciplined *for cause* that an adjudicator may substitute such other penalty as seems just and reasonable in the circumstances. Where the employer elects to dismiss with notice or pay in lieu of notice, however, s. 97(2.1) does not apply. In such circumstances, the employee may only grieve the length of the notice period. The only exception is where the employee alleges that the decision to terminate was based on a prohibited ground of discrimination.

[23] On the issue of procedural fairness, the court found that the appellant exercised his right to grieve, and thus a finding that the duty of fairness had been breached was without legal foundation. The court dismissed the appeal.

II. Issues

[24] At issue, firstly is the approach to be taken in the judicial review of a decision of a particular adjudicative tribunal which was seized of a grievance filed by the appellant after his employment was terminated. This appeal gives us the opportunity to re-examine the foundations of judicial review and the standards of review applicable in various situations.

[25] The second issue involves examining whether the appellant who held an office "at pleasure" in the civil service of New Brunswick, had the right to procedural fairness in the employer's decision to terminate him. On this occasion, we will reassess the rule that has found formal expression in *Knight*.

[22] La Cour d'appel a conclu au regard de la norme de la raisonnabilité *simpliciter* que la décision de l'arbitre était déraisonnable. Le juge Robertson a d'abord examiné l'art. 20 de la *Loi sur la Fonction publique* et relevé que suivant les règles contractuelles ordinaires, l'employeur pouvait congédier un employé soit pour motif, soit avec préavis raisonnable ou indemnité en tenant lieu. Cet article limite la faculté que le droit commun confère à l'État de congédier ses employés sans motif ni préavis. Le juge Robertson a estimé que le par. 97(2.1) de la *LRTSP* s'applique en principe aux employés non syndiqués, mais que l'arbitre ne peut substituer une autre peine lui semblant juste et raisonnable dans les circonstances que lorsque l'employé a été congédié ou a fait l'objet d'une mesure disciplinaire *pour motif*. Toutefois, lorsque l'employeur opte pour le congédiement avec préavis ou indemnité en tenant lieu, le par. 97(2.1) ne s'applique pas. Le seul recours dont dispose alors l'employé consiste à contester le préavis par voie de grief, sauf — et c'est la seule exception — lorsqu'il allègue que le congédiement est fondé sur un motif de discrimination illicite.

[23] Au chapitre de l'équité procédurale, la Cour d'appel a jugé que l'appelant avait exercé son droit de présenter un grief et qu'il n'y avait donc pas eu manquement à l'obligation d'équité procédurale. L'appel a été rejeté.

II. Les questions en litige

[24] La Cour doit d'abord déterminer quelle démarche s'imposait pour le contrôle judiciaire de la décision rendue par l'arbitre saisi du grief présenté par l'appelant après son licenciement. Le présent pourvoi lui donne l'occasion de revoir les fondements du contrôle judiciaire et les normes applicables dans différentes situations.

[25] Elle doit en second lieu se demander si l'appelant, qui était titulaire d'une charge à titre amovible dans la fonction publique du Nouveau-Brunswick, avait droit à ce que son employeur fasse preuve d'équité procédurale en prenant la décision de mettre fin à son emploi. À cet égard, nous réévaluerons la règle formulée dans l'arrêt *Knight*.

[26] The two types of judicial review, on the merits and on the process, are therefore engaged in this case. Our review of the system will therefore be comprehensive, which is preferable since a holistic approach is needed when considering fundamental principles.

III. Issue 1: Review of the Adjudicator's Statutory Interpretation Determination

A. *Judicial Review*

[27] As a matter of constitutional law, judicial review is intimately connected with the preservation of the rule of law. It is essentially that constitutional foundation which explains the purpose of judicial review and guides its function and operation. Judicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers. Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures.

[28] By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.

[29] Administrative powers are exercised by decision makers according to statutory regimes that are themselves confined. A decision maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority,

[26] Le présent pourvoi met donc en jeu les deux types de contrôle judiciaire, l'un sur le fond, l'autre sur le plan de la procédure. Notre révision portera donc sur le mécanisme dans son ensemble, ce qui est préférable, car l'examen de principes fondamentaux commande une démarche globale.

III. Premier volet : Contrôle de l'interprétation de la loi par l'arbitre

A. *Le contrôle judiciaire*

[27] Sur le plan constitutionnel, le contrôle judiciaire est intimement lié au maintien de la primauté du droit. C'est essentiellement cette assise constitutionnelle qui explique sa raison d'être et oriente sa fonction et son application. Le contrôle judiciaire s'intéresse à la tension sous-jacente à la relation entre la primauté du droit et le principe démocratique fondamental, qui se traduit par la prise de mesures législatives pour créer divers organismes administratifs et les investir de larges pouvoirs. Lorsqu'elles s'acquittent de leurs fonctions constitutionnelles de contrôle judiciaire, les cours de justice doivent tenir compte de la nécessité non seulement de maintenir la primauté du droit, mais également d'éviter toute immixtion injustifiée dans l'exercice de fonctions administratives en certaines matières déterminées par le législateur.

[28] La primauté du droit veut que tout exercice de l'autorité publique procède de la loi. Tout pouvoir décisionnel est légalement circonscrit par la loi habilitante, la common law, le droit civil ou la Constitution. Le contrôle judiciaire permet aux cours de justice de s'assurer que les pouvoirs légaux sont exercés dans les limites fixées par le législateur. Il vise à assurer la légalité, la rationalité et l'équité du processus administratif et de la décision rendue.

[29] Les décideurs administratifs exercent leurs pouvoirs dans le cadre de régimes législatifs qui sont eux-mêmes délimités. Ils ne peuvent exercer de pouvoirs qui ne leur sont pas expressément conférés. S'ils agissent sans autorisation légale,

the decision maker transgresses the principle of the rule of law. Thus, when a reviewing court considers the scope of a decision-making power or the jurisdiction conferred by a statute, the standard of review analysis strives to determine what authority was intended to be given to the body in relation to the subject matter. This is done within the context of the courts' constitutional duty to ensure that public authorities do not overreach their lawful powers: *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, at p. 234; also *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, at para. 21.

[30] In addition to the role judicial review plays in upholding the rule of law, it also performs an important constitutional function in maintaining legislative supremacy. As noted by Justice Thomas Cromwell, "the rule of law is affirmed by assuring that the courts have the final say on the jurisdictional limits of a tribunal's authority; second, legislative supremacy is affirmed by adopting the principle that the concept of jurisdiction should be narrowly circumscribed and defined according to the intent of the legislature in a contextual and purposeful way; third, legislative supremacy is affirmed and the court-centric conception of the rule of law is reined in by acknowledging that the courts do not have a monopoly on deciding all questions of law" ("Appellate Review: Policy and Pragmatism", in *2006 Isaac Pitblado Lectures*, *Appellate Courts: Policy, Law and Practice*, V-1, at p. V-12). In essence, the rule of law is maintained because the courts have the last word on jurisdiction, and legislative supremacy is assured because determining the applicable standard of review is accomplished by establishing legislative intent.

[31] The legislative branch of government cannot remove the judiciary's power to review actions and decisions of administrative bodies for compliance with the constitutional capacities of the government. Even a privative clause, which provides a strong indication of legislative intent, cannot be determinative in this respect (*Executors of the Woodward Estate v. Minister of Finance*, [1973] S.C.R. 120, at

ils portent atteinte au principe de la primauté du droit. C'est pourquoi lorsque la cour de révision se penche sur l'étendue d'un pouvoir décisionnel ou de la compétence accordée par la loi, l'analyse relative à la norme de contrôle vise à déterminer quel pouvoir le législateur a voulu donner à l'organisme en la matière. Elle le fait dans le contexte de son obligation constitutionnelle de veiller à la légalité de l'action administrative : *Crevier c. Procureur général du Québec*, [1981] 2 R.C.S. 220, p. 234; également, *Dr Q c. College of Physicians and Surgeons of British Columbia*, [2003] 1 R.C.S. 226, 2003 CSC 19, par. 21.

[30] Non seulement le contrôle judiciaire contribue au respect de la primauté du droit, mais il joue un rôle constitutionnel important en assurant la suprématie législative. Comme l'a fait observer le juge Thomas Cromwell, [TRADUCTION] « la primauté du droit est consacrée par le pouvoir d'une cour de justice de statuer en dernier ressort sur l'étendue de la compétence d'un tribunal administratif, par l'application du principe selon lequel il convient de bien délimiter la compétence et de bien la définir, en fonction de l'intention du législateur, d'une manière à la fois contextuelle et téléologique, ainsi que par la reconnaissance du fait que les cours de justice n'ont pas le pouvoir exclusif de statuer sur toutes les questions de droit, ce qui tempère la conception judiciarisée de la primauté du droit » (« Appellate Review : Policy and Pragmatism », dans *2006 Isaac Pitblado Lectures, Appellate Courts : Policy, Law and Practice*, V-1, p. V-12). Essentiellement, la primauté du droit est assurée par le dernier mot qu'ont les cours de justice en matière de compétence, et la suprématie législative, par la détermination de la norme de contrôle applicable en fonction de l'intention du législateur.

[31] L'organe législatif du gouvernement ne peut supprimer le pouvoir judiciaire de s'assurer que les actes et les décisions d'un organisme administratif sont conformes aux pouvoirs constitutionnels du gouvernement. Même si elle est révélatrice de l'intention du législateur, la clause privative ne saurait être décisive à cet égard (*Succession Woodward c. Ministre des Finances*, [1973] R.C.S. 120, p. 127).

p. 127). The inherent power of superior courts to review administrative action and ensure that it does not exceed its jurisdiction stems from the judicature provisions in ss. 96 to 101 of the *Constitution Act, 1867*: *Crevier.* As noted by Beetz J. in *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, at p. 1090, "[t]he role of the superior courts in maintaining the rule of law is so important that it is given constitutional protection". In short, judicial review is constitutionally guaranteed in Canada, particularly with regard to the definition and enforcement of jurisdictional limits. As Laskin C.J. explained in *Crevier*:

> Where . . . questions of law have been specifically covered in a privative enactment, this Court, as in *Farrah*, has not hesitated to recognize this limitation on judicial review as serving the interests of an express legislative policy to protect decisions of adjudicative agencies from external correction. Thus, it has, in my opinion, balanced the competing interests of a provincial Legislature in its enactment of substantively valid legislation and of the courts as ultimate interpreters of the *British North America Act* and s. 96 thereof. The same considerations do not, however, apply to issues of jurisdiction which are not far removed from issues of constitutionality. It cannot be left to a provincial statutory tribunal, in the face of s. 96, to determine the limits of its own jurisdiction without appeal or review. [pp. 237-38]

See also D. J. Mullan, *Administrative Law* (2001), at p. 50.

[32] Despite the clear, stable constitutional foundations of the system of judicial review, the operation of judicial review in Canada has been in a constant state of evolution over the years, as courts have attempted to devise approaches to judicial review that are both theoretically sound and effective in practice. 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.

Le pourvoir inhérent d'une cour supérieure de contrôler les actes de l'Administration et de s'assurer que celle-ci n'outrepasse pas les limites de sa compétence tire sa source des art. 96 à 101 de la *Loi constitutionnelle de 1867* portant sur la magistrature : arrêt *Crevier.* Comme l'a dit le juge Beetz dans l'arrêt *U.E.S., Local 298 c. Bibeault*, [1988] 2 R.C.S. 1048, p. 1090, « [l]e rôle des cours supérieures dans le maintien de la légalité est si important qu'il bénéficie d'une protection constitutionnelle ». En résumé, le contrôle judiciaire bénéficie de la protection constitutionnelle au Canada, surtout lorsqu'il s'agit de définir les limites de la compétence et de les faire respecter. Le juge en chef Laskin l'a expliqué dans l'arrêt *Crevier* :

> [Q]uand la disposition privative englobe spécifiquement les questions de droit, cette Cour n'a pas hésité, comme dans l'arrêt *Farrah*, à reconnaître que cette limitation du contrôle judiciaire favorise une politique législative explicite qui veut protéger les décisions des organismes judiciaires contre la rectification externe. La Cour a ainsi, à mon avis, maintenu l'équilibre entre les objectifs contradictoires du législateur provincial de voir confirmer la validité quant au fond des lois qu'il a adoptées et ceux des tribunaux d'être les interprètes en dernier ressort de l'*Acte de l'Amérique du Nord britannique* et de son art. 96. Les mêmes considérations ne s'appliquent cependant pas aux questions de compétence qui ne sont pas très éloignées des questions de constitutionnalité. Il ne peut être accordé à un tribunal créé par une loi provinciale, à cause de l'art. 96, de définir les limites de sa propre compétence sans appel ni révision. [p. 237-238]

Voir aussi D. J. Mullan, *Administrative Law* (2001), p. 50.

[32] Ses assises constitutionnelles claires et stables n'ont pas empêché le contrôle judiciaire de connaître une évolution constante au Canada, les cours de justice s'efforçant au fil des ans de concevoir une démarche tout autant valable sur le plan théorique qu'efficace en pratique. 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.

[33] Although the instant appeal deals with the particular problem of judicial review of the decisions of an adjudicative tribunal, these reasons will address first and foremost the structure and characteristics of the system of judicial review as a whole. In the wake of *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [2001] 2 S.C.R. 281, 2001 SCC 41, and *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29, it has become apparent that the present system must be simplified. The comments of LeBel J. in *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, 2002 SCC 86, at paras. 190 and 195, questioning the applicability of the "pragmatic and functional approach" to the decisions and actions of all kinds of administrative actors, illustrated the need for change.

B. *Reconsidering the Standards of Judicial Review*

[34] The current approach to judicial review involves three standards of review, which range from correctness, where no deference is shown, to patent unreasonableness, which is most deferential to the decision maker, the standard of reasonableness *simpliciter* lying, theoretically, in the middle. In our view, it is necessary to reconsider both the number and definitions of the various standards of review, and the analytical process employed to determine which standard applies in a given situation. We conclude that there ought to be two standards of review — correctness and reasonableness.

[35] The existing system of judicial review has its roots in several landmark decisions beginning in the late 1970s in which this Court developed the theory of substantive review to be applied to determinations of law, and determinations of fact and of mixed law and fact made by administrative tribunals. In *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979]

[33] Même si le présent pourvoi porte plus particulièrement sur le contrôle judiciaire d'une décision arbitrale, dans les présents motifs, la Cour se penche avant tout sur l'architecture et les caractéristiques du mécanisme de contrôle judiciaire dans son ensemble. À la suite des arrêts *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817, *Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [2002] 1 R.C.S. 3, 2002 CSC 1, *Centre hospitalier Mont-Sinaï c. Québec (Ministre de la Santé et des Services sociaux)*, [2001] 2 R.C.S. 281, 2001 CSC 41, et *S.C.F.P. c. Ontario (Ministre du Travail)*, [2003] 1 R.C.S. 539, 2003 CSC 29, il est devenu apparent que le mécanisme actuel devait être simplifié. Les observations du juge LeBel dans l'arrêt *Chamberlain c. Surrey School District No. 36*, [2002] 4 R.C.S. 710, 2002 CSC 86, par. 190 et 195, mettant en doute l'applicabilité de l'« approche pragmatique et fonctionnelle » aux décisions et aux mesures de tous les genres d'organisme administratif, font ressortir la nécessité d'une réévaluation.

B. *Repenser les normes de contrôle judiciaire*

[34] À l'heure actuelle, le contrôle judiciaire s'effectue en fonction de trois normes : celle de la décision correcte, qui n'appelle aucune déférence, celle du caractère manifestement déraisonnable, qui commande la plus grande déférence, et celle du caractère raisonnable *simpliciter*, qui se situe théoriquement à mi-chemin entre les deux. Il s'impose, selon nous, de repenser tant le nombre que la teneur des normes de contrôle, ainsi que la démarche analytique qui préside à la détermination de la norme applicable. Nous sommes d'avis qu'il ne devrait y avoir que deux normes de contrôle, celle de la décision correcte et celle de la décision raisonnable.

[35] Le mécanisme actuel de contrôle judiciaire est issu d'arrêts de principe rendus à partir de la fin des années 1970. La Cour y a élaboré la théorie de l'examen approfondi des conclusions de droit, de fait ou mixtes de droit et de fait tirées par les tribunaux administratifs. Dans l'arrêt *Syndicat canadien de la Fonction publique, section locale 963 c. Société des alcools du Nouveau-Brunswick*, [1979]

2 S.C.R. 227 ("*CUPE*"), Dickson J. introduced the idea that, depending on the legal and administrative contexts, a specialized administrative tribunal with particular expertise, which has been given the protection of a privative clause, if acting within its jurisdiction, could provide an interpretation of its enabling legislation that would be allowed to stand unless "so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review" (p. 237). Prior to *CUPE*, judicial review followed the "preliminary question doctrine", which inquired into whether a tribunal had erred in determining the scope of its jurisdiction. By simply branding an issue as "jurisdictional", courts could replace a decision of the tribunal with one they preferred, often at the expense of a legislative intention that the matter lie in the hands of the administrative tribunal. *CUPE* marked a significant turning point in the approach of courts to judicial review, most notably in Dickson J.'s warning 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). Dickson J.'s policy of judicial respect for administrative decision making marked the beginning of the modern era of Canadian administrative law.

2 R.C.S. 227 (« *SCFP* »), le juge Dickson a lancé l'idée que, selon les contextes juridiques et administratifs, le tribunal administratif spécialisé jouissant d'une expertise particulière et bénéficiant de la protection d'une clause privative pouvait, s'il n'outrepassait pas sa compétence, proposer une interprétation de sa loi habilitante qui serait jugée valable à moins qu'elle ne soit « déraisonnable au point de ne pouvoir rationnellement s'appuyer sur la législation pertinente et d'exiger une intervention judiciaire » (p. 237). Avant cet arrêt, la « doctrine de la condition préalable » était appliquée en matière de contrôle judiciaire et s'attachait au bien-fondé de la décision du tribunal administratif concernant l'étendue de sa compétence. La cour de révision pouvait alors substituer à la décision de l'organisme celle qu'elle jugeait préférable, sous prétexte que la question soulevée avait trait à la « compétence », faisant souvent fi de l'intention du législateur de s'en remettre au tribunal administratif. L'arrêt *SCFP*, et surtout la mise en garde du juge Dickson invitant les tribunaux judiciaires à « 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), a constitué un point tournant dans la conception du contrôle judiciaire. Le respect du processus décisionnel administratif préconisé par le juge Dickson a marqué le début de l'ère moderne du droit administratif canadien.

[36] *CUPE* did not do away with correctness review altogether and in *Bibeault*, the Court affirmed that there are still questions on which a tribunal must be correct. As Beetz J. explained, "the jurisdiction conferred on administrative tribunals and other bodies created by statute is limited, and . . . such a tribunal cannot by a misinterpretation of an enactment assume a power not given to it by the legislator" (p. 1086). *Bibeault* introduced the concept of a "pragmatic and functional analysis" to determine the jurisdiction of a tribunal, abandoning the "preliminary question" theory. In arriving at the appropriate standard of review, courts were to consider a number of factors including the wording of the provision conferring jurisdiction on the tribunal, the purpose of the enabling statute, the reason for the existence of the tribunal, the expertise of its

[36] Cependant, l'arrêt *SCFP* n'a pas totalement écarté l'examen suivant la norme de la décision correcte; dans l'arrêt *Bibeault*, la Cour a rappelé qu'il demeurait des questions qu'un tribunal administratif devait trancher correctement. Comme l'a expliqué le juge Beetz, « la compétence conférée aux tribunaux administratifs et à d'autres organismes créés par la loi [est] limitée, et [. . .] un tel tribunal ne [peut], par une interprétation erronée d'une disposition de loi, s'arroger un pouvoir que le législateur ne lui a pas donné » (p. 1086). L'arrêt *Bibeault* a introduit la notion d'« analyse pragmatique et fonctionnelle » pour déterminer la compétence d'un tribunal administratif et marqué l'abandon de la théorie « de la condition préalable ». Pour arriver à la bonne norme de contrôle, les cours de justice devaient tenir compte de divers éléments,

members, and the nature of the problem (p. 1088). The new approach would put "renewed emphasis on the superintending and reforming function of the superior courts" (p. 1090). The "pragmatic and functional analysis", as it came to be known, was later expanded to determine the appropriate degree of deference in respect of various forms of administrative decision making.

[37] In *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, a third standard of review was introduced into Canadian administrative law. The legislative context of that case, which provided a statutory right of appeal from the decision of a specialized tribunal, suggested that none of the existing standards was entirely satisfactory. As a result, the reasonableness *simpliciter* standard was introduced. It asks whether the tribunal's decision was reasonable. If so, the decision should stand; if not, it must fall. In *Southam*, Iacobucci J. described an unreasonable decision as one that "is not supported by any reasons that can stand up to a somewhat probing examination" (para. 56) and explained that the difference between patent unreasonableness and reasonableness *simpliciter* is the "immediacy" or "obviousness" of the defect in the tribunal's decision (para. 57). The defect will appear on the face of a patently unreasonable decision, but where the decision is merely unreasonable, it will take a searching review to find the defect.

[38] The three standards of review have since remained in Canadian administrative law, the approach to determining the appropriate standard of review having been refined in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982.

[39] The operation of three standards of review has not been without practical and theoretical difficulties, neither has it been free of criticism. One major problem lies in distinguishing between the

dont le libellé de la disposition conférant la compétence, l'objet de la loi habilitante, la raison d'être du tribunal administratif, l'expertise de ses membres et la nature du problème (p. 1088). La nouvelle approche mettait « de nouveau l'accent sur le rôle de contrôle et de surveillance joué par les cours supérieures » (p. 1090). L'« analyse pragmatique et fonctionnelle » a vu sa portée s'accroître ensuite pour englober la détermination du degré de déférence que commandaient les différents types de décision administrative.

[37] Dans l'arrêt *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748, la Cour a introduit une troisième norme de contrôle dans le droit administratif canadien. Dans cette affaire, le contexte législatif — existence d'un droit d'appel de la décision d'un tribunal spécialisé —, donnait à penser qu'aucune des normes existantes ne convenait parfaitement. D'où l'adoption de la norme du caractère raisonnable *simpliciter*, qui consiste à déterminer si la décision est raisonnable. Dans l'affirmative, la décision demeure, dans la négative, elle est annulée. Dans l'arrêt *Southam*, le juge Iacobucci a écrit au sujet de la décision déraisonnable qu'elle « n'est étayée par aucun motif capable de résister à un examen assez poussé » (par. 56). Il a expliqué que la différence entre la norme du manifestement déraisonnable et celle du raisonnable *simpliciter* réside dans le « caractère flagrant ou évident » du défaut entachant la décision du tribunal administratif (par. 57). Dans le cas d'une décision manifestement déraisonnable, le défaut est manifeste, alors que dans celui d'une décision seulement déraisonnable, il faut un examen approfondi pour le déceler.

[38] Les trois normes de contrôle font partie du droit administratif canadien depuis lors, et le mode de détermination de la norme applicable a été précisé dans l'arrêt *Pushpanathan c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1998] 1 R.C.S. 982.

[39] L'application de trois normes de contrôle n'a pas manqué de poser des difficultés d'ordre pratique et théorique, et aucune n'a échappé à la critique. Il est particulièrement difficile de distinguer la

patent unreasonableness standard and the reasonableness *simpliciter* standard. The difficulty in distinguishing between those standards contributes to the problem of choosing the right standard of review. An even greater problem lies in the application of the patent unreasonableness standard, which at times seems to require parties to accept an unreasonable decision.

[40] The definitions of the patent unreasonableness standard that arise from the case law tend to focus on the magnitude of the defect and on the immediacy of the defect (see *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63, at para. 78, *per* LeBel J.). Those two hallmarks of review under the patent unreasonableness standard have been used consistently in the jurisprudence to distinguish it from review under the standard of reasonableness *simpliciter.* As it had become clear that, after *Southam*, lower courts were struggling with the conceptual distinction between patent unreasonableness and reasonableness *simpliciter*, Iacobucci J., writing for the Court in *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20, attempted to bring some clarity to the issue. He explained the different operations of the two deferential standards as follows, at paras. 52-53:

> [A] patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" . . . . A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.
>
> A decision may be unreasonable without being patently unreasonable when the defect in the decision is less obvious and might only be discovered after "significant searching or testing" (*Southam*, *supra*, at para. 57). Explaining the defect may require a detailed exposition to show that there are no lines of reasoning supporting the decision which could reasonably lead that tribunal to reach the decision it did.

[41] As discussed by LeBel J. at length in *Toronto (City) v. C.U.P.E.*, notwithstanding the increased

norme de la décision manifestement déraisonnable de celle de la décision raisonnable *simpliciter*, ce qui ajoute au problème du choix de la bonne norme. L'application de la norme du caractère manifestement déraisonnable est encore plus problématique en ce qu'elle paraît parfois imposer aux parties une décision déraisonnable.

[40] La définition jurisprudentielle de la décision manifestement déraisonnable met généralement l'accent sur l'importance du défaut et sur son caractère flagrant (voir l'arrêt *Toronto (Ville) c. S.C.F.P., section locale 79*, [2003] 3 R.C.S. 77, 2003 CSC 63, par. 78, le juge LeBel). Les cours de justice se sont toujours fondées sur ces deux caractéristiques pour la distinguer de la décision raisonnable *simpliciter.* Après l'arrêt *Southam*, il était apparu clairement que la distinction conceptuelle entre les deux normes n'allait pas de soi pour les juridictions inférieures. Dans l'arrêt *Barreau du Nouveau-Brunswick c. Ryan*, [2003] 1 R.C.S. 247, 2003 CSC 20, s'exprimant au nom de la Cour, le juge Iacobucci a donc tenté de clarifier la question en précisant le fonctionnement de chacune des deux normes commandant la déférence (par. 52-53) :

> [D]ès qu'un défaut manifestement déraisonnable a été relevé, il peut être expliqué simplement et facilement, de façon à écarter toute possibilité réelle de douter que la décision est viciée. La décision manifestement déraisonnable a été décrite comme étant « clairement irrationnelle » ou « de toute évidence non conforme à la raison » [. . .] Une décision qui est manifestement déraisonnable est à ce point viciée qu'aucun degré de déférence judiciaire ne peut justifier de la maintenir.
>
> Une décision peut être déraisonnable sans être manifestement déraisonnable lorsque le défaut dans la décision est moins évident et qu'il ne peut être décelé qu'après « un examen ou . . . une analyse en profondeur » (*Southam*, précité, par. 57). L'explication du défaut peut exiger une explication détaillée pour démontrer qu'aucun des raisonnements avancés pour étayer la décision ne pouvait raisonnablement amener le tribunal à rendre la décision prononcée.

[41] Comme le juge LeBel en fait longuement état dans l'arrêt *Toronto (Ville) c. S.C.F.P.*, malgré

clarity that *Ryan* brought to the issue and the theoretical differences between the standards of patent unreasonableness and reasonableness *simpliciter*, a review of the cases reveals that any actual difference between them in terms of their operation appears to be illusory (see also the comments of Abella J. in *Council of Canadians with Disabilities v. Via Rail Canada Inc.*, [2007] 1 S.C.R. 650, 2007 SCC 15, at paras. 101-3). Indeed, even this Court divided when attempting to determine whether a particular decision was "patently unreasonable", although this should have been self-evident under the existing test (see *C.U.P.E. v. Ontario (Minister of Labour)*). This result is explained by the fact that both standards are based on the idea that there might be multiple valid interpretations of a statutory provision or answers to a legal dispute and that courts ought not to interfere where the tribunal's decision is rationally supported. Looking to either the magnitude or the immediacy of the defect in the tribunal's decision provides no meaningful way in practice of distinguishing between a patently unreasonable and an unreasonable decision. As Mullan has explained:

> [T]o maintain a position that it is only the "clearly irrational" that will cross the threshold of patent unreasonableness while irrationality *simpliciter* will not is to make a nonsense of the law. Attaching the adjective "clearly" to irrational is surely a tautology. Like "uniqueness", irrationality either exists or it does not. There cannot be shades of irrationality.
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> See D. J. Mullan, "Recent Developments in Standard of Review", in Canadian Bar Association (Ontario), *Taking the Tribunal to Court: A Practical Guide for Administrative Law Practitioners* (2000), at p. 25.

[42] Moreover, even if one could conceive of a situation in which a clearly or highly irrational decision were distinguishable from a merely irrational decision, it would be unpalatable to require parties to accept an irrational decision simply because, on a deferential standard, the irrationality of the decision is not clear *enough*. It is also inconsistent with the rule of law to retain an irrational decision. As

les éclaircissements de la Cour dans l'arrêt *Ryan,* notamment au chapitre des différences théoriques entre la norme du manifestement déraisonnable et celle de la décision raisonnable *simpliciter*, il appert de la jurisprudence que toute différence réelle sur le plan de l'application se révèle illusoire (voir également les remarques de la juge Abella dans l'arrêt *Conseil des Canadiens avec déficiences c. Via Rail Canada Inc.*, [2007] 1 R.C.S. 650, 2007 CSC 15, par. 101-103). D'ailleurs, dans l'affaire *S.C.F.P. c. Ontario (Ministre du Travail)*, même les juges de la Cour ont été partagés quant à savoir si la décision en cause était « manifestement déraisonnable », alors que la réponse aurait dû être évidente suivant le test applicable. Le phénomène s'explique par le fait que les deux normes s'appuient sur l'idée qu'une disposition législative peut donner lieu à plus d'une interprétation valable, et un litige, à plus d'une solution, et que la cour de révision doit se garder d'intervenir lorsque la décision administrative a un fondement rationnel. Dans les faits, ni l'importance du défaut entachant la décision ni son caractère flagrant ne permettent vraiment de distinguer une décision manifestement déraisonnable d'une décision déraisonnable. Comme le précise Mullan :

> [TRADUCTION] [S]outenir que seule la décision « clairement irrationnelle » est manifestement déraisonnable, à l'exclusion de celle qui est irrationnelle *simpliciter*, vide de sens la règle de droit. Rattacher l'adverbe « clairement » à l'adjectif « irrationnelle » est certes une tautologie. Tout comme l'« unicité », l'irrationalité est ou n'est pas. Une décision ne peut être un peu irrationnelle.
>
> Voir D. J. Mullan, « Recent Developments in Standard of Review », dans l'Association du Barreau canadien (Ontario), *Taking the Tribunal to Court : A Practical Guide for Administrative Law Practitioners* (2000), p. 25.

[42] En outre, même si l'on pouvait concevoir le cas où une décision clairement ou particulièrement irrationnelle se distinguerait d'une décision simplement irrationnelle, il répugnerait à la justice que les parties doivent se soumettre à une décision irrationnelle pour la seule raison que l'irrationalité n'est pas *assez* évidente suivant une norme appelant la déférence. Le maintien d'une décision

LeBel J. explained in his concurring reasons in *Toronto (City) v. C.U.P.E.*, at para. 108:

> In the end, the essential question remains the same under both standards: was the decision of the adjudicator taken in accordance with reason? Where the answer is no, for instance because the legislation in question cannot rationally support the adjudicator's interpretation, the error will invalidate the decision, regardless of whether the standard applied is reasonableness *simpliciter* or patent unreasonableness . . . .

See also *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, [2004] 1 S.C.R. 609, 2004 SCC 23, at paras. 40-41, *per* LeBel J.

C. *Two Standards of Review*

[43] The Court has moved from a highly formalistic, artificial "jurisdiction" test that could easily be manipulated, to a highly contextual "functional" test that provides great flexibility but little real on-the-ground guidance, and offers too many standards of review. What is needed is a test that offers guidance, is not formalistic or artificial, and permits review where justice requires it, but not otherwise. A simpler test is needed.

(1) Defining the Concepts of Reasonabless and Correctness

[44] As explained above, the patent unreasonableness standard was developed many years prior to the introduction of the reasonableness *simpliciter* standard in *Southam*. The intermediate standard was developed to respond to what the Court viewed as problems in the operation of judicial review in Canada, particularly the perceived all-or-nothing approach to deference, and in order to create a more finely calibrated system of judicial review (see also L. Sossin and C. M. Flood, "The Contextual Turn: Iacobucci's Legacy and the Standard of Review in Administrative Law" (2007), 57 *U.T.L.J.* 581). However, the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently

irrationnelle va aussi à l'encontre de la primauté du droit. Comme l'a expliqué le juge LeBel dans l'arrêt *Toronto (Ville) c. S.C.F.P.*, au par. 108 de ses motifs concordants :

> En fin de compte, la question essentielle demeure la même pour les deux normes : la décision du tribunal est-elle conforme à la raison? Si la réponse est négative du fait que, par exemple, les dispositions en cause ne peuvent rationnellement appuyer l'interprétation du tribunal, l'erreur entraîne l'invalidation de la décision, que la norme appliquée soit celle du raisonnable *simpliciter* ou du manifestement déraisonnable . . .

Voir également *Voice Construction Ltd. c. Construction & General Workers' Union, Local 92*, [2004] 1 R.C.S. 609, 2004 CSC 23, par. 40-41, le juge LeBel.

C. *Deux normes de contrôle*

[43] La Cour est passée d'un test d'emploi aisé axé sur la « compétence », à la fois artificiel et très formaliste, à un test fortement contextuel axé sur le caractère « fonctionnel », qui offre une grande souplesse, mais peu de repères concrets, et qui emporte l'application d'un trop grand nombre de normes de contrôle. Il nous faut un test qui oriente bien la démarche, qui ne soit ni formaliste ni artificiel, et qui ne permette le contrôle que lorsque la justice l'exige. La démarche doit être simplifiée.

(1) Définir les notions de décision raisonnable et de décision correcte

[44] Nous rappelons que la norme intermédiaire de la raisonnabilité *simpliciter* a été formulée dans l'arrêt *Southam* de nombreuses années après celle du manifestement déraisonnable. Elle visait à remédier aux problèmes que voyait la Cour dans le fonctionnement du contrôle judiciaire au Canada, notamment le tout ou rien apparent en matière de déférence, et à moduler davantage le mécanisme de révision (voir également L. Sossin et C. M. Flood, « The Contextual Turn : Iacobucci's Legacy and the Standard of Review in Administrative Law » (2007), 57 *U.T.L.J.* 581). Toutefois, les difficultés analytiques soulevées par l'application des différentes normes réduisent à néant toute utilité conceptuelle découlant de la plus grande souplesse propre

greater flexibility of having multiple standards of review. Though we are of the view that the three-standard model is too difficult to apply to justify its retention, now, several years after *Southam*, we believe that it would be a step backwards to simply remove the reasonableness *simpliciter* standard and revert to pre-*Southam* law. As we see it, the problems that *Southam* attempted to remedy with the introduction of the intermediate standard are best addressed not by three standards of review, but by two standards, defined appropriately.

[45] We therefore conclude that the two variants of reasonableness review should be collapsed into a single form of "reasonableness" review. The result is a system of judicial review comprising two standards — correctness and reasonableness. But the revised system cannot be expected to be simpler and more workable unless the concepts it employs are clearly defined.

[46] What does this revised reasonableness standard mean? Reasonableness is one of the most widely used and yet most complex legal concepts. In any area of the law we turn our attention to, we find ourselves dealing with the reasonable, reasonableness or rationality. But what is a reasonable decision? How are reviewing courts to identify an unreasonable decision in the context of administrative law and, especially, of judicial review?

[47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of

à l'existence de normes de contrôle multiples. Même si nous sommes d'avis que le modèle des trois normes est trop difficile à appliquer pour que son maintien soit justifié, nous estimons qu'aujourd'hui, plusieurs années après l'arrêt *Southam*, supprimer simplement la norme de la raisonnabilité *simpliciter* et revenir à l'état antérieur à cet arrêt constituerait un recul. Selon nous, la solution aux problèmes que la Cour a tenté de résoudre dans l'arrêt *Southam* en introduisant la norme intermédiaire réside dans l'application non pas de trois, mais de deux normes, convenablement circonscrites.

[45] Nous concluons donc qu'il y a lieu de fondre en une seule les deux normes de raisonnabilité. Il en résulte un mécanisme de contrôle judiciaire emportant l'application de deux normes — celle de la décision correcte et celle de la décision raisonnable. Or, la nouvelle approche ne sera plus simple et plus facile à appliquer que si les concepts auxquels elle fait appel sont bien définis.

[46] En quoi consiste cette nouvelle norme de la raisonnabilité? Bien que la raisonnabilité figure parmi les notions juridiques les plus usitées, elle est l'une des plus complexes. La question de ce qui est raisonnable, de la raisonnabilité ou de la rationalité nous interpelle dans tous les domaines du droit. Mais qu'est-ce qu'une décision raisonnable? Comment la cour de révision reconnaît-elle une décision déraisonnable dans le contexte du droit administratif et, plus particulièrement, dans celui du contrôle judiciaire?

[47] La norme déférente du caractère raisonnable procède du principe à l'origine des deux normes antérieures de raisonnabilité : certaines questions soumises aux tribunaux administratifs n'appellent pas une seule solution précise, mais peuvent plutôt donner lieu à un certain nombre de conclusions raisonnables. Il est loisible au tribunal administratif d'opter pour l'une ou l'autre des différentes solutions rationnelles acceptables. La cour de révision se demande dès lors si la décision et sa justification possèdent les attributs de la raisonnabilité. Le caractère raisonnable tient principalement à la justification de la décision, à la transparence et à l'intelligibilité du processus décisionnel, ainsi qu'à

justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[48] The move towards a single reasonableness standard does not pave the way for a more intrusive review by courts and does not represent a return to pre-*Southam* formalism. In this respect, the concept of deference, so central to judicial review in administrative law, has perhaps been insufficiently explored in the case law. What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers" (*Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at p. 596, *per* L'Heureux-Dubé J., dissenting). We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision": "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286 (quoted with approval in *Baker*, at para. 65, *per* L'Heureux-Dubé J.; *Ryan*, at para. 49).

[49] Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree

l'appartenance de la décision aux issues possibles acceptables pouvant se justifier au regard des faits et du droit.

[48] L'application d'une seule norme de raisonnabilité n'ouvre pas la voie à une plus grande immixtion judiciaire ni ne constitue un retour au formalisme d'avant l'arrêt *Southam*. À cet égard, les décisions judiciaires n'ont peut-être pas exploré suffisamment la notion de déférence, si fondamentale au contrôle judiciaire en droit administratif. Que faut-il entendre par déférence dans ce contexte? C'est à la fois une attitude de la cour et une exigence du droit régissant le contrôle judiciaire. Il ne s'ensuit pas que les cours de justice doivent s'incliner devant les conclusions des décideurs ni qu'elles doivent respecter aveuglément leurs interprétations. Elles ne peuvent pas non plus invoquer la notion de raisonnabilité pour imposer dans les faits leurs propres vues. La déférence suppose plutôt le respect du processus décisionnel au regard des faits et du droit. Elle « repose en partie sur le respect des décisions du gouvernement de constituer des organismes administratifs assortis de pouvoirs délégués » : *Canada (Procureur général) c. Mossop*, [1993] 1 R.C.S. 554, p. 596, la juge L'Heureux-Dubé, dissidente. Nous convenons avec David Dyzenhaus que la notion de [TRADUCTION] « retenue au sens de respect » n'exige pas de la cour de révision [TRADUCTION] « la soumission, mais une attention respectueuse aux motifs donnés ou qui pourraient être donnés à l'appui d'une décision » : « The Politics of Deference : Judicial Review and Democracy », dans M. Taggart, dir., *The Province of Administrative Law* (1997), 279, p. 286 (cité avec approbation par la juge L'Heureux-Dubé dans l'arrêt *Baker*, par. 65; *Ryan*, par. 49).

[49] La déférence inhérente à la norme de la raisonnabilité implique donc que la cour de révision tienne dûment compte des conclusions du décideur. Comme l'explique Mullan, le principe de la déférence [TRADUCTION] « reconnaît que dans beaucoup de cas, les personnes qui se consacrent quotidiennement à l'application de régimes administratifs souvent complexes possèdent

of expertise or field sensitivity to the imperatives and nuances of the legislative regime": D. J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93. In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

[50] As important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids inconsistent and unauthorized application of law. When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

(2) Determining the Appropriate Standard of Review

[51] Having dealt with the nature of the standards of review, we now turn our attention to the method for selecting the appropriate standard in individual cases. As we will now demonstrate, questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while many legal issues attract a standard of correctness. Some legal issues, however, attract the more deferential standard of reasonableness.

ou acquièrent une grande connaissance ou sensibilité à l'égard des impératifs et des subtilités des régimes législatifs en cause » : D. J. Mullan, « Establishing the Standard of Review : The Struggle for Complexity? » (2004), 17 *C.J.A.L.P.* 59, p. 93. La déférence commande en somme le respect de la volonté du législateur de s'en remettre, pour certaines choses, à des décideurs administratifs, de même que des raisonnements et des décisions fondés sur une expertise et une expérience dans un domaine particulier, ainsi que de la différence entre les fonctions d'une cour de justice et celles d'un organisme administratif dans le système constitutionnel canadien.

[50] S'il importe que les cours de justice voient dans la raisonnabilité le fondement d'une norme empreinte de déférence, il ne fait par ailleurs aucun doute que la norme de la décision correcte doit continuer de s'appliquer aux questions de compétence et à certaines autres questions de droit. On favorise ainsi le prononcé de décisions justes tout en évitant l'application incohérente et irrégulière du droit. La cour de révision qui applique la norme de la décision correcte n'acquiesce pas au raisonnement du décideur; elle entreprend plutôt sa propre analyse au terme de laquelle elle décide si elle est d'accord ou non avec la conclusion du décideur. En cas de désaccord, elle substitue sa propre conclusion et rend la décision qui s'impose. La cour de révision doit se demander dès le départ si la décision du tribunal administratif était la bonne.

(2) Détermination de la bonne norme de contrôle

[51] Après avoir examiné la nature des normes de contrôle, nous nous penchons maintenant sur le mode de détermination de la norme applicable dans un cas donné. Nous verrons qu'en présence d'une question touchant aux faits, au pouvoir discrétionnaire ou à la politique, et lorsque le droit et les faits ne peuvent être aisément dissociés, la norme de la raisonnabilité s'applique généralement. De nombreuses questions de droit commandent l'application de la norme de la décision correcte, mais certaines d'entre elles sont assujetties à la norme plus déférente de la raisonnabilité.

[52] The existence of a privative or preclusive clause gives rise to a strong indication of review pursuant to the reasonableness standard. This conclusion is appropriate because a privative clause is evidence of Parliament or a legislature's intent that an administrative decision maker be given greater deference and that interference by reviewing courts be minimized. This does not mean, however, that the presence of a privative clause is determinative. The rule of law requires that the constitutional role of superior courts be preserved and, as indicated above, neither Parliament nor any legislature can completely remove the courts' power to review the actions and decisions of administrative bodies. This power is constitutionally protected. Judicial review is necessary to ensure that the privative clause is read in its appropriate statutory context and that administrative bodies do not exceed their jurisdiction.

[52] L'existence d'une clause privative milite clairement en faveur d'un contrôle suivant la norme de la raisonnabilité. En effet, elle atteste la volonté du législateur que les décisions du décideur administratif fassent l'objet de plus de déférence et que le contrôle judiciaire soit minimal. Cependant, elle n'est pas déterminante. La primauté du droit exige des cours supérieures qu'elles s'acquittent de leur rôle constitutionnel et, nous le rappelons, ni le Parlement ni une législature ne peuvent écarter totalement leur pouvoir de contrôler les actes et les décisions des organismes administratifs. Il s'agit d'un pouvoir protégé par la Constitution. Le contrôle judiciaire est nécessaire afin que la clause privative soit interprétée dans le bon contexte législatif et que les organismes administratifs respectent les limites de leurs attributions.

[53] Where the question is one of fact, discretion or policy, deference will usually apply automatically (*Mossop*, at pp. 599-600; *Dr. Q*, at para. 29; *Suresh*, at paras. 29-30). We believe that the same standard must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated.

[53] En présence d'une question touchant aux faits, au pouvoir discrétionnaire ou à la politique, la retenue s'impose habituellement d'emblée (*Mossop*, p. 599-600; *Dr Q*, par. 29; *Suresh*, par. 29-30). Nous sommes d'avis que la même norme de contrôle doit s'appliquer lorsque le droit et les faits s'entrelacent et ne peuvent aisément être dissociés.

[54] Guidance with regard to the questions that will be reviewed on a reasonableness standard can be found in the existing case law. Deference 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: *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, at para. 48; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 39. Deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context: *Toronto (City) v. C.U.P.E.*, at para. 72. Adjudication in labour law remains a good example of the relevance of this approach. The case law has moved away considerably from the strict position evidenced in *McLeod v. Egan*, [1975] 1 S.C.R. 517, where it was held that an administrative decision

[54] La jurisprudence actuelle peut être mise à contribution pour déterminer quelles questions emportent l'application de la norme de la raisonnabilité. Lorsqu'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 : *Société Radio-Canada c. Canada (Conseil des relations du travail)*, [1995] 1 R.C.S. 157, par. 48; *Conseil de l'éducation de Toronto (Cité) c. F.E.E.E.S.O., district 15*, [1997] 1 R.C.S. 487, par. 39. Elle peut également s'imposer lorsque le tribunal administratif a acquis une expertise dans l'application d'une règle générale de common law ou de droit civil dans son domaine spécialisé : *Toronto (Ville) c. S.C.F.P.*, par. 72. L'arbitrage en droit du travail demeure un domaine où cette approche se révèle particulièrement indiquée. La jurisprudence a considérablement évolué depuis l'arrêt *McLeod c. Egan*, [1975] 1 R.C.S. 517, et la Cour

maker will always risk having its interpretation of an external statute set aside upon judicial review.

[55] A consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied:

- A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.
- A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).
- The nature of the question of law. A question of law that is of "central importance to the legal system . . . and outside the . . . specialized area of expertise" of the administrative decision maker will always attract a correctness standard (*Toronto (City) v. C.U.P.E.*, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.

[56] If these factors, considered together, point to a standard of reasonableness, the decision maker's decision must be approached with deference in the sense of respect discussed earlier in these reasons. There is nothing unprincipled in the fact that some questions of law will be decided on the basis of reasonableness. It simply means giving the adjudicator's decision appropriate deference in deciding whether a decision should be upheld, bearing in mind the factors indicated.

[57] An exhaustive review is not required in every case to determine the proper standard of review. Here again, existing jurisprudence may be helpful in identifying some of the questions that generally fall to be determined according to the correctness

s'est dissociée de la position stricte qu'elle y avait adoptée. Dans cette affaire, la Cour avait statué que l'interprétation, par un décideur administratif, d'une autre loi que celle qui le constitue est toujours susceptible d'annulation par voie de contrôle judiciaire.

[55] Les éléments suivants permettent de conclure qu'il y a lieu de déférer à la décision et d'appliquer la norme de la raisonnabilité :

- Une clause privative : elle traduit la volonté du législateur que la décision fasse l'objet de déférence.
- Un régime administratif distinct et particulier dans le cadre duquel le décideur possède une expertise spéciale (p. ex., les relations de travail).
- La nature de la question de droit. Celle qui revêt « une importance capitale pour le système juridique [et qui est] étrangère au domaine d'expertise » du décideur administratif appelle toujours la norme de la décision correcte (*Toronto (Ville) c. S.C.F.P.*, par. 62). Par contre, la question de droit qui n'a pas cette importance peut justifier l'application de la norme de la raisonnabilité lorsque sont réunis les deux éléments précédents.

[56] Dans le cas où, ensemble, ces facteurs militent en faveur de la norme de la raisonnabilité, il convient de déférer à la décision en faisant preuve à son endroit du respect mentionné précédemment. Il n'y a rien d'incohérent dans le fait de trancher certaines questions de droit au regard du caractère raisonnable. Il s'agit simplement de confirmer ou non la décision en manifestant la déférence voulue à l'égard de l'arbitre, compte tenu des éléments indiqués.

[57] Il n'est pas toujours nécessaire de se livrer à une analyse exhaustive pour arrêter la bonne norme de contrôle. Là encore, la jurisprudence peut permettre de cerner certaines des questions qui appellent généralement l'application de la norme de la

standard (*Cartaway Resources Corp. (Re)*, [2004] 1 S.C.R. 672, 2004 SCC 26). This simply means that the analysis required is already deemed to have been performed and need not be repeated.

[58] For example, correctness review has been found to apply to constitutional questions regarding the division of powers between Parliament and the provinces in the *Constitution Act, 1867*: *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322. Such questions, as well as other constitutional issues, are necessarily subject to correctness review because of the unique role of s. 96 courts as interpreters of the Constitution: *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54; Mullan, *Administrative Law*, at p. 60.

[59] Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. We mention true questions of *vires* to distance ourselves from the extended definitions adopted before *CUPE*. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction: D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 14-3 to 14-6. An example may be found in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19. In that case, the issue was whether the City of Calgary was authorized under the relevant municipal acts to enact bylaws limiting the number of taxi plate licences (para. 5, *per* Bastarache J.). That case involved the decision-making powers of a municipality

décision correcte (*Cartaway Resources Corp. (Re)*, [2004] 1 R.C.S. 672, 2004 CSC 26). En clair, l'analyse requise est réputée avoir déjà eu lieu et ne pas devoir être reprise.

[58] À titre d'exemple, il a été établi que la norme de contrôle applicable aux questions touchant au partage des compétences entre le Parlement et les provinces dans la *Loi constitutionnelle de 1867* est celle de la décision correcte : *Westcoast Energy Inc. c. Canada (Office national de l'énergie)*, [1998] 1 R.C.S. 322. Il ne pouvait en aller autrement pour ces questions et celles touchant par ailleurs à la Constitution à cause du rôle unique des cours de justice visées à l'art. 96 en tant qu'interprètes de la Constitution (*Nouvelle-Écosse (Workers' Compensation Board) c. Martin*, [2003] 2 R.C.S. 504, 2003 CSC 54; Mullan, *Administrative Law*, p. 60).

[59] Un organisme administratif doit également statuer correctement sur une question touchant véritablement à la compétence ou à la constitutionnalité. Nous mentionnons la question touchant véritablement à la constitutionnalité afin de nous distancier des définitions larges retenues avant l'arrêt *SCFP*. Il importe en l'espèce de considérer la compétence avec rigueur. Loin de nous l'idée de revenir à la théorie de la compétence ou de la condition préalable qui, dans ce domaine, a pesé sur la jurisprudence pendant de nombreuses années. La « compétence » s'entend au sens strict de la faculté du tribunal administratif de connaître de la question. Autrement dit, une véritable question de compétence se pose lorsque le tribunal administratif doit déterminer expressément si les pouvoirs dont le législateur l'a investi l'autorisent à trancher une question. L'interprétation de ces pouvoirs doit être juste, sinon les actes seront tenus pour *ultra vires* ou assimilés à un refus injustifié d'exercer sa compétence : D. J. M. Brown et J. M. Evans, *Judicial Review of Administrative Action in Canada* (feuilles mobiles), p. 14-3 et 14-6. L'affaire *United Taxi Drivers' Fellowship of Southern Alberta c. Calgary (Ville)*, [2004] 1 R.C.S. 485, 2004 CSC 19, constitue un bon exemple. Il s'agissait de savoir si les dispositions municipales en cause autorisaient la ville de Calgary à limiter par règlement le

and exemplifies a true question of jurisdiction or *vires*. These questions will be narrow. We reiterate the caution of Dickson J. in *CUPE* that reviewing judges must not brand as jurisdictional issues that are doubtfully so.

[60] As mentioned earlier, courts must also continue to substitute their own view of the correct answer where the question at issue is one of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" (*Toronto (City) v. C.U.P.E.*, at para. 62, *per* LeBel J.). Because of their impact on the administration of justice as a whole, such questions require uniform and consistent answers. Such was the case in *Toronto (City) v. C.U.P.E.*, which dealt with complex common law rules and conflicting jurisprudence on the doctrines of *res judicata* and abuse of process — issues that are at the heart of the administration of justice (see para. 15, *per* Arbour J.).

[61] Questions regarding the jurisdictional lines between two or more competing specialized tribunals have also been subject to review on a correctness basis: *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360, 2000 SCC 14; *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.

[62] In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

nombre de permis de taxi délivrés (par. 5, le juge Bastarache). Cette affaire relative aux pouvoirs décisionnels d'une municipalité offre un exemple de véritable question de compétence ou de constitutionnalité. L'examen relatif à l'une et l'autre questions a une portée restreinte. Il convient de rappeler la mise en garde du juge Dickson selon laquelle, en cas de doute, il faut se garder de qualifier un point de question de compétence (*SCFP*).

[60] Rappelons que dans le cas d'une question de droit générale « à la fois, d'une importance capitale pour le système juridique dans son ensemble et étrangère au domaine d'expertise de l'arbitre » (*Toronto (Ville) c. S.C.F.P.*, par. 62, le juge LeBel), la cour de révision doit également continuer de substituer à la décision rendue celle qu'elle estime constituer la bonne. Pareille question doit être tranchée de manière uniforme et cohérente étant donné ses répercussions sur l'administration de la justice dans son ensemble. C'est ce que la Cour a conclu dans l'affaire *Toronto (Ville) c. S.C.F.P.*, où étaient en cause des règles de common law complexes ainsi qu'une jurisprudence contradictoire concernant les doctrines de la chose jugée et de l'abus de procédure, des questions qui jouent un rôle central dans l'administration de la justice (par. 15, la juge Arbour).

[61] La norme de la décision correcte s'est également appliquée à la délimitation des compétences respectives de tribunaux spécialisés concurrents : *Regina Police Assn. Inc. c. Regina (Ville) Board of Police Commissioners*, [2000] 1 R.C.S. 360, 2000 CSC 14; *Québec (Commission des droits de la personne et des droits de la jeunesse) c. Québec (Procureur général)*, [2004] 2 R.C.S. 185, 2004 CSC 39.

[62] Bref, le processus de contrôle judiciaire se déroule en deux étapes. Premièrement, la cour de révision vérifie si la jurisprudence établit déjà de manière satisfaisante le degré de déférence correspondant à une catégorie de questions en particulier. En second lieu, lorsque cette démarche se révèle infructueuse, elle entreprend l'analyse des éléments qui permettent d'arrêter la bonne norme de contrôle.

[63] The existing approach to determining the appropriate standard of review has commonly been referred to as "pragmatic and functional". That name is unimportant. Reviewing courts must not get fixated on the label at the expense of a proper understanding of what the inquiry actually entails. Because the phrase "pragmatic and functional approach" may have misguided courts in the past, we prefer to refer simply to the "standard of review analysis" in the future.

[64] The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

D. *Application*

[65] Returning to the instant appeal and bearing in mind the foregoing discussion, we must determine the standard of review applicable to the adjudicator's interpretation of the *PSLRA*, in particular ss. 97(2.1) and 100.1, and s. 20 of the *Civil Service Act*. That standard of review must then be applied to the adjudicator's decision. In order to determine the applicable standard, we will now examine the factors relevant to the standard of review analysis.

(1) Proper Standard of Review on the Statutory Interpretation Issue

[66] The specific question on this front is whether the combined effect of s. 97(2.1) and s. 100.1 of the *PSLRA* permits the adjudicator to inquire into the employer's reason for dismissing an employee with notice or pay in lieu of notice. This is a question of law. The question to be answered is therefore whether in light of the privative clause, the regime under which the adjudicator acted, and the nature of the question of law involved, a standard of correctness should apply.

[63] L'analyse qui préside actuellement à la détermination de la norme de contrôle applicable est généralement qualifiée de « pragmatique et fonctionnelle ». Cette appellation importe peu, et la cour de révision ne doit pas s'y attacher au détriment de ce qu'exige réellement la démarche. Il se peut qu'elle ait induit les cours de justice en erreur dans le passé. C'est pourquoi, à l'avenir, nous parlerons simplement d'« analyse relative à la norme de contrôle ».

[64] L'analyse doit être contextuelle. Nous rappelons que son issue dépend de l'application d'un certain nombre de facteurs pertinents, dont (1) l'existence ou l'inexistence d'une clause privative, (2) la raison d'être du tribunal administratif suivant l'interprétation de sa loi habilitante, (3) la nature de la question en cause et (4) l'expertise du tribunal administratif. Dans bien des cas, il n'est pas nécessaire de tenir compte de tous les facteurs, car certains d'entre eux peuvent, dans une affaire donnée, déterminer l'application de la norme de la décision raisonnable.

D. *Application*

[65] Forts de ces principes, il nous faut maintenant déterminer la norme de contrôle applicable à l'interprétation de la *LRTSP* par l'arbitre, en particulier le par. 97(2.1) et l'art. 100.1, ainsi que de l'art. 20 de la *Loi sur la Fonction publique*, puis l'appliquer à la décision de l'arbitre. Pour arrêter cette norme, nous examinons ci-après les facteurs pertinents pour l'analyse relative à la norme de contrôle.

(1) La norme de contrôle applicable à l'interprétation législative

[66] La question précise soulevée sur ce point est celle de savoir si, ensemble, le par. 97(2.1) et l'art. 100.1 de la *LRTSP* autorisent l'arbitre à s'enquérir des motifs d'un congédiement avec préavis ou indemnité en tenant lieu. Il s'agit d'une question de droit. Il nous faut donc déterminer si, à la lumière de la clause privative, du régime habilitant l'arbitre et de la nature de la question de droit en cause, il convient d'appliquer la norme de la décision correcte.

[67] The adjudicator was appointed and empowered under the *PSLRA*; s. 101(1) of that statute contains a full privative clause, stating in no uncertain terms that "every order, award, direction, decision, declaration or ruling of . . . an adjudicator is final and shall not be questioned or reviewed in any court". Section 101(2) adds that "[n]o order shall be made or process entered, and no proceedings shall be taken in any court, whether by way of injunction, judicial review, or otherwise, to question, review, prohibit or restrain . . . an adjudicator in any of its or his proceedings." The inclusion of a full privative clause in the *PSLRA* gives rise to a strong indication that the reasonableness standard of review will apply.

[68] The nature of the regime also favours the standard of reasonableness. This Court has often recognized the relative expertise of labour arbitrators in the interpretation of collective agreements, and counselled that the review of their decisions should be approached with deference: *CUPE*, at pp. 235-36; *Canada Safeway Ltd. v. RWDSU, Local 454*, [1998] 1 S.C.R. 1079, at para. 58; *Voice Construction*, at para. 22. The adjudicator in this case was, in fact, interpreting his enabling statute. Although the adjudicator was appointed on an *ad hoc* basis, he was selected by the mutual agreement of the parties and, at an institutional level, adjudicators acting under the *PSLRA* 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. See *Alberta Union of Provincial Employees v. Lethbridge Community College*. This factor also suggests a reasonableness standard of review.

[69] The legislative purpose confirms this view of the regime. The *PSLRA* establishes a time- and cost-effective method of resolving employment disputes. It provides an alternative to judicial determination. Section 100.1 of the *PSLRA* defines the adjudicator's powers in deciding a dispute, but it also provides remedial protection for employees who are not unionized. The remedial nature of s. 100.1 and its provision for timely and binding

[67] L'arbitre a été nommé et investi de pouvoirs en vertu de la *LRTSP*, et le par. 101(1) de celle-ci constitue une clause privative absolue au libellé non équivoque : « toute ordonnance, sentence, directive, décision ou déclaration [. . .] d'un arbitre, est définitive et ne peut être contestée devant aucun tribunal ni révisée par aucun tribunal ». Le paragraphe 101(2) ajoute : « [a]ucune ordonnance ne peut être rendue, aucune action intentée et aucune procédure entamée devant un tribunal, par voie d'injonction, de recours en révision, ou autrement, pour contester, réviser, supprimer ou restreindre les pouvoirs [. . .] d'un arbitre dans l'une quelconque de [ses] procédures ». L'existence d'une clause privative absolue milite clairement en faveur d'un contrôle selon la norme de la raisonnabilité.

[68] La nature du régime est également compatible avec l'application de cette norme. La Cour a maintes fois reconnu l'expertise relative de l'arbitre dans l'interprétation d'une convention collective et préconisé le respect de sa décision à cet égard : *SCFP*, p. 235-236; *Canada Safeway Ltd. c. SDGMR, section locale 454*, [1998] 1 R.C.S. 1079, par. 58; *Voice Construction*, par. 22. En l'espèce, l'arbitre a en fait interprété sa loi habilitante. Il a certes été nommé pour régler le différend, mais les parties l'ont choisi de concert. En outre, sur le plan institutionnel, on peut présumer que les arbitres nommés en vertu de la *LRTSP* possèdent une expertise relative dans l'interprétation de la loi dont ils tiennent leur mandat ainsi que des dispositions législatives connexes qu'ils sont souvent appelés à appliquer dans l'exercice de leurs fonctions. Voir l'arrêt *Alberta Union of Provincial Employees c. Lethbridge Community College*. Ce facteur milite aussi en faveur de la norme de la raisonnabilité.

[69] L'objectif législatif confirme cette interprétation du régime. La *LRTSP* prévoit à l'égard des différends entre employeurs et employés un mode de règlement rapide et peu coûteux permettant d'éviter la voie judiciaire. Son article 100.1 définit les pouvoirs de l'arbitre appelé à régler un différend, mais il offre également une voie de recours à l'employé non syndiqué. L'accent mis sur la réparation et le règlement rapide et exécutoire des différends donne

settlements of disputes also imply that a reasonableness review is appropriate.

[70] Finally, the nature of the legal question at issue is not one that is of central importance to the legal system and outside the specialized expertise of the adjudicator. This also suggests that the standard of reasonableness should apply.

[71] Considering the privative clause, the nature of the regime, and the nature of the question of law here at issue, we conclude that the appropriate standard is reasonableness. We must now apply that standard to the issue considered by the adjudicator in his preliminary ruling.

(2) Was the Adjudicator's Interpretation Unreasonable?

[72] While we are required to give deference to the determination of the adjudicator, considering the decision in the preliminary ruling as a whole, we are unable to accept that it reaches the standard of reasonableness. The reasoning process of the adjudicator was deeply flawed. It relied on and led to a construction of the statute that fell outside the range of admissible statutory interpretations.

[73] The adjudicator considered the New Brunswick Court of Appeal decision in *Chalmers (Dr. Everett) Hospital v. Mills* as well as amendments made to the *PSLRA* in 1990 (S.N.B. 1990, c. 30). Under the former version of the Act, an employee could grieve "with respect to . . . disciplinary action resulting in discharge, suspension or a financial penalty" (s. 92(1)). The amended legislation grants the right to grieve "with respect to discharge, suspension or a financial penalty" (*PSLRA*, s. 100.1(2)). The adjudicator reasoned that the referential incorporation of s. 97(2.1) in s. 100.1(5) "necessarily means that an adjudicator has jurisdiction to make the determination described in subsection 97(2.1), i.e. that an employee has been discharged or otherwise disciplined for cause" (p. 5). He further stated that an employer "cannot avoid an inquiry into its real reasons for a discharge, or exclude resort to subsection 97(2.1), by simply stating that cause is not alleged" (*ibid.* (emphasis added)). The

à penser qu'un contrôle au regard de la norme de la raisonnabilité est indiqué.

[70] Enfin, de par sa nature, la question de droit en cause ne revêt pas une importance capitale pour le système juridique et n'est pas étrangère au domaine d'expertise de l'arbitre, ce qui favorise encore le critère de la raisonnabilité.

[71] Compte tenu de la clause privative, de la nature du régime et de celle de la question de droit soulevée, nous arrivons à la conclusion que la norme qui convient est celle de la raisonnabilité. Il nous faut donc l'appliquer à la question préalable sur laquelle a statué l'arbitre.

(2) L'interprétation de l'arbitre était-elle déraisonnable?

[72] Même si la retenue s'impose en l'espèce, nous ne pouvons conclure que, considérée dans son ensemble, la décision relative à la question préalable était raisonnable. En effet, le raisonnement de l'arbitre était foncièrement défectueux; il s'appuyait et débouchait sur une interprétation de la loi qui ne faisait pas partie des lectures acceptables.

[73] L'arbitre a tenu compte de l'arrêt *Chalmers (Dr. Everett) Hospital c. Mills*, de la Cour d'appel du Nouveau-Brunswick, ainsi que des modifications apportées à la *LRTSP* en 1990 (L.N.-B. 1990, ch. 30). Dans sa version antérieure, celle-ci prévoyait qu'un employé pouvait contester par voie de grief « une mesure disciplinaire entraînant le congédiement, la suspension ou une peine pécuniaire » (par. 92(1)). Dans sa version modifiée, elle confère le droit de présenter un grief « à l'égard du congédiement, de la suspension ou d'une peine pécuniaire » (*LRTSP*, par. 100.1(2)). L'arbitre a jugé que l'incorporation par renvoi du par. 97(2.1) au par. 100.1(5) [TRADUCTION] « confère nécessairement à l'arbitre le pouvoir de prendre la décision visée au paragraphe 97(2.1), c'est-à-dire que l'employé a été congédié ou qu'une mesure disciplinaire a été autrement prise contre lui "pour motif" » (p. 5). Il a indiqué en outre que l'employeur [TRADUCTION] « ne peut se soustraire à l'examen des véritables motifs du

adjudicator concluded that he could determine whether a discharge purportedly with notice or pay in lieu of notice was in reality for cause.

[74] The interpretation of the law is always contextual. The law does not operate in a vacuum. The adjudicator was required to take into account the legal context in which he was to apply the law. The employment relationship between the parties in this case was governed by private law. The contractual terms of employment could not reasonably be ignored. That is made clear by s. 20 of the *Civil Service Act*. Under the ordinary rules of contract, the employer is entitled to discharge an employee for cause, with notice or with pay in lieu of notice. Where the employer chooses to exercise its right to discharge with reasonable notice or pay in lieu thereof, the employer is not required to assert cause for discharge. The grievance process cannot have the effect of changing the terms of the contract of employment. The respondent chose to exercise its right to terminate without alleging cause in this case. By giving the *PSLRA* an interpretation that allowed him to inquire into the reasons for discharge where the employer had the right not to provide — or even have — such reasons, the adjudicator adopted a reasoning process that was fundamentally inconsistent with the employment contract and, thus, fatally flawed. For this reason, the decision does not fall within the range of acceptable outcomes that are defensible in respect of the facts and the law.

[75] The decision of the adjudicator treated the appellant, a non-unionized employee, as a unionized employee. His interpretation of the *PSLRA*, which permits an adjudicator to inquire into the reasons for discharge where notice is given and, under s. 97(2.1), substitute a penalty that he or she determines just and reasonable in the circumstances, creates a requirement that the employer show cause before dismissal. There can be no justification for this; no reasonable interpretation can lead to that result. Section 100.1(5) incorporates s. 97(2.1) by reference into the determination of grievances brought by non-unionized employees.

congédiement ni écarter l'application du paragraphe 97(2.1) en s'abstenant simplement d'invoquer un motif » (*ibid*. (nous soulignons)). Il a conclu qu'il pouvait déterminer si un congédiement avec préavis ou indemnité en tenant lieu constituait en fait un congédiement pour motif.

[74] L'interprétation du droit est toujours contextuelle. Une disposition ne s'applique pas en vase clos. L'arbitre devait tenir compte du contexte juridique dans lequel il lui fallait appliquer les dispositions en cause. En l'espèce, le lien d'emploi entre les parties ressortissait au droit privé. Il ne pouvait raisonnablement être fait abstraction des clauses du contrat d'emploi. L'article 20 de la *Loi sur la Fonction publique* est clair à ce sujet. Suivant les règles contractuelles ordinaires, l'employeur peut congédier un employé pour motif, avec préavis ou indemnité en tenant lieu. S'il opte pour le congédiement avec préavis raisonnable ou indemnité en tenant lieu, il n'a pas à invoquer de motif. La procédure de grief ne saurait modifier le contenu du contrat d'emploi. En l'espèce, l'intimée a décidé d'exercer son droit de mettre fin à l'emploi sans invoquer de motif. En concluant que la *LRTSP* lui permettait de rechercher les motifs du congédiement, alors que l'employeur avait le droit de ne pas les préciser, et même, de ne pas en avoir, l'arbitre a tenu un raisonnement foncièrement incompatible avec le contrat d'emploi et, de ce fait, entaché d'un vice fatal. C'est pourquoi sa décision ne fait pas partie des issues acceptables au regard des faits et du droit.

[75] Dans sa décision, l'arbitre a considéré l'appelant comme un employé syndiqué alors qu'il n'en était pas un. L'interprétation de la *LRTSP* suivant laquelle l'arbitre peut s'enquérir des motifs d'un congédiement avec préavis et, en vertu du par. 97(2.1), substituer la peine qui lui paraît juste et raisonnable dans les circonstances, oblige l'employeur à justifier au préalable le congédiement. Or, rien ne justifie pareil résultat, et nulle interprétation raisonnable ne saurait y aboutir. Le paragraphe 100.1(5) incorpore le par. 97(2.1) à la procédure de grief dans le cas d'un employé non syndiqué. Les employés assujettis à la *LRTSP* sont généralement

The employees subject to the *PSLRA* are usually unionized and the terms of their employment are determined by collective agreement; s. 97(2.1) explicitly refers to the collective agreement context. Section 100.1(5) referentially incorporates s. 97(2.1) *mutatis mutandis* into the non-collective agreement context so that non-unionized employees who are discharged *for cause and without notice* have the right to grieve the discharge and have the adjudicator substitute another penalty as seems just and reasonable in the circumstances. Therefore, the combined effect of s. 97(2.1) and s. 100.1 cannot, on any reasonable interpretation, remove the employer's right under contract law to discharge an employee with reasonable notice or pay in lieu of notice.

[76] The interpretation of the adjudicator was simply unreasonable in the context of the legislative wording and the larger labour context in which it is embedded. It must be set aside. Nevertheless, it must be acknowledged that his interpretation of the *PSLRA* was ultimately inconsequential to the overall determination of the grievance, since the adjudicator made no finding as to whether the discharge was or was not, in fact, for cause. The decision on the merits, which resulted in an order that the appellant be reinstated, instead turned on the adjudicator's decision on a separate issue — whether the appellant was entitled to and, if so, received procedural fairness with regard to the employer's decision to terminate his employment. This issue is discrete and isolated from the statutory interpretation issue, and it raises very different considerations.

IV. Issue 2: Review of the Adjudicator's Procedural Fairness Determination

[77] Procedural fairness has many faces. It is at issue where an administrative body may have prescribed rules of procedure that have been breached. It is also concerned with general principles involving the right to answer and defence where one's rights are affected. In this case, the appellant raised in his grievance letter that the reasons for the employer's dissatisfaction were not specified and that he did not have a reasonable opportunity to respond to the employer's concerns. There was,

syndiqués et une convention collective établit leurs conditions d'emploi; le par. 97(2.1) renvoie expressément au contexte de l'application d'une convention collective. Le paragraphe 100.1(5) intègre le par. 97(2.1) par renvoi, avec les adaptations nécessaires, au contexte de la non-application d'une convention collective, de façon que l'employé non syndiqué qui est congédié *pour motif et sans préavis* puisse contester le congédiement par voie de grief et obtenir de l'arbitre qu'il substitue une autre peine, selon ce qui lui semble juste et raisonnable dans les circonstances. L'application concomitante du par. 97(2.1) et de l'art. 100.1 ne saurait donc raisonnablement supprimer le droit contractuel de l'employeur de congédier un employé avec préavis raisonnable ou indemnité en tenant lieu.

[76] L'interprétation de la *LRTSP* par l'arbitre était tout simplement déraisonnable eu égard au texte de la loi et au contexte plus large des relations de travail dans lequel elle s'insérait. Elle doit être écartée. Il faut toutefois reconnaître que cette interprétation n'a finalement pas influencé le règlement global du grief, car l'arbitre n'a pas conclu qu'il s'agissait ou non d'un congédiement pour motif. La décision sur le fond et, partant, l'ordonnance de réintégration découlent plutôt de la conclusion de l'arbitre sur un autre point : l'appelant avait-il droit à l'équité procédurale et si oui, l'employeur a-t-il respecté son obligation à cet égard en décidant de mettre fin à l'emploi? Il s'agit d'une question totalement distincte de celle de l'interprétation législative et qui fait intervenir des considérations très différentes.

IV. Second volet : Contrôle de la décision de l'arbitre concernant l'équité procédurale

[77] L'équité procédurale comporte de nombreuses facettes. Elle peut être mise en doute lorsque les règles de procédure établies par un organisme administratif n'ont pas été respectées. Elle sous-tend aussi les principes généraux permettant à une personne de répondre à une allégation et de se défendre lorsque ses droits sont atteints. Dans la présente affaire, l'appelant a fait valoir dans son grief que les motifs d'insatisfaction de l'employeur n'avaient pas été précisés et qu'il n'avait pas eu la

in his view, lack of due process and a breach of procedural fairness.

[78] The procedural fairness issue was dealt with only briefly by the Court of Appeal. Robertson J.A. mentioned at the end of his reasons that a duty of fairness did not arise in this case since the appellant had been terminated with notice and had exercised his right to grieve. Before this Court, however, the appellant argued that he was entitled to procedural fairness as a result of this Court's jurisprudence. Although ultimately we do not agree with the appellant, his contention raises important issues that need to be examined more fully.

A. *Duty of Fairness*

[79] Procedural fairness is a cornerstone of modern Canadian administrative law. Public decision makers are required to act fairly in coming to decisions that affect the rights, privileges or interests of an individual. Thus stated the principle is easy to grasp. It is not, however, always easy to apply. As has been noted many times, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case" (*Knight*, at p. 682; *Baker*, at para. 21; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11, at paras. 74-75).

[80] This case raises the issue of the extent to which a duty of fairness applies to the dismissal of a public employee pursuant to a contract of employment. The grievance adjudicator concluded that the appellant had been denied procedural fairness because he had not been granted a hearing by the employer before being dismissed with four months' pay in lieu of notice. This conclusion was said to flow from this Court's decision in *Knight*, where it was held that the holder of an office "at pleasure" was entitled to be given the reasons for his or her dismissal and an opportunity to be heard before being dismissed (p. 683).

[81] We are of the view that the principles established in *Knight* relating to the applicability of a duty of fairness in the context of public employment

possibilité raisonnable d'y répondre. À son avis, il n'y avait eu ni application régulière de la loi ni équité procédurale.

[78] La Cour d'appel n'a fait qu'effleurer la question de l'équité procédurale. Le juge Robertson a mentionné à la fin de ses motifs qu'il n'y avait pas d'obligation d'équité en l'espèce car l'appelant avait été congédié avec préavis et avait exercé son droit de présenter un grief. L'appelant soutient toutefois devant nous que suivant la jurisprudence de la Cour, il avait droit à l'équité procédurale. Même si, en fin de compte, sa prétention doit être rejetée, elle soulève d'importantes questions qu'il importe d'examiner plus avant.

A. *L'obligation d'équité*

[79] L'équité procédurale est un fondement du droit administratif canadien moderne. Les décideurs publics sont tenus de faire preuve d'équité lorsqu'ils prennent des décisions touchant les droits, les privilèges ou les biens d'une personne. Le principe paraît simple, mais son application n'est pas toujours facile. Comme on l'a signalé maintes fois, « la notion d'équité procédurale est éminemment variable et son contenu est tributaire du contexte particulier de chaque cas » (*Knight*, p. 682; *Baker*, par. 21; *Moreau-Bérubé c. Nouveau-Brunswick (Conseil de la magistrature)*, [2002] 1 R.C.S. 249, 2002 CSC 11, par. 74-75).

[80] Le présent pourvoi soulève la question de savoir dans quelle mesure l'obligation d'équité s'applique à l'employeur qui congédie un fonctionnaire conformément à un contrat d'emploi. L'arbitre a conclu que l'appelant n'avait pas bénéficié de l'équité procédurale parce qu'il n'avait pas été entendu par l'employeur avant d'être congédié sur versement d'une indemnité de quatre mois de salaire tenant lieu de préavis. Il a dit se fonder sur l'arrêt *Knight* où la Cour a statué que le titulaire d'une charge à titre amovible a le droit de connaître les motifs de son renvoi et d'être entendu au préalable (p. 683).

[81] Nous sommes d'avis qu'il y a lieu de revenir sur les principes établis dans l'arrêt *Knight* à propos de l'obligation d'équité dans le contexte

merit reconsideration. While the majority opinion in *Knight* properly recognized the important place of a general duty of fairness in administrative law, in our opinion, it incorrectly analyzed the effects of a contract of employment on such a duty. The majority in *Knight* proceeded on the premise that a duty of fairness based on public law applied unless expressly excluded by the employment contract or the statute (p. 681), without consideration of the terms of the contract with regard to fairness issues. It also upheld the distinction between office holders and contractual employees for procedural fairness purposes (pp. 670-76). In our view, what matters is the nature of the employment relationship between the public employee and the public employer. Where a public employee is employed under a contract of employment, regardless of his or her status as a public office holder, the applicable law governing his or her dismissal is the law of contract, not general principles arising out of public law. What *Knight* truly stands for is the principle that there is always a recourse available where the employee is an office holder and the applicable law leaves him or her without any protection whatsoever when dismissed.

[82] This conclusion does not detract from the general duty of fairness owed by administrative decision makers. Rather it acknowledges that in the specific context of dismissal from public employment, disputes should be viewed through the lens of contract law rather than public law.

[83] In order to understand why a reconsideration of *Knight* is warranted, it is necessary to review the development of the duty of fairness in Canadian administrative law. As we shall see, its development in the public employment context was intimately related to the distinction between public office holders and contractual employees, a distinction which, in our view, has become increasingly difficult to maintain both in principle and in practice.

(1) The Preliminary Issue of Jurisdiction

[84] Before dealing with the scope of the duty of fairness in this case, a word should be said about the respondent's preliminary objection to the jurisdiction of the adjudicator under the *PSLRA*

de l'emploi dans la fonction publique. Bien que, dans cet arrêt, les juges majoritaires aient à juste titre reconnu l'importance d'une obligation générale d'équité en droit administratif, ils n'ont pas correctement analysé, selon nous, les effets d'un contrat d'emploi sur cette obligation. Ils sont partis du principe qu'il y a obligation d'équité fondée sur le droit public à moins que le contrat d'emploi ou la loi ne l'écarte expressément (p. 681), sans égard aux dispositions du contrat touchant à l'équité. Ils ont également confirmé la distinction entre le titulaire d'une charge et l'employé contractuel pour ce qui est du droit à l'équité procédurale (p. 670-676). Selon nous, la nature du lien d'emploi entre l'employé et l'employeur du secteur public est déterminante. En présence d'un contrat d'emploi, le renvoi de l'employé, que ce dernier soit ou non titulaire d'une charge publique, est régi par le droit contractuel, et non par les principes généraux du droit public. Le véritable principe qui se dégage de l'arrêt *Knight* est que le titulaire d'une charge auquel le droit applicable n'offre aucune protection en cas de renvoi dispose toujours d'un recours.

[82] Cette conclusion n'affaiblit pas l'obligation générale faite aux décideurs administratifs d'agir avec équité. Elle reconnaît plutôt que dans le contexte particulier du renvoi de la fonction publique, c'est le droit contractuel, et non le droit public, qui préside au règlement des différends.

[83] Pour comprendre la nécessité d'un réexamen de l'arrêt *Knight*, il faut retracer l'évolution de l'obligation d'équité en droit administratif canadien. Comme nous le verrons, dans le contexte de l'emploi dans la fonction publique, cette évolution est étroitement liée à la distinction entre titulaire de charge publique et employé contractuel, une distinction qui, à notre avis, soulève de plus en plus de difficultés en théorie et en pratique.

(1) La question préalable de la compétence

[84] Avant d'examiner l'étendue de l'obligation d'équité en l'espèce, nous nous penchons brièvement sur l'objection préliminaire de l'intimée selon laquelle l'arbitre n'a pas compétence, sous le

to consider procedural fairness. The respondent argues that allowing adjudicators to consider procedural fairness risks granting them the inherent powers of a court. We disagree. We can see nothing problematic with a grievance adjudicator considering a public law duty of fairness issue where such a duty exists. It falls squarely within the adjudicator's task to resolve a grievance. However, as will be explained below, the proper approach is to first identify the nature of the employment relationship and the applicable law. Where, as here, the relationship is contractual, a public law duty of fairness is not engaged and therefore should play no role in resolving the grievance.

(2) The Development of the Duty of Fairness in Canadian Public Law

[85] In Canada, the modern concept of procedural fairness in administrative law was inspired by the House of Lords' landmark decision in *Ridge v. Baldwin*, [1963] 2 All E.R. 66, a case which involved the summary dismissal of the chief constable of Brighton. The House of Lords declared the chief constable's dismissal a nullity on the grounds that the administrative body which had dismissed him had failed to provide the reasons for his dismissal or to accord him an opportunity to be heard in violation of the rules of natural justice. Central to the reasoning in the case was Lord Reid's distinction between (i) master-servant relationships (i.e. contractual employment), (ii) offices held "at pleasure", and (iii) offices where there must be cause for dismissal, which included the chief constable's position. According to Lord Reid, only the last category of persons was entitled to procedural fairness in relation to their dismissal since both contractual employees and office holders employed "at pleasure" could be dismissed without reason (p. 72). As the authors Wade and Forsyth note that, after a period of retreat from imposing procedural fairness requirements on administrative decision makers, *Ridge v. Baldwin* "marked an important change of judicial policy, indicating that natural justice was restored to favour and would be applied on a wide basis" (W. Wade and C. Forsyth, *Administrative Law* (8th ed. 2000), at p. 438).

régime de la *LRTSP*, pour connaître de questions liées à l'équité procédurale. L'intimée soutient qu'autoriser l'arbitre à se prononcer sur l'équité procédurale pourrait revenir à lui conférer les pouvoirs inhérents d'une cour de justice. Nous ne sommes pas de cet avis. Rien ne s'oppose à ce que l'arbitre saisi d'un grief examine une question touchant à l'obligation d'équité en droit public lorsqu'une telle obligation existe. Cela ressortit clairement à son mandat de régler le grief. Toutefois, comme nous le verrons plus loin, il convient d'abord de définir la nature du lien d'emploi et le droit applicable. Lorsque, comme en l'espèce, le lien est contractuel, l'obligation d'équité en droit public ne saurait jouer dans le règlement du grief.

(2) L'évolution de l'obligation d'équité en droit public canadien

[85] En droit administratif canadien, la notion moderne d'équité procédurale tire son origine de l'arrêt de principe *Ridge c. Baldwin*, [1963] 2 All E.R. 66, où la Chambre des lords a annulé le congédiement sommaire du chef de police de Brighton au motif que le décideur administratif n'avait pas motivé le renvoi ni donné à l'intéressé la possibilité de se faire entendre, contrevenant ainsi aux règles de justice naturelle. Lord Reid a axé son raisonnement sur la distinction entre (i) l'occupation d'un poste à titre d'employé (lien contractuel), (ii) l'occupation d'une charge à titre amovible et (iii) l'occupation d'un poste dont le titulaire ne peut être renvoyé que pour motif valable, tel celui du chef de police. Selon lui, seul ce dernier type de fonction conférait le droit à l'équité procédurale en cas de renvoi, car l'employé contractuel et le titulaire de charge à titre amovible pouvaient être renvoyés sans motif (p. 72). Comme le signalent Wade et Forsyth, après que l'assujettissement des décideurs administratifs à l'obligation d'équité procédurale eut connu un recul, l'arrêt *Ridge c. Baldwin* [TRADUCTION] « a substantiellement modifié la politique judiciaire en indiquant que la justice naturelle reprenait du service et s'appliquerait désormais largement » (W. Wade et C. Forsyth, *Administrative Law* (8e éd. 2000), p. 438).

[86] The principles established by *Ridge v. Baldwin* were followed by this Court in *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311. *Nicholson*, like its U.K. predecessor, marked the return to a less rigid approach to natural justice in Canada (see Brown and Evans, at pp. 7-5 to 7-9). *Nicholson* concerned the summary dismissal of a probationary police officer by a regional board of police commissioners. Laskin C.J., for the majority, at p. 328, declared the dismissal void on the ground that the officer fell into Lord Reid's third category and was therefore entitled to the same procedural protections as in *Ridge v. Baldwin*.

[87] Although *Ridge v. Baldwin* and *Nicholson* were concerned with procedural fairness in the context of the dismissal of public office holders, the concept of fairness was quickly extended to other types of administrative decisions (see e.g. *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602; *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735). In *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, Le Dain J. stated that the duty of fairness was a general principle of law applicable to all public authorities:

> This Court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual . . . . [p. 653]

(See also *Baker*, at para. 20.)

[88] In *Knight*, the Court relied on the statement of Le Dain J. in *Cardinal v. Director of Kent Institution* that the existence of a general duty to act fairly will depend on "(i) the nature of the decision to be made by the administrative body; (ii) the relationship existing between that body and the

[86] Dans l'affaire *Nicholson c. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 R.C.S. 311, notre Cour a suivi les principes établis par l'arrêt *Ridge c. Baldwin*. Comme son prédécesseur britannique, l'arrêt *Nicholson* a marqué le retour au Canada d'une conception moins rigide de la justice naturelle (voir Brown et Evans, p. 7-5 à 7-9). Le litige portait sur le congédiement sommaire d'un policier stagiaire par un comité régional des services de police. Au nom des juges majoritaires, le juge en chef Laskin (p. 328) a annulé le congédiement, estimant que le policier appartenait à la troisième catégorie établie par lord Reid, de sorte qu'il avait droit à la garantie procédurale reconnue dans l'arrêt *Ridge c. Baldwin*.

[87] Dans les affaires *Ridge c. Baldwin* et *Nicholson*, les cours de justice ont appliqué l'équité procédurale à la décision de congédier le titulaire d'une charge publique, mais elles ont tôt fait d'y assujettir par la suite d'autres types de décision administrative (voir notamment *Martineau c. Comité de discipline de l'Institution de Matsqui*, [1980] 1 R.C.S. 602; *Kane c. Conseil d'administration de l'Université de la Colombie-Britannique*, [1980] 1 R.C.S. 1105; *Procureur général du Canada c. Inuit Tapirisat of Canada*, [1980] 2 R.C.S. 735). Dans l'arrêt *Cardinal c. Directeur de l'établissement Kent*, [1985] 2 R.C.S. 643, au nom de la Cour, le juge Le Dain a vu dans l'obligation d'équité un principe de droit général applicable à tout organisme public :

> [La] Cour a confirmé que, à titre de principe général de *common law*, une obligation de respecter l'équité dans la procédure incombe à tout organisme public qui rend des décisions administratives qui ne sont pas de nature législative et qui touchent les droits, privilèges ou biens d'une personne . . . [p. 653]

(Voir aussi l'arrêt *Baker*, par. 20.)

[88] Dans l'arrêt *Knight*, la Cour s'est appuyée sur les propos du juge Le Dain dans l'arrêt *Cardinal c. Directeur de l'établissement Kent* selon lesquels l'existence d'une obligation générale d'agir équitablement dépend de ce qui suit : « (i) la nature de la décision qui doit être rendue par l'organisme

individual; and (iii) the effect of that decision on the individual's rights" (*Knight*, at p. 669).

[89] The dispute in *Knight* centred on whether a board of education had failed to accord procedural fairness when it dismissed a director of education with three months' notice pursuant to his contract of employment. The main issue was whether the director's employment relationship with the school board was one that attracted a public law duty of fairness. L'Heureux-Dubé J., for the majority, held that it did attract such a duty on the ground that the director's position had a "strong 'statutory flavour'" and could thus be qualified as a public office (p. 672). In doing so, she specifically recognized that, contrary to Lord Reid's holding in *Ridge v. Baldwin*, holders of an office "at pleasure", were also entitled to procedural fairness before being dismissed (pp. 673-74). The fact that the director's written contract of employment specifically provided that he could be dismissed with three months' notice was held not to be enough to displace a public law duty to act fairly (p. 681).

[90] From these foundational cases, procedural fairness has grown to become a central principle of Canadian administrative law. Its overarching purpose is not difficult to discern: administrative decision makers, in the exercise of public powers, should act fairly in coming to decisions that affect the interests of individuals. In other words, "[t]he observance of fair procedures is central to the notion of the 'just' exercise of power" (Brown and Evans, at p. 7-3). What is less clear, however, is whether this purpose is served by imposing public law procedural fairness requirements on public bodies in the exercise of their contractual rights as employers.

(3) Procedural Fairness in the Public Employment Context

[91] *Ridge v. Baldwin* and *Nicholson* established that a public employee's right to procedural fairness

administratif en question, (ii) la relation existant entre cet organisme et le particulier, et (iii) l'effet de cette décision sur les droits du particulier » (arrêt *Knight*, p. 669).

[89] L'affaire *Knight* soulevait la question de savoir si un conseil scolaire avait manqué à son obligation d'équité procédurale en congédiant un directeur de l'enseignement avec un préavis de trois mois conformément à son contrat d'emploi. La Cour devait principalement trancher si le lien d'emploi entre le directeur et le conseil scolaire faisait naître une obligation d'équité en droit public. Au nom des juges majoritaires, la juge L'Heureux-Dubé a conclu que tel était le cas, car le poste du directeur s'apparentait fortement à un poste d'origine législative et pouvait donc être assimilé à une charge publique (p. 672). Du coup, à l'opposé de lord Reid dans l'affaire *Ridge c. Baldwin*, elle a expressément reconnu que le titulaire d'une charge à titre amovible avait également droit au respect de l'équité procédurale en cas de congédiement (p. 673-674). La juge L'Heureux-Dubé a estimé que la clause du contrat d'emploi prévoyant que le directeur pouvait être congédié moyennant un préavis de trois mois n'était pas suffisante pour écarter l'obligation d'équité en droit public (p. 681).

[90] Ces arrêts fondateurs ont fait de l'équité procédurale un principe fondamental du droit administratif canadien dont l'objectif primordial se conçoit aisément : dans l'exercice de ses pouvoirs publics, le décideur administratif doit agir avec équité lorsqu'il rend une décision touchant les droits d'un administré. Autrement dit, [TRADUCTION] « [l]e respect de l'équité dans la procédure est essentiel à la notion d'exercice "équitable" du pouvoir » (Brown et Evans, p. 7-3). On peut toutefois se demander si l'obligation faite à un organisme public d'observer les exigences de l'équité procédurale dans l'exercice de ses droits contractuels en tant qu'employeur contribue à la réalisation de cet objectif.

(3) L'équité procédurale dans la fonction publique

[91] Les arrêts *Ridge c. Baldwin* et *Nicholson* ont établi qu'un employé du secteur public a droit

depended on his or her status as an office holder. While *Knight* extended a duty of fairness to office holders during pleasure, it nevertheless upheld the distinction between office holders and contractual employees as an important criterion in establishing whether a duty of fairness was owed. Courts have continued to rely on this distinction, either extending or denying procedural protections depending on the characterization of the public employee's legal status as an office holder or contractual employee (see e.g. *Reglin v. Creston (Town)* (2004), 34 C.C.E.L. (3d) 123, 2004 BCSC 790; *Gismondi v. Toronto (City)* (2003), 64 O.R. (3d) 688 (C.A.); *Seshia v. Health Sciences Centre* (2001), 160 Man. R. (2d) 41, 2001 MBCA 151; *Rosen v. Saskatoon District Health Board* (2001), 202 D.L.R. (4th) 35, 2001 SKCA 83; *Hanis v. Teevan* (1998), 111 O.A.C. 91; *Gerrard v. Sackville (Town)* (1992), 124 N.B.R. (2d) 70 (C.A.)).

[92] In practice, a clear distinction between office holders and contractual employees has been difficult to maintain:

> Although the law makes such a sharp distinction between office and service in theory, in practice it may be difficult to tell which is which. For tax purposes "office" has long been defined as a "subsisting, permanent substantive position which has an existence independent of the person who fills it", but for the purposes of natural justice the test may not be the same. Nor need an office necessarily be statutory, although nearly all public offices of importance in administrative law are statutory. A statutory public authority may have many employees who are in law merely its servants, and others of higher grades who are office-holders.
>
> (Wade and Forsyth, at pp. 532-33)

[93] Lord Wilberforce noted that attempting to separate office holders from contractual employees

> involves the risk of a compartmental approach which, although convenient as a solvent, may lead to narrower distinctions than are appropriate to the broader issues of administrative law. A comparative list of situations in which persons have been held entitled or not entitled to a hearing, or to observation of rules of natural

à l'équité procédurale s'il est titulaire d'une charge. Bien que l'arrêt *Knight* en ait fait également bénéficier le titulaire de charge à titre amovible, il a quand même retenu comme critère important à cet égard la distinction entre le titulaire de charge et l'employé contractuel. Les cours de justices ont continué d'appliquer cette distinction pour reconnaître ou non ce droit selon que le fonctionnaire est titulaire de charge ou employé contractuel (voir notamment *Reglin c. Creston (Town)* (2004), 34 C.C.E.L. (3d) 123, 2004 BCSC 790; *Gismondi c. Toronto (City)* (2003), 64 O.R. (3d) 688 (C.A.); *Seshia c. Health Sciences Centre* (2001), 160 Man. R. (2d) 41, 2001 MBCA 151; *Rosen c. Saskatoon District Health Board* (2001), 202 D.L.R. (4th) 35, 2001 SKCA 83; *Hanis c. Teevan* (1998), 111 O.A.C. 91; *Gerrard c. Sackville (Ville)* (1992), 124 R.N.-B. (2e) 70 (C.A.)).

[92] En pratique, toutefois, la distinction entre le titulaire d'une charge et l'employé contractuel s'est révélée difficile à appliquer :

> [TRADUCTION] Même si, en théorie, le droit fait une nette distinction entre charge et emploi, en pratique, il peut être difficile de les différencier. En matière fiscale, la « charge » est depuis longtemps définie comme « un poste durable, permanent et important qui existe indépendamment de la personne qui l'occupe ». Mais pour les besoins de la justice naturelle, le critère peut différer. Il n'est pas nécessaire non plus que la charge soit établie par une loi, bien que ce soit le cas de presque toutes les charges publiques d'importance en droit administratif. Un organisme public créé par une loi peut compter à son service de nombreuses personnes qui, légalement, sont de simples employés et d'autres, plus élevées dans la hiérarchie, qui sont titulaires d'une charge.
>
> (Wade et Forsyth, p. 532-533)

[93] Lord Wilberforce a signalé que la démarche consistant à établir une distinction entre le titulaire de charge et l'employé contractuel

> [TRADUCTION] peut mener à une analyse compartimentée qui, malgré la solution qu'elle offre, peut donner lieu à des distinctions trop ténues pour le règlement des questions plus générales qui se posent en droit administratif. L'énumération comparative des situations dans lesquelles on a reconnu ou non le droit d'être entendu ou

justice, according to the master and servant test, looks illogical and even bizarre.

(*Malloch v. Aberdeen Corp.*, [1971] 2 All E.R. 1278 (H.L.), at p. 1294)

[94] There is no reason to think that the distinction has been easier to apply in Canada. In *Knight*, as has been noted, the majority judgment relied on whether the public employee's position had a "strong 'statutory flavour'" (p. 672), but as Brown and Evans observe, "there is no simple test for determining whether there is a sufficiently strong 'statutory flavour' to a job for it to be classified as an 'office'" (p. 7-19). This has led to uncertainty as to whether procedural fairness attaches to particular positions. For instance, there are conflicting decisions on whether the position of a "middle manager" in a municipality is sufficiently important to attract a duty of fairness (compare *Gismondi*, at para. 53, and *Hughes v. Moncton (City)* (1990), 111 N.B.R. (2d) 184 (Q.B.), aff'd (1991), 118 N.B.R. (2d) 306 (C.A.)). Similarly, physicians working in the public health system may or may not be entitled to a duty of fairness (compare *Seshia* and *Rosen v. Saskatoon District Health Board*, [2000] 4 W.W.R. 606, 2000 SKQB 40).

[95] Further complicating the distinction is the fact that public employment is for the most part now viewed as a regular contractual employment relationship. The traditional position at common law was that public servants were literally "servants of the Crown" and could therefore be dismissed at will. However, it is now recognized that most public employees are employed on a contractual basis: *Wells v. Newfoundland*, [1999] 3 S.C.R. 199.

[96] *Wells* concerned the dismissal without compensation of a public office holder whose position had been abolished by statute. The Court held that, while Wells' position was created by statute, his employment relationship with the Crown was contractual and therefore he was entitled to be compensated for breach of contract according

le droit au respect de la justice naturelle, selon le lien de subordination, paraît illogique, voire bizarre.

(*Malloch c. Aberdeen Corp.*, [1971] 2 All E.R. 1278 (H.L.), p. 1294)

[94] Il n'y a pas lieu de penser que la distinction a été plus aisée au Canada. Dans l'affaire *Knight*, on l'a vu, les juges majoritaires se sont demandé si le poste de l'employé du secteur public s'apparentait fortement à un poste d'origine législative (p. 672). Brown et Evans signalent toutefois [TRADUCTION] « qu'aucun critère simple ne permet de déterminer qu'un poste s'apparente assez fortement à un poste d'origine législative pour qu'il soit qualifié de "charge" » (p. 7-19), d'où l'incertitude quant à savoir si l'équité procédurale s'applique à certains postes. Des décisions contradictoires ont d'ailleurs été rendues sur la question de savoir si le poste de « cadre intermédiaire » d'un fonctionnaire municipal était assez important pour faire naître l'obligation d'équité (comparer *Gismondi*, par. 53, et *Hughes c. Moncton (Ville)* (1990), 111 R.N.-B. (2e) 184 (B.R.), conf. par (1991), 118 R.N.-B. (2e) 306 (C.A.)). De même, l'obligation d'équité peut s'appliquer ou non au médecin travaillant pour le régime de santé public (comparer *Seshia*, et *Rosen c. Saskatoon District Health Board*, [2000] 4 W.W.R. 606, 2000 SKQB 40).

[95] La distinction est d'autant plus difficile à établir que, de nos jours, un emploi dans la fonction publique est généralement assimilé à un emploi contractuel ordinaire. Auparavant, en common law, les fonctionnaires étaient considérés comme de véritables « employés personnels de la Couronne » et pouvaient donc être congédiés à volonté. Toutefois, il est désormais établi que la plupart des fonctionnaires ont un lien d'emploi contractuel : *Wells c. Terre-Neuve*, [1999] 3 R.C.S. 199.

[96] L'arrêt *Wells* porte sur le renvoi sans indemnité d'un titulaire de charge publique dont le poste avait été aboli par la loi. La Cour a statué que malgré l'origine législative de son poste, M. Wells avait un lien d'emploi contractuel avec l'État, de sorte qu'il avait droit à une indemnité pour rupture de contrat suivant les règles habituelles du droit privé. Cet

to ordinary private law principles. Indeed, *Wells* recognized that most civil servants and public officers are employed under contracts of employment, either as members of unions bound by collective agreements or as non-unionized employees under individual contracts of employment (paras. 20-21 and 29-32). Only certain officers, like ministers of the Crown and "others who fulfill constitutionally defined state roles", do not have a contractual relationship with the Crown, since the terms of their positions cannot be modified by agreement (*Wells*, at paras. 29-32).

[97] The effect of *Wells*, as Professors Hogg and Monahan note, is that

> [t]he government's common law relationship with its employees will now be governed, for the most part, by the general law of contract, in the same way as private employment relationships. This does not mean that governments cannot provide for a right to terminate employment contracts at pleasure. However, if the government wishes to have such a right, it must either contract for it or make provision (expressly or by necessary implication) by way of statute.
>
> (P. W. Hogg and P. J. Monahan, *Liability of the Crown* (3rd ed. 2000), at p. 240)

The important point for our purposes is that *Wells* confirmed that most public office holders have a contractual employment relationship. Of course, office holders' positions will also often be governed by statute and regulations, but the essence of the employment relationship is still contractual. In this context, attempting to make a clear distinction between office holders and contractual employees for the purposes of procedural fairness becomes even more difficult.

[98] If the distinction has become difficult to maintain in practice, it is also increasingly hard to justify in principle. There would appear to be three main reasons for distinguishing between office holders and contractual employees and for extending procedural fairness protections only to the former, all of which, in our view, are problematic.

[99] First, historically, offices were viewed as a form of property, and thus could be recovered by

arrêt a en effet reconnu que l'emploi de la plupart des fonctionnaires et hauts fonctionnaires est régi par un contrat — une convention collective lorsque l'intéressé est membre d'un syndicat ou un contrat individuel de travail lorsqu'il ne l'est pas (par. 20-21 et 29-32). Seuls les titulaires de certains postes, tels les ministres de la Couronne et « d'autres personnes qui remplissent au sein de l'État des rôles définis constitutionnellement » n'ont pas de relations contractuelles avec l'État puisque leurs conditions d'emploi ne peuvent être modifiées de gré à gré (*Wells*, par. 29-32).

[97] Voici comment les professeurs Hogg et Monahan décrivent les retombées de l'arrêt *Wells* :

> [TRADUCTION] En droit commun, la relation entre l'État et ses employés sera désormais régie, pour l'essentiel, par le droit général des contrats, tout comme la relation d'emploi entre parties privées. Cela n'empêchera pas l'État de prévoir le droit de mettre fin à un contrat d'emploi à son gré. Cependant, pour qu'il puisse s'en prévaloir, ce droit devra figurer dans le contrat ou être prévu (expressément ou par déduction nécessaire) dans la loi.
>
> (P. W. Hogg et P. J. Monahan, *Liability of the Crown* (3e éd. 2000), p. 240)

Pour les besoins du présent pourvoi, l'arrêt *Wells* confirme surtout la nature contractuelle du lien d'emploi de la plupart des titulaires de charge publique. Évidemment, il arrive souvent qu'une charge soit par ailleurs assujettie à des dispositions législatives ou réglementaires, mais le lien d'emploi demeure essentiellement contractuel. Dans ce contexte, il est encore plus difficile d'établir une nette distinction entre le titulaire de charge et l'employé contractuel pour ce qui est du droit à l'équité procédurale.

[98] Si la distinction se révèle elle-même difficile en pratique, sa justification théorique l'est elle aussi de plus en plus. Trois raisons principales sont invoquées pour distinguer le titulaire de charge de l'employé contractuel et n'accorder le bénéfice de l'équité procédurale qu'au premier, mais à notre avis, elles posent toutes problème.

[99] La première raison réside dans le fait qu'autrefois, la charge était considérée comme un bien, de

the office holder who was removed contrary to the principles of natural justice. Employees who were dismissed in breach of their contract, however, could only sue for damages, since specific performance is not generally available for contracts for personal service (Wade and Forsyth, at pp. 531-32). This conception of public office has long since faded from our law: public offices are no longer treated as a form of private property.

[100] A second and more persuasive reason for the distinction is that dismissal from public office involves the exercise of delegated statutory power and should therefore be subject to public law controls like any other administrative decision (*Knight*, at p. 675; *Malloch*, at p. 1293, *per* Lord Wilberforce). In contrast, the dismissal of a contractual employee only implicates a public authority's private law rights as an employer.

[101] A third reason is that, unlike contractual employees, office holders did not typically benefit from contractual rights protecting them from summary discharge. This was true of the public office holders in *Ridge v. Baldwin* and *Nicholson*. Indeed, in both cases the statutory language purported to authorize dismissal without notice. The holders of an office "at pleasure" were in an even more tenuous position since by definition they could be dismissed without notice *and* without reason (*Nicholson*, at p. 323; *Black's Law Dictionary* (8th ed. 2004), at p. 1192 "pleasure appointment"). Because of this relative insecurity it was seen to be desirable to impose minimal procedural requirements in order to ensure that office holders were not deprived of their positions arbitrarily (*Nicholson*, at pp. 322-23; *Knight*, at pp. 674-75; Wade and Forsyth, at pp. 536-37).

[102] In our view, the existence of a contract of employment, not the public employee's status as an office holder, is the crucial consideration. Where a public office holder is employed under a contract of employment the justifications for imposing a public law duty of fairness with respect to his or her dismissal lose much of their force.

sorte qu'elle pouvait être recouvrée par le titulaire qui en avait été dépossédé au mépris des règles de justice naturelle. Or, l'employé démis de ses fonctions en violation de son contrat d'emploi ne pouvait qu'intenter une action en dommages-intérêts puisque le contrat relatif à des services personnels n'était généralement pas susceptible d'exécution en nature (Wade et Forsyth, p. 531-532). Cette conception est depuis longtemps révolue dans notre droit, car la charge publique n'est plus considérée comme un bien privé.

[100] Plus convaincante, la deuxième raison d'être de la distinction est que la décision de démettre un titulaire de charge publique suppose l'exercice d'un pouvoir légal délégué, de sorte que, à l'instar de toute décision administrative, elle doit être soumise aux mécanismes de contrôle du droit public (*Knight*, p. 675; *Malloch*, p. 1293, lord Wilberforce). À l'opposé, le renvoi d'un employé contractuel ne fait intervenir que les droits privés de l'organisme public en tant qu'employeur.

[101] Suivant la troisième raison avancée, contrairement à l'employé contractuel, le titulaire de charge ne bénéficiait généralement pas d'une clause contractuelle le protégeant contre le renvoi sommaire. Tel était le cas dans les affaires *Ridge c. Baldwin* et *Nicholson*, car le libellé de la loi autorisait la destitution sans préavis. La situation du titulaire de charge à titre amovible était encore plus précaire puisque, par définition, il pouvait être destitué sans préavis *et* sans motif : *Nicholson*, p. 323; *Black's Law Dictionary* (8e éd. 2004), p. 1192, « *pleasure appointment* » ([TRADUCTION] « nomination à titre amovible »). À cause de cette relative insécurité, il a paru souhaitable d'établir un minimum d'exigences procédurales afin que le titulaire de charge ne soit pas destitué arbitrairement (*Nicholson*, p. 322-323; *Knight*, p. 674-675; Wade et Forsyth, p. 536-537).

[102] À notre sens, c'est l'existence d'un contrat d'emploi, et non la qualité de titulaire de charge publique de l'employé, qui est déterminante. Lorsque le titulaire d'une charge publique est partie à un contrat d'emploi, l'imposition à l'employeur d'une obligation d'équité en droit public se justifie beaucoup moins.

[103] Where the employment relationship is contractual, it becomes difficult to see how a public employer is acting any differently in dismissing a public office holder and a contractual employee. In both cases, it would seem that the public employer is merely exercising its private law rights as an employer. For instance, in *Knight*, the director's position was terminated by a resolution passed by the board of education pursuant to statute, but it was done in accordance with the contract of employment, which provided for dismissal on three months' notice. Similarly, the appellant in this case was dismissed pursuant to s. 20 of the New Brunswick *Civil Service Act*, but that section provides that the ordinary rules of contract govern dismissal. He could therefore only be dismissed for just cause or on reasonable notice, and any failure to do so would give rise to a right to damages. In seeking to end the employment relationship with four months' pay in lieu of notice, the respondent was acting no differently than any other employer at common law. In *Wells*, Major J. noted that public employment had all of the features of a contractual relationship:

> A common-sense view of what it means to work for the government suggests that these relationships have all the hallmarks of contract. There are negotiations leading to agreement and employment. This gives rise to enforceable obligations on both sides. The Crown is acting much as an ordinary citizen would, engaging in mutually beneficial commercial relations with individual and corporate actors. Although the Crown may have statutory guidelines, the result is still a contract of employment. [Emphasis added; para. 22.]

If the Crown is acting as any other private actor would in hiring its employees, then it follows that the dismissal of its employees should be viewed in the same way.

[104] Furthermore, while public law is rightly concerned with preventing the arbitrary exercise of delegated powers, the good faith exercise of the contractual rights of an employer, such as the right

[103] Du moment que le lien d'emploi est contractuel, il est difficile de concevoir qu'un employeur du secteur public agisse différemment selon qu'il congédie un titulaire de charge publique ou un employé contractuel. Dans les deux cas, il appert que l'employeur ne fait qu'exercer ses droits privés à titre d'employeur. Par exemple, dans l'affaire *Knight*, le conseil scolaire avait adopté, conformément à la loi, une résolution mettant fin à l'emploi du directeur, mais il avait respecté le contrat d'emploi qui prévoyait un préavis de trois mois. De même, en l'espèce, l'appelant a été congédié en application de l'art. 20 de la *Loi sur la Fonction publique* du Nouveau-Brunswick. Or, cet article dispose que la cessation d'emploi est régie par les règles contractuelles ordinaires. En conséquence, l'appelant devait être congédié pour un motif valable ou avec un préavis raisonnable, sinon l'intimée pouvait être condamnée à lui verser des dommages-intérêts. En mettant fin à l'emploi par le versement d'une indemnité de quatre mois de salaire tenant lieu de préavis, l'intimée n'a pas agi différemment de n'importe quel autre employeur assujetti à la common law. Dans l'arrêt *Wells*, le juge Major a signalé que l'emploi dans la fonction publique possédait toutes les caractéristiques d'une relation contractuelle :

> Un examen fondé sur le bon sens de ce que signifie le fait de travailler pour le gouvernement tend à indiquer que ces relations portent toutes les marques d'un contrat. Des négociations donnent lieu à une entente et à un emploi et engendrent des obligations exécutoires pour les deux parties. La Couronne agit en grande partie comme un citoyen ordinaire le ferait, s'engageant dans des relations commerciales avantageuses pour les deux parties, tant avec des particuliers qu'avec des sociétés. Bien que la Couronne puisse être tenue de suivre des lignes directrices prévues par la loi, le résultat demeure quand même un contrat de travail. [Nous soulignons; par. 22.]

Si la Couronne se confond avec tout employeur du secteur privé lorsqu'elle engage ses employés, il devrait donc en être de même lorsqu'elle les congédie.

[104] En outre, le droit public se soucie à juste titre d'empêcher l'exercice arbitraire du pouvoir délégué, mais on ne saurait qualifier d'arbitraire l'exercice de bonne foi d'un droit contractuel

to end the employment relationship on reasonable notice, cannot be qualified as arbitrary. Where the terms of the employment contract were explicitly agreed to, it will be assumed that procedural fairness was dealt with by the parties (see, for example, in the context of collective agreements: *School District No. 5 (Southeast Kootenay) and B.C.T.F. (Yellowaga) (Re)* (2000), 94 L.A.C. (4th) 56). If, however, the contract of employment is silent, the fundamental terms will be supplied by the common law or the civil law, in which case dismissal may only be for just cause or on reasonable notice.

[105] In the context of this appeal, it must be emphasized that dismissal with reasonable notice is not unfair *per se*. An employer's right to terminate the employment relationship with due notice is simply the counterpart to the employee's right to quit with due notice (G. England, *Employment Law in Canada* (4th ed. (loose-leaf)), at para. 13.3). It is a well-established principle of the common law that, unless otherwise provided, both parties to an employment contract may end the relationship without alleging cause so long as they provide adequate notice. An employer's right to terminate on reasonable notice must be exercised within the framework of an employer's general obligations of good faith and fair dealing: *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, at para. 95. But the good faith exercise of a common law contractual right to dismiss with notice does not give rise to concerns about the illegitimate exercise of public power. Moreover, as will be discussed below, where public employers do act in bad faith or engage in unfair dealing, the private law provides a more appropriate form of relief and there is no reason that they should be treated differently than private sector employers who engage in similar conduct.

[106] Of course, a public authority must abide by any statutory restrictions on the exercise of its discretion as an employer, regardless of the terms of an employment contract, and failure to do so may give rise to a public law remedy. A public authority cannot contract out of its statutory duties. But where a dismissal decision is properly within the public authority's powers and is taken pursuant to

de l'employeur, tel celui de mettre fin à la relation d'emploi moyennant un préavis raisonnable. Lorsque les parties ont expressément convenu des clauses du contrat d'emploi, il sera présumé qu'elles se sont également entendues sur l'équité procédurale (voir, p. ex., dans le cas d'une convention collective, *School District No. 5 (Southeast Kootenay) and B.C.T.F. (Yellowaga) (Re)* (2000), 94 L.A.C. (4th) 56). Si rien n'est prévu au contrat, la common law ou le droit civil dicte les conditions fondamentales et il ne peut alors y avoir congédiement que pour motif valable ou avec préavis raisonnable.

[105] Dans le contexte du présent pourvoi, il importe de souligner que le congédiement avec préavis raisonnable n'est pas intrinsèquement injuste. Le droit de l'employeur de mettre fin à l'emploi moyennant le préavis requis est la simple contrepartie du droit de l'employé de donner sa démission moyennant le préavis requis (G. England, *Employment Law in Canada* (4e éd. (feuilles mobiles)), par. 13.3). Un principe bien établi du droit commun veut que, sauf disposition contraire, les deux parties au contrat d'emploi peuvent mettre fin à la relation sans invoquer de motif à condition que le préavis soit suffisant. L'employeur est tenu d'exercer ce droit conformément à ses obligations générales de bonne foi et de traitement équitable : *Wallace c. United Grain Growers Ltd.*, [1997] 3 R.C.S. 701, par. 95. Or, l'exercice de bonne foi du droit issu du droit commun des contrats de congédier l'employé avec préavis ne saurait mettre en doute la légitimité de l'exercice du pouvoir public. De plus — nous y reviendrons —, lorsque l'employeur du secteur public agit de mauvaise foi ou de manière inéquitable, le droit privé offre un type de recours plus approprié, et il n'y a pas lieu de le traiter différemment de l'employeur du secteur privé qui agit de même.

[106] Un organisme public doit évidemment respecter les limites légales fixées à l'exercice de son pouvoir discrétionnaire à titre d'employeur, quelles que soient les conditions du contrat d'emploi, faute de quoi il s'expose à un recours en droit public. Il ne peut se soustraire par contrat à ses obligations légales. Cependant, lorsqu'il prend la décision de congédier une personne conformément à ses

a contract of employment, there is no compelling public law purpose for imposing a duty of fairness.

[107] Nor is the protection of office holders a justification for imposing a duty of fairness when the employee is protected from wrongful dismissal by contract. The appellant's situation provides a good illustration of why this is so. As an office holder, the appellant was employed "at pleasure", and could therefore be terminated without notice or reason (*Interpretation Act*, R.S.N.B. 1973, c. I-13, s. 20). However, he was also a civil servant and, pursuant to s. 20 of the *Civil Service Act*, his dismissal was governed by the ordinary rules of contract. If his employer had dismissed him without notice and without cause he would have been entitled to claim damages for breach of contract. Even if he was dismissed with notice, it was open to him to challenge the length of notice or amount of pay in lieu of notice given. On the facts, the respondent gave the appellant four months' worth of pay in lieu of notice, which he was successful in having increased to eight months before the grievance adjudicator.

[108] It is true that the remedy of reinstatement is not available for breach of contract at common law. In this regard, it might be argued that contractual remedies, on their own, offer insufficient protection to office holders (see *de Smith, Woolf & Jowell: Judicial Review of Administrative Action* (5th ed. 1995), at p. 187). However, it must be kept in mind that breach of a public law duty of fairness also does not lead to full reinstatement. The effect of a breach of procedural fairness is to render the dismissal decision void *ab initio* (*Ridge v. Baldwin*, at p. 81). Accordingly, the employment is deemed to have never ceased and the office holder is entitled to unpaid wages and benefits from the date of the dismissal to the date of judgment (see England, at para. 17.224). However, an employer is free to follow the correct procedure and dismiss the office holder again. A breach of the duty of fairness simply requires that the dismissal decision be retaken. It therefore is incorrect to equate it to reinstatement (see *Malloch*, at p. 1284).

pouvoirs et à un contrat d'emploi, nulle considération supérieure du droit public ne justifie l'imposition d'une obligation d'équité.

[107] La protection du titulaire de charge publique ne justifie pas non plus l'assujettissement à l'obligation d'équité lorsqu'un contrat protège l'intéressé contre le congédiement injuste. La situation de l'appelant le montre bien. En tant que titulaire d'une charge publique, l'appelant était employé à titre amovible, et l'employeur pouvait donc mettre fin à son emploi sans préavis et sans motif (*Loi d'interprétation*, L.R.N.-B. 1973, ch. I-13, art. 20). Or, il était également fonctionnaire et, suivant l'art. 20 de la *Loi sur la Fonction publique*, les règles contractuelles ordinaires régissaient son congédiement. Si son employeur l'avait congédié sans préavis et sans motif, il aurait pu réclamer des dommages-intérêts pour rupture de contrat. Même s'il a été congédié avec préavis, il pouvait contester la durée de celui-ci ou le montant de l'indemnité en tenant lieu. Il appert que l'intimée lui a versé une indemnité équivalant à quatre mois de salaire en lieu et place d'un préavis et que l'arbitre saisi de son grief a porté cette indemnité à huit mois de salaire.

[108] Il est vrai qu'en common law, la réintégration ne peut être ordonnée par suite d'une rupture de contrat. On peut à cet égard soutenir que le seul droit contractuel ne protège pas suffisamment le titulaire de charge (voir *de Smith, Woolf & Jowell : Judicial Review of Administrative Action* (5e éd. 1995), p. 187). Toutefois, il ne faut pas oublier que le recours pour manquement à l'obligation d'équité en droit public ne permet pas non plus la réintégration, mais bien l'annulation *ab initio* de la décision de congédier (*Ridge c. Baldwin*, p. 81). L'emploi est donc réputé n'avoir jamais pris fin, et le titulaire de charge a droit au salaire et aux avantages impayés entre la date du congédiement et celle du jugement (voir England, par. 17.224). Cependant, l'employeur peut toujours congédier la personne de nouveau en suivant alors la bonne procédure. L'employeur qui manque à l'obligation d'équité doit simplement reprendre le processus décisionnel. Il est donc erroné de penser qu'un tel manquement donne droit à la réintégration (voir *Malloch*, p. 1284).

[109] In addition, a public law remedy can lead to unfairness. The amount of unpaid wages and benefits an office holder is entitled to will be a function of the length of time the judicial process has taken to wend its way to a final resolution rather than criteria related to the employee's situation. Furthermore, in principle, there is no duty to mitigate since unpaid wages are not technically damages. As a result, an employee may recoup much more than he or she actually lost (see England, at para. 17.224).

[110] In contrast, the private law offers a more principled and fair remedy. The length of notice or amount of pay in lieu of notice an employee is entitled to depends on a number of factors including length of service, age, experience and the availability of alternative employment (see *Wallace*, at paras. 81 ff.). The notice period may be increased if it is established that the employer acted in bad faith or engaged in unfair dealing when acting to dismiss the employee (*Wallace*, at para. 95). These considerations aim at ensuring that dismissed employees are afforded some measure of protection while looking for new employment.

[111] It is important to note as well that the appellant, as a public employee employed under a contract of employment, also had access to all of the same statutory and common law protections that surround private sector employment. He was protected from dismissal on the basis of a prohibited ground of discrimination under the *Human Rights Act*, R.S.N.B. 1973, c. H-11. His employer was bound to respect the norms laid down by the *Employment Standards Act*, S.N.B. 1982, c. E-7.2. As has already been mentioned, if his dismissal had been in bad faith or he had been subject to unfair dealing, it would have been open to him to argue for an extension of the notice period pursuant to the principles laid down in *Wallace*. In short, the appellant was not without legal protections or remedies in the face of his dismissal.

(4) The Proper Approach to the Dismissal of Public Employees

[112] In our view, the distinction between office holder and contractual employee for the purposes

[109] En outre, le recours fondé sur le droit public peut avoir des effets inéquitables. Le montant du salaire et des avantages impayés auquel le titulaire d'une charge a droit dépend du temps écoulé avant qu'une cour de justice ne rende une décision définitive, et non de critères liés à sa situation. De plus, l'employé n'a pas en principe l'obligation de limiter le préjudice, le salaire impayé ne constituant pas à strictement parler des dommages-intérêts. Il s'ensuit que l'employé peut obtenir beaucoup plus que ce qu'il a réellement perdu (voir England, par. 17.224).

[110] À l'opposé, le droit privé offre un recours mieux fondé et plus juste. La durée du préavis ou le montant de l'indemnité en tenant lieu dépend de différentes variables, dont les états de service, l'âge, l'expérience et l'existence d'autres possibilités d'emploi (voir *Wallace*, par. 81 et suiv.). Le préavis peut être prolongé lorsqu'il est établi que l'employeur a fait preuve de mauvaise foi ou agi de manière inéquitable en congédiant l'employé (*Wallace*, par. 95). L'objectif est d'assurer à l'employé congédié une certaine protection jusqu'à ce qu'il trouve un nouvel emploi.

[111] Il importe de signaler qu'à titre d'employé du secteur public régi par un contrat d'emploi, l'appelant avait également droit aux mesures de protection prévues par la loi et le droit commun au bénéfice des employés du secteur privé. La *Loi sur les droits de la personne*, L.R.N.-B. 1973, ch. H-11, le protégeait contre le congédiement pour un motif de discrimination interdit, et son employeur était tenu de se conformer à la *Loi sur les normes d'emploi*, L.N.-B. 1982, ch. E-7.2. Rappelons que s'il avait été congédié de mauvaise foi ou de façon inéquitable, il aurait pu demander un préavis plus long selon les principes énoncés dans l'arrêt *Wallace*. Bref, l'appelant n'était pas privé de protections ou de recours légaux advenant son congédiement.

(4) La démarche qui s'impose à l'égard du congédiement d'un fonctionnaire

[112] La distinction entre titulaire de charge et employé contractuel aux fins de déterminer un droit

of a public law duty of fairness is problematic and should be done away with. The distinction is difficult to apply in practice and does not correspond with the justifications for imposing public law procedural fairness requirements. What is important in assessing the actions of a public employer in relation to its employees is the nature of the employment relationship. Where the relationship is contractual, it should be viewed as any other private law employment relationship regardless of an employee's status as an office holder.

[113] The starting point, therefore, in any analysis, should be to determine the nature of the employment relationship with the public authority. Following *Wells*, it is assumed that most public employment relationships are contractual. Where this is the case, disputes relating to dismissal should be resolved according to the express or implied terms of the contract of employment and any applicable statutes and regulations, without regard for whether the employee is an office holder. A public authority which dismisses an employee pursuant to a contract of employment should not be subject to any additional public law duty of fairness. Where the dismissal results in a breach of contract, the public employee will have access to ordinary contractual remedies.

[114] The principles expressed in *Knight* in relation to the general duty of fairness owed by public authorities when making decisions that affect the rights, privileges or interests of individuals are valid and important. However, to the extent that the majority decision in *Knight* ignored the important effect of a contract of employment, it should not be followed. Where a public employee is protected from wrongful dismissal by contract, his or her remedy should be in private law, not in public law.

[115] The dismissal of a public employee should therefore generally be viewed as a typical employment law dispute. However, there may be occasions where a public law duty of fairness will still apply. We can envision two such situations at present. The first occurs where a public employee is not, in fact,

à l'équité reconnu en droit public soulève des difficultés et devrait selon nous être abandonnée. Elle s'est révélée difficile dans les faits et sans corrélation avec la raison d'être de l'imposition de l'obligation d'équité procédurale. Ce qui importe dans l'évaluation des actes de l'employeur public à l'endroit de son employé, c'est la nature de la relation d'emploi : lorsqu'elle est contractuelle, elle doit être considérée comme toute autre relation d'emploi assujettie au droit privé, même lorsque l'employé est titulaire d'une charge.

[113] L'analyse doit donc s'attacher d'abord à la nature du lien d'emploi avec l'organisme public. Depuis l'arrêt *Wells*, la plupart des relations d'emploi dans la fonction publique sont tenues pour contractuelles. Lorsque le lien est contractuel, tout différend relatif au congédiement doit être réglé comme le prévoit expressément ou implicitement le contrat d'emploi et conformément aux dispositions législatives ou réglementaires applicables, que l'employé soit ou non titulaire de charge. L'organisme public qui renvoie un employé en application d'un contrat d'emploi ne devrait pas être assujetti en outre à une obligation d'équité reconnue en droit public. Lorsque le congédiement contrevient au contrat, le fonctionnaire dispose des recours habituels suivant le droit des contrats.

[114] Les principes formulés dans l'arrêt *Knight* relativement à l'obligation générale d'équité à laquelle est tenu l'organisme public dont la décision touche les droits, les privilèges ou les biens d'une personne demeurent valables et importants. Toutefois, dans la mesure où les juges majoritaires n'ont pas tenu compte de l'effet déterminant d'un contrat d'emploi, l'arrêt ne devrait pas être suivi. L'employé qu'un contrat protège contre le congédiement injuste devait pouvoir exercer un recours en droit privé, et non en droit public.

[115] Il convient donc généralement de considérer le congédiement d'un employé du secteur public comme un différend ordinaire en droit du travail. Il peut quand même arriver que l'obligation d'équité procédurale s'applique. Deux situations peuvent actuellement être envisagées. La

protected by a contract of employment. This will be the case with judges, ministers of the Crown and others who "fulfill constitutionally defined state roles" (*Wells*, at para. 31). It may also be that the terms of appointment of some public office holders expressly provide for summary dismissal or, at the very least, are silent on the matter, in which case the office holders may be deemed to hold office "at pleasure" (see e.g. New Brunswick *Interpretation Act*, s. 20; *Interpretation Act*, R.S.C. 1985, c. I-21, s. 23(1)). Because an employee in this situation is truly subject to the will of the Crown, procedural fairness is required to ensure that public power is not exercised capriciously.

[116] A second situation occurs when a duty of fairness flows by necessary implication from a statutory power governing the employment relationship. In *Malloch*, the applicable statute provided that dismissal of a teacher could only take place if the teacher was given three weeks' notice of the motion to dismiss. The House of Lords found that this necessarily implied a right for the teacher to make representations at the meeting where the dismissal motion was being considered. Otherwise, there would have been little reason for Parliament to have provided for the notice procedure in the first place (p. 1282). Whether and what type of procedural requirements result from a particular statutory power will of course depend on the specific wording at issue and will vary with the context (*Knight*, at p. 682).

B. *Conclusion*

[117] In this case, the appellant was a contractual employee of the respondent in addition to being a public office holder. Section 20 of the *Civil Service Act* provided that, as a civil servant, he could only be dismissed in accordance with the ordinary rules of contract. In these circumstances it was unnecessary to consider any public law duty of procedural fairness. The respondent was fully within its rights

première est celle où l'employé du secteur public n'est pas protégé dans les faits par un contrat d'emploi, comme c'est le cas des ministres de la Couronne et d'autres personnes qui « remplissent au sein de l'État des rôles définis constitutionnellement » (*Wells*, par. 31). Il peut aussi arriver que la nomination autorise expressément le congédiement sommaire du titulaire de la charge publique ou, à tout le moins, qu'elle ne prévoit rien à ce sujet, auquel cas l'intéressé peut être réputé occuper son poste à titre amovible (voir notamment la *Loi d'interprétation* du Nouveau-Brunswick, art. 20, et la *Loi d'interprétation*, L.R.C. 1985, ch. I-21, par. 23(1)). Étant donné que l'employé est alors véritablement soumis à la volonté de l'État, l'obligation d'équité procédurale doit être imposée afin que le pouvoir public ne soit pas exercé de façon irrégulière.

[116] Dans la deuxième situation possible, l'obligation d'équité découle, par déduction nécessaire, d'un pouvoir légal régissant la relation d'emploi. Dans l'affaire *Malloch*, la loi applicable prévoyait qu'un enseignant ne pouvait être congédié qu'après avoir été informé trois semaines à l'avance de la tenue de la réunion où son congédiement serait proposé. La Chambre des lords a estimé que l'enseignant avait nécessairement le droit d'être entendu à cette réunion, sinon l'avis exigé par le législateur n'aurait eu aucune raison d'être (p. 1282). Naturellement, l'existence d'exigences procédurales et leur nature dépendront du libellé de la disposition en cause et varieront selon le contexte (*Knight*, p. 682).

B. *Conclusion*

[117] En l'espèce, l'appelant était à la fois titulaire d'une charge publique et employé contractuel de l'intimée. L'article 20 de la *Loi sur la Fonction publique* prévoyait qu'à titre de fonctionnaire, il ne pouvait être congédié que suivant les règles contractuelles ordinaires. Il n'était donc pas nécessaire de tenir compte de quelque obligation d'équité procédurale en droit public. L'intimée

to dismiss the appellant with pay in lieu of notice without affording him a hearing. The respondent dismissed the appellant with four months' pay in lieu of notice. The appellant was successful in increasing this amount to eight months. The appellant was protected by contract and was able to obtain contractual remedies in relation to his dismissal. By imposing procedural fairness requirements on the respondent over and above its contractual obligations and ordering the full "reinstatement" of the appellant, the adjudicator erred in his application of the duty of fairness and his decision was therefore correctly struck down by the Court of Queen's Bench.

V. Disposition

[118] We would dismiss the appeal. There will be no order for costs in this Court as the respondent is not requesting them.

The following are the reasons delivered by

[119] BINNIE J. — I agree with my colleagues that the appellant's former employment relationship with the respondent is governed by contract. The respondent chose to exercise its right to terminate the employment without alleging cause. The adjudicator adopted an unreasonable interpretation of s. 20 of the *Civil Service Act*, S.N.B. 1984, c. C-5.1, and of ss. 97(2.1) and 100.1 of the *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P-25. The appellant was a non-unionized employee whose job was terminated in accordance with contract law. Public law principles of procedural fairness were not applicable in the circumstances. These conclusions are enough to dispose of the appeal.

[120] However, my colleagues Bastarache and LeBel JJ. are embarked on a more ambitious mission, stating that:

> Although the instant appeal deals with the particular problem of judicial review of the decisions of an

pouvait parfaitement congédier l'appelant en lui versant une indemnité tenant lieu de préavis, sans lui offrir la possibilité d'être entendu. Elle a versé à l'appelant quatre mois de salaire tenant lieu de préavis, et ce dernier a obtenu que cette indemnité soit portée à huit mois de salaire. Bénéficiant de la protection d'un contrat, l'appelant a pu obtenir des mesures de réparation de nature contractuelle en liaison avec son congédiement. En assujettissant l'intimée à l'obligation d'équité procédurale en sus de ses obligations contractuelles et en ordonnant la réintégration de l'appelant, l'arbitre a commis une erreur dans l'application de l'obligation d'équité, et la Cour du Banc de la Reine a annulé à bon droit sa décision.

V. Dispositif

[118] Nous sommes d'avis de rejeter le pourvoi. Aucune demande n'ayant été présentée en ce sens par l'intimée, aucune ordonnance n'est rendue relativement aux dépens devant la Cour.

Version française des motifs rendus par

[119] LE JUGE BINNIE — Je conviens avec mes collègues que le lien d'emploi était régi par un contrat. L'intimée a exercé son droit de mettre fin à l'emploi de l'appelant sans invoquer de motif. L'arbitre a interprété l'art. 20 de la *Loi sur la Fonction publique*, L.N.-B. 1984, ch. C-5.1, ainsi que le par. 97(2.1) et l'art. 100.1 de la *Loi relative aux relations de travail dans les services publics*, L.R.N.-B. 1973, ch. P-25, d'une manière déraisonnable. L'appelant était un employé non syndiqué, et l'intimée a mis fin à son emploi conformément au droit contractuel. Les principes du droit public relatifs à l'équité procédurale ne s'appliquaient pas dans les circonstances. Ces conclusions suffisent pour statuer sur le pourvoi.

[120] Cependant, mes collègues les juges Bastarache et LeBel s'attellent à une tâche plus ambitieuse et affirment ce qui suit :

> Même si le présent pourvoi porte plus particulièrement sur le contrôle judiciaire d'une décision arbitrale,

adjudicative tribunal, these reasons will address first and foremost the structure and characteristics of the system of judicial review as a whole.

. . .

. . . 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. [Emphasis added; paras. 33 and 32.]

[121] The need for such a re-examination is widely recognized, but in the end my colleagues' reasons for judgment do not deal with the "system as a whole". They focus on administrative tribunals. In that context, they reduce the applicable standards of review from three to two ("correctness" and "reasonableness"), but retain the pragmatic and functional analysis, although now it is to be called the "standard of review analysis" (para. 63). A broader reappraisal is called for. Changing the name of the old pragmatic and functional test represents a limited advance, but as the poet says:

What's in a name? that which we call a rose
By any other name would smell as sweet;

(*Romeo and Juliet*, Act II, Scene ii)

[122] I am emboldened by my colleagues' insistence that "a holistic approach is needed when considering fundamental principles" (para. 26) to express the following views. Judicial review is an idea that has lately become unduly burdened with law office metaphysics. We are concerned with substance not nomenclature. The words themselves are unobjectionable. The dreaded reference to "functional" can simply be taken to mean that generally speaking courts have the last word on what *they* consider the correct decision on legal matters (because deciding legal issues is their "function"), while administrators should generally have the last word within *their* function, which is to decide administrative matters. The word "pragmatic" not only signals a distaste for formalism but recognizes that a conceptually tidy division of functions has to be tempered by

dans les présents motifs, la Cour se penche avant tout sur l'architecture et les caractéristiques du mécanisme de contrôle judiciaire dans son ensemble.

. . .

. . . 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. [Nous soulignons; par. 33 et 32.]

[121] La nécessité d'un tel réexamen est largement reconnue, mais en fin de compte, mes collègues ne s'attaquent pas au « mécanisme dans son ensemble ». Leurs motifs visent les tribunaux administratifs. Dans ce contexte, ils ramènent le nombre de normes de contrôle applicables de trois à deux (la « décision correcte » et la « décision raisonnable »), mais conservent l'analyse pragmatique et fonctionnelle, qu'ils rebaptisent « analyse relative à la norme de contrôle » (par. 63). Une réévaluation plus vaste s'impose. Modifier l'appellation de l'ancienne analyse pragmatique et fonctionnelle constitue une modeste avancée, mais comme dit le poète :

Qu'y a-t-il dans un nom?
Ce que nous appelons une rose embaumerait autant sous un autre nom.

(*Roméo et Juliette*, acte II, scène ii)

[122] Vu l'affirmation de mes collègues selon laquelle « l'examen de principes fondamentaux commande une démarche globale » (par. 26), j'ose exprimer mon point de vue sur le sujet. Ces dernières années, des débats métaphysico-juridiques ont indûment embrouillé la notion de contrôle judiciaire. Il s'agit de modifier le mécanisme lui-même, et non son appellation. En eux-mêmes, les termes employés n'ont rien de répréhensible. Le redoutable qualificatif « fonctionnel » peut simplement être interprété comme conférant généralement aux cours de justice le pouvoir de décider en fin de compte ce qui, à *leur* avis, constitue la bonne décision sur le plan juridique (leur « fonction » étant de statuer sur les questions de droit), alors que le décideur administratif devrait généralement avoir le dernier mot dans l'exercice de *sa* fonction, qui consiste à trancher en matière administrative. Non

practical considerations: for example, a labour board is better placed than the courts to interpret the intricacies of provisions in a labour statute governing replacement of union workers; see e.g. *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227.

[123] Parliament or a provincial legislature is often well advised to allocate an administrative decision to someone other than a judge. The judge is on the outside of the administration looking in. The legislators are entitled to put their trust in the viewpoint of the designated decision maker (particularly as to what constitutes a reasonable outcome), not only in the case of the administrative tribunals of principal concern to my colleagues but (taking a "holistic approach") also in the case of a minister, a board, a public servant, a commission, an elected council or other administrative bodies and statutory decision makers. In the absence of a full statutory right of appeal, the court ought generally to respect the exercise of the administrative discretion, particularly in the face of a privative clause.

[124] On the other hand, a court is right to insist that *its* view of the correct opinion (i.e. the "correctness" standard of review) is accepted on questions concerning the Constitution, the common law, and the interpretation of a statute other than the administrator's enabling statute (the "home statute") or a rule or statute closely connected with it; see generally D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (looseleaf), at para. 14:2210.

[125] Thus the law (or, more grandly, the "rule of law") sets the boundaries of potential administrative action. It is sometimes said by judges that an administrator acting within his or her discretion

seulement l'adjectif « pragmatique » exprime une répugnance pour le formalisme, mais il reconnaît également la nécessité de tempérer la stricte division conceptuelle des fonctions par des considérations pratiques (p. ex., le fait qu'un conseil des relations de travail est plus à même qu'une cour de justice d'interpréter les subtilités de dispositions législatives sur le travail régissant le remplacement de travailleurs syndiqués : voir, entre autres, *Syndicat canadien de la Fonction publique, section locale 963 c. Société des alcools du Nouveau-Brunswick*, [1979] 2 R.C.S. 227).

[123] Souvent, le législateur fédéral ou provincial est bien inspiré de confier à un autre organisme qu'une cour de justice le soin de rendre une décision administrative. La cour de justice a sur l'Administration un point de vue extérieur à celle-ci. Il est loisible au législateur de s'en remettre au jugement d'un décideur qu'il désigne (en particulier quant à la raisonnabilité du résultat) non seulement dans le cas des tribunaux administratifs auxquels s'intéressent principalement mes collègues, mais aussi (suivant une démarche globale) dans le cas d'un ministre, d'un organisme, d'un fonctionnaire, d'un corps élu ou d'un autre organisme administratif ou d'origine législative. En l'absence d'un droit d'appel inconditionnel prévu par la loi, la cour de révision doit généralement respecter l'exercice du pouvoir discrétionnaire, surtout en présence d'une clause privative.

[124] Par contre, elle peut légitimement soutenir que ce qu'*elle* estime constituer la bonne décision (la norme de la « décision correcte ») prévaut pour les questions relatives à la Constitution, au droit commun et à l'interprétation d'autres lois que la loi habilitante du décideur administratif (sa « loi constitutive ») ou une règle ou un texte législatif étroitement lié à celle-ci : voir généralement D. J. M. Brown et J. M. Evans, *Judicial Review of Administrative Action in Canada* (feuilles mobiles), par. 14 : 2210.

[125] Le droit ou, plus solennellement, la « règle de droit », délimite donc la portée de l'action administrative possible. Les juges disent parfois que dans l'exercice de son pouvoir discrétionnaire, le

"has the right to be wrong". This reflects an unduly court-centred view of the universe. A disagreement between the court and an administrator does not necessarily mean that the administrator is wrong.

A. *Limits on the Allocation of Decision Making*

[126] It should not be difficult in the course of judicial review to identify legal questions requiring disposition by a judge. There are three basic legal limits on the allocation of administrative discretion.

[127] Firstly, the Constitution restricts the legislator's ability to allocate issues to administrative bodies which s. 96 of the *Constitution Act, 1867* has allocated to the courts. The logic of the constitutional limitation is obvious. If the limitation did not exist, the government could transfer the work of the courts to administrative bodies that are not independent of the executive and by statute immunize the decisions of these bodies from effective judicial review. The country would still possess an independent judiciary, but the courts would not be available to citizens whose rights or interests are trapped in the administration.

[128] Secondly, administrative action must be founded on statutory or prerogative (i.e. common law) powers . This too is a simple idea. No one can exercise a power they do not possess. Whether or not the power (or jurisdiction) exists is a question of law for the courts to determine, just as it is for the courts (not the administrators) to have the final word on questions of general law that may be relevant to the resolution of an administrative issue. The instances where this Court has deferred to an administrator's conclusion of law *outside* his or her home statute, or a statute "intimately" connected thereto, are exceptional. We should say so. Instead, my colleagues say the court's view of the law will prevail

décideur administratif « a le droit de se tromper », ce qui traduit, de la part des cours de justice, une conception de l'univers centrée sur elles-mêmes. Ce n'est pas parce que la cour est en désaccord avec le décideur administratif que ce dernier a nécessairement tort.

A. *Les limites imposées à l'attribution du pouvoir décisionnel*

[126] Lors du contrôle judiciaire, la détermination des questions de droit devant être tranchées par une cour de justice ne devrait pas être ardue. Trois éléments restreignent fondamentalement l'attribution du pouvoir discrétionnaire administratif.

[127] En premier lieu, la Constitution empêche le législateur de confier à un organisme administratif le règlement d'une question qui relève d'une cour de justice suivant l'art. 96 de la *Loi constitutionnelle de 1867*, et ce, pour une raison manifeste. Si ce n'était pas le cas, l'État pourrait confier la tâche des tribunaux judiciaires à des organismes administratifs qui ne sont pas indépendants de l'exécutif et, par voie législative, soustraire les décisions de ces organismes à un véritable contrôle judiciaire. Le pays conserverait un pouvoir judiciaire indépendant, mais les cours de justice seraient hors de portée des citoyens dont les droits sont piégés dans l'appareil administratif.

[128] En deuxième lieu, l'action administrative doit s'appuyer sur un pouvoir conféré par la loi ou découlant d'une prérogative (c.-à-d. de la common law). Là également, le principe est simple. Nul ne peut exercer un pouvoir dont il n'est pas investi. Il appartient à la cour de révision de statuer sur la question de droit que constitue l'existence ou l'inexistence d'un pouvoir (ou d'une compétence), tout comme il lui revient (et non au décideur administratif) de trancher en dernier ressort les questions de droit générales susceptibles de jouer dans le règlement d'une question administrative. Ce n'est qu'exceptionnellement que la Cour a déféré à une conclusion de droit tirée par un décideur administratif dans l'application d'*autres* dispositions que celles de sa loi constitutive ou d'une loi « intimement » liée à celle-ci. Disons-le. Au lieu de cela, mes collègues estiment que l'interprétation préconisée par la cour de révision l'emporte

where the question at issue is one of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise". [para. 60]

It is, with respect, a distraction to unleash a debate in the reviewing judge's courtroom about whether or not a particular question of law is "of central importance to the legal system as a whole". It should be sufficient to frame a rule exempting from the correctness standard the provisions of the home statute and closely related statutes which require the expertise of the administrative decision maker (as in the labour board example). Apart from that exception, we should prefer clarity to needless complexity and hold that the last word on questions of general law should be left to judges.

[129] Thirdly, a fair procedure is said to be the handmaiden of justice. Accordingly, procedural limits are placed on administrative bodies by statute and the common law. These include the requirements of "procedural fairness", which will vary with the type of decision maker and the type of decision under review. On such matters, as well, the courts have the final say. The need for such procedural safeguards is obvious. Nobody should have his or her rights, interests or privileges adversely dealt with by an unjust process. Nor is such an unjust intent to be attributed easily to legislators. Hansard is full of expressions of concern by Ministers and Members of Parliament regarding the fairness of proposed legislative provisions. There is a dated *hauteur* about judicial pronouncements such as that the "justice of the common law will supply the omission of the legislature" (*Cooper v. Wandsworth Board of Works* (1863), 14 C.B. (N.S.) 180, 143 E.R. 414 (C.P.), at p. 420). Generally speaking, legislators and judges in this country are working with a common set of basic legal and constitutional values. They share a belief in the rule of law. Constitutional considerations aside, however, statutory protections can nevertheless be repealed and common law protections can be modified by statute, as was demonstrated in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor*

dans le cas d'une question de droit générale « à la fois, d'une importance capitale pour le système juridique dans son ensemble et étrangère au domaine d'expertise de l'arbitre ». [par. 60]

Sauf le respect que je leur dois, tout débat quant à savoir si une question de droit donnée est « d'une importance capitale pour le système juridique dans son ensemble » distrait la cour dans l'accomplissement de sa tâche. Il devrait suffire de soustraire à l'application de la norme de la décision correcte l'interprétation de la loi constitutive du décideur administratif ou de quelque loi très connexe faisant appel à l'expertise de ce dernier (en matière de relations de travail, par exemple). Cette exception mise à part, nous devrions préférer la clarté à la complexité superflue et statuer que la cour de révision a le dernier mot sur une question de droit générale.

[129] En troisième lieu, le caractère équitable de la procédure est censé être au service de la justice. C'est pourquoi le législateur et la common law imposent aux organismes administratifs des obligations en la matière — dont l'« équité procédurale » — qui varient selon la catégorie à laquelle appartient le décideur et la nature de la décision en cause. La cour de révision a le dernier mot à ce chapitre aussi. La nécessité de telles garanties procédurales est manifeste. Nul ne devrait voir ses droits, ses intérêts ou ses privilèges faire l'objet d'une décision défavorable à l'issue d'une procédure injuste. On ne saurait non plus prêter au législateur l'intention d'obtenir pareil résultat inique. Le Hansard regorge de préoccupations exprimées par des ministres et des députés concernant le caractère équitable des dispositions législatives proposées. Certaines affirmations, telle la [TRADUCTION] « justice de la common law suppléera aux lacunes du législateur » (*Cooper c. Wandsworth Board of Works* (1863), 14 C.B. (N.S.) 180, 143 E.R. 414 (C.P.), p. 420), traduisent une attitude hautaine dépassée à l'égard des décisions de justice. En règle générale, les législateurs et les juges de ce pays exercent leurs fonctions à partir d'un ensemble commun de valeurs juridiques et constitutionnelles. Ils partagent une même foi dans la primauté du droit. Toutefois, abstraction faite du respect de la Constitution, une

Control and Licensing Branch), [2001] 2 S.C.R. 781, 2001 SCC 52.

B. *Reasonableness of Outcome*

[130] At this point, judicial review shifts gears. When the applicant for judicial review challenges the substantive *outcome* of an administrative action, the judge is invited to cross the line into second-guessing matters that lie within the function of the administrator. This is controversial because it is not immediately obvious why a judge's view of the reasonableness of an administrative policy or the exercise of an administrative discretion should be preferred to that of the administrator to whom Parliament or a legislature has allocated the decision, unless there is a full statutory right of appeal to the courts, or it is otherwise indicated in the conferring legislation that a "correctness" standard is intended.

[131] In *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, Beetz J. adopted the view that "[t]o a large extent judicial review of administrative action is a specialized branch of statutory interpretation" (p. 1087 (emphasis deleted)). Judicial intervention in administrative decisions on grounds of substance (in the absence of a constitutional challenge) has been based on presumed legislative intent in a line of cases from *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.*, [1947] 2 All E.R. 680 (C.A.) ("you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority" (p. 683)) to *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.* ("was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation . . . ?" (p. 237)). More recent examples are *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (para. 53), and *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*,

garantie légale peut tout de même être abrogée et celle offerte par la common law, modifiée par la loi, comme cela avait été le cas dans l'affaire *Ocean Port Hotel Ltd. c. Colombie-Britannique (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 R.C.S. 781, 2001 CSC 52.

B. *La raisonnabilité du résultat*

[130] À cette étape, l'objet du contrôle judiciaire devient différent. Lorsque le demandeur conteste une mesure administrative quant au fond, la cour de révision est invitée à faire un pas de plus et à remettre en question une décision relevant du décideur administratif, ce qui prête à controverse. En effet, en ce qui concerne la raisonnabilité d'une politique administrative ou de l'exercice d'un pouvoir discrétionnaire administratif, il n'y a pas de raison évidente de préférer l'appréciation judiciaire à celle du décideur administratif auquel le législateur a attribué le pouvoir de trancher, sauf lorsque la loi prévoit un droit d'appel inconditionnel devant une cour de justice ou que l'intention du législateur d'assujettir le décideur à la norme de la décision correcte ressort par ailleurs de la loi habilitante.

[131] Dans l'arrêt *U.E.S., Local 298 c. Bibeault*, [1988] 2 R.C.S. 1048, le juge Beetz a estimé que « [d]ans une large mesure, l'examen judiciaire d'un acte administratif est une division spécialisée de l'interprétation des lois » (p. 1087 (soulignement omis)). Dans une série d'affaires allant d'*Associated Provincial Picture Houses Ltd. c. Wednesbury Corp.*, [1947] 2 All E.R. 680 (C.A.) (où il est dit à la p. 683 : [TRADUCTION] « on peut se trouver en présence de quelque chose de si absurde qu'il ne viendrait jamais à l'idée d'une personne sensée que cela relève des pouvoirs de l'autorité ») à *Syndicat canadien de la Fonction publique, section locale 963* (où la Cour se demande à la p. 237 : « l'interprétation de la Commission est-elle déraisonnable au point de ne pouvoir rationnellement s'appuyer sur la législation pertinente . . . ? »), le contrôle judiciaire de décisions administratives sur le fond (en l'absence d'une allégation d'inconstitutionnalité) s'est appuyé sur l'intention présumée du législateur. Au nombre des arrêts plus récents, mentionnons *Baker c. Canada (Ministre de la*

[2001] 2 S.C.R. 281, 2001 SCC 41 (paras. 60-61). Judicial review proceeds on the justified presumption that legislators do not intend results that depart from *reasonable* standards.

C. *The Need to Reappraise the Approach to Judicial Review*

[132] The present difficulty, it seems, does not lie in the component parts of judicial review, most of which are well entrenched in decades of case law, but in the current methodology for putting those component parts into action. There is afoot in the legal profession a desire for clearer guidance than is provided by lists of principles, factors and spectrums. It must be recognized, of course, that complexity is inherent in all legal principles that must address the vast range of administrative decision making. The objection is that our present "pragmatic and functional" approach is more complicated than is required by the subject matter.

[133] People who feel victimized or unjustly dealt with by the apparatus of government, and who have no recourse to an administrative appeal, should have access to an independent judge through a procedure that is quick and relatively inexpensive. Like much litigation these days, however, judicial review is burdened with undue cost and delay. Litigants understandably hesitate to go to court to seek redress for a perceived administrative injustice if their lawyers cannot predict with confidence even what standard of review will be applied. The disposition of the case may well *turn* on the choice of standard of review. If litigants do take the plunge, they may find the court's attention focussed not on their complaints, or the government's response, but on lengthy and arcane discussions of something they are told is the pragmatic and functional test. Every hour of a lawyer's preparation and court time devoted to unproductive "lawyer's talk" poses a significant cost to the applicant. If the challenge is unsuccessful, the unhappy applicant may also

Citoyenneté et de l'Immigration), [1999] 2 R.C.S. 817 (par. 53), et *Centre hospitalier Mont-Sinaï c. Québec (Ministre de la Santé et des Services sociaux)*, [2001] 2 R.C.S. 281, 2001 CSC 41 (par. 60-61). Le contrôle judiciaire se fonde sur la présomption légitime que le législateur n'a pas voulu de résultats qui ne répondent pas à quelque norme de *raisonnabilité.*

C. *La réévaluation nécessaire du mécanisme de contrôle judiciaire*

[132] Il appert que la difficulté actuelle réside non pas dans les éléments constitutifs du contrôle judiciaire, dont la plupart sont bien ancrés dans des décennies de jurisprudence, mais bien dans la méthode couramment employée pour les mettre à l'œuvre. La profession juridique appelle de ses vœux l'établissement de repères plus clairs que ceux offerts par des énumérations de principes, de facteurs et d'échelles. Force est toutefois de reconnaître que la complexité est inhérente à tout principe juridique devant s'appliquer à une vaste gamme de décisions administratives. Ce que l'on reproche à l'actuelle analyse « pragmatique et fonctionnelle » c'est d'être plus compliquée qu'elle ne le devrait.

[133] La personne qui s'estime victime de l'appareil gouvernemental ou traitée injustement par celui-ci, et à qui l'Administration ne confère aucun droit d'appel, devrait avoir accès à un tribunal judiciaire indépendant au moyen d'une procédure rapide et relativement peu coûteuse. Or, comme bien des instances engagées de nos jours, le contrôle judiciaire est à la fois trop coûteux et trop long. On comprend le justiciable d'hésiter à s'adresser aux tribunaux pour obtenir réparation à l'égard de ce qu'il considère comme une injustice administrative lorsque son avocat ne peut même pas prévoir avec certitude quelle norme de contrôle s'appliquera. Pourtant, l'issue du recours peut bien *dépendre* de la norme de contrôle retenue. Le justiciable qui va de l'avant constate que la cour ne met pas l'accent sur sa prétention ou sur la mesure prise par l'État, mais qu'elle arbitre plutôt un long et mystérieux débat sur une méthode dite « pragmatique et fonctionnelle ». Chaque heure de préparation et de vacation que consacre l'avocat à un débat

face a substantial bill of costs from the successful government agency. A victory before the reviewing court may be overturned on appeal because the wrong "standard of review" was selected. A small business denied a licence or a professional person who wants to challenge disciplinary action should be able to seek judicial review without betting the store or the house on the outcome. Thus, in my view, the law of judicial review should be pruned of some of its unduly subtle, unproductive, or esoteric features.

D. *Standards of Review*

[134] My colleagues conclude that three standards of review should be reduced to two standards of review. I agree that this simplification will avoid some of the arcane debates about the point at which "unreasonableness" becomes "patent unreasonableness". However, in my view the repercussions of their position go well beyond administrative tribunals. My colleagues conclude, and I agree:

> Looking to either the magnitude or the immediacy of the defect in the tribunal's decision provides no meaningful way in practice of distinguishing between a patently unreasonable and an unreasonable decision. [para. 41]

More broadly, they declare that "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review" (para. 44), and "any actual difference between them in terms of their operation appears to be illusory" (para. 41). A test which is incoherent when applied to administrative tribunals does not gain in coherence or logic when applied to other administrative decision makers such as mid-level bureaucrats or, for that matter, Ministers. If logic and language cannot capture the distinction in one context, it must equally be deficient elsewhere in the field of judicial review. I therefore proceed on the basis that the distinction between "patent unreasonableness" and "reasonableness *simpliciter*" has been declared by the Court

juridique improductif coûte cher au client. De plus, le demandeur débouté peut bien devoir verser des dépens substantiels au gouvernement. La décision favorable rendue par la cour de révision peut être infirmée en appel au motif que la bonne « norme de contrôle » n'a pas été appliquée. La petite entreprise à qui on refuse un permis ou le professionnel qui fait l'objet d'une mesure disciplinaire devrait pouvoir demander le contrôle judiciaire de la décision sans miser son commerce ou sa maison sur l'issue de l'instance. C'est pourquoi le droit applicable en la matière devrait à mon sens être débarrassé de certaines caractéristiques indûment subtiles, improductives ou ésotériques.

D. *Les normes de contrôle*

[134] Mes collègues concluent que les trois normes de contrôle devraient être ramenées à deux. Cette simplification permettra certes d'éviter certains échanges obscurs sur le moment auquel une décision « déraisonnable » devient « manifestement déraisonnable », mais selon moi, elle aura des répercussions sur bien d'autres décideurs. Je souscris à l'avis de mes collègues lorsqu'ils affirment :

> Dans les faits, ni l'importance du défaut entachant la décision ni son caractère flagrant ne permettent vraiment de distinguer une décision manifestement déraisonnable d'une décision déraisonnable. [par. 41]

D'un point de vue général, ils ajoutent que « les difficultés analytiques soulevées par l'application des différentes normes réduisent à néant toute utilité conceptuelle découlant de la plus grande souplesse propre à l'existence de normes de contrôle multiples » (par. 44), puis « toute différence réelle sur le plan de l'application se révèle illusoire » (par. 41). Un test incohérent appliqué à un tribunal administratif ne gagne pas en cohérence ou en logique lorsqu'il s'applique à un autre décideur administratif, qu'il s'agisse d'un fonctionnaire de rang moyen, voire d'un ministre. Lorsque ni la logique ni la langue ne peuvent saisir la distinction dans un contexte, elles ne peuvent non plus le faire par ailleurs dans le domaine du contrôle judiciaire. Je suppose donc que la Cour abandonne la distinction entre le « manifestement déraisonnable » et le

to be abandoned. I propose at this point to examine what I see as some of the implications of this abandonment.

E. *Degrees of Deference*

[135] The distinction between reasonableness *simpliciter* and patent unreasonableness was not directed merely to "the magnitude or the immediacy of the defect" in the administrative decision (para. 41). The distinction also recognized that different administrative decisions command different degrees of deference, depending on who is deciding what.

[136] A minister making decisions under the *Extradition Act*, R.S.C. 1985, c. E-23, to surrender a fugitive, for example, is said to be "at the extreme legislative end of the *continuum* of administrative decision-making" (*Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631, at p. 659). On the other hand, a ministerial delegate making a deportation decision according to ministerial guidelines was accorded considerably less deference in *Baker* (where the "reasonableness *simpliciter*" standard was applied). The difference does not lie only in the judge's view of the perceived immediacy of the defect in the administrative decision. In *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, a unanimous Court adopted the caution in the context of counter-terrorism measures that "[i]f the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove" (para. 33). Administrative decision makers generally command respect more for their expertise than for their prominence in the administrative food chain. Far more numerous are the lesser officials who reside in the bowels and recesses of government departments adjudicating pension benefits or the granting or withholding of licences, or municipal boards poring over budgets or allocating costs of local improvements. Then there are the Cabinet and Ministers of the Crown who make broad decisions of public policy such as testing cruise missiles, *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, or policy decisions

« raisonnable *simpliciter* ». Je me penche maintenant sur certaines des conséquences que me paraît avoir cet abandon.

E. *Les degrés de déférence*

[135] La distinction entre la norme de la décision raisonnable *simpliciter* et celle de la décision manifestement déraisonnable ne tenait pas seulement à « l'importance du défaut entachant la décision [administrative] ni [à] son caractère flagrant » (par. 41). Elle reconnaissait aussi le fait que différentes décisions administratives appellent différents degrés de déférence, selon l'identité du décideur et la nature de la décision.

[136] On dit par exemple de la décision du ministre d'extrader un fugitif en application de la *Loi sur l'extradition*, L.R.C. 1985, ch. E-23, qu'elle « se situe à l'extrême limite législative du processus décisionnel administratif » (*Idziak c. Canada (Ministre de la Justice)*, [1992] 3 R.C.S. 631, p. 659). Par contre, la décision d'un représentant du ministre d'expulser une personne sur le fondement de lignes directrices ministérielles a fait l'objet d'une déférence bien moins grande dans l'affaire *Baker*, où la norme de la « décision raisonnable *simpliciter* » a été appliquée. La distinction ne tient pas seulement à l'opinion du juge quant au caractère flagrant du défaut entachant la décision administrative. Dans l'affaire *Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [2002] 1 R.C.S. 3, 2002 CSC 1, la Cour a fait sienne à l'unanimité la mise en garde suivante applicable dans le contexte de mesures contre le terrorisme : [TRADUCTION] « Pour que la population accepte les conséquences de ces décisions, elles doivent être prises par des personnes que la population a choisies et qu'elle peut écarter » (par. 33). En règle générale, le décideur administratif commande le respect davantage pour son expertise que pour son importance dans la hiérarchie de l'État. Les fonctionnaires de rang inférieur qui, dans le dédale des différents ministères, accordent prestations de retraite et autres ou délivrent (ou refusent) permis et licences, ou encore, les organismes municipaux qui planchent sur des budgets ou répartissent les coûts d'améliorations locales, sont de loin les décideurs les plus nombreux. Puis il y a le Cabinet et

arising out of decisions of major administrative tribunals, as in *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735, at p. 753, where the Court said: "The very nature of the body must be taken into account in assessing the technique of review which has been adopted by the Governor in Council."

[137] Of course, the degree of deference also depends on the nature and content of the question. An adjudicative tribunal called on to approve pipelines based on "public convenience and necessity" (*Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322) or simply to take a decision in the "public interest" is necessarily accorded more room to manoeuvre than is a professional body, given the task of determining an appropriate sanction for a member's misconduct (*Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20).

[138] In our recent jurisprudence, the "nature of the question" before the decision maker has been considered as one of a number of elements to be considered in choosing amongst the various standards of review. At this point, however, I believe it plays a more important role in terms of substantive review. It helps to define the range of reasonable outcomes within which the administrator is authorized to choose.

[139] The judicial sensitivity to different levels of respect (or deference) required in different situations is quite legitimate. "Contextualizing" a single standard of review will shift the debate (slightly) from choosing *between* two standards of reasonableness that each represent a different level of deference to a debate *within* a single standard of reasonableness to determine the appropriate level of deference. In practice, the result of today's decision may be like the bold innovations of a traffic engineer that in the end do no more than shift rush hour congestion from one road intersection to another

les ministres qui prennent des décisions politiques de large portée comme celle de permettre l'essai de missiles de croisière (*Operation Dismantle Inc. c. La Reine*, [1985] 1 R.C.S. 441) ou des décisions politiques dans la foulée de tribunaux administratifs de premier plan, comme dans l'affaire *Procureur général du Canada c. Inuit Tapirisat of Canada*, [1980] 2 R.C.S. 735, où la Cour a dit qu'« [i]l faut, dans l'évaluation de la technique de révision adoptée par le gouverneur en conseil, tenir compte de la nature même de ce corps constitué » (p. 753).

[137] Bien sûr, le degré de déférence tient aussi à la nature et à la teneur de la question à trancher. Le tribunal administratif appelé à approuver un pipeline sur le fondement de l'« utilité publique » (*Westcoast Energy Inc. c. Canada (Office national de l'énergie)*, [1998] 1 R.C.S. 322) ou simplement à rendre une décision « dans l'intérêt public » jouit nécessairement d'une plus grande marge de manœuvre que l'organisme professionnel auquel il incombe de déterminer la sanction qu'il convient d'imposer à un membre pris en faute (*Barreau du Nouveau-Brunswick c. Ryan*, [2003] 1 R.C.S. 247, 2003 CSC 20).

[138] Dans la jurisprudence récente de la Cour, la « nature de la question » soumise au décideur est considérée comme l'un des éléments à prendre en compte pour arrêter la bonne norme de contrôle. Maintenant, je crois cependant qu'elle joue un rôle plus déterminant sur le fond. Elle contribue en effet à circonscrire les issues raisonnables qui s'offrent au décideur administratif.

[139] Il est parfaitement légitime que les cours se soucient des différents degrés de respect (ou de déférence) que commandent différentes situations. Appliquer en fonction du contexte une norme de contrôle unique transforme (quelque peu) le débat : il ne s'agit plus de choisir *entre* deux normes de raisonnabilité correspondant chacune à un degré de déférence distinct, mais bien de déterminer le bon degré de déférence *à l'intérieur* d'une seule norme de raisonnabilité. Le résultat du présent arrêt pourrait bien s'apparenter dans les faits à celui obtenu par un ingénieur de la circulation routière dont les

without any overall saving to motorists in time or expense.

[140] That said, I agree that the repeated attempts to define and explain the difference between reasonableness *simpliciter* and "patent" unreasonableness can be seen with the benefit of hindsight to be unproductive and distracting. Nevertheless, the underlying issue of degrees of deference (which the two standards were designed to address) remains.

[141] Historically, our law recognized "patent" unreasonableness before it recognized what became known as reasonableness *simpliciter*. The adjective "patent" initially underscored the level of respect that was due to the designated decision maker, and signalled the narrow authority of the courts to interfere with a particular administrative *outcome* on substantive grounds. The reasonableness *simpliciter* standard was added at a later date to recognize a reduced level of deference. Reducing three standards of review to two standards of review does not alter the reality that at the high end "patent" unreasonableness (in the sense of manifestly indefensible) was not a bad description of the hurdle an applicant had to get over to have an administrative decision quashed on a ground of substance. The danger of labelling the most "deferential" standard as "reasonableness" is that it may be taken (wrongly) as an invitation to reviewing judges not simply to identify the usual issues, such as whether irrelevant matters were taken into consideration, or relevant matters were not taken into consideration, but to reweigh the input that resulted in the administrator's decision as if it were the judge's view of "reasonableness" that counts. At this point, the judge's role is to identify the outer boundaries of reasonable outcomes within which the administrative decision maker is free to choose.

F. *Multiple Aspects of Administrative Decisions*

[142] Mention should be made of a further feature that also reflects the complexity of the subject

mesures audacieuses visant à réduire la congestion à l'heure de pointe ne font en fin de compte que déplacer le problème d'une intersection à une autre sans économie globale de temps ou d'argent pour les automobilistes.

[140] Cela dit, je conviens qu'avec le recul, les tentatives répétées de définir et d'expliquer la différence entre la décision raisonnable *simpliciter* et la décision « manifestement » déraisonnable peuvent être tenues pour vaines et importunes. Néanmoins, la question sous-jacente du degré de déférence (que devait régler l'application des deux normes) demeure.

[141] Notre droit a reconnu la norme du « manifestement » déraisonnable avant celle de la décision raisonnable *simpliciter*. Au départ, l'adverbe « manifestement » soulignait l'importance du respect auquel avait droit le décideur administratif et la minceur du pouvoir de la cour de réviser sa décision sur le fond. La norme du raisonnable *simpliciter* s'est ajoutée subséquemment pour reconnaître un degré de déférence moindre. Malgré l'abaissement du nombre de normes de contrôle de trois à deux, il demeure qu'à la limite supérieure de l'échelle, l'expression « manifestement » déraisonnable (au sens de manifestement indéfendable) rendait assez bien la difficulté que devait surmonter le demandeur pour obtenir l'annulation d'une décision administrative sur le fond. Qualifier de « raisonnable » la décision qui justifie la plus grande déférence risque d'inciter (à tort) les cours de révision à ne pas seulement se poser les questions habituelles (p. ex., des éléments non pertinents ont-ils été pris en compte ou a-t-on fait abstraction d'éléments pertinents?), mais à soupeser à leur tour les données à partir desquelles le décideur administratif a tranché, comme si leur perception de ce qui est « raisonnable » l'emportait. Le rôle de la cour de révision est de délimiter les résultats raisonnables parmi lesquels le décideur administratif est libre de choisir.

F. *Les multiples facettes de la décision administrative*

[142] Il convient de faire état d'une autre caractéristique qui témoigne également de la complexité

matter of judicial review. An applicant may advance several grounds for quashing an administrative decision. He or she may contend that the decision maker has misinterpreted the general law. He or she may argue, in the alternative, that even if the decision maker got the general law straight (an issue on which the court's view of what is correct will prevail), the decision maker did not properly apply it to the facts (an issue on which the decision maker is entitled to deference). In a challenge under the *Canadian Charter of Rights and Freedoms* to a surrender for extradition, for example, the minister will have to comply with the Court's view of *Charter* principles (the "correctness" standard), but if he or she correctly appreciates the applicable law, the court will properly recognize a wide discretion in the application of those principles to the particular facts. The same approach is taken to less exalted decision makers (*Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11). In the jargon of the judicial review bar, this is known as "segmentation".

G. *The Existence of a Privative Clause*

[143] The existence of a privative clause is currently subsumed within the "pragmatic and functional" test as one factor amongst others to be considered in determining the appropriate standard of review, where it supports the choice of the patent unreasonableness standard. A single standard of "reasonableness" cannot mean that the degree of deference is unaffected by the existence of a suitably worded privative clause. It is certainly a relevant contextual circumstance that helps to calibrate the intrusiveness of a court's review. It signals the level of respect that must be shown. Chief Justice Laskin during argument once memorably condemned the quashing of a labour board decision protected by a strong privative clause, by saying "what's wrong with these people [the judges], can't they read?" A system of judicial review based on the rule of law ought not to treat a privative clause as conclusive, but it is more than just another "factor" in the hopper of pragmatism and functionality. Its existence should presumptively foreclose judicial review on the basis of *outcome* on substantive grounds unless the applicant can show that the

du contrôle judiciaire. Plusieurs motifs d'annulation peuvent être invoqués à l'encontre d'une décision administrative, dont celui que son auteur a mal interprété le droit général. Subsidiairement, même si le décideur a bien interprété celui-ci (la norme de la décision correcte s'appliquant à cet égard), on peut lui reprocher de ne l'avoir pas correctement appliqué aux faits (le décideur ayant droit à la déférence sur ce point). Lorsque, par exemple, la décision d'extrader une personne est contestée sur le fondement de la *Charte canadienne des droits et libertés*, le ministre doit se conformer à l'interprétation judiciaire des principes constitutionnels (la norme de la « décision correcte »), mais lorsqu'il saisit bien le droit applicable, la cour lui reconnaît à juste titre un large pouvoir discrétionnaire dans l'application de ces principes aux faits de l'espèce. La même approche vaut pour les décideurs de rang inférieur (*Moreau-Bérubé c. Nouveau-Brunswick (Conseil de la magistrature)*, [2002] 1 R.C.S. 249, 2002 CSC 11). Dans le jargon du contrôle judiciaire, on parle de « fractionnement ».

G. *L'existence d'une clause privative*

[143] L'existence d'une clause privative est actuellement prise en compte lors l'analyse « pragmatique et fonctionnelle » comme l'un des facteurs jouant dans la détermination de la bonne norme de contrôle et elle milite alors en faveur de la norme du manifestement déraisonnable. Même si une seule norme de « raisonnabilité » s'applique, l'existence d'une clause privative convenablement libellée influence nécessairement le degré de déférence. Il s'agit sans aucun doute d'un élément contextuel pertinent qui permet à la cour de moduler son immixtion, et c'est un indice du respect qui s'impose. Lors de plaidoiries, le juge en chef Laskin a un jour vertement condamné l'annulation d'une décision administrative en droit du travail malgré l'application d'une clause privative non équivoque : [TRADUCTION] « Qu'est-ce qui ne va pas chez ces gens [les juges], ils ne savent pas lire? » Un mécanisme de contrôle judiciaire axé sur la primauté du droit ne doit pas tenir une clause privative pour décisive, mais celle-ci constitue davantage qu'un « facteur » parmi d'autres dans l'analyse pragmatique et fonctionnelle. Sa présence devrait *a priori*

clause, properly interpreted, permits it or there is some legal reason why it cannot be given effect.

H. *A Broader Reappraisal*

[144] "Reasonableness" is a big tent that will have to accommodate a lot of variables that inform and limit a court's review of the outcome of administrative decision making.

[145] The theory of our recent case law has been that once the appropriate standard of review is selected, it is a fairly straightforward matter to apply it. In practice, the criteria for selection among "reasonableness" standards of review proved to be undefinable and their application unpredictable. 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 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.

[146] The going-in presumption should be that the standard of review of any administrative outcome on grounds of substance is not correctness but reasonableness ("contextually" applied). The fact that the legislature designated someone other than the court as the decision maker calls for deference to (or judicial respect for) the outcome, absent a broad statutory right of appeal. Administrative decisions generally call for the exercise of discretion. Everybody recognizes in such cases that there is *no* single "correct" outcome. It should also be

faire obstacle au contrôle judiciaire de la *décision* sur le fond, sauf lorsque le demandeur peut établir que la clause, interprétée correctement, l'autorise ou que pour quelque motif juridique, il ne peut être donné effet à celle-ci.

H. *Une réévaluation plus large*

[144] La notion de « raisonnabilité » est vaste et son application devra prendre en compte un grand nombre de variables qui délimitent le contrôle judiciaire d'une décision administrative.

[145] Suivant la jurisprudence récente de notre Cour, une fois arrêtée, la norme de contrôle est en principe relativement simple à appliquer. Or, dans les faits, les critères présidant au choix entre les normes fondées sur la « raisonnabilité » se révèlent indéfinissables et leur application, imprévisible. 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 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.

[146] Il devrait être présumé au départ que la norme de contrôle de toute décision administrative sur le fond est celle non pas de la décision correcte, mais bien de la raisonnabilité (appliquée selon le contexte). Le fait que le législateur a conféré le pouvoir décisionnel à un autre organisme qu'une cour de justice appelle la déférence (ou le respect judiciaire), sauf droit d'appel général prévu par la loi. La décision administrative suppose normalement l'exercice du pouvoir discrétionnaire. Nul ne conteste qu'il *ne saurait* alors y avoir qu'une seule

presumed, in accordance with the ordinary rules of litigation, that the decision under review *is* reasonable until the applicant shows otherwise.

[147] An applicant urging the non-deferential "correctness" standard should be required to demonstrate that the decision under review rests on an error in the determination of a *legal* issue not confided (or which constitutionally *could* not be confided) to the administrative decision maker to decide, whether in relation to jurisdiction or the general law. Labour arbitrators, as in this case, command deference on legal matters within their enabling statute or on legal matters intimately connected thereto.

[148] When, then, should a decision be deemed "unreasonable"? My colleagues suggest a test of *irrationality* (para. 46), but the editors of de Smith point out that "many decisions which fall foul of [unreasonableness] have been coldly rational" (*de Smith, Woolf & Jowell: Judicial Review of Administrative Action* (5th ed. 1995), at para. 13-003). A decision meeting this description by this Court is *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29, where the Minister's appointment of retired judges with little experience in labour matters to chair "interest" arbitrations (as opposed to "grievance" arbitrations) between hospitals and hospital workers was "coldly rational" in terms of the Minister's own agenda, but was held by a majority of this Court to be patently unreasonable in terms of the history, object and purpose of the authorizing legislation. He had not used the appointment power for the purposes for which the legislature had conferred it.

[149] Reasonableness rather than rationality has been the traditional standard and, properly interpreted, it works. That said, a single "reasonableness" standard will now necessarily incorporate *both* the degree of deference formerly reflected in the distinction between patent unreasonableness and reasonableness *simpliciter*, *and* an assessment

décision correcte. Conformément aux règles qui régissent habituellement les litiges, on devrait aussi présumer que la décision visée par le contrôle *est* raisonnable, sauf preuve contraire du demandeur.

[147] Celui qui préconise l'application de la norme de la décision correcte — soit l'absence de déférence — devrait être tenu de prouver que la décision contestée résulte du règlement erroné d'une question *juridique* ne relevant pas (ou ne *pouvant* pas constitutionnellement relever) du décideur administratif, qu'elle ait trait à la compétence ou au droit en général. Un arbitre en droit du travail, comme celui visé en l'espèce, a droit à la déférence lorsque sa décision porte sur une question de droit relevant de sa loi habilitante ou sur une question de droit très connexe.

[148] Dans quels cas une décision devrait-elle alors être tenue pour « déraisonnable »? Mes collègues proposent le critère de l'*irrationalité* (par. 46). Or, l'introduction de *de Smith, Woolf & Jowell : Judicial Review of Administrative Action* (5e éd. 1995) signale que [TRADUCTION] « nombre de décisions qui heurtent [la raison] se révèlent froidement rationnelles » (par. 13-003). Dans l'affaire *S.C.F.P. c. Ontario (Ministre du Travail)*, [2003] 1 R.C.S. 539, 2003 CSC 29, où le ministre responsable avait choisi des juges retraités peu familiarisés avec le domaine des relations de travail pour présider des conseils d'arbitrage appelés à statuer sur des différends (et non des griefs) opposant des hôpitaux à leurs employés, la décision du ministre était « froidement rationnelle » au regard des objectifs du ministre, mais les juges majoritaires de la Cour ont estimé qu'elle était manifestement déraisonnable eu égard à l'historique, à l'objet et à la raison d'être de la loi habilitante. Le ministre n'avait pas exercé son pouvoir de désignation aux fins prévues par le législateur.

[149] La norme traditionnelle est celle de la raisonnabilité, et non de la rationalité. Interprétée correctement, elle s'applique fort bien. Dorénavant, toutefois, une norme de « raisonnabilité » unique englobera nécessairement le degré de déférence que traduisait auparavant la distinction entre le manifestement déraisonnable et le raisonnable *simpliciter*,

of the range of options reasonably open to the decision maker in the circumstances, in light of the reasons given for the decision. Any reappraisal of our approach to judicial review should, I think, explicitly recognize these different dimensions to the "reasonableness" standard.

I. *Judging "Reasonableness"*

[150] I agree with my colleagues that "reasonableness" depends on the context. It must be calibrated to fit the circumstances. A driving speed that is "reasonable" when motoring along a four-lane interprovincial highway is not "reasonable" when driving along an inner city street. The standard ("reasonableness") stays the same, but the reasonableness assessment will vary with the relevant circumstances.

[151] This, of course, is the nub of the difficulty. My colleagues write:

> In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. [para. 47]

I agree with this summary but what is required, with respect, is a more easily applied framework into which the judicial review court and litigants can plug in the relevant context. No one doubts that in order to overturn an administrative outcome on grounds of substance (i.e. leaving aside errors of fairness or law which lie within the supervising "function" of the courts), the reviewing court must be satisfied that the outcome was outside the scope of reasonable responses open to the decision maker under its grant of authority, usually a statute. "[T]here is always a perspective", observed Rand J., "within which a statute is intended [by the legislature] to operate": *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140. How is that "perspective" to be ascertained? The reviewing judge will obviously want to consider the precise nature and function of the decision maker including its expertise, the terms and objectives of the governing statute (or common law) conferring the power of decision, including

et la prise en compte des décisions qui auraient pu raisonnablement être rendues dans les circonstances, compte tenu des motifs invoqués. Je suis d'avis que toute réforme du mécanisme de contrôle judiciaire doit reconnaître expressément ces différents aspects de la norme de la « raisonnabilité ».

I. *Statuer sur la « raisonnabilité »*

[150] À l'instar de mes collègues, je crois que la « raisonnabilité » d'une décision tient au contexte. La raisonnabilité doit être adaptée aux circonstances. La limite de vitesse jugée « raisonnable » sur une autoroute interprovinciale à quatre voies ne l'est plus dans une rue du centre-ville. La norme (celle de la « raisonnabilité ») demeure la même, mais l'appréciation du caractère raisonnable varie selon les faits en cause.

[151] Tel est évidemment le nœud du problème. Mes collègues affirment :

> Le caractère raisonnable tient principalement à la justification de la décision, à la transparence et à l'intelligibilité du processus décisionnel, ainsi qu'à l'appartenance de la décision aux issues possibles acceptables pouvant se justifier au regard des faits et du droit. [par. 47]

Je suis d'accord, mais sauf le respect que je leur dois, il faut une grille d'analyse que la cour de révision et les parties puissent plus aisément appliquer aux faits en cause. Nul doute que pour infirmer une décision administrative sur le fond (abstraction faite des erreurs relatives à l'équité ou au droit, qui ressortissent à sa fonction de surveillance), la cour de révision doit être convaincue que la décision ne fait pas partie de celles que pouvait raisonnablement rendre le décideur dans l'exercice du pouvoir que lui confère généralement une disposition législative. Comme l'a fait observer le juge Rand, [TRADUCTION] « une loi est toujours censée [suivant l'intention du législateur] s'appliquer dans une certaine optique » : *Roncarelli c. Duplessis*, [1959] R.C.S. 121, p. 140. Comment doit-on déterminer cette « optique »? La cour de révision tiendra assurément compte de la nature et de la fonction précises du décideur, y compris son expertise, du libellé et des objectifs de la loi (ou de la common

the existence of a privative clause and the nature of the issue being decided. Careful consideration of these matters will reveal the extent of the discretion conferred, for example, the extent to which the decision formulates or implements broad public policy. In such cases, the range of permissible considerations will obviously be much broader than where the decision to be made is more narrowly circumscribed, e.g., whether a particular claimant is entitled to a disability benefit under governmental social programs. In some cases, the court will have to recognize that the decision maker was required to strike a proper balance (or achieve proportionality) between the adverse impact of a decision on the rights and interests of the applicant or others directly affected weighed against the public purpose which is sought to be advanced. In each case, careful consideration will have to be given to the reasons given for the decision. To this list, of course, may be added as many "contextual" considerations as the court considers relevant and material.

[152] Some of these indicia were included from the outset in the pragmatic and functional test itself (see *Bibeault*, at p. 1088). The problem, however, is that under *Bibeault*, and the cases that followed it, these indicia were used to choose among the different standards of review, which were themselves considered more or less fixed. In *Law Society of New Brunswick v. Ryan*, for example, the Court *rejected* the argument that "it is sometimes appropriate to apply the reasonableness standard more deferentially and sometimes less deferentially depending on the circumstances" (para. 43). It seems to me that collapsing everything beyond "correctness" into a single "reasonableness" standard will require a reviewing court to do exactly that.

[153] The Court's adoption in this case of a single "reasonableness" standard that covers both the degree of deference assessment and the reviewing court's evaluation, in light of the appropriate degree of deference, of whether the decision falls within a range of reasonable administrative choices will require a reviewing court to juggle a number of variables that are necessarily to be considered

law) conférant le pouvoir, y compris la présence d'une clause privative, et de la nature de la question à trancher. L'examen attentif de ces éléments révélera l'étendue du pouvoir discrétionnaire, comme la mesure dans laquelle la décision traduit ou met en œuvre une politique publique générale. Bien sûr, la gamme des éléments pouvant être considérés sera alors plus grande que lorsque la question à trancher est plus étroitement circonscrite (le demandeur a-t-il droit, p. ex., à une prestation d'invalidité en application d'un programme social public?). La cour devra parfois reconnaître que le décideur devait établir un juste équilibre (ou une proportionnalité) entre, d'une part, les répercussions défavorables de la décision sur les droits et les intérêts du demandeur ou d'autres personnes directement touchées et, d'autre part, l'objectif public poursuivi. Elle devra toujours considérer attentivement les motifs de la décision. Elle pourra évidemment prendre en compte tous les autres éléments « contextuels » qu'elle jugera pertinents et importants.

[152] Certains de ces éléments ont été intégrés dès le départ à l'analyse pragmatique et fonctionnelle elle-même (voir l'arrêt *Bibeault*, p. 1088). Or, dans cet arrêt comme dans ceux qui l'ont suivi, ces éléments ont présidé au choix entre les différentes normes de contrôle, lesquelles étaient considérées comme plus ou moins immuables. Dans l'arrêt *Barreau du Nouveau-Brunswick c. Ryan*, la Cour a *rejeté* l'argument qu'« il est parfois approprié d'appliquer la norme de la décision raisonnable avec plus de déférence et parfois avec moins de déférence, selon les circonstances » (par. 43). Assujettir tout ce qui n'est pas soumis à la norme de la « décision correcte » à une norme de « raisonnabilité » unique revient à exiger de la cour de révision qu'elle fasse exactement cela.

[153] Le fait que la Cour adopte en l'espèce une norme de « raisonnabilité » unique qui suppose à la fois que l'on arrête le degré de déférence approprié et, compte tenu de celui-ci, que l'on détermine si la décision administrative figure au nombre des choix qui s'offraient raisonnablement au décideur, oblige la cour de révision à soupeser un certain nombre de variables qui doivent nécessairement être

together. Asking courts to have regard to more than one variable is not asking too much, in my opinion. In other disciplines, data are routinely plotted simultaneously along both an *X* axis and a *Y* axis, without traumatizing the participants.

[154] It is not as though we lack guidance in the decided cases. Much has been written by various courts about deference and reasonableness in the particular contexts of different administrative situations. Leaving aside the "pragmatic and functional" test, we have ample precedents to show when it is (or is not) appropriate for a court to intervene in the outcome of an administrative decision. The problem is that courts have lately felt obliged to devote too much time to multi-part threshold tests instead of focussing on the who, what, why and wherefor of the litigant's complaint on its merits.

[155] That having been said, a reviewing court ought to recognize throughout the exercise that fundamentally the "reasonableness" of the outcome is an issue given to others to decide. The exercise of discretion is an important part of administrative decision making. Adoption of a single "reasonableness" standard should not be seen by potential litigants as a lowering of the bar to judicial intervention.

J. *Application to This Case*

[156] Labour arbitrators often have to juggle different statutory provisions in disposing of a grievance. The courts have generally attached great importance to their expertise in keeping labour peace. In this case, the adjudicator was dealing with his "home statute" plus other statutes intimately linked to public sector relations in New Brunswick. He was working on his "home turf", and the legislature has made clear in the privative clause that it intended the adjudicator to determine the outcome of the appellant's grievance. In this field, quick and cheap justice (capped by finality) advances the achievement of the legislative scheme. Recourse to judicial review is discouraged. I would therefore apply a reasonableness standard to the adjudicator's

considérées de pair. Selon moi, exiger des cours de justice qu'elles prennent en compte plus d'une variable à la fois n'est pas excessif. Dans d'autres domaines, il est courant que des données figurent sur l'axe des *X* et l'axe des *Y* sans que cela n'effare les participants.

[154] Ce n'est pas comme si la jurisprudence n'établissait aucun paramètre. Différentes cours de justice se sont prononcées abondamment sur la déférence et la raisonnabilité eu égard à différentes situations administratives. Au-delà de l'analyse « pragmatique et fonctionnelle », un grand nombre de décisions judiciaires permettent de déterminer dans quels cas il convient ou non de réformer une décision administrative. Or, ces dernières années, les cours se sont senties obligées de consacrer un temps considérable à l'application de critères préalables comportant de multiples volets, et ce, au détriment des tenants et des aboutissants du litige.

[155] Cela dit, tout au long de la démarche, la cour de révision doit se rappeler que, fondamentalement, ce n'est pas à elle de juger de la « raisonnabilité » d'une décision. Le pouvoir discrétionnaire joue un rôle important dans le processus décisionnel administratif. Il ne faudrait pas voir dans l'établissement d'une seule norme de « raisonnabilité » un assouplissement des conditions auxquelles une cour de justice peut s'immiscer dans ce processus.

J. *L'application à la présente espèce*

[156] L'arbitre doit souvent appliquer différentes dispositions législatives pour statuer sur un grief. Les tribunaux ont généralement accordé une grande importance à son expertise pour le maintien de la paix sociale. Dans la présente affaire, l'arbitre a appliqué sa « loi constitutive » et d'autres dispositions législatives intimement liées aux relations de travail dans les services publics au Nouveau-Brunswick. Il évoluait sur son propre terrain, et la clause privative indiquait clairement la volonté du législateur de lui laisser le soin de statuer sur le grief de l'appelant. Dans ce domaine, le caractère rapide et peu coûteux de la procédure (le caractère définitif de la décision jouant à cet égard) favorise la mise en œuvre du régime législatif. Le contrôle

interpretation of his "home turf" statutory framework.

[157] Once under the flag of reasonableness, however, the salient question before the adjudicator in this case was essentially legal in nature, as reflected in the reasons he gave for his decision. He was not called on to implement public policy; nor was there a lot of discretion in dealing with a non-unionized employee. The basic facts were not in dispute. He was disposing of a *lis* which he believed to be governed by the legislation. He was right to be conscious of the impact of his decision on the appellant, but he stretched the law too far in coming to his rescue. I therefore join with my colleagues in dismissing the appeal.

The reasons of Deschamps, Charron and Rothstein JJ. were delivered by

[158] DESCHAMPS J. — The law of judicial review of administrative action not only requires repairs, it needs to be cleared of superfluous discussions and processes. This area of the law can be simplified by examining the *substance* of the work courts are called upon to do when reviewing any case, whether it be in the context of administrative or of appellate review. Any review starts with the identification of the questions at issue as questions of law, questions of fact or questions of mixed fact and law. Very little else needs to be done in order to determine whether deference needs to be shown to an administrative body.

[159] By virtue of the Constitution, superior courts are the only courts that possess inherent jurisdiction. They are responsible both for applying the laws enacted by Parliament and the legislatures and for insuring that statutory bodies respect their legal boundaries. Parliament and the legislatures cannot totally exclude judicial oversight without overstepping the division between legislative or executive powers and judicial powers. Superior courts are, in the end, the protectors of the integrity of the rule of law and the justice system.

judiciaire est déconseillé aux parties. C'est pourquoi j'appliquerais la norme de la raisonnabilité à l'interprétation de sa loi habilitante par l'arbitre.

[157] Dès lors, toutefois, la principale question que devait trancher l'arbitre revêtait essentiellement un caractère juridique, comme l'attestent ses motifs. Il n'avait pas à appliquer une politique publique et il ne jouissait pas d'un large pouvoir discrétionnaire pour trancher à l'égard d'un employé non syndiqué. Les faits fondamentaux n'étaient pas contestés. Il devait statuer sur un différend qui, selon lui, ressortissait à la loi. Il a eu raison de se soucier de l'incidence de sa décision sur l'appelant, mais il a exagéré la portée de la loi au bénéfice de ce dernier. Je me joins donc à mes collègues pour rejeter le pourvoi.

Version française des motifs des juges Deschamps, Charron et Rothstein rendus par

[158] LA JUGE DESCHAMPS — Les règles régissant le contrôle judiciaire de l'action gouvernementale ont besoin de plus que d'une simple réforme. Le droit, en ce domaine, doit être débarassé des grilles d'analyse et des débats inutiles. On peut simplifier ce domaine du droit en s'en remettant à la *substance* du travail qu'accomplit une cour de justice lorsqu'elle est appelée à réviser une décision, que ce soit lors d'un contrôle administratif ou d'un simple appel. Dans chaque cas, il faut d'abord déterminer si la question en litige est une question de droit, de fait ou mixte de fait et de droit. Cela fait, bien peu d'autres éléments doivent s'ajouter à l'analyse pour déterminer si la cour doit faire preuve de déférence à l'endroit de l'organisme administratif.

[159] En vertu de la Constitution, seules les cours supérieures sont dotées d'une compétence inhérente. Il leur revient d'appliquer les lois adoptées par le Parlement et les assemblées législatives et de veiller à ce que les organismes créés par les lois n'outrepassent pas leurs pouvoirs légaux. Un législateur ne peut écarter complètement leur rôle de surveillance sans enfreindre la règle de la séparation des pouvoirs législatif ou exécutif et du pouvoir judiciaire. Les cours supérieures assurent en définitive l'intégrité de la règle de droit et du système de

Judicial review of administrative action is rooted in these fundamental principles and its boundaries are largely informed by the roles of the respective branches of government.

[160] The judicial review of administrative action has, over the past 20 years, been viewed as involving a preliminary analysis of whether deference is owed to an administrative body based on four factors: (1) the nature of the question, (2) the presence or absence of a privative clause, (3) the expertise of the administrative decision maker and (4) the object of the statute. The process of answering this preliminary question has become more complex than the determination of the substantive questions the court is called upon to resolve. In my view, the analysis can be made plainer if the focus is placed on the issues the parties need to have adjudicated rather than on the nature of the judicial review process itself. By focusing first on "the nature of the question", to use what has become familiar parlance, it will become apparent that all four factors need not be considered in every case and that the judicial review of administrative action is often not distinguishable from the appellate review of court decisions.

[161] Questions before the courts have consistently been identified as either questions of fact, questions of law or questions of mixed fact and law. Whether undergoing appellate review or administrative law review, decisions on questions of fact always attract deference. The use of different terminology — "palpable and overriding error" versus "unreasonable decision" — does not change the substance of the review. Indeed, in the context of appellate review of court decisions, this Court has recognized that these expressions as well as others all encapsulate the same principle of deference with respect to a trial judge's findings of fact: *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25, at paras. 55-56. Therefore, when the issue is limited to questions of fact, there is no need to enquire into any other factor in order to determine that deference is owed to an administrative decision maker.

[162] Questions of law, by contrast, require more thorough scrutiny when deference is evaluated,

justice. Le contrôle judiciaire de l'action administrative s'appuie sur ces principes fondamentaux et il est en grande partie délimité par le rôle de chacun de ces organes du gouvernement.

[160] Depuis une vingtaine d'années, on considère que le contrôle judiciaire de l'action administrative exige que l'on détermine au préalable le degré de déférence applicable, et ce, en fonction de quatre facteurs : (1) la nature de la question en cause, (2) l'existence ou l'inexistence d'une clause privative, (3) l'expertise du décideur administratif et (4) l'objet de la loi. La démarche préalable se révèle plus complexe que le règlement des questions de fond en litige. À mon sens, l'analyse peut être simplifiée si une plus grande importance est accordée aux questions que les parties demandent à la cour de trancher qu'à la nature du processus de révision lui-même. En s'attachant d'abord à « la nature de la question », pour reprendre l'expression désormais consacrée, on constatera que les quatre facteurs ne doivent pas être pris en compte dans tous les cas et que, souvent, le contrôle judiciaire de l'action administrative fait appel aux mêmes notions que le contrôle en appel d'une décision judiciaire.

[161] De tout temps, une question en litige a été qualifiée de question de fait, de droit ou mixte de fait et de droit. Dans le cadre d'un appel ou d'un contrôle judiciaire, la décision relative à une question de fait commande toujours la déférence. Les nuances terminologiques — « erreur manifeste et dominante » ou « décision déraisonnable » — ne changent pas la teneur de l'examen. En effet, dans le contexte d'un appel visant une décision judiciaire, la Cour a reconnu que ces expressions ainsi que d'autres renvoient au même principe du respect des conclusions de fait tirées en première instance : *H.L. c. Canada (Procureur général)*, [2005] 1 R.C.S. 401, 2005 CSC 25, par. 55-56. Partant, lorsque le litige ne porte que sur les faits, il n'est nécessaire de tenir compte d'aucun autre facteur pour déterminer si la déférence s'impose à l'endroit du décideur administratif.

[162] Par contre, dans le cas d'une question de droit, un examen plus approfondi est requis pour

and the particular context of administrative decision making can make judicial review different than appellate review. Although superior courts have a core expertise to interpret questions of law, Parliament or a legislature may have provided that the decision of an administrative body is protected from judicial review by a privative clause. When an administrative body is created to interpret and apply certain legal rules, it develops specific expertise in exercising its jurisdiction and has a more comprehensive view of those rules. Where there is a privative clause, Parliament or a legislature's intent to leave the final decision to that body cannot be doubted and deference is usually owed to the body.

[163] However, privative clauses cannot totally shield an administrative body from review. Parliament, or a legislature, cannot have intended that the body would be protected were it to overstep its delegated powers. Moreover, if such a body is asked to interpret laws in respect of which it does not have expertise, the constitutional responsibility of the superior courts as guardians of the rule of law compels them to insure that laws falling outside an administrative body's core expertise are interpreted correctly. This reduced deference insures that laws of general application, such as the Constitution, the common law and the *Civil Code*, are interpreted correctly and consistently. Consistency of the law is of prime societal importance. Finally, deference is not owed on questions of law where Parliament or a legislature has provided for a statutory right of review on such questions.

[164] The category of questions of mixed fact and law should be limited to cases in which the determination of a legal issue is inextricably intertwined with the determination of facts. Often, an administrative body will first identify the rule and then apply it. Identifying the contours and the content of a legal rule are questions of law. Applying the rule, however, is a question of mixed fact and law. When considering a question of mixed fact and law, a reviewing court should show an adjudicator the same deference as an appeal court would show a lower court.

évaluer le niveau de déférence, et dans le contexte particulier de l'action administrative, le contrôle judiciaire peut différer de l'appel. Les cours supérieures sont certes mieux placées pour interpréter le droit, mais le législateur peut, au moyen d'une clause privative, limiter le contrôle judiciaire d'une décision administrative. Lorsqu'un organisme administratif est constitué pour interpréter et appliquer certaines règles juridiques, il acquiert une expertise particulière dans l'exercice de sa compétence et a une compréhension plus complète de ces règles. En présence d'une clause privative, l'on ne saurait mettre en doute la volonté du législateur de laisser à l'organisme le soin de trancher en dernier ressort, de sorte que la déférence s'impose habituellement.

[163] Une clause privative ne peut toutefois faire totalement obstacle au contrôle judiciaire. Le législateur ne peut avoir voulu y soustraire l'organisme administratif qui outrepasse les pouvoirs qui lui sont délégués. De plus, en tant que gardiennes de la primauté du droit, les cours supérieures ont l'obligation constitutionnelle de veiller à ce qu'un organisme administratif interprète correctement les lois qui ne ressortissent pas à son domaine d'expertise propre. Cette atténuation de la déférence garantit une interprétation juste et cohérente des dispositions de portée générale comme celles de la Constitution, de la common law et du *Code civil*. La cohérence du droit revêt une importance primordiale dans notre société. Enfin, une cour n'a pas à montrer de déférence lorsqu'il s'agit d'une question de droit et que la loi prévoit expressément un droit de révision pour ce type de question.

[164] Il n'y a de question mixte de fait et de droit que lorsque la question de droit est inextricablement liée aux conclusions de fait. Dans bien des cas, l'organisme administratif détermine d'abord la règle applicable, puis l'applique. Circonscrire une règle de droit et en déterminer la teneur sont des questions de droit. Toutefois, l'application de la règle de droit aux faits est une question mixte de fait et de droit. La cour de révision qui se penche sur une question mixte de fait et de droit devrait manifester autant de déférence envers le décideur que le ferait une cour d'appel vis-à-vis d'une cour inférieure.

[165] In addition, Parliament or a legislature may confer a discretionary power on an administrative body. Since the case at bar does not concern a discretionary power, it will suffice for the purposes of these reasons to note that, in any analysis, deference is owed to an exercise of discretion unless the body has exceeded its mandate.

[166] In summary, in the adjudicative context, the same deference is owed in respect of questions of fact and questions of mixed fact and law on administrative review as on an appeal from a court decision. A decision on a question of law will also attract deference, provided it concerns the interpretation of the enabling statute and provided there is no right of review.

[167] I would be remiss were I to disregard the difficulty inherent in any exercise of deference. In *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63, LeBel J. explained why a distinction between the standards of patent unreasonableness and unreasonableness *simpliciter* is untenable. I agree. The problem with the definitions resides in attempts by the courts to enclose the concept of reasonableness in a formula fitting all cases. No matter how this Court defines this concept, any context considered by a reviewing court will, more often than not, look more like a rainbow than a black and white situation. One cannot change this reality. I use the word "deference" to define the contours of reasonableness because it describes the attitude adopted towards the decision maker. The word "reasonableness" concerns the decision. However, neither the concept of reasonableness nor that of deference is particular to the field of administrative law. These concepts are also found in the context of criminal and civil appellate review of court decisions. Yet, the exercise of the judicial supervisory role in those fields has not given rise to the complexities encountered in administrative law. The process of stepping back and taking an *ex post facto* look at the decision to determine whether there is an error justifying intervention should not be more

[165] De plus, le législateur peut investir un organisme administratif d'un pouvoir discrétionnaire. Comme un tel pouvoir n'est pas en cause dans la présente affaire, je me contente de faire observer que peu importe le cadre d'analyse, il y a lieu de faire preuve de déférence à l'égard de l'exercice du pouvoir discrétionnaire, sauf lorsque le décideur outrepasse son mandat.

[166] En résumé, dans le contexte juridictionnel, la décision sur une question de fait ou une question mixte de fait et de droit commande le même respect qu'il s'agisse du contrôle d'une décision administrative ou de l'appel d'une décision judiciaire. La décision sur une question de droit justifie aussi la déférence, à condition qu'elle porte sur l'interprétation de la loi habilitante et qu'il n'y ait pas de droit de révision.

[167] Je ne saurais passer sous silence la difficulté inhérente à tout exercice de déférence. Dans l'arrêt *Toronto (Ville) c. S.C.F.P., section locale 79*, [2003] 3 R.C.S. 77, 2003 CSC 63, le juge LeBel explique en quoi la distinction établie entre la norme de la décision manifestement déraisonnable et celle de la décision déraisonnable *simpliciter* n'est pas défendable. Je suis du même avis. Il est difficile de définir ces normes parce que les tribunaux tentent de ramener la notion de raisonnabilité à une formule unique d'application universelle. Quelle que soit la manière dont la Cour définit le concept, le contexte soumis à l'examen de la cour de révision sera plus souvent nuancé que tranché. On ne peut changer cette réalité. J'emploie le terme « déférence » pour définir les contours de la raisonnabilité parce qu'il renvoie à l'attitude adoptée vis-à-vis du décideur. Le terme « raisonnabilité » se rattache, lui, à la décision. Cependant, ni la notion de raisonnabilité ni celle de déférence ne sont spécifiques au droit administratif. On les retrouve également dans le contexte du contrôle en appel d'une décision judiciaire rendue au pénal ou au civil. Pourtant, dans ces domaines, le contrôle judiciaire ne soulève pas les difficultés rencontrées en droit administratif. La démarche qui consiste à prendre du recul et à faire un examen *ex post facto* pour déterminer si la décision est entachée d'une erreur justifiant sa révision ne devrait

complex in the administrative law context than in the criminal and civil law contexts.

[168] In the case at bar, the adjudicator was asked to adjudicate the grievance of a non-unionized employee. This meant that he had to identify the rules governing the contract. Identifying those rules is a question of law. Section 20 of the *Civil Service Act*, S.N.B. 1984, c. C-5.1, incorporates the rules of the common law, which accordingly become the starting point of the analysis. The adjudicator had to decide whether those rules had been ousted by the *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P-25 ("*PSLRA*"), as applied, *mutatis mutandis*, to the case of a non-unionized employee (ss. 97(2.1), 100.1(2) and 100.1(5)). The common law rules relating to the dismissal of an employee differ completely from the ones provided for in the *PSLRA* that the adjudicator is regularly required to interpret. Since the common law, not the adjudicator's enabling statute, is the starting point of the analysis, and since the adjudicator does not have specific expertise in interpreting the common law, the reviewing court does not have to defer to his decision on the basis of expertise. This leads me to conclude that the reviewing court can proceed to its own interpretation of the rules applicable to the non-unionized employee's contract of employment and determine whether the adjudicator could enquire into the cause of the dismissal. The applicable standard of review is correctness.

[169] It is clear from the adjudicator's reasoning that he did not even consider the common law rules. He said:

> An employee to whom section 20 of the *Civil Service Act* and section 100.1 of the *PSLR Act* apply may be discharged for cause, with reasonable notice or with severance pay in lieu of reasonable notice. A discharge for cause may be for disciplinary or non-disciplinary reasons. [p. 5]

[170] The employer's common law right to dismiss without cause is not alluded to in this key passage of the decision. Unlike a unionized employee, a non-unionized employee does not have employment security. His or her employment may be terminated without cause. The corollary of the

pas être plus complexe en matière administrative qu'en matière pénale ou civile.

[168] En l'espèce, l'arbitre était saisi du grief d'un employé non syndiqué. Il devait donc déterminer les règles applicables au contrat. La détermination de ces règles constitue une décision sur une question de droit. L'article 20 de la *Loi sur la Fonction publique*, L.N.-B. 1984, ch. C-5.1, incorpore les règles de la common law, lesquelles constituent dès lors le point de départ de l'analyse. L'arbitre devait déterminer si ces règles étaient écartées par la *Loi relative aux relations de travail dans les services publics*, L.R.N.-B. 1973, ch. P-25 (« *LRTSP* »), appliquée avec les adaptations nécessaires à l'employé non syndiqué (par. 97(2.1), 100.1(2) et 100.1(5)). Les règles de la common law relatives au congédiement d'un employé diffèrent totalement de celles prévues dans la *LRTSP* que l'arbitre est régulièrement appelé à interpréter. La décision ne commande pas la retenue, car c'est la common law, et non la loi habilitante, qui est le point de départ de l'analyse; l'arbitre ne possède en ce domaine aucune expertise particulière. J'en conclus que la cour de révision peut s'en remettre à sa propre interprétation des règles applicables au contrat d'emploi de l'employé non syndiqué et déterminer si l'arbitre pouvait ou non s'enquérir des motifs du congédiement. La norme de contrôle applicable est celle de la décision correcte.

[169] Il ressort du raisonnement de l'arbitre que l'application des règles de la common law n'a même pas été envisagée :

> [TRADUCTION] L'employé visé à l'art. 20 de la *Loi sur la Fonction publique* et à l'art. 100.1 de la *LRTSP* peut être congédié pour motif avec préavis raisonnable ou indemnité en tenant lieu. Un tel congédiement peut, selon le cas, se fonder sur des motifs disciplinaires ou autres. [p. 5]

[170] Dans ce passage clé, l'arbitre ne mentionne pas que la common law permet à l'employeur de congédier l'employé sans motif. Contrairement à l'employé syndiqué, l'employé non syndiqué ne bénéficie pas de la sécurité d'emploi. Il peut être mis fin à son emploi sans motif. Ce droit de l'employeur

employer's right to dismiss without cause is the employee's right to reasonable notice or to compensation in lieu of notice. The distinction between the common law rules of employment and the statutory rules applicable to a unionized employee is therefore essential if s. 97(2.1) is to be applied *mutatis mutandis* to the case of a non-unionized employee as required by s. 100.1(5). The adjudicator's failure to inform himself of this crucial difference led him to look for a cause, which was not relevant in the context of a dismissal without cause. In a case involving dismissal without cause, only the amount of the compensation or the length of the notice is relevant. In a case involving dismissal for cause, the employer takes the position that no compensation or notice is owed to the employee. This was not such a case. In the case at bar, the adjudicator's role was limited to evaluating the length of the notice. He erred in interpreting s. 97(2.1) in a vacuum. He overlooked the common law rules, misinterpreted s. 100.1(5) and applied s. 97(2.1) literally to the case of a non-unionized employee.

[171] This case is one where, even if deference had been owed to the adjudicator, his interpretation could not have stood. The legislature could not have intended to grant employment security to non-unionized employees while providing only that the *PSLRA* was to apply *mutatis mutandis*. This right is so fundamental to an employment relationship that it could not have been granted in so indirect and obscure a manner.

[172] In this case, the Court has been given both an opportunity and the responsibility to simplify and clarify the law of judicial review of administrative action. The judicial review of administrative action need not be a complex area of law in itself. Every day, reviewing courts decide cases raising multiple questions, some of fact, some of mixed fact and law and some purely of law; in various contexts, the first two of these types of questions tend to require deference, while the third often does not. Reviewing courts are already amply equipped to resolve such questions and do not need a specialized analytical toolbox in order to review administrative decisions.

a pour corollaire le droit de l'employé à un préavis raisonnable ou à une indemnité en tenant lieu. La distinction entre les règles de la common law régissant l'emploi et celles d'origine législative applicables à l'employé syndiqué est donc essentielle à l'application du par. 97(2.1) à un employé non syndiqué, avec les adaptations nécessaires, conformément au par. 100.1(5). L'omission de tenir compte de cette différence cruciale a amené l'arbitre à rechercher un motif de congédiement, ce qui était hors de propos dans le contexte d'un congédiement sans motif. En effet, dans le cas d'un tel congédiement, seul est en cause le montant de l'indemnité ou la durée du préavis. Lorsqu'il congédie un employé pour motif, l'employeur tient pour acquis qu'il n'a pas à lui verser d'indemnité ou à lui donner de préavis. Or, en l'espèce, il ne s'agit pas d'un congédiement pour motif. Le rôle de l'arbitre se limitait à l'examen de la durée du préavis. Il a eu tort d'interpréter le par. 97(2.1) en vase clos. Il a ignoré les règles de la common law, il a mal interprété le par. 100.1(5) et il a appliqué le par. 97(2.1) à la lettre à un employé non syndiqué.

[171] Dans la présente affaire, même si l'arbitre avait eu droit à déférence, son interprétation n'aurait pu être retenue. Le législateur n'a pu manifester son intention d'accorder la sécurité d'emploi aux employés non syndiqués en prévoyant seulement l'application de la *LRTSP* avec les adaptations nécessaires. En matière de relations de travail, ce droit revêt une importance telle qu'il ne saurait être reconnu de manière aussi indirecte et vague.

[172] Dans le présent pourvoi, la Cour a à la fois la possibilité et l'obligation de simplifier et de clarifier le droit relatif au contrôle judiciaire de l'action administrative, un domaine qui ne saurait être condamné à la complexité. Tous les jours, les cours de révision sont appelées à statuer sur des affaires soulevant de multiples questions, certaines de fait, d'autres de fait et de droit et d'autres encore, de droit seulement. Dans les divers contextes considérés, les deux premières catégories de questions commandent la déférence, mais pas toujours la troisième. Les cours de révision sont déjà tout à fait en mesure de trancher ces questions et elles n'ont pas besoin de nouveaux outils d'analyse spécialisés pour contrôler les décisions administratives.

[173] On the issue of natural justice, I agree with my colleagues. On the result, I agree that the appeal should be dismissed.

APPENDIX

Relevant Statutory Provisions

Civil Service Act, S.N.B. 1984, c. C-5.1

20 Subject to the provisions of this Act or any other Act, termination of the employment of a deputy head or an employee shall be governed by the ordinary rules of contract.

Public Service Labour Relations Act, R.S.N.B. 1973, c. P-25

92(1) Where an employee has presented a grievance up to and including the final level in the grievance process with respect to

(*a*) the interpretation or application in respect of him of a provision of a collective agreement or an arbitral award, or

(*b*) disciplinary action resulting in discharge, suspension or a financial penalty,

and his grievance has not been dealt with to his satisfaction, he may, subject to subsection (2), refer the grievance to adjudication.

Public Service Labour Relations Act, R.S.N.B. 1973, c. P-25, as amended

97(2.1) Where an adjudicator determines that an employee has been discharged or otherwise disciplined by the employer for cause and the collective agreement or arbitral award does not contain a specific penalty for the infraction that resulted in the employee being discharged or otherwise disciplined, the adjudicator may substitute such other penalty for the discharge or discipline as to the adjudicator seems just and reasonable in all the circumstances.

. . .

100.1(2) An employee who is not included in a bargaining unit may, in the manner, form and within such time as may be prescribed, present to the employer a

[173] Je souscris aux motifs de mes collègues concernant le respect de la justice naturelle. Je suis également d'avis de rejeter le pourvoi.

ANNEXE

Dispositions législatives

Loi sur la Fonction publique, L.N.-B. 1984, ch. C-5.1

20 Sous réserve de la présente loi ou de toute autre loi, la cessation d'emploi d'un administrateur général ou d'un employé est régie par les règles contractuelles ordinaires.

Loi relative aux relations de travail dans les services publics, L.R.N.-B. 1973, ch. P-25

92(1) Lorsqu'un employé a porté son grief au plus haut palier de la procédure applicable aux griefs, en ce qui concerne

a) l'interprétation ou l'application à son égard d'une disposition d'une convention collective ou d'une sentence arbitrale, ou

b) une mesure disciplinaire entraînant le congédiement, la suspension ou une peine pécuniaire,

et que son grief n'a pas été réglé de façon satisfaisante pour lui, il peut, sous réserve du paragraphe (2), renvoyer ce grief à l'arbitrage.

Loi relative aux relations de travail dans les services publics, L.R.N.-B. 1973, ch. P-25, et modifications

97(2.1) Lorsqu'un arbitre décide qu'un employé a été congédié ou qu'une mesure disciplinaire a été autrement prise contre lui par l'employeur pour motif et que la convention collective ou la sentence arbitrale ne contient pas une peine spécifique pour l'infraction en raison de laquelle l'employé a été congédié ou s'est vu imposer autrement une mesure disciplinaire, l'arbitre peut substituer une autre peine pour le congédiement ou la mesure disciplinaire qui semble juste et raisonnable à l'arbitre dans toutes les circonstances.

. . .

100.1(2) Un employé qui ne fait pas partie d'une unité de négociation peut, de la manière, au moyen de la formule et dans le délai qui peuvent être prescrits, présenter

grievance with respect to discharge, suspension or a financial penalty.

100.1(3) Where an employee has presented a grievance in accordance with subsection (2) and the grievance has not been dealt with to the employee's satisfaction, the employee may refer the grievance to the Board who shall, in the manner and within such time as may be prescribed, refer the grievance to an adjudicator appointed by the Board.

. . .

100.1(5) Sections 19, 97, 98.1, 101, 108 and 111 apply *mutatis mutandis* to an adjudicator to whom a grievance has been referred in accordance with subsection (3) and in relation to any decision rendered by such adjudicator.

. . .

101(1) Except as provided in this Act, every order, award, direction, decision, declaration or ruling of the Board, an arbitration tribunal or an adjudicator is final and shall not be questioned or reviewed in any court.

101(2) No order shall be made or process entered, and no proceedings shall be taken in any court, whether by way of injunction, judicial review, or otherwise, to question, review, prohibit or restrain the Board, an arbitration tribunal or an adjudicator in any of its or his proceedings.

Appeal dismissed.

Solicitors for the appellant: Stewart McKelvey, Fredericton.

Solicitor for the respondent: Attorney General of New Brunswick, Fredericton.

un grief à l'employeur à l'égard du congédiement, de la suspension ou d'une peine pécuniaire.

100.1(3) Lorsqu'un employé a présenté un grief conformément au paragraphe (2) et que le grief n'a pas été traité à la satisfaction de l'employé, l'employé peut renvoyer le grief à la Commission qui doit, de la manière et dans le délai qui peuvent être prescrits, renvoyer le grief à un arbitre nommé par la Commission.

. . .

100.1(5) Les articles 19, 97, 98.1, 101, 108 et 111 s'appliquent *mutatis mutandis* à un arbitre à qui un grief a été renvoyé conformément au paragraphe (3) et relativement à toute décision rendue par cet arbitre.

. . .

101(1) Sous réserve des dispositions contraires de la présente loi, toute ordonnance, sentence, directive, décision ou déclaration de la Commission, d'un tribunal d'arbitrage ou d'un arbitre, est définitive et ne peut être contestée devant aucun tribunal ni revisée par aucun tribunal.

101(2) Aucune ordonnance ne peut être rendue, aucune action intentée et aucune procédure entamée devant un tribunal, par voie d'injonction, de recours en révision, ou autrement, pour contester, réviser, supprimer ou restreindre les pouvoirs de la Commission, d'un tribunal d'arbitrage ou d'un arbitre dans l'une quelconque de leurs procédures.

Pourvoi rejeté.

Procureurs de l'appelant : Stewart McKelvey, Fredericton.

Procureur de l'intimée : Procureur général du Nouveau-Brunswick, Fredericton.

TAB 4

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

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.

Held: The appeal from the result should be dismissed.

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.

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.

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

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.

Arrêt : Le pourvoi quant à l'issue est rejeté.

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.

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.

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

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

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

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.

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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 n^o^ 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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APPEAL from a judgment of the Quebec Court of Appeal (Rochon, Dufresne and Léger JJ.A.), 2010 QCCA 24, [2010] R.J.Q. 77, 326 D.L.R. (4th) 749, [2010] Q.J. No. 88 (QL), 2010 CarswellQue 13368, affirming a decision of Déziel J., 2008 QCCS 2450 (CanLII), [2008] J.Q. nº 5222 (QL), 2008 CarswellQue 5285, dismissing an application for judicial review of a decision of the Tribunal des professions, 2007 QCTP 152 (CanLII), [2007] D.T.P.Q. nº 152 (QL). Appeal dismissed.

Sophie Dormeau and *Sophie Préfontaine*, for the appellant.

Claude G. Leduc and *Luce Bastien*, for the respondent Pierre Bernard, in his capacity as Assistant Syndic of the Barreau du Québec.

Dominique A. Jobin and *Noémi Potvin*, for the respondents Tribunal des professions and the Attorney General of Quebec.

Babak Barin and *Frédéric Côté*, for the intervener the Federation of Law Societies of Canada.

David Grossman, Sylvain Lussier, *Julien Morissette* and *Annie Gallant*, for the intervener the Canadian Civil Liberties Association.

Mathieu Bouchard and *Audrey Boctor*, for the intervener the Young Bar Association of Montreal.

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POURVOI contre un arrêt de la Cour d'appel du Québec (les juges Rochon, Dufresne et Léger), 2010 QCCA 24, [2010] R.J.Q. 77, 326 D.L.R. (4th) 749, [2010] J.Q. nº 88 (QL), 2010 CarswellQue 77, qui a confirmé une décision du juge Déziel, 2008 QCCS 2450 (CanLII), [2008] J.Q. nº 5222 (QL), 2008 CarswellQue 5285, qui avait rejeté une requête en révision judiciaire d'une décision du Tribunal des professions, 2007 QCTP 152 (CanLII), [2007] D.T.P.Q. nº 152 (QL). Pourvoi rejeté.

Sophie Dormeau et *Sophie Préfontaine*, pour l'appelant.

Claude G. Leduc et *Luce Bastien*, pour l'intimé Pierre Bernard, ès qualités de syndic adjoint du Barreau du Québec.

Dominique A. Jobin et *Noémi Potvin*, pour les intimés le Tribunal des professions et le procureur général du Québec.

Babak Barin et *Frédéric Côté*, pour l'intervenante la Fédération des ordres professionnels de juristes du Canada.

David Grossman, *Sylvain Lussier*, *Julien Morissette* et *Annie Gallant*, pour l'intervenante l'Association canadienne des libertés civiles.

Mathieu Bouchard et *Audrey Boctor*, pour l'intervenante l'Association du Jeune Barreau de Montréal.

The judgment of the Court was delivered by

[1] Abella J. — The focus of this appeal is on the decision of a disciplinary body to reprimand a lawyer for the content of a letter he wrote to a judge after a court proceeding.

[2] The lawyer does not challenge the constitutionality of the provision in the *Code of ethics* under which he was reprimanded. Nor, before us, does he challenge the length of the suspension he received. What he *does* challenge, is the constitutionality of the decision itself, claiming that it violates his freedom of expression under the *Canadian Charter of Rights and Freedoms.*

[3] This raises squarely the issue of how to protect *Charter* guarantees and the values they reflect in the context of adjudicated administrative decisions. Normally, if a discretionary administrative decision is made by an adjudicator within his or her mandate, that decision is judicially reviewed for its reasonableness. The question is whether the presence of a *Charter* issue calls for the replacement of this administrative law framework with the *Oakes* test, the test traditionally used to determine whether the state has justified a law's violation of the *Charter* as a "reasonable limit" under s. 1.

[4] It seems to me to be possible to reconcile the two regimes in a way that protects the integrity of each. The way to do that is to recognize that an adjudicated administrative decision is not like a law which can, theoretically, be objectively justified by the state, making the traditional s. 1 analysis an awkward fit. On whom does the onus lie, for example, to formulate and assert the pressing and substantial objective of an adjudicated decision, let alone justify it as rationally connected to, minimally impairing of, and proportional to that objective? On the other hand, the protection of *Charter* guarantees is a fundamental and

Version française du jugement de la Cour rendu par

[1] La juge Abella — Le présent appel porte principalement sur la décision d'un comité de discipline de réprimander un avocat pour le contenu d'une lettre qu'il a écrite à un juge après une audience.

[2] L'avocat ne conteste pas la constitutionnalité de la disposition du *Code de déontologie* en vertu de laquelle il a été sanctionné. Il ne conteste pas non plus, devant nous, la durée de la suspension qui lui a été infligée. Ce qu'il conteste, c'est la constitutionnalité de la décision elle-même, puisqu'il prétend qu'elle enfreint la liberté d'expression que lui garantit la *Charte canadienne des droits et libertés*.

[3] Cela pose, sans détour, la question de la protection des garanties visées par la *Charte* et des valeurs qu'elles reflètent, dans le contexte des décisions administratives en matières contentieuses. Normalement, si un décideur a rendu une décision administrative conforme à son mandat en exerçant un pouvoir discrétionnaire, la révision judiciaire qui la concerne vise à juger de son caractère raisonnable. Ainsi, la question à trancher est celle de savoir si la présence d'une question relative à la *Charte* appelle le remplacement de ce cadre d'analyse de droit administratif par le test énoncé dans *R. c. Oakes*, [1986] 1 R.C.S. 103, test utilisé traditionnellement pour déterminer si l'État a justifié la violation de la *Charte* par une loi en démontrant que cette violation s'inscrit dans les limites raisonnables au sens de l'article premier.

[4] Il me semble possible de concilier les deux régimes de manière à protéger l'intégrité de chacun d'entre eux. Pour ce faire, il faut reconnaître qu'une décision administrative en matière contentieuse n'est pas assimilable à une loi qui peut, en théorie, être objectivement justifiée par l'État et que, dans ce contexte, l'analyse traditionnelle fondée sur l'article premier est boiteuse. Sur qui pèserait, par exemple, le fardeau de formuler et de défendre l'objectif urgent et réel d'une telle décision administrative, sans parler du fardeau de démontrer l'existence d'un lien rationnel, d'une atteinte minimale ainsi que la proportionnalité de cette atteinte

pervasive obligation, no matter which adjudicative forum is applying it. How then do we ensure this rigorous *Charter* protection while at the same time recognizing that the assessment must necessarily be adjusted to fit the contours of what is being assessed and by whom?

[5] We do it by recognizing that while a formulaic application of the *Oakes* test may not be workable in the context of an adjudicated decision, distilling its essence works the same justificatory muscles: balance and proportionality. I see nothing in the administrative law approach which is inherently inconsistent with the strong *Charter* protection — meaning its guarantees and values — we expect from an *Oakes* analysis. The notion of deference in administrative law should no more be a barrier to effective *Charter* protection than the margin of appreciation is when we apply a full s. 1 analysis.

[6] 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. In assessing whether an adjudicated decision violates the *Charter*, however, 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.

à l'objectif visé? Par ailleurs, la protection des garanties visées par la *Charte* constitue une obligation fondamentale et omniprésente, quel que soit le forum décisionnel qui en assure l'application. Dans ce contexte, comment pouvons-nous assurer cette protection constitutionnelle rigoureuse tout en reconnaissant que l'évaluation doit nécessairement être modulée de manière à ce qu'elle soit adaptée à ce qui est évalué et à l'instance qui y procède?

[5] Nous le faisons en reconnaissant que même si l'application convenue du test énoncé dans *Oakes* pourrait ne pas convenir dans le contexte d'une décision administrative en matière contentieuse, en extraire l'essence fait intervenir les mêmes réflexes justificateurs : l'équilibre et la proportionnalité. Je ne vois rien dans l'approche du droit administratif qui soit intrinsèquement incompatible avec la solide protection conférée par la *Charte* — soit la protection des garanties qui y sont énoncées et des valeurs qu'elle consacre — que nous attendons d'une analyse conforme à *Oakes*. De plus, la notion de déférence applicable en droit administratif ne devrait pas plus constituer un obstacle à une protection constitutionnelle efficace que ne le fait la marge d'appréciation quand nous appliquons l'analyse complète fondée sur l'article premier.

[6] 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.

[7] As this Court has noted, most recently in *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, the nature of the reasonableness analysis is always contingent on its context. 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.

[8] In this case, the discipline committee's decision to reprimand the lawyer reflected a proportionate balancing of its public mandate to ensure that lawyers behave with "objectivity, moderation and dignity" with the lawyer's expressive rights. It is, as a result, a reasonable one.

Background

[9] Gilles Doré was counsel for Daniel Lanthier in criminal proceedings. On June 18 and 19, 2001, Mr. Doré appeared before Boilard J. in the Superior Court of Quebec seeking a stay of proceedings or, in the alternative, the release of his client on bail. In the course of Mr. Doré's argument, Justice Boilard said about him that [TRANSLATION] "an insolent lawyer is rarely of use to his client". In his written reasons rejecting Mr. Doré's application on June 21, 2001, Boilard J. levied further criticism (*R. v. Lanthier*, 2001 CanLII 9351). He accused Mr. Doré of [TRANSLATION] "bombastic rhetoric and hyperbole" and said that the court must "put aside" Mr. Doré's "impudence". Justice Boilard characterized Mr. Doré's request for a stay as "totally ridiculous" and one of his arguments as "idle quibbling". Finally, he said that "fixated on or obsessed with his narrow vision of reality, which is not consistent with the facts, Mr. Doré has done nothing to help his client discharge his burden".

[7] Comme la Cour l'a déjà souligné, le plus récemment dans l'arrêt *Catalyst Paper Corp. c. North Cowichan (District)*, 2012 CSC 2, [2012] 1 R.C.S. 5, la nature de l'analyse du caractère raisonnable est toujours tributaire du contexte. Dans celui de la *Charte*, cette 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.

[8] En l'espèce, la décision du Comité de discipline de réprimander l'avocat a établi un juste équilibre, soit un équilibre proportionné, entre son mandat — qui consiste à garantir que les avocats agissent avec « objectivité, [. . .] modération et [. . .] dignité » — et le droit de l'avocat concerné à la libre expression. Par conséquent, cette décision est raisonnable.

Contexte

[9] M^e Gilles Doré représentait M. Daniel Lanthier dans une instance criminelle. Les 18 et 19 juin 2001, il comparaissait devant le juge Boilard de la Cour supérieure du Québec pour demander l'arrêt des procédures ou, subsidiairement, la mise en liberté sous caution de son client. Au cours de la plaidoirie de M^e Doré, le juge Boilard a dit à son sujet qu'« un avocat insolent est rarement utile à son client ». Dans les motifs écrits de la décision rendue le 21 juin 2001 par laquelle il a rejeté la requête de M^e Doré, le juge Boilard a formulé d'autres critiques à l'égard de l'avocat (*R. c. Lanthier*, 2001 CanLII 9351), l'accusant de faire de la « rhétorique ronflante et de l'hyperbole », ajoutant que la cour devait « mettre de côté » son « outrecuidance ». Il a qualifié la requête de M^e Doré de « tout à fait ridicule » et l'un de ses arguments d'« argutie sans fondement ». Enfin, il a également écrit qu'« obnubilé ou obsédé dans sa vision d'une réalité étriquée, non conforme aux faits, M^e Doré n'a rien fait pour assister son client à se décharger de son fardeau ».

[10] On June 21, 2001, Mr. Doré wrote a private letter to Justice Boilard, stating:

[TRANSLATION]

WITHOUT PREJUDICE OR ADMISSION

Sir,

I have just left the Court. Just a few minutes ago, as you hid behind your status like a coward, you made comments about me that were both unjust and unjustified, scattering them here and there in a decision the good faith of which will most likely be argued before our Court of Appeal.

Because you ducked out quickly and refused to hear me, I have chosen to write a letter as an entirely personal response to the equally personal remarks you permitted yourself to make about me. This letter, therefore, is from man to man and is outside the ambit of my profession and your functions.

If no one has ever told you the following, then it is high time someone did. Your chronic inability to master any social skills (to use an expression in English, that language you love so much), which has caused you to become pedantic, aggressive and petty in your daily life, makes no difference to me; after all, it seems to suit you well.

Your deliberate expression of these character traits while exercising your judicial functions, however, and your having made them your trademark concern me a great deal, and I feel that it is appropriate to tell you.

Your legal knowledge, which appears to have earned the approval of a certain number of your colleagues, is far from sufficient to make you the person you could or should be professionally. Your determination to obliterate any humanity from your judicial position, your essentially non-existent listening skills, and your propensity to use your court — where you lack the courage to hear opinions contrary to your own — to launch ugly, vulgar, and mean personal attacks not only confirms that you are as loathsome as suspected, but also casts shame on you as a judge, that most extraordinarily important function that was entrusted to you.

I would have very much liked to say this to your face, but I highly doubt that, given your arrogance, you are able to face your detractors without hiding behind your judicial position.

[10] Le 21 juin 2001, M^e^ Doré a adressé une lettre privée au juge Boilard, dans laquelle il écrivait :

SOUS RÉSERVE ET SANS ADMISSION

Monsieur,

Je sors à peine de cour. Il y a quelques minutes, vous cachant lâchement derrière votre statut, vous avez tenu à mon égard des propos aussi injustes qu'injustifiés, parsemés ici et là dans une décision dont la bonne foi sera vraisemblablement débattue devant notre Cour d'appel.

Comme vous vous êtes défilé rapidement et avez refusé de m'entendre, je choisis la forme épistolaire pour répondre à titre purement personnel aux propos tout aussi personnels que vous vous êtes permis à mon endroit. La présente est donc d'homme à homme, hors le circuit de ma profession et de vos fonctions.

Si ce qui suit ne vous a jamais été signalé, il était grand temps que ça le soit. Si votre incapacité chronique à maîtriser quelque aptitude sociale (« *social skills* » vous qui aimez tant l'anglais) vous a amené à adopter un comportement pédant, hargneux et mesquin dans votre vie de tous les jours, peu m'importe; cela semble après tout vous convenir.

Si toutefois, délibérément, vous importez ces traits de caractère dans l'exercice de votre magistrature et que vous en faites votre marque de commerce, cela m'importe beaucoup et il me semble approprié de vous en faire part.

En effet, vos connaissances juridiques qui semblent rallier l'approbation d'un certain nombre de vos collègues, sont loin d'être suffisantes pour faire de vous ce que vous auriez pu et du [*sic*] être au plan professionnel. Votre détermination à évacuer toute humanité de votre magistrature, votre capacité d'écoute à toutes fins pratiques nulle et votre propension à vous servir de votre tribune — de laquelle vous n'avez pas le courage de faire face à l'expression d'opinions contraires aux vôtres — pour vous adonner à des attaques personnelles d'une mesquinerie à ce point repoussante qu'elles en sont vulgaires, non seulement confirme [*sic*] l'être exécrable qu'on devine mais encore, font de votre magistrature une honte pour ce poste extraordinairement important qui vous fut jadis confié.

J'aurais bien aimé vous en faire part personnellement mais je doute fort que dans votre arrogance et en l'absence de votre paravent judiciaire, vous soyez capable de faire face à vos détracteurs.

Worst of all, you possess the most appalling of all defects for a man in your position: You are fundamentally unjust. I doubt that that will ever change.

Sincerely,

Gilles Doré

P.S. As this letter is purely personal, I see no need to distribute it.

(C.A. judgment, 2010 QCCA 24, 326 D.L.R. (4th) 749, at para. 5)

[11] The next day, June 22, 2001, Mr. Doré wrote to Chief Justice Lyse Lemieux, with a copy to Justice Boilard. He made it clear that he was not filing a complaint with her against Justice Boilard. Instead, Mr. Doré respectfully requested that he not be required to appear before Justice Boilard in the future since he was concerned that he could not properly represent his clients before him.

[12] On July 10, 2001, Mr. Doré complained to the Canadian Judicial Council about Justice Boilard's conduct. On July 13, 2001, Chief Justice Lemieux sent a copy of the letter Mr. Doré had sent to Justice Boilard to the Syndic du Barreau, the body that disciplines lawyers in Quebec.

[13] In March 2002, the Assistant Syndic filed a complaint against Mr. Doré based on his letter to Justice Boilard. The complaint alleged that Mr. Doré had violated both art. 2.03 of the *Code of ethics of advocates*, R.R.Q. 1981, c. B-1, r. 1, and Mr. Doré's oath of office. Article 2.03 stated: "The conduct of an advocate must bear the stamp of objectivity, moderation and dignity."

[14] In the interval between the filing of the Assistant Syndic's complaint against Mr. Doré and the actual proceedings against him, a committee of judges appointed by the Judicial Council to look into Mr. Doré's complaint communicated its conclusions to Mr. Doré and Justice Boilard in letters sent on July 15, 2002. The committee found that

Pis encore, vous avez la pire des tares pour un homme de votre position : vous êtes foncièrement injuste et je doute que cela puisse changer un jour.

Sincèrement,

Gilles Doré

P.S. Comme cette missive est à titre purement personnelle [*sic*], je ne vois nullement la nécessité d'en faire la diffusion.

(Jugement de la C.A., 2010 QCCA 24 (CanLII), par. 5)

[11] Le lendemain, soit le 22 juin 2001, M^e^ Doré a écrit à la juge en chef Lyse Lemieux et expédié une copie conforme de cette lettre au juge Boilard. Il a clairement indiqué que cette démarche ne constituait pas une plainte à l'endroit du juge Boilard. Il demandait plutôt, respectueusement, de ne plus avoir à plaider devant ce juge, parce qu'il craignait de ne pas pouvoir représenter ses clients adéquatement devant lui.

[12] Le 10 juillet 2001, M^e^ Doré a saisi le Conseil canadien de la magistrature d'une plainte au sujet de la conduite du juge Boilard. Le 13 juillet 2001, la juge en chef Lemieux a transmis une copie de la lettre envoyée au juge Boilard par M^e^ Doré au syndic du Barreau du Québec, l'organisme responsable dans cette province des questions disciplinaires concernant les avocats.

[13] Au mois de mars 2002, le syndic adjoint a formulé une plainte contre M^e^ Doré fondée sur la lettre qu'il avait adressée au juge Boilard. Selon cette plainte, l'avocat avait contrevenu à l'art. 2.03 du *Code de déontologie des avocats*, R.R.Q. 1981, ch. B-1, r. 1, et manqué à son serment d'office. L'article 2.03 énonçait que : « [l]a conduite de l'avocat doit être empreinte d'objectivité, de modération et de dignité. »

[14] Entre le dépôt de la plainte du syndic adjoint contre M^e^ Doré et l'audience disciplinaire, un comité de juges nommés par le Conseil canadien de la magistrature pour étudier la plainte formulée par M^e^ Doré a communiqué ses conclusions au plaignant et au juge en leur expédiant des lettres le 15 juillet 2002. Le comité a conclu que le juge

Justice Boilard had made [TRANSLATION] "unjustified derogatory remarks to Mr. Doré" stating, in part:

[TRANSLATION] . . . to use the words "bombastic rhetoric and hyperbole" and "impudence" in referring to counsel arguing a case before you, quite clearly in good faith, is unnecessarily insulting. To reply to counsel who submits that you have not allowed him to argue his case "that an insolent lawyer is rarely of use to his client" not only is unjustified in the circumstances, but could tarnish counsel's professional reputation in the eyes of his client, his peers and the public. To say to counsel arguing a case before you that "I have the impression this is going to be tiresome" is to gratuitously degrade him. To describe a procedure before the court as "totally ridiculous" is unnecessarily humiliating. It is the panel's opinion that such comments would seem to show contempt for counsel not only as an individual but also as a professional.

The evidence reveals a flagrant lack of respect for an officer of the court, namely Mr. Doré, who was nevertheless at all times respectful to the court. The evidence also shows signs of impatience on your part that are surprising in light of every judge's duty to listen calmly to the parties and to counsel. It is the panel's opinion that in so abusing your power as a judge, you not only tarnished your image as a dispenser of justice, but also undermined the judiciary, the image of which has unfortunately been diminished. The panel reminds you that your independence and your authority as a judge do not exempt you from respecting the dignity of every individual who argues a case before you. Dispensing justice while gratuitously insulting counsel is befitting neither for the judge nor for the judiciary.

Having also read the judgments of the Quebec Court of Appeal in *R. v. Proulx*, *R. v. Bisson* and *R. v. Callochia*, the panel observed that you tend to use your platform to unjustly denigrate counsel appearing before you. The transcript of the hearing of April 9, 2002 in *Sa Majesté la Reine v. Sébastien Beauchamp*, which contains evidence of personal attacks on another lawyer, also confirmed that the case raised in Mr. Doré's complaint is neither unique nor isolated, but shows that extreme conduct and comments seem to form part of a more generalized attitude. In the panel's view, the fact that such an attitude could persist despite warnings from the Court of Appeal is troubling.

Boilard avait fait des « remarques désobligeantes et injustifiées à M^e^ Doré » et il a notamment indiqué que de :

. . . parler de la « rhétorique ronflante et de l'hyperbole » et de l'« outrecuidance » de l'avocat qui plaide devant vous, de toute évidence de bonne foi, est inutilement offensant. Répliquer à un avocat, qui soumet que vous ne l'avez pas laissé plaider, « qu'un avocat insolent est rarement utile à son client » n'est [*sic*] non seulement injustifié dans les circonstances mais risque de porter atteinte à la réputation de l'avocat en tant que professionnel devant son client, ses paires [*sic*] et le public. Dire à un avocat qui plaide devant vous que « j'ai l'impression que cela va être pénible » abaisse gratuitement l'avocat. Qualifier une procédure devant la Cour « de tout à fait ridicule » est inutilement humiliant. Le sous-comité est d'avis que de tels commentaires sembleraient témoigner d'une attitude de dédain envers l'avocat non seulement en tant qu'individu, mais aussi en tant que professionnel.

La preuve décèle un manque flagrant de respect envers un officier de la Cour, dont M^e^ Doré qui, en tout temps, est néanmoins resté respectueux envers le Tribunal. La preuve révèle en outre des écarts d'impatience de votre part qui surprennent, face au devoir de tout juge d'écouter les parties et les avocats en toute sérénité. Le sous-comité est d'avis qu'en abusant ainsi de votre pouvoir de magistrat, vous avez non seulement terni votre image de justicier mais vous avez également porté atteinte à la magistrature, dont l'image en est sortie malheureusement amoindrie. Le sous-comité vous rappelle que votre indépendance et votre autorité en tant que juge ne vous dispensent pas de respecter la dignité de tout individu qui se trouve à plaider devant vous. Dispenser justice en insultant gratuitement l'avocat ne sied ni au juge, ni à la magistrature.

Ayant également pris connaissance des jugements de la Cour d'appel du Québec dans *R. c. Proulx*, *R. c. Bisson* et *R. c. Callochia*, le sous-comité a pu constater votre penchant à vous servir de votre tribune pour dénigrer injustement l'avocat qui paraît devant vous. La transcription de l'audience du 9 avril 2002 dans *Sa Majesté la Reine c. Sébastien Beauchamp*, qui témoigne d'attaques personnelles à l'encontre d'un autre avocat, est venue également confirmer que la plainte de M^e^ Doré ne soulève pas un cas unique ou isolé, mais témoigne d'un comportement et de propos excessifs qui semblent s'inscrire dans une attitude plus générale. Qu'une telle attitude puisse perdurer, malgré les avertissements de la Cour d'appel, est un constat troublant, de l'avis du sous-comité, pour autant que cela continue.

The panel finds that the impatience you showed and the immoderate comments you made to an officer of the court, Mr. Doré, are unacceptable and merit an expression of the panel's disapproval under subsection 55(2) of the Canadian Judicial Council By-Laws.

The panel notes that you have deferred to its decision and assumes that the fact that Mr. Doré has made a complaint will lead you to reflect on this and will remind you of your duty as a judge to show respect and courtesy to all counsel who appear before you.

[15] On July 22, 2002, after receiving this reprimand, Justice Boilard recused himself from a complex criminal trial involving the Hell's Angels, a trial related to the trial of Daniel Lanthier in which Mr. Doré had acted. As a result of this recusal, the Attorney General of Quebec requested the Canadian Judicial Council to conduct an inquiry. The Judicial Council concluded that Justice Boilard's recusal had not constituted misconduct.

[16] As for Mr. Doré, the proceedings before the Disciplinary Council of the Barreau du Québec took place between April 2003 and January 2006. In its January 18, 2006 decision, the Disciplinary Council found that Mr. Doré's letter was [TRANSLATION] "likely to offend and is rude and insulting" (2006 CanLII 53416, at para. 58). It concluded that his statements had little expressive value, as they were "merely opinions, perceptions and insults" (para. 62). The Disciplinary Council rejected Mr. Doré's submission that his letter was private, since it was written by him as a lawyer. It also concluded that Justice Boilard's conduct could not be relied on as justification for the letter.

[17] The Disciplinary Council rejected Mr. Doré's argument that art. 2.03 violated s. 2(*b*) of the *Charter*. While acknowledging that the provision infringed on freedom of expression, the Disciplinary Council found that

[TRANSLATION] [t]his is a limitation on freedom of expression that is entirely reasonable, even necessary, in the Canadian legal system, where lawyers and

Le sous-comité est d'avis que vos écarts d'impatience et vos remarques immodérées faites à l'égard d'un officier de la Cour, Me Doré, sont inacceptables et méritent la désapprobation du sous-comité conformément au paragraphe 55(2) du Règlement administratif du Conseil.

Le sous-comité a pris soin de noter que vous vous en remettiez à la décision du sous-comité et prend pour acquis que le fait que Me Doré se soit plaint vous fasse réfléchir et vous rappelle votre obligation de magistrat de traiter tout avocat qui se présente devant vous avec respect et courtoisie.

[15] Le 22 juillet 2002, après avoir écopé de cette réprimande, le juge Boilard s'est récusé dans un procès complexe intenté contre les Hell's Angels et lié au procès dans lequel Me Doré représentait M. Daniel Lanthier. Par suite de cette récusation, le procureur général du Québec a demandé au Conseil canadien de la magistrature de mener une enquête. Au terme de celle-ci, le Conseil a conclu que le juge Boilard ne s'était pas conduit de façon inappropriée en se récusant.

[16] Pour ce qui est de Me Doré, l'audition de la plainte par le Comité de discipline du Barreau du Québec s'est déroulée entre les mois d'avril 2003 et de janvier 2006. Dans une décision rendue le 18 janvier 2006, le Comité de discipline a conclu que la lettre de Me Doré « est de nature à choquer et constitue des propos grossiers et injurieux » (2006 CanLII 53416, par. 58). Il a jugé que les propos de l'avocat n'avaient que peu de valeur sur le plan expressif parce qu'il ne s'agissait que d'« opinions, [de] perceptions et [d']insultes » (par. 62). Le Comité de discipline a rejeté l'argument de Me Doré selon lequel la lettre était de nature privée, jugeant que c'est en tant qu'avocat qu'il l'avait écrite. Il a également conclu que l'avocat ne pouvait invoquer la conduite du juge Boilard pour justifier la lettre.

[17] Le Comité de discipline a également rejeté l'argument de Me Doré selon lequel l'art. 2.03 violerait l'al. 2*b*) de la *Charte*. Tout en reconnaissant que la disposition restreint la liberté d'expression, le Comité a conclu comme suit :

Il s'agit d'une restriction à la liberté d'expression qui est tout à fait raisonnable, voire même nécessaire dans le système de droit canadien où les avocats et les juges

judges must work together in the interest of justice. [para. 88]

Moreover, it concluded that Mr. Doré had willingly joined a profession that was subject to rules of discipline that he knew would limit his freedom of expression. While the rules may [TRANSLATION] "be seen as restrictions imposed on the members of the Barreau in comparison to the freedom that may be enjoyed by other Canadian citizens", they are made in exchange for "the privileges conferred on lawyers as members of an 'exclusive profession'" (paras. 109-10). On July 24, 2006, based on what it found to be the seriousness of Mr. Doré's conduct and on his failure to show remorse, the same panel suspended Mr. Doré's ability to practise law for 21 days (2006 CanLII 53436).

[18] Mr. Doré appealed the Disciplinary Council's decisions to the Tribunal des professions on several grounds (2007 QCTP 152 (CanLII)). This time, he did not challenge the constitutionality of art. 2.03. Instead, he argued that the manner in which the relevant legislation was applied by the Disciplinary Council was unconstitutional because his comments were protected by s. 2(*b*) of the *Charter.*

[19] The Tribunal reviewed the constitutionality of the Disciplinary Council's decision on a standard of correctness, but said that a full *Oakes* analysis under s. 1 of the *Charter* was inappropriate where a decision only applied to one person. Instead, it held that "[t]he issue becomes one of proportionality or, more specifically, minimal limitation of the guaranteed right" (para. 69, citing *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256, at para. 155). In the circumstances, the Disciplinary Council's decision to sanction Mr. Doré was found to be a [TRANSLATION] "minimal restriction on freedom of expression" (para. 76). It rejected Mr. Doré's argument that Justice Boilard's disparaging remarks justified his letter. It also rejected his argument that the letter was private, since Mr. Doré remained "an officer of the court and a lawyer" (para. 77) and had exceeded the objectivity, moderation and

doivent collaborer entre eux dans les meilleurs intérêts de la justice. [par. 88]

En outre, le Comité a conclu que M^e^ Doré avait librement adhéré à une profession régie par un code de déontologie dont il savait qu'il limiterait sa liberté d'expression. Si ces règles peuvent « être perçu[e]s comme des restrictions imposées aux membres du Barreau en comparaison avec la liberté dont peuvent bénéficier les autres citoyens canadiens », il s'agit d'une « contrepartie aux privilèges qui sont accordés aux avocats qui sont membre[s] d'une "profession à exercice exclusif" » (par. 109-110). Le 24 juillet 2006, la même formation du Comité de discipline, estimant que le manquement de M^e^ Doré à son obligation était grave et qu'il n'avait exprimé aucun repentir, a prononcé la sanction qu'il lui infligeait, soit une suspension de son droit de pratique durant 21 jours (2006 CanLII 53436).

[18] M^e^ Doré a interjeté appel des décisions du Comité de discipline devant le Tribunal des professions, invoquant plusieurs moyens (2007 QCTP 152 (CanLII)). Cette fois, il n'a pas contesté la constitutionnalité de l'art. 2.03. Il a plutôt fait valoir que l'application des dispositions pertinentes par le Comité de discipline était inconstitutionnelle, puisque les commentaires qu'il avait formulés étaient protégés par l'al. 2*b*) de la *Charte.*

[19] Le Tribunal a examiné la constitutionnalité de la décision du Comité de discipline selon la norme de la décision correcte, mais il a précisé que l'application intégrale de l'analyse élaborée dans *Oakes* fondée sur l'article premier de la *Charte* ne convenait pas à l'égard des décisions applicables à une seule personne. Il a conclu que « [l]a question se réduit [plutôt] à un problème de proportionnalité ou, plus précisément, de restriction minimale du droit garanti » (par. 69, citant *Multani c. Commission scolaire Marguerite-Bourgeoys*, 2006 CSC 6, [2006] 1 R.C.S. 256, par. 155). Compte tenu des circonstances, le Tribunal a jugé que la décision du Comité d'imposer une mesure disciplinaire à M^e^ Doré constituait une « restriction minimale de la liberté d'expression » (par. 76). Il a écarté l'argument de M^e^ Doré selon lequel les remarques désobligeantes du juge Boilard justifiaient sa lettre. Il n'a pas non plus retenu l'argument du caractère

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 M^e^ 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 M^e^ 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 M^e^ 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, M^e^ 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 M^e^ 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 M^e^ 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

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] M^e^ 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, M^e^ 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

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

Prof. John Evans argued that if courts were too quick to bypass administrative law in favour of the *Charter*, "a rich source of thought and experience about law and government will be overlooked or lost altogether" ("The Principles of Fundamental Justice: The Constitution and the Common Law" (1991), 29 *Osgoode Hall L.J.* 51, at p. 73). Similarly, Prof. Cartier suggested that the *Slaight* approach reduced the role of administrative law to the "formal determination of jurisdiction on the basis of statutory interpretation", which prevented the control of discretion with reference to "values" and presented "an impoverished picture of administrative law" (pp. 68-69).

[28] The scope of the review of discretionary administrative decisions that provided the backdrop for the decision in *Slaight* was altered by this Court's decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 65. In that case, L'Heureux-Dubé J. concluded that administrative decision-makers were required to take into account fundamental Canadian values, including those in the *Charter*, when exercising their discretion (*Baker*, at paras. 53-56).

[29] Building on the decision in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 ("*C.U.P.E.*"), *Baker* represented a further shift away from Diceyan principles. By recognizing that administrative decision-makers are both bound by fundamental values and empowered to adjudicate them, *Baker* ceded interpretive authority on those issues to those decision-makers (David Dyzenhaus and Evan Fox-Decent, "Rethinking the Process/Substance Distinction: *Baker* v. *Canada*" (2001), 51 *U.T.L.J.* 193, at p. 240). This allows the *Charter* to "nurture" administrative law, by emphasizing that *Charter* values infuse the inquiry (Cartier, at pp. 75 and 86; see also Mary Liston, "Governments in Miniature: The Rule of Law in the Administrative

spécialisés en droit administratif. Le professeur John Evans a soutenu que si les tribunaux étaient trop prompts à esquiver le droit administratif au profit d'analyses fondées sur 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 » (« The Principles of Fundamental Justice : The Constitution and the Common Law » (1991), 29 *Osgoode Hall L.J.* 51, p. 73). Dans le même ordre d'idées, la professeure Cartier a affirmé que l'approche préconisée dans *Slaight* réduisait le rôle du droit administratif à [TRADUCTION] « déterminer la compétence de façon formelle en fonction de l'interprétation des lois », et que cela empêche la révision de l'exercice du pouvoir discrétionnaire en ce qui concerne les « valeurs » et donne « une image appauvrie du droit administratif » (p. 68-69).

[28] La portée de la révision des décisions administratives de nature discrétionnaire qui a servi de toile de fond à la décision rendue dans *Slaight* a été modifiée par la décision de la Cour dans l'affaire *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817, par. 65. Dans cet arrêt, la juge L'Heureux-Dubé a conclu que les décideurs administratifs devaient tenir compte des valeurs canadiennes fondamentales, notamment celles consacrées par la *Charte*, lorsqu'ils exercent leur pouvoir discrétionnaire (*Baker*, par. 53-56).

[29] Fort de la décision rendue dans *Syndicat canadien de la Fonction publique, section locale 963 c. Société des alcools du Nouveau-Brunswick*, [1979] 2 R.C.S. 227 (« *S.C.F.P.* »), l'arrêt *Baker* s'est davantage écarté des principes énoncés par Dicey. En reconnaissant que les décideurs administratifs sont à la fois liés par des valeurs fondamentales et habilités à statuer sur elles, *Baker* leur a cédé le pouvoir d'interprétation quant à ces questions (David Dyzenhaus et Evan Fox-Decent, « Rethinking the Process/Substance Distinction : *Baker* v. *Canada* » (2001), 51 *U.T.L.J.* 193, p. 240). La *Charte* peut ainsi [TRADUCTION] « favoriser le développement » du droit administratif en mettant l'accent pour que les valeurs qu'elle consacre infusent l'enquête (Cartier, p. 75 et 86;

State", in Colleen M. Flood and Lorne Sossin, eds., *Administrative Law in Context* (2008), 77, at p. 100; Susan L. Gratton and Lorne Sossin, "In Search of Coherence: The *Charter* and Administrative Law under the McLachlin Court", in David A. Wright and Adam M. Dodek, eds., *Public Law at the McLachlin Court: The First Decade* (2011), 145, at pp. 157-58).

[30] When this is weighed together with this Court's subsequent decisions, we see a completely revised relationship between the *Charter*, the courts, and administrative law than the one first encountered in *Slaight*. In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the Court held that judicial review should be guided by a policy of deference, justified on the basis of legislative intent, respect for the specialized expertise of administrative decision-makers, and recognition that courts do not have a monopoly on adjudication in the administrative state (para. 49). And in *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765, at paras. 78-82, building on the development of the jurisprudence, the Court found that administrative tribunals with the power to decide questions of law have the authority to apply the *Charter* and grant *Charter* remedies that are linked to matters properly before them.

[31] But, as predicted by Chief Justice Dickson, this Court has explored different ways to review the constitutionality of administrative decisions, vacillating between the values-based approach in *Baker* and the more formalistic template in *Slaight*. The s. 1 *Oakes* approach suggested by Lamer J., was followed in *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*

voir également Mary Liston, « Governments in Miniature : The Rule of Law in the Administrative State », dans Colleen M. Flood et Lorne Sossin, dir., *Administrative Law in Context* (2008), 77, p. 100; Susan L. Gratton et Lorne Sossin, « In Search of Coherence : The *Charter* and Administrative Law under the McLachlin Court », dans David A. Wright et Adam M. Dodek, dir., *Public Law at the McLachlin Court : The First Decade* (2011), 145, p. 157-58).

[30] Lorsque l'affirmation qui précède est appréciée au regard des décisions ultérieures de la Cour, nous entrevoyons une relation entre la *Charte*, les tribunaux et le droit administratif complètement différente de celle dont il a été question pour la première fois dans *Slaight*. Dans *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, la Cour a conclu que la révision judiciaire doit être orientée par une politique de retenue justifiée par le respect de la volonté du législateur, le respect de l'expertise spécialisée que possèdent les décideurs administratifs et la reconnaissance que les cours de justice n'ont pas le pouvoir exclusif de statuer sur toutes les questions dans le domaine administratif (par. 49). Dans *R. c. Conway*, 2010 CSC 22, [2010] 1 R.C.S. 765, par. 78-82, s'appuyant sur l'évolution de la jurisprudence, la Cour a conclu que les tribunaux administratifs dotés du pouvoir de trancher des questions de droit ont le pouvoir d'appliquer la *Charte* et d'accorder les réparations qu'autorise cette dernière dans les affaires dont ils sont régulièrement saisis.

[31] Cela étant dit, depuis, comme l'avait prédit le juge en chef Dickson, notre Cour a exploré différentes méthodes d'examen de la constitutionnalité des décisions administratives. Elle a oscillé entre, d'une part, l'approche fondée sur les valeurs préconisées dans *Baker* et, d'autre part, le modèle plus formaliste préconisé dans *Slaight*. L'approche proposée par le juge Lamer dans *Oakes* et fondée sur l'article premier a été suivie dans *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)*,

v. Burns, 2001 SCC 7, [2001] 1 S.C.R. 283; and *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 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.

[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).

[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,

[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] 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] 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] 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

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).

[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.

[39] This Court has already recognized the difficulty of applying the *Oakes* framework beyond the context of reviewing a law or other rule of general application. This has been the case in applying *Charter* values to the common law, "where there is no specific enactment that can be examined in terms of objective, rational connection, least drastic means and proportionate effect" (Peter W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), vol. 2, at section 38.15). In *R. v. Daviault*, [1994] 3 S.C.R. 63, for example, in assessing the common law rule relating to establishing intent under extreme intoxication, the Court held that no *Oakes* analysis was required when reviewing a common law rule for compliance with *Charter* values:

> If a new common law rule could be enunciated which would not interfere with an accused person's right to have control over the conduct of his or her defence, I can see no conceptual problem with the Court's simply enunciating such a rule to take the place of the old rule, without considering whether the old rule could nonetheless be upheld under s. 1 of the *Charter.* Given that the common law rule was fashioned by judges and not by Parliament or a legislature, judicial deference to elected bodies is not an issue. If it is possible to reformulate a common law rule so that it will not conflict with the principles of fundamental justice, such a reformulation should be undertaken. [pp. 93-94, citing *R. v. Swain*, [1991] 1 S.C.R. 933, at p. 978.]

[40] In *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, this Court explicitly rejected the use of the s. 1 *Oakes* framework in developing the common law of defamation for two reasons. First, when interpreting a common law rule, there is no violation of a *Charter* right, but a conflict between principles, so "the balancing must be more flexible than the traditional s. 1 analysis", with *Charter* values providing the guidelines for any modification to the common law (para. 97). Second, the Court noted that "the division of onus which normally operates in a *Charter* challenge" was not appropriate for private litigation under the common law, as the party seeking to change the

[39] La Cour a déjà reconnu la difficulté que pose l'application du cadre d'analyse formulé dans *Oakes* au-delà du contexte de la révision d'une loi ou d'un autre type de règles de droit d'application générale. Le défi s'est posé lorsqu'il s'est agi d'appliquer les valeurs protégées par la *Charte* à la common law [TRADUCTION] « qui ne recèle aucun texte réglementaire qui puisse être examiné en terme d'objectif, de lien rationnel, d'atteinte minimale et d'effet proportionnel » (Peter W. Hogg, *Constitutional Law of Canada* (5e éd. suppl.), vol. 2, par. 38.15). Dans *R. c. Daviault*, [1994] 3 R.C.S. 63, par exemple, la Cour devait évaluer la règle de common law relative à l'établissement de l'existence de l'intention dans le cas d'une intoxication extrême. Elle a conclu qu'il n'était pas nécessaire de procéder à l'analyse prescrite par *Oakes* dans le contexte de la révision d'une règle de common law pour s'assurer de sa conformité aux valeurs consacrées par la *Charte* :

> S'il est possible d'énoncer une nouvelle règle de common law qui ne contrevienne pas au droit de l'accusé de contrôler la conduite de sa défense, je n'ai aucune difficulté à imaginer que la Cour puisse simplement la formuler, en remplacement de l'ancienne, sans chercher à savoir si l'ancienne règle pourrait néanmoins être maintenue en vertu de l'article premier de la *Charte*. Vu que la règle de common law a été créée par des juges et non par le législateur, l'égard que les tribunaux doivent avoir envers les organismes élus n'est pas en cause. S'il est possible de reformuler une règle de common law de façon qu'elle ne s'oppose pas aux principes de justice fondamentale, il faudrait le faire. [p. 93-94, citant *R. c. Swain*, [1991] 1 R.C.S. 933, p. 978.]

[40] Dans *Hill c. Église de scientologie de Toronto*, [1995] 2 R.C.S. 1130, la Cour a explicitement rejeté, pour deux raisons, l'utilisation du cadre d'analyse formulé dans *Oakes* lorsqu'il s'est agi d'élaborer la common law en matière de diffamation. Premièrement, quand il est question d'interpréter une règle de common law, il n'y a pas de violation d'un droit visé par la *Charte*, mais plutôt un conflit entre deux principes, de sorte que, d'une part, « la pondération doit être plus souple que l'analyse traditionnelle effectuée en vertu de l'article premier » et que, d'autre part, les valeurs consacrées par la *Charte* offrent alors des lignes directrices quant à toute modification de la common law

common law should not be allowed to benefit from a reverse onus (para. 98). As a result, the Court went on to "consider the common law of defamation in light of the values underlying the *Charter*" (para. 99). And in *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, the Court relied on *Charter* values in introducing the new defence of responsible communication on matters of public interest to the law of defamation, without engaging in an *Oakes* analysis.

[41] A further example is found in *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, [2002] 1 S.C.R. 156, where the Court dealt with the common law of secondary picketing. After concluding that freedom of expression was engaged, the Court did not embark on an *Oakes* analysis. Instead, it found that the appropriate question was "which approach [to regulating secondary picketing] best balances the interests at stake in a way that conforms to the fundamental values reflected in the *Charter*?" (para. 65).

[42] Though each of these cases engaged *Charter* values, the Court did not see the *Oakes* test as the vehicle for balancing whether those values were taken into sufficient account. The same is true, it seems to me, in the administrative law context, where decision-makers are called upon to exercise their statutory discretion in accordance with *Charter* protections.

[43] What is the impact of this approach on the standard of review that applies when assessing the compliance of an administrative decision with *Charter* values? There is no doubt that when a tribunal is determining the constitutionality of a law,

(par. 97). Deuxièmement, la Cour a souligné que « le partage habituel du fardeau dans [une] contestation [. . .] fondée sur la *Charte* » ne convenait pas pour un litige privé en common law puisque la partie qui cherche à faire modifier la common law ne devrait pas pouvoir profiter d'un renversement du fardeau de la preuve (par. 98). La Cour a donc examiné « la common law de la diffamation à la lumière des valeurs de la *Charte* » (par. 99). De plus, dans *Grant c. Torstar Corp.*, 2009 CSC 61, [2009] 3 R.C.S. 640, la Cour s'est fondée sur les valeurs consacrées par la *Charte* pour introduire dans le droit relatif à la diffamation le nouveau moyen de défense de communication responsable concernant des questions d'intérêt public, et ce, sans faire intervenir l'analyse élaborée dans *Oakes*.

[41] L'arrêt *S.D.G.M.R., section locale 558 c. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 CSC 8, [2002] 1 R.C.S. 156, est un autre exemple de décision allant en ce sens. Il s'agit de l'affaire où la Cour a traité de la notion de common law de piquetage secondaire. Or, après avoir conclu que la liberté d'expression était en jeu, elle n'a pas procédé à l'analyse décrite dans *Oakes*. Elle a plutôt conclu que la question qu'il fallait se poser était celle de savoir quelle est « l'approche [pour régir le piquetage secondaire] qui pondère le mieux les intérêts en jeu, d'une façon conforme aux valeurs fondamentales reflétées dans la *Charte* » (par. 65).

[42] Ainsi, même si toutes ces causes mettaient en jeu des valeurs consacrées par la *Charte*, la Cour n'a pas jugé bon d'utiliser le test élaboré dans *Oakes* pour décider si ces valeurs avaient été suffisamment prises en compte. Il en va de même, à mon avis, dans le contexte du droit administratif, où les décideurs sont appelés à exercer le pouvoir discrétionnaire que leur confère la loi en s'assurant de protéger les droits visés par la *Charte*.

[43] Quel est l'effet de cette approche sur la norme de révision applicable à l'appréciation de la conformité d'une décision administrative aux valeurs consacrées par la *Charte*? Il ne fait aucun doute que la décision d'un tribunal administratif au sujet

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.

[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.]

[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.

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] 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] 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.

[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

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).

[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.

[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

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] 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] 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

to the relevant facts required to balance competing considerations and benefits from expertise:

This Court has repeatedly affirmed that deference is owed to the Minister's decision whether to order surrender once a fugitive has been committed for extradition. The issue in the case at bar concerns the standard to be applied in reviewing the Minister's assessment of a fugitive's *Charter* rights. Reasonableness is the appropriate standard of review for the Minister's decision, regardless of whether the fugitive argues that extradition would infringe his or her rights under the *Charter*. As is evident from this Court's jurisprudence, to ensure compliance with the *Charter* in the extradition context, the Minister must balance competing considerations, and where many such considerations are concerned, the Minister has superior expertise. The assertion that interference with the Minister's decision will be limited to exceptional cases of "real substance" reflects the breadth of the Minister's discretion; the decision should not be interfered with unless it is unreasonable (*Schmidt* [*Canada v. Schmidt*, [1987] 1 S.C.R. 500]) (for comments on the standards of correctness and reasonableness, see *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9). [Emphasis added; para. 34.]

[51] The alternative — adopting a correctness review in every case that implicates *Charter* values — will, as Prof. Mullan noted, essentially lead to courts "retrying" a range of administrative decisions that would otherwise be subjected to a reasonableness standard:

If correctness review becomes the order of the day in all *Charter* contexts, including the determination of factual issues and the application of the law to those facts, then what in effect can occur is that the courts will perforce assume the role of a *de novo* appellate body from all tribunals the task of which is to make decisions that of necessity have an impact on *Charter* rights and freedoms: Review Boards, Parole Boards, prison disciplinary tribunals, child welfare authorities, and the like. Whether that kind of judicial micro-managing of aspects of the administrative process should take place is a highly problematic question. [Emphasis added; p. 145.]

ministre et de sa proximité avec les faits pertinents, de déférer aux décisions de ce dernier pour la mise en balance des considérations opposées en jeu :

Notre Cour a confirmé à maintes reprises que la déférence s'imposait à l'endroit de la décision du ministre de prendre ou non un arrêté d'extradition une fois le fugitif incarcéré. Elle doit aujourd'hui déterminer quelle norme de contrôle judiciaire s'applique à l'appréciation ministérielle des droits constitutionnels du fugitif. Cette norme demeure celle de la raisonnabilité, même lorsque le fugitif fait valoir que l'extradition porterait atteinte à ses droits constitutionnels. Il ressort de la jurisprudence de notre Cour que pour assurer le respect de la *Charte* dans le contexte d'une demande d'extradition, le ministre doit tenir compte de considérations opposées et possède à l'égard de bon nombre de celles-ci une plus grande expertise. L'affirmation selon laquelle les tribunaux n'interviendront que dans les cas exceptionnels où cela « s'impose réellement » traduit bien la portée du pouvoir discrétionnaire du ministre. La décision ne doit en effet être modifiée que si elle est déraisonnable (*Schmidt* [*Canada c. Schmidt*, [1987] 1 R.C.S. 500]) (voir l'analyse de la norme de la décision correcte et de la norme de la décision raisonnable dans l'arrêt *Dunsmuir c. Nouveau-Brunswick*, [2008] 1 R.C.S. 190, 2008 CSC 9. [Je souligne; par. 34.]

[51] Comme le signale le professeur Mullan, l'autre solution — soit celle qui consiste à appliquer la norme de la décision correcte chaque fois que des valeurs consacrées par la *Charte* sont en cause — aurait essentiellement pour effet que des décisions administratives qui auraient autrement été révisées suivant la norme de la décision raisonnable seraient « jugées à nouveau » :

[TRADUCTION] Si tous les contextes relatifs à la *Charte* devaient commander l'examen de la justesse de la décision, même en ce qui concerne les questions de fait et l'application du droit aux conclusions de fait, cela pourrait avoir pour effet de conférer aux tribunaux judiciaires le rôle de cours d'appel *de novo* à l'égard de tous les tribunaux administratifs appelés à rendre des décisions qui toucheront immanquablement des droits ou libertés garantis par la *Charte*, tels les commissions de révision ou de libération conditionnelle, les comités de discipline de pénitenciers, les autorités de protection de l'enfance, etc. L'opportunité d'un tel interventionnisme judiciaire dans ces divers aspects du processus administratif est une question très délicate. [Je souligne; p. 145.]

[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*.

[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).

[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).

[57] On judicial review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the

[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] 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] 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

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.

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] 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.

[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

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.

[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] 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.

[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.

[61] No party in this dispute challenges the importance of professional discipline to prevent incivility in the legal profession, namely "potent displays of disrespect for the participants in the justice system, beyond mere rudeness or discourtesy" (Michael Code, "Counsel's Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System" (2007), 11 *Can. Crim. L.R.* 97, at p. 101; see also Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline* (5th ed. 2009), at p. 8-1). The duty to encourage civility, "both inside and outside the courtroom", rests with the courts and with lawyers (*R. v. Felderhof* (2003), 68 O.R. (3d) 481 (C.A.), at para. 83).

[62] As a result, rules similar to art. 2.03 are found in codes of ethics that govern the legal profession throughout Canada. The Canadian Bar Association's *Code of Professional Conduct* (2009), for example, states that a "lawyer should at all times be courteous, civil, and act in good faith to the court or tribunal and to all persons with whom the lawyer has dealings in the course of an action or proceeding" (c. IX, at para. 16; see also Law Society of Upper Canada, *Rules of Professional Conduct* (updated 2011), r. 6.03(5)).

[63] But 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 justice system in general and judges in particular (MacKenzie, at p. 26-1; *R. v. Kopyto* (1987), 62 O.R. (2d) 449 (C.A.); and *Attorney-General v. Times Newspapers Ltd.*, [1974] A.C. 273 (H.L.)).

[64] In *Histed v. Law Society of Manitoba*, 2007 MBCA 150, 225 Man. R. (2d) 74, where Steel J.A. upheld a disciplinary decision resulting from a lawyer's criticism of a judge, the critical role played by lawyers in assuring the accountability of the judiciary was acknowledged:

[61] Nul ne conteste, en l'espèce, l'importance que revêtent les règles déontologiques pour la prévention de l'incivilité dans la profession juridique, à savoir [TRADUCTION] « les manifestations flagrantes d'irrespect pour les participants au système de justice, qui dépassent la simple impolitesse ou discourtoisie » (Michael Code, « Counsel's Duty of Civility : An Essential Component of Fair Trials and an Effective Justice System » (2007), 11 *Rev. can. D.P.* 97, p. 101; voir aussi Gavin MacKenzie, *Lawyers and Ethics : Professional Responsibility and Discipline* (5e éd. 2009), p. 8-1). C'est aux tribunaux et aux avocats qu'incombe le devoir de promouvoir la civilité [TRADUCTION] « tant à l'intérieur qu'à l'extérieur de la salle d'audience » (*R. c. Felderhof* (2003), 68 O.R. (3d) 481 (C.A.), par. 83).

[62] On trouve donc des règles analogues à l'art. 2.03 dans tous les codes de déontologie régissant la profession juridique au Canada. Par exemple, le *Code de déontologie professionnelle* (2009) de l'Association du Barreau canadien énonce que « [l]'avocat doit faire preuve de courtoisie et de civilité et agir de bonne foi envers le tribunal judiciaire ou administratif et toutes les personnes avec qui il interagit en cours d'instance ou de procès » (ch. IX, par. 16; voir aussi le *Code de déontologie* du Barreau du Haut-Canada (mis à jour en 2011), règle 6.03(5)).

[63] Toutefois, lorsqu'il s'agit de déterminer quand un comportement 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 (MacKenzie, p. 26-1; *R. c. Kopyto* (1987), 62 O.R. (2d) 449 (C.A.); et *Attorney-General c. Times Newspapers Ltd.*, [1974] A.C. 273 (H.L.)).

[64] Dans *Histed c. Law Society of Manitoba*, 2007 MBCA 150, 225 Man. R. (2d) 74, la juge Steel a maintenu une décision disciplinaire relative à la critique d'un juge par un avocat et a reconnu le rôle primordial qu'assument les avocats en matière de responsabilité judiciaire :

Not only should the judiciary be accountable and open to criticism, but lawyers play a very unique role in ensuring that accountability. As professionals with special expertise and officers of the court, lawyers are under a special responsibility to exercise fearlessness in front of the courts. They must advance their cases courageously, and this may result in criticism of proceedings before or decisions by the judiciary. The lawyer, as an intimate part of the legal system, plays a pivotal role in ensuring the accountability and transparency of the judiciary. To play that role effectively, he/she must feel free to act and speak without inhibition and with courage when the circumstances demand it. [Emphasis added; para. 71.]

[65] Proper respect for these expressive rights may involve disciplinary bodies tolerating a degree of discordant criticism. As the Ontario Court of Appeal observed in a different context in *Kopyto*, 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 by any means argue for an unlimited right on the part of lawyers to breach the legitimate public expectation that they will behave with civility.

[66] 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.

[67] In this case, the 21-day suspension imposed on Mr. Doré is not before this Court, since Mr. Doré did not appeal it either to the Court of Appeal or to this Court. All we have been asked to determine is

[TRADUCTION] Non seulement les juges doivent-ils répondre de leurs actions et accepter la critique, mais les avocats jouent un rôle privilégié dans l'actualisation de cette responsabilité. En tant que professionnels spécialisés et officiers de justice, les avocats ont une obligation particulière d'intrépidité devant les tribunaux. Ils doivent plaider avec courage, ce qui peut les amener à critiquer le déroulement d'une instance ou une décision. Faisant partie intégrante du système de justice, les avocats jouent un rôle crucial dans l'actualisation de la responsabilité et de la transparence judiciaires. Pour s'acquitter efficacement de ce rôle, ils doivent se sentir libres d'agir et de parler sans contrainte et avec courage lorsque les circonstances l'exigent. [Je souligne; par. 71.]

[65] Il peut découler du respect qui est dû à ce droit à la liberté d'expression que des organismes disciplinaires tolèrent certaines critiques acérées. Comme la Cour d'appel de l'Ontario l'a signalé dans le contexte différent de l'arrêt *Kopyto*, 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.

[66] 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 des droits 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.

[67] En l'espèce, la Cour n'est pas saisie de la sanction infligée à M^e^ Doré, soit une suspension de son droit de pratique durant 21 jours, puisque ce dernier n'en a pas fait appel ni en Cour d'appel ni

whether the Disciplinary Council's conclusion that a reprimand was warranted under art. 2.03 of the *Code of ethics* was a reasonable one. To make that assessment, we must consider whether this result reflects a proportionate application of the statutory mandate with Mr. Doré's expressive rights.

[68] 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.

[69] A reprimand for a lawyer does not automatically flow from criticizing a judge or the judicial system. As discussed, such criticism, even when it is expressed robustly, can be constructive. However in the context of disciplinary hearings, such criticism will be measured against the public's reasonable expectations of a lawyer's professionalism. As the Disciplinary Council found, Mr. Doré's letter was outside those expectations. His displeasure with Justice Boilard was justifiable, but the extent of the response was not.

[70] The Disciplinary Council recognized that a lawyer must have [TRANSLATION] "total liberty and independence in the defence of a client's rights", and "has the right to respond to criticism or remarks addressed to him by a judge", a right which the Council recognized "can suffer no

devant la Cour. Nous sommes uniquement appelés à déterminer si la conclusion du Comité de discipline selon laquelle il était justifié de le réprimander pour avoir contrevenu à l'art. 2.03 du *Code de déontologie* était raisonnable. Pour procéder à cette évaluation, nous devons examiner si ce résultat est le fruit d'une mise en balance proportionnée du mandat légal et du droit de M^e^ Doré à la liberté d'expression.

[68] 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.

[69] Un avocat qui critique un juge ou le système judiciaire n'est pas automatiquement passible d'une réprimande. Comme nous en avons discuté, une telle critique, même exprimée sans ménagement, peut être constructive. Cependant, dans le contexte d'audiences disciplinaires, une telle critique 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 M^e^ Doré ne satisfait pas à ces attentes. Son mécontentement à l'égard du juge Boilard était légitime, mais la teneur de sa réponse ne l'était pas.

[70] Le Comité de discipline a reconnu que « [d]ans la poursuite de la défense des droits d'un client, l'avocat doit pouvoir jouir d'une totale liberté et indépendance » et a « le droit [. . .] de répondre à des critiques ou des remarques qui lui sont adressées par un juge », un droit qui, comme

restrictions when it is a question of defending clients' rights before the courts" (paras. 68-70). It was also "conscious" of the fact that art. 2.03 may constitute a restriction on a lawyer's expressive rights (para. 79). But where, as here, the judge was called [TRANSLATION] "loathsome", arrogant and "fundamentally unjust" and was accused by Mr. Doré of "hid[ing] behind [his] status like a coward"; having a "chronic inability to master any social skills"; being "pedantic, aggressive and petty in [his] daily life"; having "obliterate[d] any humanity from [his] judicial position"; having "non-existent listening skills"; having a "propensity to use [his] court — where [he] lack[s] the courage to hear opinions contrary to [his] own — to launch ugly, vulgar, and mean personal attacks", which "not only confirms that [he is] as loathsome as suspected, but also casts shame on [him] as a judge"; and being "[un]able to face [his] detractors without hiding behind [his] judicial position", the Council concluded that the [TRANSLATION] "generally accepted norms of moderation and dignity" were "overstepped" (para. 86).

[71] In the circumstances, the Disciplinary Council found that Mr. Doré's letter warranted a reprimand. In light of the excessive degree of vituperation in the letter's context and tone, this conclusion cannot be said to represent an unreasonable balance of Mr. Doré's expressive rights with the statutory objectives.

[72] I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: Sophie Dormeau, Outremont.

l'a reconnu le Comité ne « prête à aucune concession lorsqu'il est question de défendre les droits des individus devant les tribunaux » (par. 68-70). Le Comité de discipline était aussi « conscient » du fait que l'art. 2.03 pouvait constituer une restriction à la liberté d'expression d'un avocat (par. 79). Mais lorsque, comme dans le cas présent, le juge a été traité d'« être exécrable », arrogant et « foncièrement injuste », et a été accusé par M^e^ Doré de se « cach[er] lâchement derrière [son] statut », d'avoir une « incapacité chronique à maîtriser quelque aptitude sociale », d'« adopter un comportement pédant, hargneux et mesquin dans [sa] vie de tous les jours », d'avoir « évacu[é] toute humanité de [sa] magistrature », d'avoir une « capacité d'écoute à toutes fins pratiques nulle », d'avoir une « propension à [se] servir de [sa] tribune — de laquelle [il] n'[a] pas le courage de faire face à l'expression d'opinions contraires aux [siennes] — pour [s']adonner à des attaques personnelles d'une mesquinerie à ce point repoussante qu'elles en sont vulgaires » ce qui « non seulement confirme [*sic*] l'être exécrable qu'on devine mais encore, font de [sa] magistrature une honte », et d'être incapable « en l'absence de [son] paravent judiciaire, [. . .] de faire face à [ses] détracteurs », le Comité de discipline a conclu que « la norme de modération et de dignité généralement acceptée » a été « outrepassée » (par. 86).

[71] Dans les circonstances, le Comité de discipline a conclu que la lettre de M^e^ Doré justifiait qu'il fasse l'objet d'une réprimande. À la lumière du degré excessif de vitupération dans le contenu de la lettre et de son ton, on ne peut prétendre que cette conclusion est le fruit d'une mise en balance déraisonnable du droit à la liberté d'expression de M^e^ Doré, d'une part, et des objectifs visés par la loi, d'autre part.

[72] En conséquence, je suis d'avis de rejeter le pourvoi avec dépens.

Pourvoi rejeté avec dépens.

Procureur de l'appelant : Sophie Dormeau, Outremont.

Solicitors for the respondent Pierre Bernard, in his capacity as Assistant Syndic of the Barreau du Québec: Mercier Leduc, Montréal.

Solicitor for the respondents Tribunal des professions and the Attorney General of Quebec: Attorney General of Quebec, Sainte-Foy.

Solicitors for the intervener the Federation of Law Societies of Canada: BCF, Montréal.

Solicitors for the intervener the Canadian Civil Liberties Association: Osler, Hoskin & Harcourt, Montréal.

Solicitors for the intervener the Young Bar Association of Montreal: Irving Mitchell Kalichman, Westmount.

Procureurs de l'intimé Pierre Bernard, ès qualités de syndic adjoint du Barreau du Québec : Mercier Leduc, Montréal.

Procureur des intimés le Tribunal des professions et le procureur général du Québec : Procureur général du Québec, Sainte-Foy.

Procureurs de l'intervenante la Fédération des ordres professionnels de juristes du Canada : BCF, Montréal.

Procureurs de l'intervenante l'Association canadienne des libertés civiles : Osler, Hoskin & Harcourt, Montréal.

Procureurs de l'intervenante l'Association du Jeune Barreau de Montréal : Irving Mitchell Kalichman, Westmount.

TAB 5

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*

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*

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.

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.

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

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.

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.

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.

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

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.

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.

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 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.

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.

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.

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.

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

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.

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.

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.

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.

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.

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.

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.

That said, the Minister is not required to permit Loyola to teach about the ethics of other religions from a

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 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.

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.

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.

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.

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.

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.

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

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.

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.

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.

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.

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.

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.

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.

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

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.

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.

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.

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*.

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.

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.

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*.

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.

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.

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.

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.

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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*

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*).

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.

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.

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.*

Marguerite-Bourgeoys, 2006 SCC 6, [2006] 1 S.C.R. 256; *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567; *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48, [2004] 2 S.C.R. 650; *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86, [2002] 4 S.C.R. 710; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5; *R. v. Oakes*, [1986] 1 S.C.R. 103; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; Eur. Court H. R., *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A No. 260-A; *Metropolitan Church of Bessarabia v. Moldova*, No. 45701/99, ECHR 2001-XII; *Bruker v. Marcovitz*, 2007 SCC 54, [2007] 3 S.C.R. 607; *Adler v. Ontario*, [1996] 3 S.C.R. 609; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698.

By McLachlin C.J. and Moldaver J.

Applied: *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551; *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134; **referred to:** *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. CIP Inc.*, [1992] 1 S.C.R. 843; *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391; *Sindicatul "Păstorul Cel Bun" v. Romania* (2014), 58 E.H.R.R. 10; *Metropolitan Church of Bessarabia v. Moldova*, No. 45701/99, ECHR 2001-XII; *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 132 S. Ct. 694 (2012); *National Labor Relations Board v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979); *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *S.L. v. Commission scolaire des Chênes*, 2012 SCC 7, [2012] 1 S.C.R. 235.

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Mark Phillips and *Jacques S. Darche*, for the appellants.

Benoit Boucher, *Dominique Legault*, *Amélie Pelletier-Desrosiers* and *Caroline Renaud*, for the respondent.

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Mark Phillips et *Jacques S. Darche*, pour les appelants.

Benoit Boucher, *Dominique Legault*, *Amélie Pelletier-Desrosiers* et *Caroline Renaud*, pour l'intimé.

Barry W. Bussey and *Derek Ross*, for the intervener the Canadian Council of Christian Charities.

Albertos Polizogopoulos and *Don Hutchinson*, for the intervener the Evangelical Fellowship of Canada.

Robert E. Reynolds and *Ruth Ross*, for the intervener the Christian Legal Fellowship.

Palbinder K. Shergill, *Q.C.*, and *Balpreet Singh Boparai*, for the intervener the World Sikh Organization of Canada.

Ian C. Moes and *André Schutten*, for the intervener the Association of Christian Educators and Schools Canada.

Jean-Philippe Groleau, *Guy Du Pont* and *Léon H. Moubayed*, for the intervener the Canadian Civil Liberties Association.

Ranjan K. Agarwal and *Jack R. Maslen*, for the interveners the Catholic Civil Rights League, Association des parents catholiques du Québec, the Faith and Freedom Alliance and Association de la communauté copte orthodoxe du grand Montréal.

Blake Bromley, for the intervener the Faith, Fealty and Creed Society.

Jean-Yves Côté and *Paul D. Faris*, for the intervener the Home School Legal Defence Association of Canada.

Gerald D. Chipeur, *Q.C.*, and *Grace Mackintosh*, for the interveners the Seventh-day Adventist Church in Canada and the Seventh-day Adventist Church — Quebec Conference.

Milton James Fernandes and *Sergio G. Famularo*, for the interveners Corporation archiépiscopale catholique romaine de Montréal and Archevêque catholique romain de Montréal.

Barry W. Bussey et *Derek Ross*, pour l'intervenant le Conseil canadien des œuvres de charité chrétiennes.

Albertos Polizogopoulos et *Don Hutchinson*, pour l'intervenante l'Alliance évangélique du Canada.

Robert E. Reynolds et *Ruth Ross*, pour l'intervenante l'Alliance des chrétiens en droit.

Palbinder K. Shergill, *c.r.*, et *Balpreet Singh Boparai*, pour l'intervenante World Sikh Organization of Canada.

Ian C. Moes et *André Schutten*, pour l'intervenante Association of Christian Educators and Schools Canada.

Jean-Philippe Groleau, *Guy Du Pont* et *Léon H. Moubayed*, pour l'intervenante l'Association canadienne des libertés civiles.

Ranjan K. Agarwal et *Jack R. Maslen*, pour les intervenantes la Ligue catholique des droits de l'homme, l'Association des parents catholiques du Québec, Faith and Freedom Alliance et l'Association de la communauté copte orthodoxe du grand Montréal.

Blake Bromley, pour l'intervenante Faith, Fealty and Creed Society.

Jean-Yves Côté et *Paul D. Faris*, pour l'intervenante Home School Legal Defence Association of Canada.

Gerald D. Chipeur, *c.r.*, et *Grace Mackintosh*, pour les intervenantes l'Église adventiste du septième jour au Canada et l'Église adventiste du septième jour — Fédération du Québec.

Milton James Fernandes et *Sergio G. Famularo*, pour les intervenants la Corporation archiépiscopale catholique romaine de Montréal et l'Archevêque catholique romain de Montréal.

The judgment of LeBel, Abella, Cromwell and Karakatsanis JJ. was delivered by

[1] Abella J. — 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. Like all courses in the mandatory curriculum, the Minister may grant private schools an exemption from the ERC Program if they offer an alternative program that the Minister deems to be equivalent.

[2] This appeal results from a judicial review of the Minister's decision to deny an exemption sought by a private, Catholic school. The Minister based her decision on the fact that the school's whole proposed program was to be taught from a Catholic perspective. It was not, as a result, "equivalent" to the ERC Program. The school submits that this is an interference with its religious freedom. The Minister submits that it is a necessary strategy to ensure that students are knowledgeable about and respectful of the differences of others. In a sense, they are both right . . .

[3] This Court's decision in *Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395, sets out the applicable framework for assessing whether the Minister has exercised her statutory discretion in accordance with the relevant *Canadian Charter of Rights and Freedoms* protections. *Doré* succeeded a line of conflicting jurisprudence which veered between cases like *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, and *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, that applied s. 1 (and a traditional *Oakes* analysis) to discretionary administrative decisions, and those, like *Lake v. Canada (Minister of Justice)*, [2008] 1 S.C.R. 761, which applied an administrative law approach. The result in *Doré* was to eschew a literal s. 1 approach in favour of a *robust* proportionality

Version française du jugement des juges LeBel, Abella, Cromwell et Karakatsanis rendu par

[1] La juge Abella — 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 différentes religions du monde. Comme pour tous les cours du programme obligatoire, le ministre peut exempter certaines écoles privées du programme ÉCR si elles offrent un programme de remplacement qu'il juge équivalent.

[2] Le présent pourvoi résulte du contrôle judiciaire d'une décision de la ministre refusant une telle exemption à une école privée catholique. La ministre a fondé sa décision sur le fait que l'ensemble du programme proposé par l'école allait être enseigné selon une perspective catholique. Par conséquent, le programme n'était pas « équivalent » au programme ÉCR. L'école soutient que cette intervention de la ministre porte atteinte à sa liberté de religion. La ministre plaide que la neutralité de l'enseignement constitue une stratégie nécessaire pour s'assurer que les élèves connaissent et respectent les différences. En un sens, la ministre et l'école ont toutes deux raison . . .

[3] Dans *Doré c. Barreau du Québec*, [2012] 1 R.C.S. 395, la Cour a établi le cadre d'analyse applicable pour décider si un ministre a exercé son pouvoir discrétionnaire conformément aux dispositions pertinentes de la *Charte canadienne des droits et libertés*. Cet arrêt a succédé à une série de décisions contradictoires qui ont oscillé entre des arrêts tels *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038, et *Multani c. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 R.C.S. 256, qui ont appliqué l'art. 1 (et l'analyse traditionnelle énoncée dans *Oakes*) à des décisions administratives qui découlaient de l'exercice d'un pouvoir discrétionnaire, et d'autres arrêts tels *Lake c. Canada (Ministre de la Justice)*, [2008] 1 R.C.S. 761, qui ont appliqué une approche de droit administratif. Ainsi,

analysis consistent with administrative law principles.

[4] Under *Doré*, where a discretionary administrative decision engages the protections enumerated in the *Charter* — both the *Charter*'s guarantees and the foundational values they reflect — the discretionary decision-maker is required to proportionately balance the *Charter* protections to ensure that they are limited no more than is necessary given the applicable statutory objectives that she or he is obliged to pursue.

[5] In this case, the Minister's decision reflected the fundamental assumption that any program taught from a religious perspective could not be an alternative to the ERC Program and that the religious school could not teach even its own religion from its own perspective.

[6] For the reasons that follow, in my view prescribing to Loyola how it is to explain Catholicism to its students seriously interferes with freedom of religion, while representing no significant benefit to the ERC Program's objectives. In a context like Quebec's, where private denominational schools are legal, this represents a disproportionate, and therefore unreasonable interference with the values underlying freedom of religion of those individuals who seek to offer and who wish to receive a Catholic education at Loyola. On the other hand, I see no significant impairment of freedom of religion in requiring Loyola to offer a course that explains the beliefs, ethics and practices of other religions in as objective and neutral a way as possible, rather than from the Catholic perspective.

Background

[7] Loyola High School is a private, English-speaking Catholic high school for boys. It is highly respected, and has been administered by the Jesuit Order since the school's founding in the 1840s. Its

dans *Doré*, l'approche fondée sur l'art. 1 prise littéralement a été écartée au profit d'une analyse *robuste* de la proportionnalité compatible avec les principes de droit administratif.

[4] Suivant *Doré*, lorsqu'une décision fait intervenir les protections énumérées dans la *Charte* — soit tant les droits qui y sont énoncés que les valeurs dont ils sont le reflet —, le ou la ministre doit veiller à ce que ces protections ne soient pas restreintes plus qu'il n'est nécessaire compte tenu des objectifs applicables visés par la loi qu'il ou elle a l'obligation de chercher à atteindre.

[5] En l'espèce, la décision de la ministre a reposé sur le postulat fondamental voulant que tout programme enseigné suivant une perspective religieuse ne puisse remplacer le programme ÉCR et qu'une école confessionnelle ne puisse pas enseigner, même sa propre religion, selon son propre point de vue.

[6] Pour les motifs qui suivent, j'estime que le fait de prescrire à Loyola comment elle doit expliquer le catholicisme à ses élèves porte gravement atteinte à la liberté de religion et ne contribue pas d'une manière appréciable à la réalisation des objectifs du programme ÉCR. Dans un contexte comme celui du Québec, où l'existence des écoles privées confessionnelles est légalement reconnue, il s'agit d'une atteinte disproportionnée, et par conséquent déraisonnable, aux valeurs qui sous-tendent la liberté de religion des personnes qui veulent offrir et qui souhaitent recevoir une éducation catholique à Loyola. En revanche, je ne vois aucune atteinte appréciable à la liberté de religion dans le fait d'obliger Loyola à offrir un cours où l'on explique les convictions, l'éthique et les pratiques d'autres religions de façon aussi neutre et objective que possible plutôt que suivant la perspective catholique.

Contexte

[7] L'école secondaire Loyola (« Loyola ») est une école secondaire catholique privée de langue anglaise pour garçons. C'est un établissement très respecté qui est administré par l'ordre des Jésuites depuis sa

mission, teaching, and characteristics are Jesuit. Most of the students at Loyola come from Catholic families.

[8] Until relatively recently, public education in Quebec was entirely confessional in nature and public schools were organized along denominational lines, under the complete control of the Catholic and Protestant Committees of the Council of Public Instruction, who "ran their respective schools with little or no government interference": Spencer Boudreau, "From Confessional to Cultural: Religious Education in the Schools of Québec" (2011), 38 *Religion & Education* 212, at p. 213.

[9] With the Quiet Revolution in the 1960s, the state took charge of educational institutions formerly controlled by religious communities. By 2000, public schools were fully secularized and denominational schools no longer had official status in the public system. They were, however, permitted to operate as private schools: see *S.L. v. Commission scolaire des Chênes*, [2012] 1 S.C.R. 235, at para. 12.

[10] The Ethics and Religious Culture (ERC) Program, which is the most recent step in the process of secularization of the school system, replaced all the remaining Catholic and Protestant religious programs with a secularized study of religion and ethics. It became mandatory for all schools, public and private, at the start of the 2008-2009 school year. At the secondary level, the program is required to be taught in four of the five years of school: *Basic school regulation for preschool, elementary and secondary education*, CQLR, c. I-13.3, r. 8, ss. 23 and 23.1.

[11] The ERC Program has two key stated objectives: the "recognition of others" and the "pursuit of the common good". The first objective is based on

fondation dans les années 1840. Sa mission, son enseignement et ses autres caractéristiques sont typiques des institutions jésuites. La plupart des élèves qui fréquentent cette école sont issus de familles catholiques.

[8] Jusqu'à une période relativement récente, l'instruction publique au Québec avait un caractère entièrement confessionnel, et les écoles publiques — qui étaient organisées suivant des divisions religieuses — relevaient exclusivement de comités d'instruction publique catholiques et protestants qui [TRADUCTION] « dirigeaient leurs écoles respectives avec peu ou pas d'ingérence de l'État » : Spencer Boudreau, « From Confessional to Cultural : Religious Education in the Schools of Québec » (2011), 38 *Religion & Education* 212, p. 213.

[9] Dans la foulée de la Révolution tranquille, soit durant les années 60, l'État a pris en charge les établissements d'enseignement qui relevaient jusque-là des communautés religieuses. En 2000, le processus de déconfessionnalisation du système d'éducation public était achevé et les écoles confessionnelles ne possédaient plus de statut officiel au sein du système public. Elles pouvaient toutefois exercer leurs activités en tant qu'écoles privées : voir l'arrêt *S.L. c. Commission scolaire des Chênes*, [2012] 1 R.C.S. 235, par. 12.

[10] Le programme ÉCR, qui marque l'étape la plus récente dans le processus de déconfessionnalisation du système d'éducation, a remplacé tous les programmes religieux catholiques et protestants qui existaient encore par un enseignement non confessionnel de la religion et de l'éthique. Au début de l'année scolaire 2008-2009, ce programme est devenu obligatoire pour tous les établissements d'enseignement, qu'ils soient publics ou privés. Le cours d'ÉCR est, depuis, une matière obligatoire pendant quatre des cinq années du cours secondaire : *Régime pédagogique de l'éducation préscolaire, de l'enseignement primaire et de l'enseignement secondaire*, RLRQ, c. I-13.3, r. 8, art. 23 et 23.1.

[11] Le programme ÉCR comporte deux objectifs explicites : « la reconnaissance de l'autre » et « la poursuite du bien commun ». Le premier de ces

the principle that all people possess equal value and dignity. The second seeks to foster shared values of human rights and democracy. By imposing this program in its schools, Quebec seeks to inculcate in all students openness to diversity and respect for others.

[12] In order to fulfil these objectives, the ERC Program has three components which seek to develop three competencies among students: the ability to understand "religious culture", which includes the study of world religions; the ability to reflect on ethical questions; and the ability to engage in dialogue. The three competencies are intended to support and reinforce one another.

[13] 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 program takes a cultural and phenomenological rather than a doctrinal approach to the study of religions. Because of their role in Quebec's history, it accords a prominent role to Catholicism and Protestantism, but teachers are also required to discuss Judaism, Islam, Hinduism, Buddhism, and Aboriginal belief systems.

[14] The purpose of the ethics component is to encourage students to critically reflect on their own ethical conduct and that of others, as well as on the values and norms that different religious and social groups adopt to guide their behaviour.

[15] The purpose of the dialogue component, which is integrated with the ethics and religious culture components, is to help students develop the skills to interact respectfully with people of different beliefs in a diverse society, and to understand the impact of their behaviour on the broader community.

objectifs repose sur le principe suivant lequel toutes les personnes sont égales en valeur et en dignité. Le second vise l'épanouissement des valeurs communes que sont les droits de la personne et la démocratie. En imposant ce programme dans ses écoles, le Québec cherche à inculquer à tous les élèves un esprit d'ouverture à la diversité ainsi que le respect de l'autre.

[12] Pour réaliser ces objectifs, le programme ÉCR comprend trois volets qui tendent à l'apprentissage par l'élève de trois compétences : comprendre le « phénomène religieux » — ce qui inclut l'étude de religions du monde —, réfléchir sur des questions éthiques et pratiquer le dialogue. Ces trois compétences sont censées se compléter et se renforcer l'une l'autre.

[13] 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 diverses religions se sont enracinées et se développent. Le programme aborde l'étude des religions sous un angle culturel et phénoménologique plutôt que doctrinal. En raison du rôle qu'ils ont joué dans l'histoire du Québec, le programme accorde une place prépondérante au catholicisme et au protestantisme, mais les enseignants sont également tenus de discuter du judaïsme, de l'islam, de l'hindouisme, du bouddhisme et des systèmes de croyances autochtones.

[14] 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 et sociaux pour guider leur conduite.

[15] Le volet relatif au dialogue — qui fait également partie intégrante des deux autres volets du programme — vise à aider les élèves à acquérir des habiletés leur permettant d'interagir de façon respectueuse avec des gens qui ont des convictions différentes au sein d'une société diversifiée et de comprendre les répercussions de leur propre comportement sur la collectivité en général.

[16] The ERC Program provides a framework that teachers must utilize to help students develop these competencies, but leaves teachers with considerable flexibility in developing their own lessons and structuring their course to convey this content.

[17] The major world religions are taught through themes. Students explore the elements of religious traditions, including different representations of divinity, creation stories, and religious rites, rules and duties. They also discuss Quebec's religious heritage. They then learn about the founding and development of different world religions, and examine the ways that different traditions and philosophical texts have approached questions about divinity, the meaning of life and death, and the human condition generally. And they draw on literature to explore different kinds of religious experiences, methodologies for transmitting religion, and ways religious experiences shape people and communities.

[18] Students develop competency in ethics by exploring themes such as freedom, autonomy, and tolerance, among others. They develop competency in dialogue by learning about different forms of dialogue; strategies for developing, explaining or challenging a point of view; and processes and patterns of thought that can undermine dialogue, such as stereotyping and prejudice.

[19] The orientation of the ERC Program is strictly secular and cultural; it requires teachers to take a "professional stance" of objectivity and impartiality. That means that they are not to advance the truth of a particular belief system or attempt to influence their students' beliefs. Instead, their role is to foster awareness of diverse values, beliefs and cultures. Teachers in the program are therefore expected to act as mediators to help their students develop the critical capacity to understand, articulate and question different points of view.

[16] Bien que le programme ÉCR constitue un cadre pédagogique que sont tenus de suivre les enseignants pour aider les élèves à acquérir ces trois compétences, il leur laisse tout de même une latitude considérable pour l'élaboration de leurs leçons et pour l'organisation de leurs cours en vue de transmettre cette matière.

[17] Les principales religions du monde sont enseignées par thèmes. Les élèves explorent certains éléments des traditions religieuses, notamment une variété de représentations de la divinité, de récits de la création ainsi que de rites, préceptes et devoirs religieux. Ils discutent également du patrimoine religieux québécois. Ils étudient ensuite l'établissement et l'évolution de diverses religions du monde, et examinent la façon dont certaines traditions et certains textes philosophiques traitent de questions telles que le divin, le sens de la vie et de la mort et la condition humaine en général. Ils puisent ensuite dans la littérature pour examiner divers types d'expériences religieuses et modes de transmission de la religion, ainsi que différentes façons dont l'expérience religieuse façonne les gens et les collectivités.

[18] Les élèves développent leur compétence en éthique en explorant des thèmes comme la liberté, l'autonomie et la tolérance. Ils développent leur compétence en dialogue en étudiant diverses formes de dialogue, des stratégies leur permettant de former, d'expliquer ou de remettre en question un point de vue, et des modes de pensée ou façons de voir les choses qui peuvent nuire au dialogue, par exemple les stéréotypes et les préjugés.

[19] Le programme ÉCR a une optique strictement laïque et culturelle : il exige des enseignants qu'ils adoptent une « attitude professionnelle » objective et impartiale. Ceux-ci doivent donc s'abstenir d'affirmer la vérité d'un système particulier de croyances ou de tenter d'influencer les convictions de leurs élèves. Leur rôle consiste plutôt à favoriser la connaissance d'une variété de valeurs, de convictions et de cultures. On attend donc des enseignants, dans le cadre de ce programme, qu'ils agissent comme intermédiaires et aident les élèves à développer leur sens critique afin qu'ils soient en mesure de comprendre, de formuler et de remettre en question divers points de vue.

[20] The ERC program has already been scrutinized — and found to be constitutional — by this Court in the context of the public school system. In *S.L.*, a group of parents claimed that the program would confuse their children and interfere with their religious training because it exposed them to information about various world religions from a secular perspective. They argued that this amounted to a violation of s. 2(*a*) of the *Charter*.

[21] The Court rejected their claim and affirmed the constitutionality of the ERC Program as a mandatory component of the curriculum in public schools. In her reasons, Justice Deschamps observed that

> [p]arents are free to pass their personal beliefs on to their children if they so wish. However, the early exposure of children to realities that differ from those in their immediate family environment is a fact of life in society. The suggestion that exposing children to a variety of religious facts in itself infringes their religious freedom or that of their parents amounts to a rejection of the multicultural reality of Canadian society and ignores the Quebec government's obligations with regard to public education. Although such exposure can be a source of friction, it does not in itself constitute an infringement of s. 2(*a*) of the *Canadian Charter* and of s. 3 of the *Quebec Charter*. [*S.L.*, at para. 40]

[22] The same Ethics and Religious Culture Program is now before us in the context of a private denominational school. Like their counterparts in the public school system, the core curriculum of private denominational schools is regulated by the province and is compulsory: *Education Act*, CQLR, c. I-13.3, ss. 447 and 459; *Basic school regulation for preschool, elementary and secondary education*, ss. 23 and 23.1; *An Act respecting private education*, CQLR, c. E-9.1, ss. 25 and 32.

[23] A private school is entitled to provide an alternative but "equivalent" program if the Minister approves its content. Section 22 of the *Regulation respecting the application of the Act respecting private education*, CQLR, c. E-9.1, r. 1, sets out the Minister's authority to grant an exemption where

[20] Le programme ÉCR a déjà été analysé — et jugé constitutionnel par la Cour — dans le contexte du système scolaire public. Dans l'affaire *S.L.*, un groupe de parents affirmait que ce programme créerait de la confusion chez leurs enfants et nuirait à leur formation religieuse, parce qu'il les exposerait à de l'information sur diverses religions du monde d'un point de vue laïque. Ils soutenaient qu'il s'agissait d'une violation de l'al. 2*a*) de la *Charte*.

[21] La Cour a rejeté leur prétention et confirmé la constitutionnalité du programme ÉCR en tant qu'élément obligatoire du programme d'études des écoles publiques. Dans ses motifs, la juge Deschamps a fait remarquer que

> [l]es parents qui le désirent sont libres de transmettre à leurs enfants leurs croyances personnelles. Cependant, l'exposition précoce des enfants à des réalités autres que celles qu'ils vivent dans leur environnement familial immédiat constitue un fait de la vie en société. Suggérer que le fait même d'exposer des enfants à différents faits religieux porte atteinte à la liberté de religion de ceux-ci ou de leurs parents revient à rejeter la réalité multiculturelle de la société canadienne et méconnaître les obligations de l'État québécois en matière d'éducation publique. Bien qu'une telle exposition puisse être source de frictions, elle ne constitue pas en soi une atteinte à l'al. 2*a*) de la *Charte canadienne* et à l'art. 3 de la *Charte québécoise*. [*S.L.*, par. 40]

[22] En l'espèce, nous sommes appelés à examiner la validité du même programme ÉCR dans le contexte d'une école privée confessionnelle. Les écoles de ce type, à l'instar des établissements scolaires du réseau public, appliquent un programme d'études de base régi par la province et obligatoire : *Loi sur l'instruction publique*, RLRQ, c. I-13.3, art. 447 et 459; *Régime pédagogique de l'éducation préscolaire, de l'enseignement primaire et de l'enseignement secondaire*, art. 23 et 23.1; *Loi sur l'enseignement privé*, RLRQ, c. E-9.1, art. 25 et 32.

[23] Les écoles privées sont autorisées à enseigner un programme de remplacement, mais « équivalent », si le ministre en approuve le contenu. L'article 22 du *Règlement d'application de la Loi sur l'enseignement privé*, RLRQ, c. E-9.1, r. 1, confère en effet au ministre le pouvoir d'exempter un

the school in question proposes to teach an alternative program which the Minister decides is sufficiently similar to the compulsory curriculum. It states:

22. Every institution shall be exempt from the [compulsory curriculum] provided the institution dispenses programs of studies which the Minister of Education, Recreation and Sports judges equivalent.

[24] On March 30, 2008, approximately five months before the ERC Program became mandatory across the Quebec school system, Loyola's Principal and Director wrote to the Minister to request an exemption from the program for the upcoming school year. They claimed that the program was incompatible with Loyola's Catholic mission and convictions and proposed an alternative program that placed greater emphasis on Catholic beliefs and ethics.

[25] In response to the Minister's request for additional information, Loyola sent the Minister a document setting out a general description of its proposed alternative program. The document presents the religious and ethical teachings of the Catholic Church as a central component of the proposed alternative program and as the basis upon which students should learn about other religions. Although it provides an opportunity to discuss major world religions and different ethical positions, the normative core of Loyola's proposed curriculum is the doctrine and belief system of the Catholic Church. Catholic doctrine and ethics would be emphasized early and taught in great depth, and would frame the discussion of other religions and ethical approaches. The third year of the program, for example — a year in which Loyola's proposed program would focus primarily on teaching its students about ethics — is described as a course on "Catholic Moral Teaching" designed to "offer a Catholic vision for answering the question 'What kind of person am I becoming, and what kind of person do I want to become?' It centers on Jesus as the model of full humanness".

établissement d'enseignement du programme d'études obligatoire, dans la mesure où le programme de remplacement proposé est, de l'avis du ministre, suffisamment semblable au programme obligatoire. L'article 22 est ainsi rédigé :

22. Tout établissement est exempté [du programme d'études obligatoire] pourvu que l'établissement offre des programmes jugés équivalents par le ministre de l'Éducation, du Loisir et du Sport.

[24] Le 30 mars 2008, soit environ cinq mois avant que le programme ÉCR ne devienne obligatoire pour l'ensemble du réseau scolaire québécois, le directeur et le président de Loyola ont écrit à la ministre et demandé que l'école soit exemptée de l'obligation d'appliquer ce programme pour l'année scolaire à venir. Ils soutenaient que ce programme était incompatible avec la mission et les convictions catholiques de Loyola, et proposaient en outre un programme de remplacement plus axé sur les croyances et l'éthique catholiques que le programme de référence.

[25] En réponse à la demande de la ministre pour des renseignements complémentaires, Loyola lui a fait parvenir par écrit une description générale du programme de remplacement qu'elle proposait. Dans ce document, les enseignements religieux et éthiques de l'Église catholique étaient présentés comme un élément central du programme de remplacement proposé et comme le cadre de référence de l'étude des autres religions. Bien que le programme d'études proposé prévoit la possibilité de traiter des principales religions du monde et de différents points de vue éthiques, son essence normative correspond à la doctrine et aux croyances de l'Église catholique. Ainsi, on s'attacherait au départ à la doctrine et à l'éthique catholiques, qui seraient enseignées en détail et serviraient de cadre pour l'étude des autres religions et approches éthiques. Par exemple, le cours de la troisième année du programme — année où le programme proposé porterait principalement sur l'enseignement de l'éthique — est décrit comme un cours sur [TRADUCTION] « l'enseignement moral catholique » qui vise à « offrir aux élèves une vision catholique, afin de leur permettre de répondre aux

In the fourth year of the program, which focuses on the world religions component,

> [t]he course presents a concise history of the Catholic Church, covering the significant events and doctrines that have shaped the course of Catholic thought and action over the past millennia. Beginning with the Apostolic Age, it follows the rise of Christendom through the High Middle Ages to the Reformation and into the Twentieth Century. Topics include the early fathers of the Church, scholars, heresies, councils, popes and saints and concludes with an exploration of the current challenges that we face in the post-modern world.
>
> . . . As the course progress[es] through history, a variety of Religions are discussed . . . [i]n particular, the interaction between the Catholic Church and the various other religions is explored.

Loyola's proposed course description did not address the dialogue competency that is required as part of the ERC Program.

[26] In a letter dated August 7, 2008, the Minister denied Loyola's request for an exemption from teaching the ERC curriculum, seeing Loyola's proposed approach as essentially a request for a departure from teaching the ERC subject altogether, rather than for an exemption based on a proposed equivalent course.

[27] Loyola sent a follow-up request to the Minister on August 25, 2008, attempting to demonstrate how its proposed alternative program met the objectives of the ERC Program. In its view, the religious nature of the school prevented it from teaching Catholic beliefs or other religions from a "neutral" or detached perspective. Although its program would be taught from a Catholic perspective, it would offer its students a deeper and more thorough understanding of world religions by going beyond history and external customs to engage seriously with their fundamental beliefs. It also

questions suivantes : "Quel genre de personne suis-je en train de devenir? Quel genre de personne est-ce que je souhaite devenir?" Il est centré sur Jésus en tant que modèle d'humanité pleine et entière ». Durant la quatrième année du programme, où l'accent serait mis sur les religions dans le monde :

> [TRADUCTION] Le cours présente un bref historique de l'Église catholique et porte sur les événements et doctrines d'importance qui ont influencé le cours de la pensée et de l'action catholiques au cours des derniers millénaires. En commençant par l'âge apostolique, le cours suit l'ascension de la chrétienté tout au long du haut Moyen Âge jusqu'à la Réforme et au vingtième siècle. Les thèmes abordés comprennent les premiers Pères de l'Église, les théoriciens, les hérésies, les conciles, les papes et les saints. Le cours se conclut par un examen des défis actuels auxquels nous devons faire face dans le monde postmoderne.
>
> . . . Au fur et à mesure que le cours avance dans l'histoire, diverses religions sont étudiées [. . .] On se penche notamment sur l'interaction entre l'Église catholique et les diverses autres religions.

La description du cours proposé ne traitait pas de la compétence au dialogue, un aspect pourtant obligatoire du programme ÉCR.

[26] Dans une lettre datée du 7 août 2008, la ministre a refusé la demande présentée par Loyola en vue d'être exempté de l'obligation d'enseigner le programme ÉCR puisqu'elle jugeait que la proposition de Loyola consistait essentiellement en une demande de dispense quant à l'ensemble du programme ÉCR plutôt qu'en une demande d'exemption basée sur l'enseignement d'un cours équivalent.

[27] Le 25 août 2008, Loyola a envoyé une seconde demande à la ministre dans laquelle elle a tenté de démontrer en quoi le programme de remplacement qu'elle proposait respectait les objectifs du programme ÉCR. À son avis, le caractère confessionnel de l'école l'empêchait d'enseigner les croyances catholiques ou les autres religions d'un point de vue « neutre » ou détaché. Certes, le programme de l'école serait enseigné suivant une perspective catholique, mais elle offrirait aux élèves une compréhension plus approfondie et plus complète des religions du monde, en allant au-delà de

affirmed its commitment to teaching its students to [TRANSLATION] "think critically, to obtain information, to be aware of the principal ethical issues and to examine popular beliefs and practices", but from a Catholic perspective.

[28] This second request was also denied by the Minister. In a letter dated November 13, 2008, a department official writing on the Minister's behalf expressed concern that Loyola's proposed program was faith-based, rather than cultural. The letter also mentioned what were seen as defects in the development of competency in dialogue and in the role of the teacher. The letter set out the following six bases for the Minister's decision to deny Loyola's request for an exemption:

[TRANSLATION]

- The two main goals of the Ethics and Religious Culture program are recognition of others and pursuit of the common good. The approach to and the conception of the common good developed in the Ethics and Religious Culture program [and those] proposed by Loyola High School are very different. The approach advocated in the Ethics and Religious Culture program is cultural, not faith-based. According to the summary of the program proposed by Loyola High School and submitted to the department for evaluation, the program is based on the Catholic faith and its main goal is the transmission of Catholic beliefs and convictions. It encompasses a conception of others, but once again from a Christian Catholic perspective.

- Again according to the summary of the program submitted to the department for evaluation, it appears that, contrary to the Ethics and Religious Culture program, the Loyola High School program does not lead the student to reflect on the common good, or on ethical issues, but rather to adopt the Jesuit perspective of Christian service.

- The ethics component of the Ethics and Religious Culture program does not offer the students moral education. It takes into consideration elements of

l'histoire de ces religions et de leurs manifestations extérieures et en les amenant à se pencher sérieusement sur leurs croyances fondamentales. Loyola y confirmait aussi son engagement à enseigner à ses élèves « à penser de manière critique, à s'informer, à être au courant des principales questions d'éthique et à questionner et examiner les croyances et pratiques populaires », mais d'un point de vue catholique.

[28] La seconde demande a elle aussi été refusée par la ministre. Dans une lettre datée du 13 novembre 2008, une cadre du ministère qui écrivait au nom de la ministre s'est dite préoccupée par le fait que le programme proposé était fondé sur la foi plutôt que sur la culture. Elle y a également fait état de ce qui était considéré comme des lacunes dans le développement des compétences relatives au dialogue et dans le rôle de l'enseignant. La lettre énonçait les six raisons suivantes pour justifier la décision de la ministre de refuser la demande d'exemption :

- Les deux grandes finalités du programme Éthique et culture religieuse sont la reconnaissance de l'autre et la poursuite du bien commun. L'approche et la conception du bien commun développées dans le programme Éthique et culture religieuse et celles proposées par Loyola High School sont très différentes. L'approche préconisée dans le programme Éthique et culture religieuse est culturelle et non fondée sur la foi. Or, suivant le sommaire du programme proposé par Loyola High School et soumis au Ministère pour évaluation, il appert que le programme de Loyola High School est fondé sur la foi catholique et a pour principale finalité la transmission des croyances et convictions catholiques. Il englobe une conception de l'autre, mais toujours par rapport à la perspective chrétienne catholique.

- Toujours suivant le sommaire du programme soumis au Ministère pour évaluation, il appert que, contrairement au programme Éthique et culture religieuse, le programme de Loyola High School n'amène pas l'élève à réfléchir sur le bien commun, ni sur des questions d'éthique, mais l'amène plutôt à adopter la perspective jésuite du service chrétien.

- Le volet éthique du programme Éthique et culture religieuse ne propose pas d'enseignement moral aux élèves. Il tient compte d'éléments de la culture

religious culture, whereas, according to the information transmitted to the department, the ethics aspect of the program proposed by Loyola High School focuses on the teaching of moral reference points laid down by the Catholic Church.

- According to the summary of the program submitted to the department for evaluation, the program proposed by Loyola High School does not provide for the development of competence in the practice of dialogue within the meaning of the Ethics and Religious Culture program.
- The training in religious culture of the Ethics and Religious Culture program is aimed at an enlightened comprehension of the many expressions of the religious experience present in Québec culture and in the world. Each religious tradition is observed individually without comparison or reference to another tradition. According to the summary of the program proposed by Loyola High School and transmitted to the department for evaluation, the program does not meet the requirements for the Ethics and Religious Culture program in terms of religious culture, as religions are studied in connection with the Catholic religion.
- Again according to the summary of the program submitted to the department for evaluation, the program proposed by Loyola High School is distinguished from the Ethics and Religious Culture program in terms of the teacher's role. In the Ethics and Religious Culture program, the teacher's foremost responsibility is to assist and guide the students in their reflections, whereas according to the information provided the department, the teacher of the program proposed by Loyola High School seems to have to teach the foundations of the religion and universe of Jesuit Catholic beliefs.

[29] Loyola brought an application for judicial review of the Minister's decision. In its view, the "normative pluralism" that underpinned the entire ERC Program was a violation of freedom of religion because it was incompatible with Loyola's character as a Catholic institution. After hearing additional testimony from Loyola about its proposed alternative program, the application judge concluded that the Minister's decision was incorrect, and constituted an unjustified violation of Loyola's right to religious freedom.

religieuse, alors que, selon les informations transmises au Ministère, le volet éthique du programme proposé par Loyola High School apparaît axé sur l'enseignement de repères moraux édictés par l'Église catholique.

- Suivant le sommaire du programme soumis au Ministère pour évaluation, il appert que le programme proposé par Loyola High School ne prévoit pas le développement de la compétence à la pratique du dialogue au sens où le programme Éthique et culture religieuse l'entend.
- La formation en culture religieuse du programme Éthique et culture religieuse vise une compréhension éclairée des multiples expressions du religieux présentes dans la culture québécoise et dans le monde. Chaque tradition religieuse est observée individuellement sans comparaison ou référence à une autre tradition. Suivant le sommaire du programme proposé par Loyola High School transmis au Ministère pour évaluation, il appert que ce programme ne satisfait pas aux exigences du programme Éthique et culture religieuse relatives à la culture religieuse, car l'étude des religions apparaît être réalisée en lien avec la religion catholique.
- Toujours suivant le sommaire du programme soumis au Ministère pour évaluation, il appert que le programme proposé par Loyola High School se distingue du programme Éthique et culture religieuse en ce qui a trait au rôle de l'enseignant. En effet, dans le programme Éthique et culture religieuse, la première responsabilité de l'enseignant est d'accompagner et de guider ses élèves dans leur réflexion, alors que suivant les informations fournies au Ministère, l'enseignant du programme proposé par Loyola High School semble devoir enseigner les fondements de la religion et de l'univers des croyances catholiques jésuites.

[29] Loyola a demandé le contrôle judiciaire de la décision de la ministre, plaidant que le « pluralisme normatif » qui sert de fondement à l'ensemble du programme ÉCR violait la liberté de religion parce qu'il est incompatible avec le caractère confessionnel catholique de l'établissement. Après avoir entendu des témoignages additionnels produits par Loyola au sujet du programme de remplacement proposé, le juge saisi de la demande a conclu que la décision de la ministre était incorrecte et qu'elle constituait une violation injustifiée du droit à la liberté de religion de cette institution.

[30] On appeal, the Quebec Court of Appeal unanimously overturned the decision. Applying this Court's decision in *Doré*, the Court of Appeal held that a reasonableness standard should be applied in assessing how the Minister balanced the *Charter* rights at stake. It concluded that the ERC Program did not interfere with religious freedom in any substantial manner, and that the Minister had therefore exercised her discretion in a reasonable manner.

[31] Before this Court, Loyola took a different position than in the prior proceedings. Loyola had previously asserted that the *entire* orientation of the ERC Program represented an impairment of religious freedom on the basis that discussing any religion through a neutral lens would be incompatible with Catholic beliefs. Its revised position before us was that it did not object to teaching *other* world religions objectively in the first component which focuses on "understanding religious culture". But it still wanted to be able to teach the *ethics* of other religious traditions from the perspective of the Catholic religion rather than in an objective and neutral way. Moreover, it continued to assert the right to teach Catholic doctrine and ethics from a Catholic perspective. Loyola took no position on the perspective from which it would seek to teach the dialogue component, which would be integrated with the other two components of its proposed alternative program. The position of the Minister before this Court, however, remained the same as it had been in the prior proceedings, namely, that in no aspect of the ERC Program would Loyola be permitted to teach from a Catholic perspective. It follows that Loyola's change of position has little impact on the analysis. The question instead is whether the *Minister*'s unchanged position, as reflected in her decision concerning the equivalency of Loyola's proposed program, interferes with the relevant *Charter* protections no more than is necessary given the statutory objectives she was required to pursue.

[30] En appel, les juges de la Cour d'appel du Québec ont unanimement infirmé cette décision. Appliquant l'arrêt rendu par la Cour dans l'affaire *Doré*, ils ont jugé qu'il fallait appliquer la norme de la décision raisonnable pour apprécier la manière dont la ministre avait mis en balance les droits garantis par la *Charte* qui étaient en cause. La Cour d'appel a conclu que le programme ÉCR ne portait aucune atteinte substantielle à la liberté de religion et que la ministre avait donc exercé son pouvoir discrétionnaire de façon raisonnable.

[31] Devant la Cour, Loyola a adopté une position différente de celle qu'elle avait défendue au cours des procédures antérieures. Jusqu'alors, elle avait soutenu que *toute* l'orientation du programme ÉCR constituait une atteinte à son droit à la liberté de religion, puisque discuter de toute religion sous un éclairage neutre était incompatible avec les convictions catholiques. Selon la position révisée qu'elle nous a présentée, elle ne s'oppose plus à l'enseignement d'*autres* religions du monde de façon objective dans le cadre du premier volet, soit celui qui est axé sur « la compréhension du phénomène religieux ». Cela dit, Loyola souhaite toujours pouvoir enseigner l'*éthique* d'autres traditions religieuses du point de vue de la religion catholique plutôt que d'une manière neutre et objective. De plus, elle continue à revendiquer son droit d'enseigner la doctrine et l'éthique catholiques dans une perspective catholique. Loyola n'a pas pris position sur la perspective suivant laquelle elle enseignerait le volet relatif à la pratique du dialogue qui serait intégré aux deux autres volets du programme de remplacement proposé. Pour sa part, la ministre a maintenu devant la Cour la même position que devant les juridictions inférieures, soit que Loyola ne devrait être autorisée à enseigner aucun aspect du programme ÉCR suivant une perspective catholique. Ainsi, le changement de position de Loyola n'a que peu d'incidence sur l'analyse. La question revient plutôt à savoir si la position inchangée de *la ministre*, comme l'illustre sa décision concernant l'équivalence du programme proposé par Loyola, interfère aussi peu qu'il est nécessaire de le faire avec les protections pertinentes garanties par la *Charte* compte tenu des objectifs de la loi qu'elle avait l'obligation de chercher à atteindre.

Analysis

[32] Loyola does not challenge the Minister's statutory authority to impose curricular requirements, but rather her discretionary decision to deny Loyola an exemption from the ERC Program. The reasonableness of the Minister's decision depends on whether it reflected a proportionate balance between the statutory mandate to grant exemptions only when a proposed alternative program is "equivalent" to the prescribed curriculum, based on the ERC Program's goals of promoting tolerance and respect for difference, and the religious freedom of the members of the Loyola community who seek to offer and wish to receive a Catholic education.

[33] Loyola, a non-profit corporation constituted under Part III of the Quebec *Companies Act*, CQLR, c. C-38, also argued that its own religious freedom had been violated by the decision. I recognize that individuals may sometimes require a legal entity in order to give effect to the constitutionally protected communal aspects of their religious beliefs and practice, such as the transmission of their faith: *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567, at para. 181; *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, [2004] 2 S.C.R. 650. I do not believe it is necessary, however, to decide whether corporations enjoy religious freedom in their own right under s. 2(*a*) of the *Charter* or s. 3 of the *Charter of human rights and freedoms*, CQLR, c. C-12 (the *Quebec Charter*), in order to dispose of this appeal.

[34] In this case Loyola, as an entity lawfully created to give effect to religious belief and practice, was denied a statutory exemption from an otherwise mandatory regulatory scheme. As the subject of the administrative decision, Loyola is entitled to apply for judicial review and to argue that the Minister failed to respect the values underlying the grant of

Analyse

[32] Loyola conteste non pas le pouvoir légal de la ministre d'imposer certaines exigences pédagogiques, mais plutôt la décision qu'elle a prise, par suite de l'exercice de son pouvoir discrétionnaire, de refuser de l'exempter de l'obligation d'appliquer le programme ÉCR. Pour juger du caractère raisonnable de la décision de la ministre, il faut déterminer si cette décision est le fruit d'une mise en balance proportionnée du mandat légal d'accorder une exemption uniquement si le programme proposé est « équivalent » au programme d'études prescrit compte tenu des objectifs de promotion de la tolérance et du respect des différences du programme ÉCR, d'une part, et de la liberté de religion des membres de la communauté de Loyola qui veulent offrir et qui souhaitent recevoir une éducation catholique, d'autre part.

[33] Loyola, une corporation sans but lucratif constituée sous le régime de la partie III de la *Loi sur les compagnies* du Québec, RLRQ, c. C-38, a également fait valoir que la décision avait porté atteinte à sa liberté de religion. Je reconnais que les individus peuvent parfois avoir besoin d'une personne morale pour donner effet aux aspects collectifs, protégés par la Constitution, de leurs croyances et pratiques religieuses, comme la transmission de leur foi : *Alberta c. Hutterian Brethren of Wilson Colony*, [2009] 2 R.C.S. 567, par. 181; *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine c. Lafontaine (Village)*, [2004] 2 R.C.S. 650. Toutefois, pour statuer sur le présent pourvoi, je ne crois pas qu'il soit nécessaire de décider si les sociétés jouissent elles-mêmes de la liberté de religion protégée par l'al. 2*a*) de la *Charte* ou par l'art. 3 de la *Charte des droits et libertés de la personne*, RLRQ, c. C-12 (« *Charte québécoise* »).

[34] En l'espèce, Loyola, en tant qu'entité légalement constituée pour donner effet à des croyances et pratiques religieuses, s'est vu refuser l'octroi d'une exemption prévue par la loi d'un régime réglementaire par ailleurs obligatoire. Parce qu'elle est l'objet de cette décision administrative, l'école est autorisée à présenter une demande de contrôle

her discretion as part of its challenge of the merits of the decision. In my view, as a result, it is not necessary to decide whether Loyola itself, as a corporation, enjoys the benefit of s. 2(*a*) rights, since the Minister is bound in any event to exercise her discretion in a way that respects the values underlying the grant of her decision-making authority, including the *Charter*-protected religious freedom of the members of the Loyola community who seek to offer and wish to receive a Catholic education: *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, at para. 71.

judiciaire et à soutenir, dans le cadre de sa contestation du bien-fondé de la décision, que la ministre n'a pas respecté les valeurs sous-jacentes à l'octroi de son pouvoir discrétionnaire. À mon avis, il n'est donc pas nécessaire de décider si Loyola, en tant que société, jouit elle-même du bénéfice des droits protégés par l'al. 2*a*), puisque, en effet, la ministre est tenue de toute façon d'exercer son pouvoir discrétionnaire dans le respect des valeurs sous-jacentes à l'octroi de son pouvoir décisionnel, et notamment de la liberté de religion que garantit la *Charte* aux membres de cette communauté qui veulent offrir ou qui souhaitent recevoir une éducation catholique : *Chamberlain c. Surrey School District No. 36*, [2002] 4 R.C.S. 710, par. 71.

[35] This case, as the Court of Appeal noted and as the parties before this Court accepted, squarely engages the framework set out in *Doré*, which applies to discretionary administrative decisions that engage the *Charter*. *Doré* requires administrative decision-makers to proportionately balance the *Charter* protections —values and rights — at stake in their decisions with the relevant statutory mandate: *Doré*, at para. 55.

[35] Comme l'a souligné la Cour d'appel et comme en ont convenu les parties devant la Cour, la présente cause fait directement intervenir le cadre d'analyse élaboré dans *Doré,* qui s'applique aux décisions administratives de nature discrétionnaire emportant l'application de la *Charte*. *Doré* oblige les décideurs administratifs à procéder à une mise en balance proportionnée des protections — droits et valeurs — offertes par la *Charte* en jeu dans leurs décisions, d'une part, et du mandat légal pertinent, d'autre part : *Doré*, par. 55.

[36] As Aharon Barak explained, the purpose of a constitutional right is the realization of its constitutional values: *Human Dignity: The Constitutional Value and the Constitutional Right* (2015), at p. 144. In the *Doré* analysis, *Charter* values — those values that underpin each right and give it meaning — help determine the extent of any given infringement in the particular administrative context and, correlatively, when limitations on that right are proportionate in light of the applicable statutory objectives: *Hutterian Brethren*, at para. 88; Lorne Sossin and Mark Friedman, "Charter Values and Administrative Justice" (2014), 67 *S.C.L.R.* (2d) 391, at pp. 403-4.

[36] Comme Aharon Barak l'a expliqué, un droit constitutionnel existe en vue de la réalisation des valeurs constitutionnelles qu'il recèle : *Human Dignity : The Constitutional Value and the Constitutional Right* (2015), p. 144. Dans l'analyse préconisée par *Doré*, les valeurs consacrées par la *Charte* — soit les valeurs qui sous-tendent chaque droit et qui leur donnent un sens — aident à préciser l'ampleur d'une atteinte à un droit donné dans le contexte administratif en cause et, corrélativement, à savoir dans quels cas les restrictions à ce droit sont proportionnées compte tenu des objectifs légaux applicables : *Hutterian Brethren*, par. 88; Lorne Sossin et Mark Friedman, « Charter Values and Administrative Justice » (2014), 67 *S.C.L.R.* (2d) 391, p. 403-404.

[37] On judicial review, the task of the reviewing court applying the *Doré* framework is to assess whether the decision is reasonable because it reflects a proportionate balance between the *Charter*

[37] Lors d'un contrôle judiciaire, le rôle de la cour appelée à appliquer le cadre d'analyse établi dans *Doré* consiste à se demander si la décision en cause est raisonnable parce qu'elle est le

protections at stake and the relevant statutory mandate: *Doré*, at para. 57. Reasonableness review is a contextual inquiry: *Catalyst Paper Corp. v. North Cowichan (District)*, [2012] 1 S.C.R. 5, at para. 18. In the context of decisions that implicate the *Charter*, to be defensible, a decision must accord with the fundamental values protected by the *Charter*.

[38] The *Charter* enumerates a series of guarantees that can only be limited if the government can justify those limitations as proportionate. As a result, in order to ensure that decisions accord with the fundamental values of the *Charter* in contexts where *Charter* rights are engaged, reasonableness requires proportionality: *Doré*, at para. 57. As Aharon Barak noted, "Reasonableness in [a strong] sense strikes a proper balance among the relevant considerations, and it does not differ substantively from proportionality": "Proportionality (2)", in *The Oxford Handbook of Comparative Constitutional Law* (2012), Michel Rosenfeld and András Sajó, eds., 738, at p. 743.

[39] The preliminary issue is whether the decision engages the *Charter* by limiting its protections. If such a limitation has occurred, then "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* protections at play": *Doré*, at para. 57. A proportionate balancing is one that gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate. Such a balancing will be found to be reasonable on judicial review: *Doré*, at paras. 43-45.

[40] A *Doré* proportionality analysis finds analytical harmony with the final stages of the *Oakes* framework used to assess the reasonableness of a

fruit d'une mise en balance proportionnée des protections en jeu conférées par la *Charte*, d'une part, et du mandat pertinent conféré par la loi, d'autre part : *Doré*, par. 57. L'appréciation du caractère raisonnable d'une décision constitue une analyse contextuelle : *Catalyst Paper Corp. c. North Cowichan (District)*, [2012] 1 R.C.S. 5, par. 18. Pour être défendable, une décision mettant en cause la *Charte* doit être conforme aux valeurs fondamentales garanties par ce texte.

[38] La *Charte* énumère une série de garanties qui ne peuvent être restreintes que si le gouvernement peut démontrer que ces restrictions sont proportionnées. En conséquence, pour qu'une telle décision soit conforme aux valeurs fondamentales consacrées par la *Charte* lorsque sont en cause des droits que protègent cette dernière, la raisonnabilité commande la proportionnalité : *Doré*, par. 57. Comme l'a souligné Aharon Barak, [TRADUCTION] « [l]a raisonnabilité [au sens fort du terme] établit un juste équilibre entre les considérations pertinentes, et ne diffère pas substantiellement de la proportionnalité » : « Proportionality (2) », dans *The Oxford Handbook of Comparative Constitutional Law* (2012), Michel Rosenfeld et András Sajó, dir., 738, p. 743.

[39] La question préliminaire consiste à déterminer si la décision fait intervenir la *Charte* en restreignant les protections que confère cette dernière. En présence d'une telle restriction, « 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 en cause protégés par la *Charte* » : *Doré*, par. 57. Une mise en balance proportionnée en est une qui donne effet autant que possible aux protections en cause conférées par la *Charte* compte tenu du mandat législatif particulier en cause. Une telle mise en balance sera jugée raisonnable dans le cadre d'un contrôle judiciaire : *Doré*, par. 43-45.

[40] L'analyse de la proportionnalité prescrite par l'arrêt *Doré* s'harmonise avec les étapes finales du cadre d'analyse énoncé dans *Oakes* qui sert pour

limit on a *Charter* right under s. 1: minimal impairment and balancing. Both *R. v. Oakes*, [1986] 1 S.C.R. 103, and *Doré* require that *Charter* protections are affected as little as reasonably possible in light of the state's particular objectives: see *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160. As such, *Doré*'s proportionality analysis is a robust one and "works the same justificatory muscles" as the *Oakes* test: *Doré*, at para. 5.

déterminer si une restriction à un droit garanti par la *Charte* est raisonnable au regard de l'article premier : atteinte minimale et équilibre. Les arrêts *R. c. Oakes*, [1986] 1 R.C.S. 103, et *Doré* exigent tous deux que l'on restreigne les protections conférées par la *Charte* aussi peu que cela est raisonnablement possible eu égard aux objectifs particuliers de l'État : voir *RJR-MacDonald Inc. c. Canada (Procureur général)*, [1995] 3 R.C.S. 199, par. 160. L'analyse de la proportionnalité préconisée par l'arrêt *Doré* constitue donc une solide analyse qui « fait intervenir les mêmes réflexes justificateurs » que le test de l'arrêt *Oakes* : *Doré*, par. 5.

[41] The *Doré* analysis is also a highly contextual exercise. As under the minimal impairment stage of the *Oakes* analysis, under *Doré* there may be more than one proportionate outcome that protects *Charter* values as fully as possible in light of the applicable statutory objectives and mandate: *RJR-MacDonald*, at para. 160.

[41] L'analyse décrite dans *Doré* constitue aussi un exercice hautement contextuel. Tout comme le volet de l'atteinte minimale de l'analyse prescrite par l'arrêt *Oakes*, plusieurs issues peuvent être proportionnées et protéger les valeurs consacrées par la *Charte* aussi pleinement que possible à la lumière des objectifs et mandat applicables prévus par la loi : *RJR-MacDonald*, par. 160.

[42] *Doré*'s approach to reviewing administrative decisions that implicate the *Charter*, including those of adjudicative tribunals, responds to the diverse set of statutory and procedural contexts in which administrative decision-makers operate, and respects the expertise that these decision-makers typically bring to the process of balancing the values and objectives at stake on the particular facts in their statutory decisions: para. 47; see also David Mullan, "Administrative Tribunals and Judicial Review of *Charter* Issues After *Multani*" (2006), 21 *N.J.C.L.* 127, at p. 149; and 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. As Lorne Sossin and Mark Friedman have observed in their cogent article:

[42] La démarche que la Cour a appliquée dans *Doré* pour contrôler les décisions administratives faisant intervenir la *Charte*, y compris celles d'organismes juridictionnels, tient compte des divers cadres légaux et procéduraux dans lesquels les décideurs administratifs sont appelés à agir. Elle respecte en outre l'expertise que ceux-ci apportent généralement au processus de mise en balance des valeurs et des objectifs en cause eu égard aux faits particuliers de l'affaire dans les décisions qu'ils prennent en application de la loi : par. 47; voir aussi David Mullan, « Administrative Tribunals and Judicial Review of *Charter* Issues After *Multani* » (2006), 21 *R.N.D.C.* 127, p. 149; et 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. Comme les auteurs Lorne Sossin et Mark Friedman le font observer dans leur article convaincant :

While the Charter jurisprudence can shed light on the scope of Charter values, it remains for each tribunal to determine . . . how to balance those values against its policy mandate. For example, while personal autonomy

[TRADUCTION] Bien que la jurisprudence relative à la Charte puisse nous éclairer sur la portée des valeurs consacrées par cette dernière, il revient à chaque tribunal administratif de déterminer [. . .] comment mettre

may be a broadly recognized Charter value, it will necessarily mean something different in the context of a privacy commission than in the context of a parole board. [p. 422]

[43] The context before us — state regulation of religious schools — poses the question of how to balance robust protection for the values underlying religious freedom with the values of a secular state. Part of secularism, however, is respect for religious differences. 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 those of another: Richard Moon, "Freedom of Religion Under the *Charter of Rights*: The Limits of State Neutrality" (2012), 45 *U.B.C. L. Rev.* 497, at pp. 498-99. 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.

[44] Through this form of neutrality, the state affirms and recognizes the religious freedom of individuals and their communities. As Prof. Moon noted:

Underlying the [state] neutrality requirement, and the insulation of religious beliefs and practices from political decision making, is a conception of religious belief or commitment as deeply rooted, as an element of the individual's identity, rather than simply a choice or judgment she or he has made. Religious belief lies at the core of the individual's worldview. It orients the individual in the world, shapes his or her perception of the social and natural orders, and provides a moral framework for his or her actions. Moreover, religious belief ties the individual to a community of believers and is often the central or defining association in her or his life. The individual believer participates in a shared system of practices and values that may, in some cases, be described as "a way of life". If religion is an aspect of the individual's identity,

en balance ces valeurs et le mandat général dont il est investi. Par exemple, bien que l'autonomie personnelle puisse constituer une valeur consacrée par la Charte généralement reconnue, elle aura nécessairement un sens différent aux yeux d'un commissariat à la protection de la vie privée et à ceux d'une commission des libérations conditionnelles. [p. 422]

[43] Le contexte particulier de la présente affaire — qui porte sur la réglementation par l'État des écoles confessionnelles — 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. La laïcité vise toutefois en partie le respect des différences religieuses. Un État laïque ne s'immisce 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 : Richard Moon, « Freedom of Religion Under the *Charter of Rights* : The Limits of State Neutrality » (2012), 45 *U.B.C. L. Rev.* 497, p. 498-499. 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.

[44] Par cette forme de neutralité, l'État confirme et reconnaît la liberté de religion des individus et celle des communautés auxquelles ils appartiennent. Comme le professeur Moon le fait observer :

[TRADUCTION] À la base de l'exigence de cette neutralité [de l'État] et du principe du cloisonnement entre, d'une part, les convictions et les pratiques religieuses et, d'autre part, les décisions politiques, se trouve une conception de la croyance et de l'engagement religieux qui sont profondément enracinés, ou de l'engagement envisagé comme un élément de l'identité de l'individu plutôt que comme une simple question de choix ou de jugement personnels. La croyance religieuse se situe au cœur même de la vision que chacun se fait du monde. Elle oriente l'individu dans le monde, façonne sa perception de l'ordre social et naturel et encadre son agir sur le plan moral. De plus, les convictions religieuses permettent à l'individu de s'identifier à une communauté de croyants, qui constitue souvent le groupe le plus important dans

then when the state treats his or her religious practices or beliefs as less important or less true than the practices of others, or when it marginalizes her or his religious community in some way, it is not simply rejecting the individual's views and values, it is denying her or his equal worth. [Footnote omitted; p. 507.]

[45] Because it allows communities with different values and practices to peacefully co-exist, a secular state also supports pluralism. The European Court of Human Rights recognized the relationship between religious freedom, secularism and pluralism in *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A No. 260-A, a case about a Jehovah's Witness who had been repeatedly arrested for violating Greece's ban on proselytism. Concluding that the claimant's Article 9 rights to religious freedom had been violated, the court wrote:

As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. [p. 17]

See also *Metropolitan Church of Bessarabia v. Moldova*, No. 45701/99, ECHR 2001-XII.

[46] This does not mean that religious differences trump core national values. On the contrary, as this Court observed in *Bruker v. Marcovitz*, [2007] 3 S.C.R. 607:

Not all differences are compatible with Canada's fundamental values and, accordingly, not all barriers to their

sa vie ou celui qui le définit. Le croyant adhère à un système de pratiques et de valeurs communes qui, dans certains cas, peuvent être qualifiées de « modes de vie ». Si la religion constitue un aspect de l'identité d'une personne, l'État qui considère les pratiques ou les convictions religieuses de cette personne comme étant moins importantes ou moins véridiques que celles d'une autre ou qui marginalise d'une manière ou d'une autre sa communauté religieuse ne fait pas que rejeter les opinions et les valeurs de cette personne; il nie que cette personne a la même valeur que les autres êtres humains. [Note de bas de page omise; p. 507.]

[45] Parce qu'il permet à des collectivités ayant des valeurs et des pratiques différentes de coexister de façon pacifique, l'État laïque soutient aussi le pluralisme. La Cour européenne des droits de l'homme a reconnu les liens qui existaient entre la liberté de religion, la laïcité et le pluralisme dans *Kokkinakis c. Grèce*, jugement du 25 mai 1993, série A n° 260-A, où il était question d'un Témoin de Jéhovah qui avait été arrêté à maintes reprises pour avoir violé l'interdiction du prosélytisme en Grèce. Concluant que les droits à la liberté de religion garantis au demandeur par l'art. 9 avaient été violés, la cour a écrit :

Telle que la protège l'article 9, la liberté de pensée, de conscience et de religion représente l'une des assises d'une « société démocratique » au sens de la Convention. Elle figure, dans sa dimension religieuse, parmi les éléments les plus essentiels de l'identité des croyants et de leur conception de la vie, mais elle est aussi un bien précieux pour les athées, les agnostiques, les sceptiques ou les indifférents. Il y va du pluralisme — chèrement conquis au cours des siècles — consubstantiel à pareille société. [p. 17]

Voir également l'arrêt *Église métropolitaine de Bessarabie c. Moldova*, n° 45701/99, CEDH 2001-XII.

[46] Pour autant, les différences religieuses ne l'emportent pas sur les valeurs nationales fondamentales. Au contraire, comme la Cour l'a signalé dans l'arrêt *Bruker c. Marcovitz*, [2007] 3 R.C.S. 607 :

[Ces différences] ne sont pas toutes compatibles avec les valeurs canadiennes fondamentales et par conséquent,

expression are arbitrary. Determining when the assertion of a right based on difference must yield to a more pressing public interest is a complex, nuanced, fact-specific exercise that defies bright-line application. It is, at the same time, a delicate necessity for protecting the evolutionary integrity of both multiculturalism and public confidence in its importance. [para. 2]

Or, as the Bouchard-Taylor report observed:

A democratic, liberal State cannot be indifferent to certain core values, especially basic human rights, the equality of all citizens before the law, and popular sovereignty. These are the constituent values of our political system and they provide its foundation.

(Gérard Bouchard and Charles Taylor, Commission de consultation sur les pratiques d'accommodement reliées aux différences culturelles, *Building the Future: A Time for Reconciliation* (2008), at p. 134)

[47] These shared values — equality, human rights and democracy — are values the state always has a legitimate interest in promoting and protecting. They enhance the conditions for integration and points of civic solidarity by helping connect us despite our differences: Jürgen Habermas, "Religion in the Public Sphere" (2006), 14 *Eur. J. of Philos.* 1, at p. 5. This is what makes pluralism work. As McLachlin J. noted in *Adler v. Ontario*, [1996] 3 S.C.R. 609 (dissenting in part), "[a] multicultural multireligious society can only work . . . if people of all groups understand and tolerate each other": para. 212. Religious freedom must therefore be understood in the context of a secular, multicultural and democratic society with a strong interest in protecting dignity and diversity, promoting equality, and ensuring the vitality of a common belief in human rights.

[48] The state, therefore, has a legitimate interest in ensuring that students in *all* schools are capable,

les obstacles à leur expression ne sont pas tous arbitraires. Déterminer les circonstances dans lesquelles l'affirmation d'un droit fondé sur une différence doit céder le pas à un intérêt public plus pressant constitue un exercice complexe, nuancé, tributaire des faits propres à chaque espèce qu'il serait illusoire d'encadrer nettement. Mais cette tâche est également une délicate nécessité, requise afin de protéger l'intégrité évolutive du multiculturalisme et de l'assurance du public quant à son importance. [par. 2]

Ou, comme le Rapport Bouchard-Taylor le fait observer :

Un État démocratique et libéral ne saurait être indifférent à l'égard de certaines valeurs clés, notamment les droits humains fondamentaux, l'égalité de tous les citoyens devant la loi et la souveraineté populaire. Ce sont les valeurs constitutives de notre régime politique; elles lui procurent ses fondements.

(Gérard Bouchard et Charles Taylor, Commission de consultation sur les pratiques d'accommodement reliées aux différences culturelles, *Fonder l'avenir : Le temps de la conciliation* (2008), p. 134)

[47] Ces valeurs communes — l'égalité, les droits de la personne et la démocratie — sont des valeurs que l'État a toujours un intérêt légitime à promouvoir et à protéger. Elles favorisent les conditions d'intégration et mettent en valeur des éléments de solidarité civique en aidant les citoyens à forger des liens malgré leurs différences : Jürgen Habermas, « Religion in the Public Sphere » (2006), 14 *Eur. J. of Philos.* 1, p. 5. C'est là ce qui fait fonctionner le pluralisme. Ainsi que la juge McLachlin (dissidente en partie) l'a souligné dans l'arrêt *Adler c. Ontario*, [1996] 3 R.C.S. 609, « [u]ne société [multiculturelle multiconfessionnelle] ne peut fonctionner [. . .] que si les membres de tous les groupes qui la composent se comprennent et se tolèrent mutuellement » (par. 212). La liberté de religion doit donc s'interpréter dans le contexte d'une société laïque, multiculturelle et démocratique qui tient au plus haut point à protéger la dignité et la diversité, à favoriser l'égalité et à assurer la vitalité d'une croyance commune à l'égard des droits de la personne.

[48] L'État a, par conséquent, un intérêt légitime à s'assurer que les élèves de *toutes* les écoles seront

as adults, of conducting themselves with openness and respect as they confront cultural and religious differences. A pluralist, multicultural democracy depends on the capacity of its citizens "to engage in thoughtful and inclusive forms of deliberation amidst, and enriched by," different religious worldviews and practices: Benjamin L. Berger, "Religious Diversity, Education, and the 'Crisis' in State Neutrality" (2014), 29 *C.J.L.S.* 103, at p. 115.

[49] With this context in mind, we turn to assessing the Minister's decision in order to determine whether it proportionately balanced religious freedom with the statutory objectives of the ERC Program.

[50] I begin with an analysis of the statutory objectives at stake. Under s. 22 of the *Regulation respecting the application of the Act respecting private education*, the Minister is required to grant exemptions from the mandatory program when a school offers an "equivalent" program. The starting point for the analysis of the statutory objectives is interpreting the meaning of "equivalent", taking into account the words of the provision in this regulatory context, the scheme of the Act, the object of the Act, and the intention of Parliament: Elmer A. Driedger, *The Construction of Statutes* (1974), at p. 67; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21.

[51] This regulatory context concerns the minimum educational attainments required of students in private and public schools across Quebec. Quebec seeks to ensure that students who graduate with a provincially approved secondary school diploma demonstrate the knowledge and competencies they need to be productive members of society, and that schools granting secondary school diplomas facilitate the realization of these skills. In particular, the Minister has a statutory responsibility to adopt measures that will contribute to individuals' education and development, and to ensure that educational institutions offer services of sufficient quality: *An Act respecting the Ministère de l'Éducation, du Loisir et du Sport*, CQLR, c. M-15, s. 2.

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 et pluraliste doit pouvoir compter sur la capacité de ses citoyens [TRADUCTION] « de discuter de manière réfléchie et ouverte en profitant » de diverses visions du monde et pratiques religieuses : Benjamin L. Berger, « Religious Diversity, Education, and the "Crisis" in State Neutrality » (2014), 29 *R.C.D.S.* 103, p. 115.

[49] C'est dans cette optique que nous allons déterminer si la ministre a procédé à une mise en balance proportionnée du droit à la liberté de religion, d'une part, et des objectifs fixés par la loi pour le programme ÉCR, d'autre part.

[50] Je commencerais par une analyse des objectifs de la loi qui sont en cause. Suivant l'art. 22 du *Règlement d'application de la Loi sur l'enseignement privé*, le ministre est tenu d'exempter une école du programme d'études obligatoire si celle-ci offre un programme « équivalent ». Le point de départ de l'analyse des objectifs de la loi consiste à interpréter le terme « équivalent » eu égard au libellé de la disposition en cause dans ce contexte réglementaire, à l'économie de la loi, à son objet et à l'intention du législateur : Elmer A. Driedger, *The Construction of Statutes* (1974), p. 67; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 21.

[51] Le contexte réglementaire en question concerne le niveau minimal de connaissances exigé des élèves des écoles privées et publiques de la province. Le Québec veut ainsi s'assurer que les élèves qui obtiennent un diplôme d'études secondaires approuvé par la province possèdent les connaissances et les compétences dont ils auront besoin pour être des membres productifs de la société et que les écoles qui décernent des diplômes d'études secondaires facilitent l'acquisition de ces habiletés. Plus particulièrement, le ministre a la responsabilité légale d'adopter des mesures propres à contribuer à l'éducation et au développement des personnes, et de s'assurer que les établissements d'enseignement offrent des services d'une qualité suffisante : *Loi sur le ministère de l'Éducation, du Loisir et du Sport*, RLRQ, c. M-15, art. 2.

[52] To this end, under the *Basic school regulation for preschool, elementary and secondary education*, Quebec prescribes the compulsory subjects that must be taught each year and sets out minimum requirements for the instructional hours to be accorded to each subject: ss. 23 and 23.1. The Minister also has the power to set out core course objectives and content, establish curricula to teach these core subjects, as well as allow for optional content that can be customized according to the needs of students: *Education Act*, s. 461. The mandatory curricula must be taught in private as well as public schools: *An Act respecting private education*, ss. 25 and 32. Finally, the regulatory scheme also requires all private educational institutions to hold a permit to operate, which enables the Minister to ensure that all private schools are complying with the general regulatory framework it has set out: *An Act respecting private education*, s. 10.

[53] The power to grant exemptions from the mandatory curriculum in cases where a school offers an "equivalent" program is part of the Minister's broader regulatory role of ensuring that basic educational standards are met by schools and students alike. As a result, in order to be consistent with the scheme as a whole, the Minister's interpretation of which programs are "equivalent" should take into account the objectives each course seeks to meet and the competencies it seeks to inculcate in students.

[54] At the same time, however, there would be little point in offering an exemption if, in order to receive it, the proposed alternative program had to be identical to the mandatory program in every way. The exemption exists in a regulatory scheme that anticipates and sanctions the existence of private denominational schools. And the preamble to *An Act respecting the Ministère de l'Éducation, du Loisir et du Sport*, which sets out the Minister's powers, recognizes that parents have the right to choose establishments that, according to their own convictions, best respect the rights of their children. In order to respect values of religious freedom in this

[52] À cette fin, dans son *Régime pédagogique de l'éducation préscolaire, de l'enseignement primaire et de l'enseignement secondaire*, le Québec prescrit les matières qui doivent être enseignées chaque année et établit des exigences minimales quant au nombre d'heures à consacrer à l'enseignement de chaque matière : art. 23 et 23.1. Le ministre a également le pouvoir de prévoir des objectifs et un contenu de cours essentiels, d'établir des programmes d'enseignement de ces matières essentielles, ainsi que de permettre un contenu optionnel pouvant être adapté aux besoins des élèves : *Loi sur l'instruction publique*, art. 461. Les programmes obligatoires doivent être enseignés tant dans les écoles privées que dans les écoles publiques : *Loi sur l'enseignement privé*, art. 25 et 32. Enfin, le régime réglementaire exige de tous les établissements d'enseignement privés qu'ils détiennent un permis d'exploitation, ce qui permet au ministre de s'assurer qu'ils respectent tous le régime général de réglementation qu'il a établi : *Loi sur l'enseignement privé*, art. 10.

[53] Le pouvoir d'accorder des exemptions du régime obligatoire lorsqu'une école offre un programme « équivalent » fait partie du rôle plus général de réglementation du ministre, qui consiste à s'assurer que les normes fondamentales en matière d'éducation sont respectées tant par les écoles que par les élèves. En conséquence, pour être compatible avec le régime dans son ensemble, l'interprétation par le ministre de ce qui constitue des programmes « équivalents » devrait tenir compte des objectifs poursuivis par chaque cours et des compétences que ceux-ci visent à inculquer aux élèves.

[54] Cela dit, il n'y aurait guère d'intérêt à offrir cette exemption si, pour pouvoir s'en prévaloir, il fallait démontrer que le programme de remplacement proposé est en tout point identique au programme obligatoire. Cette exemption fait partie d'un régime réglementaire qui envisage et sanctionne l'existence des écoles privées confessionnelles. En outre, le préambule de la *Loi sur le ministère de l'Éducation, du Loisir et du Sport*, qui énonce les pouvoirs du ministre, reconnaît que les parents ont le droit de choisir des établissements qui, selon leurs propres convictions, respectent davantage les droits de leurs enfants. Par souci de respect des valeurs de la liberté

context, as well as to cohere with the larger regulatory scheme, a reasonable interpretation of the process for granting exemptions from the mandatory curriculum would leave at least some room for the religious character of those schools. The regulation providing for such exemptions would otherwise operate to prevent what the *Act respecting private education* itself allows — a private school being denominational.

[55] Although it prescribes some course content, the documentation describing the ERC Program does not set out detailed lesson plans that teachers are required to cover. The program is instead structured to be flexible and thematic, providing only a general framework to guide students in developing competencies in ethics, dialogue and religious culture, in service of the two key objectives of the program: the recognition of others and the pursuit of the common good.

[56] Given the highly flexible nature of the ERC Program and its heavy emphasis on these two objectives, as well as the context of the regulatory scheme as a whole, it is unreasonable to interpret equivalence as requiring a strict adherence to specific course content, rather than in terms of the ERC's program objectives generally. Using the program's objectives as the marker for equivalence leaves the necessary flexibility for the possibility of acceptable differences between an alternative program and the ERC Program, including differences that can accommodate religious freedom. As long as the alternative program substantially realizes the objectives of the ERC Program, it should be considered equivalent. The Minister's task was therefore to arrive at a decision that proportionately balanced the realization of the ERC Program's objectives of promoting respect for others and openness to diversity, with respect for *Charter*-protected religious freedom in this context.

de religion dans ce contexte, et de cohérence avec le régime réglementaire plus large, une interprétation raisonnable du processus d'octroi des exemptions du programme d'études obligatoire laisserait au moins une certaine place au caractère confessionnel de ces écoles. Le règlement qui prévoit de telles exemptions aurait autrement pour effet d'empêcher ce que permet la *Loi sur l'enseignement privé* — soit qu'une école privée ait un caractère confessionnel.

[55] Bien que le programme ÉCR prescrive un certain contenu de cours, la documentation qui le décrit n'établit pas de plans de leçons détaillés que les enseignants sont tenus de respecter. Le programme permet au contraire une certaine souplesse et un enseignement thématique; on ne fournit qu'un cadre général destiné à orienter les élèves dans le développement de leurs compétences en éthique, en dialogue et en phénomène religieux afin de répondre à deux objectifs clés du programme : la reconnaissance de l'autre et la poursuite du bien commun.

[56] Vu la grande souplesse du programme ÉCR et la haute importance qu'il attache à ces deux objectifs, et vu le contexte dans lequel s'inscrit le régime réglementaire dans son ensemble, il est déraisonnable de considérer que l'équivalence exige le respect strict d'un contenu de cours précis, plutôt que de l'interpréter en fonction des objectifs poursuivis par le programme de façon générale. Utiliser les objectifs du programme comme indicateur de l'équivalence offre la souplesse nécessaire pour permettre de conclure à l'existence de différences acceptables entre un programme de remplacement et le programme ÉCR, y compris des différences compatibles avec la liberté de religion. Dans la mesure où il permet de réaliser pour l'essentiel les objectifs du programme ÉCR, le programme de remplacement devrait être considéré comme équivalent. La tâche de la ministre consistait donc à prendre une décision qui établissait une mise en balance proportionnée de la réalisation des objectifs du programme ÉCR de promotion du respect de l'autre et d'ouverture à la diversité, d'une part, et du respect de la liberté de religion dans ce contexte protégée par la *Charte*, d'autre part.

[57] The information that was before the Minister when she made her decision about Loyola's proposed alternative program consisted of two letters requesting the exemption and a three-page proposed curriculum document. Based on these documents, the Minister identified a number of key differences between the two programs. The crucial difference, however, was the religious nature of Loyola's program. Loyola proposed an alternative program that would focus on Catholic precepts and ethics, and discuss other belief systems from a Catholic perspective. Its main goal, as the Minister's representative noted in her letter dated November 13, 2008, was the "transmission of Catholic beliefs and convictions". As this letter to Loyola makes clear, in the Minister's view, a program that departs in any way from the ERC Program's posture of strict neutrality, even partially, cannot achieve the state's objectives of promoting respect for others and openness to diversity. This was also the position that Quebec took before this Court.

[58] The Minister's decision necessarily engages religious freedom. The starting point, and the inspiration for most of this Court's subsequent jurisprudence about religious freedom, is *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, where Dickson J. (as he then was), writing for the majority, articulated his visionary approach to freedom of religion:

> The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.
>
> Freedom can primarily be characterized by the absence of coercion or constraint. . . . Coercion includes not only such blatant forms of compulsion as direct commands to

[57] Lorsqu'elle a pris sa décision au sujet du programme de remplacement proposé par Loyola, les renseignements dont disposait la ministre étaient contenus dans deux lettres par lesquelles Loyola demandait une exemption et dans un document de trois pages décrivant le programme d'études proposé. Se fondant sur ces documents, la ministre a relevé plusieurs différences fondamentales entre les deux programmes. La différence cruciale, toutefois, avait trait au caractère religieux du programme proposé par Loyola. En effet, ce dernier était axé sur les préceptes et l'éthique catholiques et traitait d'autres systèmes de croyances d'un point de vue catholique. Ainsi qu'une représentante de la ministre l'a fait remarquer dans sa réponse datée du 13 novembre 2008, ce programme avait pour principale finalité la « transmission des croyances et convictions catholiques ». Comme l'indiquait par ailleurs clairement cette lettre adressée à Loyola, selon la ministre, un programme qui s'écarte de quelque façon — même partiellement — de la stricte neutralité imposée par le programme ÉCR ne peut réaliser les objectifs étatiques de promotion du respect de l'autre et d'ouverture à la diversité. Le Québec a adopté la même position devant la Cour.

[58] Cette décision de la ministre fait nécessairement intervenir la liberté de religion. Le point de départ et la source d'inspiration de l'essentiel de la jurisprudence de la Cour sur la liberté de religion est l'arrêt *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, dans lequel le juge Dickson (plus tard Juge en chef), au nom des juges majoritaires, a exprimé comme suit sa conception visionnaire de la liberté de religion :

> Le concept de la liberté de religion se définit essentiellement comme le droit de croire ce que l'on veut en matière religieuse, le droit de professer ouvertement des croyances religieuses sans crainte d'empêchement ou de représailles et le droit de manifester ses croyances religieuses par leur mise en pratique et par le culte ou par leur enseignement et leur propagation. Toutefois, ce concept signifie beaucoup plus que cela.
>
> La liberté peut se caractériser essentiellement par l'absence de coercition ou de contrainte. [. . .] La coercition comprend non seulement la contrainte flagrante

act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. *Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.*

What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The *Charter* safeguards religious minorities from the threat of "the tyranny of the majority". [Emphasis added; pp. 336-37.]

[59] Justice Dickson's formulation of religious freedom is founded on the idea 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: *Hutterian Brethren*, at paras. 31, 130 and 182; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 781. In the words of Justice LeBel: "Religion is about religious beliefs, but also about religious relationships" (*Hutterian Brethren*, at para. 182).

[60] 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: Victor Muñiz-Fraticelli and Lawrence David, "Whence a nexus with religion? Religious institutionalism in a Canadian context", forthcoming, at p. 2; Dieter Grimm, "Conflicts Between General Laws and Religious Norms" (2009), 30 *Cardozo L. Rev.* 2369, at p. 2373. To fail to recognize this dimension of religious belief would be to "effectively denigrate those religions in which more emphasis is placed on communal worship or other communal religious activities": Dwight Newman, *Community and Collective Rights: A Theoretical Framework for Rights held by Groups*

exercée, par exemple, sous forme d'ordres directs d'agir ou de s'abstenir d'agir sous peine de sanction, mais également les formes indirectes de contrôle qui permettent de déterminer ou de restreindre les possibilités d'action d'autrui. La liberté au sens large comporte l'absence de coercition et de contrainte et le droit de manifester ses croyances et pratiques. *La liberté signifie que, sous réserve des restrictions qui sont nécessaires pour préserver la sécurité, l'ordre, la santé ou les mœurs publics ou les libertés et droits fondamentaux d'autrui, nul ne peut être forcé d'agir contrairement à ses croyances ou à sa conscience*.

Une majorité religieuse, ou l'État à sa demande, ne peut, pour des motifs religieux, imposer sa propre conception de ce qui est bon et vrai aux citoyens qui ne partagent pas le même point de vue. La *Charte* protège les minorités religieuses contre la menace de « tyrannie de la majorité ». [Italiques ajoutés; p. 336 et 337.]

[59] La conception de la liberté de religion exprimée par le juge Dickson repose sur l'idée 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 : *Hutterian Brethren*, par. 31, 130 et 182; *R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713, p. 781. Pour reprendre les propos du juge LeBel : « [l]a religion a trait aux croyances religieuses, mais aussi [aux] rapports religieux » (*Hutterian Brethren*, par. 182).

[60] 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 : Victor Muñiz-Fraticelli et Lawrence David, « Whence a nexus with religion? Religious institutionalism in a Canadian context », article à paraître, p. 2; Dieter Grimm, « Conflicts Between General Laws and Religious Norms » (2009), 30 *Cardozo L. Rev*. 2369, p. 2373. Méconnaître cette dimension des croyances religieuses reviendrait à [TRADUCTION] « dénigrer en fait les religions qui accordent une plus grande importance au culte collectif ou à d'autres formes d'activités religieuses

(2011), at p. 78. See also Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (1995), at p. 105.

[61] These collective aspects of religious freedom — in this case, the collective manifestation and transmission of Catholic beliefs through a private denominational school — are a crucial part of Loyola's claim. In *S.L.*, this Court held that the imposition of the ERC Program in public schools did not impose limits on the religious freedom of individual students and parents. This case, however, can be distinguished from *S.L.* because Loyola is a private religious institution created to support the collective practice of Catholicism and the transmission of the Catholic faith. The question is not only how Loyola is required to teach about *other* religions, but also how it is asked to teach about the very faith that animates its character and the comparative relationship between Catholicism and other faiths. The Minister's decision therefore demonstrably interferes with the manner in which the members of an institution formed for the very purpose of transmitting Catholicism, can teach and learn about the Catholic faith. This engages religious freedom protected under s. 2(*a*) of the *Charter*.

[62] I agree with Loyola that the Minister's decision had a serious impact on religious freedom in this context. To tell a Catholic school how to explain its faith undermines the liberty of the members of its community who have chosen to give effect to the collective dimension of their religious beliefs by participating in a denominational school.

[63] As Justice Dickson observed in *Big M Drug Mart*, "whatever else freedom of conscience and religion may mean, it must at the very least mean this: government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose" (p. 347). Although the state's purpose here is secular, requiring

collectives » : Dwight Newman, *Community and Collective Rights : A Theoretical Framework for Rights held by Groups* (2011), p. 78. Voir également Will Kymlicka, *Multicultural Citizenship : A Liberal Theory of Minority Rights* (1995), p. 105.

[61] Les aspects collectifs de la liberté de religion — dans le cas qui nous occupe, la manifestation et la transmission de la foi catholique par le truchement d'une école privée confessionnelle — constituent un élément essentiel de l'argumentation de Loyola. Dans *S.L.*, la Cour a conclu que l'imposition du programme ÉCR dans les écoles publiques ne portait pas atteinte à la liberté de religion individuelle des élèves et des parents. Le présent pourvoi peut toutefois être distingué de cette affaire parce que Loyola est une institution confessionnelle privée créée pour favoriser la pratique collective du catholicisme et la transmission de la foi catholique. La question ne consiste pas seulement à savoir comment Loyola est tenue d'enseigner d'*autres* religions, mais aussi à savoir comment on lui demande d'enseigner la religion qui constitue son essence même, ainsi que la comparaison entre le catholicisme et d'autres religions. La décision de la ministre empiète donc 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 fait intervenir la liberté de religion protégée par l'al. 2*a*) de la *Charte.*

[62] Je conviens avec Loyola que la décision de la ministre a eu une incidence sérieuse sur la liberté de religion dans ce contexte. Dicter à une école catholique la façon dont elle doit expliquer sa religion porte 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.

[63] Comme le fait observer le juge Dickson dans l'arrêt *Big M Drug Mart*, « quels que soient les autres sens que peut avoir la liberté de conscience et de religion, elle doit à tout le moins signifier ceci : le gouvernement ne peut, dans un but sectaire, contraindre des personnes à professer une foi religieuse ou à pratiquer une religion en particulier » (p. 347).

Loyola's teachers to take a neutral posture even about Catholicism means that the state is telling them how to teach the very religion that animates Loyola's identity. It amounts to requiring a Catholic institution to speak about Catholicism in terms defined by the state rather than by its own understanding of Catholicism.

[64] It also interferes with the rights of parents to transmit the Catholic faith to their children, not because it requires neutral discussion of other faiths and ethical systems, but because it prevents a Catholic discussion of Catholicism. This ignores the fact that an essential ingredient of the vitality of a religious community is the ability of its members to pass on their beliefs to their children, whether through instruction in the home or participation in communal institutions.

[65] This principle has received wide recognition in international human rights instruments. Article 18(4) of the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, for example, protects the rights of parents to guide their children's religious upbringing:

> The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

[66] Though not relied on by Loyola in this case, s. 41 of the *Quebec Charter* also protects the rights of parents to guide their children's religious upbringing:

> Parents or the persons acting in their stead have a right to give their children a religious and moral education in keeping with their convictions and with proper regard for their children's rights and interests.

Bien que, en l'espèce, l'objectif de l'État soit laïque, obliger les enseignants de Loyola à adopter un point de vue neutre même lorsqu'ils parlent du catholicisme équivaut à dicter à ceux-ci la manière dont ils doivent enseigner la religion qui constitue l'identité même de Loyola. Cela revient à exiger d'un établissement catholique qu'il traite du catholicisme selon des modalités définies par l'État plutôt que d'après sa propre conception du catholicisme.

[64] La décision de la ministre porte également atteinte au droit des parents de transmettre la foi catholique à leurs enfants, non pas parce qu'elle exige une discussion neutre quant à d'autres religions et à d'autres systèmes éthiques, mais parce qu'elle empêche toute discussion sur le catholicisme selon une perspective catholique. Elle ne tient aucunement compte du fait qu'un élément essentiel de la vitalité d'une communauté de croyants est la capacité de ses membres de transmettre leur foi à leurs enfants, soit au moyen d'un enseignement donné à la maison, soit par la participation aux activités d'institutions collectives.

[65] Ce principe a fait l'objet d'une vaste reconnaissance dans les instruments internationaux relatifs aux droits de la personne. Le paragraphe 18(4) du *Pacte international relatif aux droits civils et politiques*, 999 R.T.N.U. 171, par exemple, protège le droit des parents de guider l'éducation religieuse de leurs enfants :

> Les États parties au présent Pacte s'engagent à respecter la liberté des parents et, le cas échéant, des tuteurs légaux, de faire assurer l'éducation religieuse et morale de leurs enfants conformément à leurs propres convictions.

[66] Bien que Loyola n'invoque pas cette disposition en l'espèce, l'art. 41 de la *Charte québécoise* protège lui aussi le droit des parents de guider l'éducation religieuse de leurs enfants :

> Les parents ou les personnes qui en tiennent lieu ont le droit d'assurer l'éducation religieuse et morale de leurs enfants conformément à leurs convictions, dans le respect des droits de leurs enfants et de l'intérêt de ceux-ci.

[67] Ultimately, measures which undermine the character of lawful religious institutions and disrupt the vitality of religious communities represent a profound interference with religious freedom.

[68] There is, on the other hand, insufficient demonstrable benefit to the furtherance of the state's objectives in requiring Loyola's teachers to teach Catholicism from a neutral perspective. In her letter dated November 13, 2008 explaining her decision to deny Loyola's exemption, the Minister sets out her reasons for rejecting Loyola's proposed alternative curriculum:

[TRANSLATION]

- . . . The approach to and the conception of the common good developed in the Ethics and Religious Culture program [and those] proposed by Loyola High School are very different. . . . [T]he program proposed by Loyola . . . is based on the Catholic faith and its main goal is the transmission of Catholic beliefs and convictions.
- . . . the ethics aspect of the program proposed by Loyola . . . focuses on the teaching of moral reference points laid down by the Catholic Church.
- . . . the program does not meet the requirements for the Ethics and Religious Culture program in terms of religious culture, as religions are studied in connection with the Catholic religion.
- . . . the . . . program does not lead the student to reflect on the common good, or on ethical issues, but rather to adopt the Jesuit perspective of Christian service.

These passages reflect the central problems with the Minister's decision: it treats teaching any part of the proposed alternative program from a Catholic perspective as necessarily inimical to the state's core objectives in imposing the ERC Program and it gives no weight to the values of religious freedom engaged by the decision. There is, in short, no balancing of freedom of religion in relation to the statutory objectives. The result is a disproportionate outcome that does not protect *Charter* values as

[67] En fin de compte, des mesures qui portent atteinte à l'essence même d'institutions confessionnelles légitimes et compromettent la vitalité de communautés de croyants constituent une atteinte grave à la liberté de religion.

[68] Il n'y a, en outre, pas suffisamment d'avantages évidents à favoriser la réalisation des objectifs de l'État en exigeant des enseignants de Loyola qu'ils expliquent le catholicisme d'un point de vue neutre. Dans sa lettre datée du 13 novembre 2008, qui explique sa décision de refuser d'accorder une exemption à Loyola, la ministre a exposé les motifs pour lesquels elle a rejeté le programme de remplacement proposé par cette dernière :

- . . . L'approche et la conception du bien commun développées dans le programme Éthique et culture religieuse et celles proposées par Loyola High School sont très différentes. [. . .] [Le] programme proposé par Loyola [. . .] est fondé sur la foi catholique et a pour principale finalité la transmission des croyances et convictions catholiques.
- . . . le volet éthique du programme proposé par Loyola [. . .] [consiste en] [. . .] l'enseignement de repères moraux édictés par l'Église catholique.
- . . . [l]e programme ne satisfait pas aux exigences du programme Éthique et culture religieuse relatives à la culture religieuse, car l'étude des religions apparaît être réalisée en lien avec la religion catholique.
- . . . le programme [. . .] n'amène pas l'élève à réfléchir sur le bien commun, ni sur des questions d'éthique, mais l'amène plutôt à adopter la perspective jésuite du service chrétien.

Ces passages illustrent les failles principales de la décision de la ministre : considérer que le fait d'enseigner toute partie du programme de remplacement proposé d'un point de vue catholique va nécessairement à l'encontre des objectifs fondamentaux que poursuivait l'État en imposant le programme ÉCR et n'accorder aucun poids aux valeurs de la liberté de religion sur lesquelles elle porte. Bref, cette décision n'est pas le fruit d'une mise en balance de la liberté de religion, d'une part, et des objectifs de la

fully as possible in light of those statutory objectives.

[69] In the Quebec context, where private denominational schools are authorized, forcing a religious school to teach its own religion from a non-religious perspective does not assist in realizing the ERC Program's basic curricular goals of encouraging among students respect for others and openness to others. The Minister's decision suggests that engagement with an individual's own religion on his or her own terms can simply be presumed to impair respect for others. This assumption runs counter to the objectives of the regulatory scheme as a whole and it has a disproportionate impact on the values underlying religious freedom in this context. This necessarily renders the Minister's decision unreasonable.

[70] The disproportionate nature of this decision is reinforced by the fact that the Minister's decision effectively prohibits Loyola from teaching about Catholic ethics from a Catholic perspective. Catholic doctrine and Catholic ethics are simply too intertwined to make it possible to teach one from a religious perspective and the other neutrally. More to the point, there is no reason to distinguish between the two when it comes to religious freedom. In both cases, preventing Loyola from teaching Catholicism seriously impairs its Catholic identity.

[71] Loyola, as previously noted, conceded before this Court that it was prepared to teach the first competency — world religions other than Catholicism — from a neutral perspective. It sought, however, to be exempt from teaching the *ethics* of other religions from a neutral perspective, and proposed instead to do so from a Catholic perspective. Unlike my colleagues in their concurring opinion, however, I agree with the Court of Appeal that requiring Loyola to teach about the ethics of *other* religions in a neutral, historical and phenomenological way

loi, d'autre part. Cela entraîne un résultat disproportionné qui ne protège pas les valeurs consacrées par la *Charte* autant qu'il est possible de le faire à la lumière de ces objectifs législatifs.

[69] Dans le contexte québécois, où l'existence d'écoles privées confessionnelles est autorisée, forcer une de ces écoles à enseigner sa propre religion selon une perspective non religieuse ne contribue certes pas à la réalisation des objectifs pédagogiques fondamentaux du programme ÉCR d'encourager chez les élèves le respect des différences et l'ouverture aux autres. La décision de la ministre laisse toutefois 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 présomption va à l'encontre des objectifs du régime réglementaire dans son ensemble et a une incidence disproportionnée sur les valeurs qui sous-tendent la liberté de religion dans ce contexte. Cela rend nécessairement la décision de la ministre déraisonnable.

[70] Le caractère disproportionné de cette décision est renforcé par le fait que cette dernière interdit dans les faits à Loyola d'enseigner l'éthique catholique selon une perspective catholique. La doctrine et l'éthique catholiques sont tout simplement trop étroitement liées pour qu'il soit possible d'enseigner une matière d'un point de vue catholique et l'autre, de façon neutre. Plus précisément, rien ne justifie d'établir une distinction entre les deux lorsqu'il est question de la liberté de religion. Dans les deux cas, empêcher Loyola d'enseigner le catholicisme porte sérieusement atteinte à l'identité catholique de cette institution.

[71] Comme nous l'avons vu, Loyola a reconnu devant la Cour qu'elle était disposée à enseigner la première compétence — soit les religions dans le monde autre que le catholicisme — d'un point de vue neutre. Elle a toutefois demandé d'être exemptée de l'obligation d'enseigner l'*éthique* des autres religions d'un point de vue neutre, et a proposé de le faire plutôt selon une perspective catholique. Cela dit, contrairement à mes collègues dans leur décision concurrente, je partage l'avis de la Cour d'appel selon lequel le fait d'obliger Loyola à enseigner

would not interfere disproportionately with the relevant *Charter* protections implicated by the decision. Justice Deschamps's admonition that exposing children to a variety of religious facts does not, in itself, infringe on their parents' religious freedom remains compelling in a denominational school: *S.L.*, at para. 40. I agree with her that 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. See *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, at paras. 46 and 48.

[72] But what does it mean to teach about the ethics of other religions in a "neutral" and "objective" way in the context of a religious school that is permitted to teach its own religion and ethics from a religious perspective? My starting point is that 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.

[73] I quickly acknowledge that in a religious school, teaching other ethical frameworks in a neutral way may be a delicate exercise. A school like Loyola must be allowed some flexibility as it navigates these difficult moments. Catholicism's answer to ethical questions, for instance, will sometimes conflict with the approach taken by the ethics of other religions. It would be surprising if, in classes discussing other belief systems, students did not ask for comparative explanations, questions Loyola's teachers are clearly free to answer. A comparative approach that explains the Catholic ethical perspective and responds to questions about it is of course legitimate.

l'éthique d'*autres* religions d'une façon neutre, historique et phénoménologique ne porterait pas atteinte de manière disproportionnée aux protections pertinentes conférées par la *Charte* et en cause en l'espèce. La mise en garde formulée par la juge Deschamps voulant que l'exposition des enfants à divers faits religieux ne porte pas atteinte en soi à la liberté de religion de leurs parents demeure avérée dans le cas d'une école confessionnelle : *S.L.*, par. 40. Je suis d'accord avec elle pour dire que, 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. Voir le *Renvoi relatif au mariage entre personnes du même sexe*, [2004] 3 R.C.S. 698, par. 46 et 48.

[72] Cela dit, qu'entend-on par enseigner l'éthique d'autres religions de façon « neutre » et « objective » dans le cas d'une école confessionnelle autorisée à enseigner sa propre religion et sa propre éthique selon une perspective religieuse? Je pars du principe que, 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.

[73] Je reconnais d'emblée que le fait d'enseigner d'autres systèmes éthiques de façon neutre, au sein d'une école confessionnelle, peut constituer un exercice délicat. Une institution comme Loyola doit disposer d'une certaine marge de manœuvre lorsqu'elle traverse ces moments difficiles. La réponse qu'apporte le catholicisme aux questions d'éthique, par exemple, entrera parfois en conflit avec l'approche préconisée par l'éthique d'autres religions. Il serait étonnant que, dans les cours où l'on étudie d'autres systèmes de croyances, les élèves ne réclament pas des explications qui appellent certaines comparaisons, questions auxquelles les enseignants de Loyola sont certainement libres de répondre. Une approche comparative qui explique la perspective éthique catholique et répond aux questions sur celle-ci constitue bien entendu une approche légitime.

[74] But the fact that there are difficulties in implementation does not mean the state should be required to throw up its hands and abandon its objectives. Those objectives are not only of immense public importance, they are also, as this Court confirmed in *S.L.*, constitutional. Pursuing them in a religious school may require the Minister to accept some adjustments to the program to make it align with the school's religious character, but these adjustments need not mean the wholesale replacement of objective explications of other religions' ethical systems with a program that frames its discussion of ethics primarily through the moral lens of a school's religious perspective.

[74] 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. Ces derniers ne revêtent pas seulement une importance capitale pour le public; ils sont également, comme la Cour l'a confirmé dans l'arrêt *S.L.*, constitutionnels. Poursuivre ces objectifs au sein d'une école confessionnelle exigera peut-être du ministre qu'il accepte certains ajustements au programme pour l'harmoniser avec le caractère confessionnel de l'établissement, mais ces ajustements ne signifient toutefois pas le remplacement en bloc des explications objectives du système éthique d'autres religions par 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.

[75] The alternative program that Loyola submitted to the Minister would teach other ethical frameworks primarily through the lens of Catholic ethics and morality. Even if Loyola's teachers do so respectfully, this fundamentally transforms the ethics component of the ERC Program from a study of different ethical approaches into a class on Catholicism. The resulting risk is 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 goal of ensuring respect for those whose religious beliefs are different, a goal no less worthy in a religious school than in a public one.

[75] Le programme de remplacement que Loyola a soumis à la ministre prévoit l'enseignement d'autres systèmes éthiques principalement à travers le prisme de l'éthique et de la morale catholiques. Même si cet enseignement se fait avec respect, cela transforme fondamentalement le volet éthique du programme ÉCR, qui passe de l'étude des différentes approches éthiques à un cours sur le catholicisme. On risque donc forcément de considérer 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 ceux dont les croyances religieuses sont différentes et qui est tout aussi louable dans une école confessionnelle que dans une école publique.

[76] The key is in how the discussion is framed. An emphasis on objective instruction insofar as possible, and on teaching other ethical positions in their own right, does not mean stifling debate or denying Loyola's Catholic identity. On the contrary, the framework of the discussions would be wider because they are not based solely on a particular religion's perspective. That religion's own ethical framework would necessarily be part of the discussion, but the role will be one of significant participant rather than hegemonic tutor.

[76] La question clé est celle de savoir comment la discussion est structurée. Privilégier dans la mesure du possible une formation objective et insister sur l'enseignement d'autres positions éthiques en fonction de leur valeur propre n'a pas pour effet d'étouffer le débat ou de nier l'identité catholique de Loyola. Au contraire, le cadre des discussions s'en trouverait ainsi élargi puisqu'il ne reposerait pas uniquement sur une perspective religieuse particulière. Le cadre éthique de cette religion ferait nécessairement partie de la discussion, mais son rôle serait celui d'un acteur important plutôt que celui d'une puissance hégémonique.

[77] There is no doubt that this will not always be easy. The question is, given the undisputed significance of the ERC Program's objectives, can requiring Loyola's teachers to teach and discuss other religions and their ethical positions as objectively as possible really be seen as a serious interference with freedom of religion merely because it may be difficult to execute neatly?

[78] I have difficulty seeing how this can undermine the values of religious freedom. I do not dispute that the belief systems Loyola's teachers are required to explain to their students may not reflect their personal beliefs, or Loyola's institutional allegiances. But teaching about the ethics of other religions is largely a factual exercise. It need not be a clash of values. Nor is asking Loyola's teachers to teach other religions and ethical positions as objectively as possible a requirement that they shed their own beliefs. It is, instead, a pedagogical tool utilized by good teachers for centuries — let the information, not the personal views of the teacher, guide the discussion. The fact that those personal principles are not central when discussing the ethical principles of other religions does not mean that the Loyola teacher is silenced, or forced to forego his own beliefs, or even appears to be doing so. It also does not mean that Loyola's teachers are foreclosed from explaining the Catholic perspective and its differences from other faiths.

[79] In any event, 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. It does not, in my respectful view, because it rests on the assumption that a confessional program cannot achieve the objectives of the ERC Program. 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. It is, with respect, unreasonable as a result.

[77] Certes, cela ne sera pas toujours facile. Cela dit, compte tenu de l'importance incontestée des objectifs du programme ÉCR, le fait d'obliger Loyola à enseigner et à examiner d'autres religions et leurs positions éthiques aussi objectivement que possible peut-il véritablement être considéré comme une entrave à la liberté de religion simplement parce qu'il peut être difficile d'exécuter commodément ce programme?

[78] J'ai du mal à concevoir comment cela peut porter atteinte aux valeurs de la liberté de religion. Je ne conteste pas que les systèmes de croyances que les enseignants de Loyola sont tenus d'expliquer à leurs élèves ne reflètent peut-être pas leurs croyances personnelles ou les allégeances institutionnelles de l'école. Toutefois, enseigner les valeurs éthiques d'autres religions est en grande partie une démarche factuelle. Il n'est pas nécessaire que cet enseignement donne lieu à un conflit de valeurs. Le fait de demander aux enseignants de Loyola d'expliquer d'autres religions et positions éthiques aussi objectivement que possible ne les oblige pas non plus à renier leurs propres convictions. Il s'agit plutôt d'un outil pédagogique utilisé par les bons enseignants depuis des siècles : laisser la matière et non leurs opinions personnelles orienter la discussion. Le fait que ces principes personnels ne soient pas au cœur de l'examen des principes éthiques d'autres religions ne signifie pas pour autant que les enseignants de Loyola sont condamnés au silence ou forcés de renier leurs propres convictions ou même qu'il semble qu'il en soit ainsi. Cela ne signifie pas non plus qu'il leur est interdit d'expliquer la perspective catholique et en quoi elle diffère des autres religions.

[79] Quoi qu'il en soit, 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. À mon avis, elle ne l'est pas, et ce, parce qu'elle repose sur la prémisse qu'un programme confessionnel ne peut atteindre les objectifs du programme ÉCR. 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. Soit dit en tout respect, cette décision est déraisonnable.

[80] This is not to suggest, however, that in a religious school, the Minister is required to allow the ERC Program — a program that is framed as a tool to teach students about different world religions and ethical beliefs — to be replaced by a program that focuses on that religion's doctrine and morality. To ask a religious school's teachers to discuss other religions and their ethical beliefs as objectively as possible does not seriously harm the values underlying religious freedom. These features of the ERC Program are essential to achieving its objectives. But preventing a school like Loyola from teaching and discussing Catholicism in any part of the program from its own perspective does little to further those objectives while at the same time seriously interfering with the values underlying religious freedom.

[81] I would therefore allow the appeal, set aside the Minister's decision, and remit the matter to the Minister for reconsideration in light of these reasons. An exemption cannot be withheld on the basis that Loyola must teach Catholicism and Catholic ethics from a neutral perspective. In the circumstances, I would make no order for costs.

The reasons of McLachlin C.J. and Rothstein and Moldaver JJ. were delivered by

THE CHIEF JUSTICE AND MOLDAVER J. —

I. Overview

[82] Loyola, a private Catholic high school, challenges the decision of the Minister of Education, Recreation and Sports ("Minister") refusing to grant it an exemption from the Ethics and Religious Culture course ("ERC Program"), a compulsory program requiring the teaching of world religions, ethics and dialogue in a neutral way. The application judge set aside the Minister's decision, holding

[80] Il ne s'agit pas de suggérer par cela que, dans une école confessionnelle, le ministre doit permettre que le programme ÉCR — un programme conçu comme un outil visant à permettre aux élèves d'acquérir des connaissances sur diverses religions et convictions éthiques du monde — soit remplacé par un programme axé sur la doctrine et la morale de la religion de cette école. Demander aux enseignants d'une école confessionnelle de discuter d'autres religions et de leurs convictions éthiques aussi objectivement que possible ne porte pas sérieusement atteinte aux valeurs qui sous-tendent la liberté de religion. Ces caractéristiques du programme ÉCR sont essentielles à l'atteinte de ses objectifs. Toutefois, le fait d'empêcher complètement une école comme Loyola d'enseigner et de traiter du catholicisme selon sa propre perspective dans le cadre de son programme contribue peu à l'atteinte de ces objectifs tout en portant gravement atteinte aux valeurs qui sous-tendent la liberté de religion.

[81] Je suis donc d'avis d'accueillir le pourvoi, d'annuler la décision de la ministre et de renvoyer l'affaire au ministre pour réexamen à la lumière des présents motifs. Une exemption ne peut pas être refusée au motif que Loyola doit enseigner le catholicisme et l'éthique catholique suivant une perspective neutre. Dans les circonstances, je ne rendrai aucune ordonnance concernant les dépens.

Version française des motifs de la juge en chef McLachlin et des juges Rothstein et Moldaver rendus par

LA JUGE EN CHEF ET LE JUGE MOLDAVER —

I. Aperçu

[82] Loyola, une école secondaire catholique privée, conteste la décision de la ministre de l'Éducation, du Loisir et du Sport (« la ministre ») de refuser de l'exempter de l'obligation de donner le cours d'éthique et de culture religieuse (« programme ÉCR »), un programme obligatoire qui impose l'enseignement de façon neutre des religions dans le monde, de l'éthique et du dialogue.

that it violated Loyola's constitutional right to freedom of religion. The Quebec Court of Appeal reversed that decision. Loyola now appeals with leave to this Court.

Le juge saisi de la demande a annulé la décision de la ministre, concluant que cette décision violait le droit constitutionnel à la liberté de religion de l'école. La Cour d'appel du Québec a infirmé cette décision. Loyola se pourvoit maintenant devant la Cour, sur autorisation.

[83] Like our colleague Abella J., we would allow the appeal. In our view, the Minister's decision cannot be upheld because it failed to protect Loyola's right to religious freedom. In reaching that conclusion, we respectfully differ from our colleague on a number of points, including her choice of remedy.

[83] À l'instar de notre collègue la juge Abella, nous sommes d'avis d'accueillir le pourvoi. À notre avis, la décision de la ministre ne peut être maintenue, parce qu'elle n'a pas protégé le droit à la liberté de religion de Loyola. Tout en tirant cette conclusion, nous exprimons, soit dit en tout respect, notre désaccord avec la juge Abella sur un certain nombre de points, notamment en ce qui concerne la réparation à accorder.

II. Background Facts

II. Contexte factuel

[84] The government of Quebec, as part of a plan of progressive secularization of the public school system, incorporated the ERC Program into its core curriculum. Beginning in 2008, all schools were required to deliver a program teaching world religions, ethics and dialogue from a secular, morally neutral perspective. The legislative and regulatory scheme provided exemptions for private schools to teach an equivalent program, with requests for exemptions to be assessed by the Minister.

[84] Le gouvernement du Québec a incorporé le programme ÉCR aux matières de base dans le cadre d'un projet de déconfessionnalisation progressive du système scolaire public. Depuis 2008, toutes les écoles sont tenues d'offrir un programme d'enseignement des religions dans le monde, de l'éthique et du dialogue selon une perspective laïque et moralement neutre. Le régime législatif et réglementaire prévoit des exemptions pour les écoles privées qui peuvent être autorisées à enseigner un programme équivalent, après examen des demandes à cet effet par le ministre.

[85] Loyola High School is a respected Catholic private school, founded in 1848 as part of the Collège Sainte-Marie, administered by the Jesuit Order and serving the Catholic community of Montréal. It applied for an exemption to teach a program that, in its view, achieved the same educational objectives of the ERC Program, but in harmony with its religious convictions. The Minister refused, on the basis that Loyola's proposed program had a religious perspective that was unacceptable, and that it amounted to a program of moral education that did not follow the required neutral and cultural approach to religion and ethics.

[85] L'école secondaire Loyola est une institution catholique privée réputée, fondée en 1848 en tant que partie du Collège Sainte-Marie; elle est administrée par l'ordre des Jésuites et dessert la communauté catholique de Montréal. Elle a demandé une exemption afin de pouvoir enseigner un programme qui, à son avis, atteignait les mêmes objectifs que le programme ÉCR, mais en conformité avec ses convictions religieuses. La ministre a refusé, au motif que le programme proposé par Loyola avait une perspective religieuse qui était inacceptable et qu'il équivalait à un programme d'éducation morale qui ne respectait pas la conception neutre et culturelle de la religion et de l'éthique qui était exigée.

III. Procedural History

[86] The application judge heard evidence from several expert and lay witnesses, and made extensive findings of fact which we address in greater detail in our analysis. He found that the Minister's refusal constituted a serious infringement of Loyola's right to religious freedom. In the result, he granted Loyola's application, quashed the Minister's decision, and ordered an exemption (2010 QCCS 2631).

[87] On appeal by the Minister, the Quebec Court of Appeal applied the administrative law framework from *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, and concluded that the Minister's decision was reasonable. The Court of Appeal expressed skepticism that denying an exemption to teach a modified version of the ERC Program posed *any* infringement on Loyola's freedom to teach the Catholic religion. Furthermore, it concluded that even if there were an infringement, it would be [TRANSLATION] "trivial because [the ERC Program] is only one class among many" and "the program does not require teachers to refute the precepts of the Catholic religion, but only to abstain from expressing their opinions or convictions" (2012 QCCA 2139, at para. 174 (CanLII)). In consequence, the Court of Appeal overturned the application judge, and reinstated the decision of the Minister. As we explain, we respectfully disagree with the Court of Appeal's conclusion that the infringement was trivial. Indeed, for reasons that will become apparent, we are satisfied that the infringement had a substantial impact on Loyola's right to religious freedom.

IV. Analysis

[88] We are required to address several issues in deciding this appeal. First, we must decide whether Loyola as a religious organization is entitled to the constitutional protection of freedom of religion. Concluding that it is, we analyze the proper interpretation of the legislative and regulatory scheme

III. Historique des procédures

[86] Le juge saisi de la demande a entendu la déposition de plusieurs témoins experts et ordinaires, et a tiré de nombreuses conclusions de fait que nous examinerons plus en détail dans notre analyse. Il a conclu que le refus de la ministre constituait une atteinte grave au droit à la liberté de religion de Loyola. Il a donc accueilli la demande de cette dernière, annulé la décision de la ministre et ordonné une exemption (2010 QCCS 2631, [2010] R.J.Q. 1417).

[87] Lors de l'appel interjeté par la ministre, la Cour d'appel du Québec a appliqué le cadre d'analyse de droit administratif établi par l'arrêt *Doré c. Barreau du Québec*, 2012 CSC 12, [2012] 1 R.C.S. 395, et conclu que la décision de la ministre était raisonnable. La Cour d'appel a exprimé des doutes sur le fait qu'un refus d'accorder à l'école une exemption afin de lui permettre d'enseigner une version modifiée du programme ÉCR constituait une atteinte *quelconque* à sa liberté d'enseigner la religion catholique. Elle a conclu en outre que, même s'il y avait eu atteinte, celle-ci aurait été « négligeable, car [le programme ÉCR ne constitue qu'] un cours parmi plusieurs » et qu'« il n'est pas demandé à l'enseignant de réfuter les préceptes de la religion catholique, mais de s'abstenir d'exprimer son opinion ou ses convictions » (2012 QCCA 2139, [2012] R.J.Q. 2112, par. 174). En conséquence, la Cour d'appel a infirmé la décision du juge saisi de la demande et rétabli celle de la ministre. Comme nous l'expliquerons plus loin, nous ne partageons pas l'avis de la Cour d'appel selon lequel l'atteinte était négligeable. En fait, pour des raisons qui deviendront évidentes, nous sommes convaincus que l'atteinte a eu un effet substantiel sur le droit à la liberté de religion de Loyola.

IV. Analyse

[88] Pour trancher le présent pourvoi, nous devrons examiner plusieurs questions. Tout d'abord, il faudra déterminer si Loyola, en tant qu'organisation religieuse, bénéficie de la protection constitutionnelle relative à la liberté de religion. Estimant qu'elle jouit d'une telle protection, nous nous pencherons

at issue in this appeal, including the ERC Program and the exemption provision. We review the content of Loyola's proposed equivalent program, and then evaluate the Minister's decision in light of Loyola's constitutional right to religious freedom — first, determining whether Loyola's freedom of religion was breached, and second, determining whether that breach was minimally impairing and therefore justified under s. 1 of the *Canadian Charter of Rights and Freedoms* (the "*Canadian Charter*" or "*Charter*"). Finding that Loyola's freedom of religion was infringed, and that the infringement was not minimally impairing, we offer guidelines on the appropriate scope of an equivalent program that would comply with the *Charter* while meeting the objectives of the ERC Program. Finally, we determine that the appropriate remedy is an order of mandamus granting an exemption to Loyola to teach such a program.

ensuite sur l'interprétation à donner au régime législatif et réglementaire en cause en l'espèce, notamment au programme ÉCR et à la disposition d'exemption. Ensuite, nous examinerons le contenu du programme que propose Loyola comme équivalent, puis nous évaluerons la décision de la ministre à la lumière du droit constitutionnel à la liberté de religion de cette institution — en déterminant, premièrement, s'il y a eu atteinte à la liberté de religion de l'école et, deuxièmement, si cette atteinte était minimale et donc justifiée au regard de l'article premier de la *Charte canadienne des droits et libertés* (« *Charte canadienne* » ou « *Charte* »). Concluant qu'il y a eu atteinte à la liberté de religion de Loyola et que cette atteinte n'était pas minimale, nous formulerons des lignes directrices quant au contenu acceptable d'un programme équivalent, contenu qui serait compatible avec la *Charte* tout en permettant d'atteindre les objectifs du programme ÉCR. Finalement, nous conclurons que la réparation appropriée consiste à prononcer une ordonnance de *mandamus* qui permettrait à Loyola d'enseigner un tel programme.

A. *Does Loyola as a Religious Organization Enjoy Freedom of Religion Under Section 2(a) of the Canadian Charter and Section 3 of the Quebec Charter?*

A. *En tant qu'organisation religieuse, Loyola jouit-elle de la liberté de religion garantie par l'al. 2a) de la Charte canadienne et par l'art. 3 de la Charte québécoise?*

[89] Loyola is a religious non-profit corporation constituted under Part III of Quebec's *Companies Act*, CQLR, c. C-38. For over a century, it has pursued a vocation of providing Catholic religious education for young men. Loyola asserts that, as a religious organization, it is protected by the guarantee of freedom of religion in the *Canadian Charter* and the *Charter of human rights and freedoms*, CQLR, c. C-12 (the "*Quebec Charter*").

[89] Loyola est une corporation religieuse sans but lucratif constituée en vertu de la partie III de la *Loi sur les compagnies* du Québec, RLRQ, c. C-38. Pendant plus d'un siècle, elle a poursuivi sa mission consistant à offrir une éducation religieuse catholique aux jeunes hommes. Cette école prétend bénéficier, en tant qu'organisation religieuse, de la protection accordée à la liberté de religion garantie par la *Charte canadienne* et par la *Charte des droits et libertés de la personne*, RLRQ, c. C-12 (« *Charte québécoise* »).

[90] The Attorney General of Quebec contends that Loyola enjoys no such constitutional protection because it is not a natural person, but merely a legal person: religious freedom protects sincerely held beliefs, and a corporation is capable of neither sincerity nor belief. This raises the question of whether

[90] Le procureur général du Québec soutient que Loyola ne bénéficie pas d'une telle protection constitutionnelle parce qu'elle n'est pas une personne physique, mais simplement une société : la liberté de religion protège les croyances sincères, or, une société n'est capable ni de faire preuve de

religious organizations are protected by the guarantee of freedom of religion.

[91] In our view, Loyola may rely on the guarantee of freedom of religion found in s. 2(*a*) of the *Canadian Charter*. 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. Canadian and international jurisprudence supports this conclusion.

[92] This Court has affirmed that freedom of religion under s. 2(*a*) of the *Canadian Charter* has both an individual and a collective dimension. In *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, Bastarache J., writing in dissent but not on this point, quoted Professor Timothy Macklem for the proposition that

> religions are necessarily collective endeavours. . . . It follows that any genuine freedom of religion must protect, not only individual belief, but the institutions and practices that permit the collective development and expression of that belief.

(Para. 137, quoting "Faith as a Secular Value" (2000), 45 *McGill L.J.* 1, at p. 25.)

[93] In *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, Justice Abella and Justice LeBel, both writing in dissent but not on this point, emphasized the collective dimension of religious freedom. Justice Abella noted the "group, or 'community', aspect of religious freedom" (para. 131), while Justice LeBel observed:

> Religion is about religious beliefs, but also about religious relationships. . . . [This appeal] raises issues about belief, but also about the maintenance of communities of faith. We are discussing the fate . . . of a community that shares a common faith and a way of life

sincérité ni d'avoir des croyances. Cela soulève la question de savoir si les organisations religieuses bénéficient de la protection accordée à la liberté de religion.

[91] À notre avis, Loyola peut invoquer la liberté de religion protégée par l'al. 2*a*) de la *Charte canadienne*. 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. La jurisprudence canadienne et internationale appuie cette conclusion.

[92] La Cour a affirmé que la liberté de religion protégée par l'al. 2*a*) de la *Charte canadienne* comporte une dimension à la fois individuelle et collective. Dans l'arrêt *Syndicat Northcrest c. Amselem*, 2004 CSC 47, [2004] 2 R.C.S. 551, le juge Bastarache, qui était dissident, mais non sur cette question, a cité le professeur Timothy Macklem à cet effet :

> [TRADUCTION] . . . la religion est nécessairement une entreprise collective. [. . .] Il s'ensuit que la véritable liberté de religion doit protéger non seulement la croyance individuelle, mais aussi les institutions et pratiques par lesquelles passent le développement et l'expression collectifs de cette croyance.

(Par. 137, citant « Faith as a Secular Value » (2000), 45 *R.D. McGill* 1, p. 25.)

[93] Dans *Alberta c. Hutterian Brethren of Wilson Colony*, 2009 CSC 37, [2009] 2 R.C.S. 567, la juge Abella et le juge LeBel, tous deux dissidents, mais non sur cette question, ont mis l'accent sur la dimension collective de la liberté de religion. La juge Abella a insisté sur « l'aspect "collectif" de la liberté de religion » (par. 131). Pour sa part, le juge LeBel a fait remarquer que :

> La religion a trait aux croyances religieuses, mais aussi [aux] rapports religieux. Le présent pourvoi [. . .] soulève des questions sur les croyances, mais aussi sur le maintien des communautés organisées autour d'une même foi. Nous discutons [. . .] du sort [. . .] d'une communauté qui

that is viewed by its members as a way of living that faith and of passing it on to future generations. [Emphasis added; para. 182.]

[94] The individual and collective aspects of freedom of religion are indissolubly intertwined. The freedom of religion of individuals cannot flourish without freedom of religion for the organizations through which those individuals express their religious practices and through which they transmit their faith.

[95] In this respect, the guarantee of freedom of religion resembles the guarantees of freedom of expression, freedom from unreasonable search and seizure and trial within a reasonable time, all of which have been held to apply to corporations: see *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. CIP Inc.*, [1992] 1 S.C.R. 843. As with s. 2(*a*), the text of these rights refers not to "individuals" but to "everyone" or "any person", which has been interpreted as including corporations: see D. Gibson, *The Law of the Charter: Equality Rights* (1990), at pp. 53-54.

[96] International human rights instruments recognize the communal character of religion and support the extension of constitutional protection to the organizations through which congregants worship and teach their faith. Article 18 of the *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), provides:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 9 of the *European Convention on Human Rights*, 213 U.N.T.S. 221, contains a virtually identical provision. Similarly, the *International Covenant*

partage la même foi et un mode de vie qui est perçu par ses membres comme une façon de vivre cette foi et de la transmettre aux générations futures. [Nous soulignons; par. 182.]

[94] Les aspects individuels et collectifs de la liberté de religion sont indissolublement liés. En effet, la liberté de religion des individus ne peut s'épanouir si les organisations par l'entremise desquelles ceux-ci expriment leurs pratiques religieuses et transmettent leur foi ne bénéficient pas elles aussi d'une telle liberté.

[95] La liberté de religion s'apparente à cet égard à la liberté d'expression, à la protection contre les fouilles, perquisitions et saisies abusives et au droit à la tenue d'un procès dans un délai raisonnable, lesquels ont tous été jugés s'appliquer aux sociétés : voir *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326; *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145; *R. c. CIP Inc.*, [1992] 1 R.C.S. 843. Tout comme pour l'al. 2*a*), le texte de ces droits ne renvoie pas à des « individus », mais à « chacun » ou à « tout inculpé », ce qu'on a interprété comme incluant les sociétés : voir D. Gibson, *The Law of the Charter : Equality Rights* (1990), p. 53-54.

[96] Les instruments internationaux relatifs aux droits de la personne reconnaissent le caractère collectif de la religion et appuient l'élargissement de la protection constitutionnelle aux organisations par l'entremise desquelles les fidèles font leurs dévotions et enseignent leur foi. L'article 18 de la *Déclaration universelle des droits de l'homme*, A.G. Rés. 217 A (III), Doc. N.U. A/810, p. 71 (1948), est rédigé en ces termes :

> Toute personne a droit à la liberté de pensée, de conscience et de religion; ce droit implique la liberté de changer de religion ou de conviction ainsi que la liberté de manifester sa religion ou sa conviction, seule ou en commun, tant en public qu'en privé, par l'enseignement, les pratiques, le culte et l'accomplissement des rites.

L'article 9 de la *Convention européenne des droits de l'homme*, 213 R.T.N.U. 221, renferme une disposition presque identique. De même, le *Pacte*

on Civil and Political Rights, 999 U.N.T.S. 171, to which Canada is a signatory, provides:

Article 18. 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

. . .

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

[97] The *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified: *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, at para. 70. It follows that the collective aspect of freedom of religion should find protection under the *Charter*.

[98] Foreign jurisprudence supports Loyola's claim to freedom of religion: see *Sindicatul "Păstorul Cel Bun" v. Romania* (2014), 58 E.H.R.R. 10, at para. 136; *Metropolitan Church of Bessarabia v. Moldova*, No. 45701/99, ECHR 2001-XII; *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 132 S. Ct. 694 (2012); *National Labor Relations Board v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979).

[99] The Attorney General of Quebec points out that in *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, Dickson C.J. commented that "a business corporation cannot possess religious beliefs" (p. 784). However, a religious organization may in a very real sense have religious beliefs and rights. Thus, Dickson C.J. referred to the s. 2(*a*) freedom of "individuals and groups" (p. 759 (emphasis added)),

international relatif aux droits civils et politiques, 999 R.T.N.U. 171, dont le Canada est signataire, prévoit :

Article 18. 1. Toute personne a droit à la liberté de pensée, de conscience et de religion; ce droit implique la liberté d'avoir ou d'adopter une religion ou une conviction de son choix, ainsi que la liberté de manifester sa religion ou sa conviction, individuellement ou en commun, tant en public qu'en privé, par le culte et l'accomplissement des rites, les pratiques et l'enseignement.

. . .

4. Les États parties au présent Pacte s'engagent à respecter la liberté des parents et, le cas échéant, des tuteurs légaux, de faire assurer l'éducation religieuse et morale de leurs enfants conformément à leurs propres convictions.

[97] Il faut présumer que la *Charte* accorde une protection au moins aussi grande que les instruments internationaux ratifiés par le Canada en matière de droits de la personne : *Health Services and Support — Facilities Subsector Bargaining Assn. c. Colombie-Britannique*, 2007 CSC 27, [2007] 2 R.C.S. 391, par. 70. L'aspect collectif de la liberté de religion devrait donc bénéficier de la protection accordée par la *Charte*.

[98] La jurisprudence étrangère confirme le droit à la liberté de religion revendiqué par Loyola : voir *Sindicatul « Păstorul cel Bun » c. Roumanie*, nº 2330/09, 9 juillet 2013 (HUDOC), par. 136; *Église métropolitaine de Bessarabie c. Moldova*, nº 45701/99, CEDH 2001-XII; *Hosanna-Tabor Evangelical Lutheran Church and School c. Equal Employment Opportunity Commission*, 132 S. Ct. 694 (2012); *National Labor Relations Board c. Catholic Bishop of Chicago*, 440 U.S. 490 (1979).

[99] Certes, comme le souligne le procureur général du Québec, dans l'arrêt *R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713, le juge en chef Dickson a fait observer qu'« une société commerciale ne saurait avoir des croyances religieuses » (p. 784). Cependant, une organisation religieuse peut d'une manière très concrète avoir des croyances et des droits religieux. Le juge en chef Dickson a donc

describing that freedom using language from *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 336, as "the right to manifest religious belief by worship and practice or by teaching and dissemination" (p. 757).

[100] On the submissions before us, and given the collective aspect of religious freedom long established in our jurisprudence, we conclude that an organization meets the requirements for s. 2(*a*) protection if (1) it is constituted primarily for religious purposes, and (2) its operation accords with these religious purposes.

[101] The precise scope of these requirements may require clarification in future cases which test their boundaries, but it is evident that Loyola falls within their ambit. It is a non-profit religious corporation constituted for the purpose of offering a Jesuit education to children within Quebec's Catholic religious community. It has operated for over a century in accordance with this religious educational purpose.

[102] We note that the same result is reached under s. 3 of the *Quebec Charter*. If anything, the conclusion is clearer, because the *Quebec Charter* accords freedom of religion to "[e]very person", unlike the *Canadian Charter* which uses the more ambiguous "[e]veryone". Under Quebec's *Interpretation Act*, CQLR, c. I-16, "the word 'person' includes natural or legal persons, . . . unless inconsistent with the statute or with the special circumstances of the case": s. 61(16). No inconsistency arises here; on the contrary, for the reasons just discussed, the circumstances favour recognition of the right of freedom of religion for religious organizations.

parlé de la liberté des « particuliers et [d]es groupes » garantie par l'al. 2*a*) (p. 759 (nous soulignons)), et décrit cette liberté en reprenant les termes utilisés dans *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, p. 336, soit comme étant « le droit de manifester ses croyances religieuses par leur mise en pratique et par le culte ou par leur enseignement et leur propagation » (p. 757).

[100] Compte tenu des arguments qui nous ont été présentés, et de l'aspect collectif de la liberté de religion que reconnaît depuis longtemps notre jurisprudence, nous concluons qu'une organisation satisfait aux exigences applicables pour pouvoir bénéficier de la protection conférée par l'al. 2*a*) si (1) elle est constituée principalement à des fins religieuses, et (2) ses activités sont compatibles avec ces fins.

[101] L'étendue précise de ces exigences pourrait devoir être clarifiée dans la jurisprudence à venir, mais il est clair que Loyola y satisfait. Il s'agit d'une corporation religieuse sans but lucratif constituée dans le but d'offrir une éducation jésuite aux enfants de la communauté catholique du Québec et qui exerce ses activités depuis plus d'un siècle dans le respect de cette mission éducative religieuse.

[102] Soulignons que l'art. 3 de la *Charte québécoise* mène au même résultat. En fait, l'analyse fondée sur cette disposition mène à une conclusion encore plus manifeste puisque la *Charte québécoise* accorde la liberté de religion à « [t]oute personne », contrairement à la *Charte canadienne* qui utilise le terme plus ambigu « [c]hacun ». Selon la *Loi d'interprétation* du Québec, RLRQ, c. I-16, « le mot "personne" comprend les personnes physiques ou morales [. . .], à moins que la loi ou les circonstances particulières du cas ne s'y opposent » : par. 61(16). Rien en l'espèce ne s'y oppose; au contraire, pour les motifs que nous venons d'exposer, les circonstances favorisent la reconnaissance du droit à la liberté de religion pour les organisations religieuses.

B. *The Interpretation of the Legislative and Regulatory Scheme at Issue*

[103] To understand and evaluate the Minister's decision, it is necessary to understand the legislative and regulatory scheme under which it was made.

[104] The starting point is the legislation. As of 2000, religious schools in Quebec can exist only as private schools. The compulsory curriculum set by the Minister applies to all schools, including private schools: *An Act respecting private education*, CQLR, c. E-9.1, s. 25. As of the 2008-2009 school year, the ERC Program formed part of the compulsory curriculum for all schools in the province.

[105] The legislation imposing the compulsory curriculum on public and private schools contains a provision authorizing the government to adopt regulations to provide exemptions to particular institutions. Section 111 of the *Act respecting private education* states:

111. The Government may, by regulation . . . ,

. . .

(7) . . . authorize . . . the Minister to exclude, on the conditions he may determine, persons, bodies, institutions or educational services from all or some of the provisions of this Act . . .;

[106] Pursuant to this power, the government of Quebec adopted s. 22 of the *Regulation respecting the application of the Act respecting private education*, CQLR, c. E-9.1, r. 1, which allows private schools to obtain exemptions from teaching the compulsory curriculum:

22. Every institution shall be exempt from the [requirement to teach the compulsory curriculum] provided the institution dispenses programs of studies which the Minister of Education, Recreation and Sports judges equivalent.

B. *L'interprétation à donner au régime législatif et réglementaire en cause*

[103] Pour comprendre et apprécier la décision de la ministre, il est nécessaire de comprendre le régime législatif et réglementaire en vertu duquel elle a été prise.

[104] Le point de départ de l'analyse est la loi. Depuis l'an 2000, les écoles confessionnelles au Québec ne peuvent exister qu'en tant qu'écoles privées. Le programme d'enseignement obligatoire établi par le ministre s'applique à toutes les écoles, y compris les écoles privées : *Loi sur l'enseignement privé*, RLRQ, c. E-9.1, art. 25. Depuis l'année scolaire 2008-2009, le programme ÉCR fait partie des matières obligatoires que doivent enseigner toutes les écoles de la province.

[105] La loi qui impose ce programme obligatoire aux écoles publiques et privées renferme une disposition qui autorise le gouvernement à prendre des règlements visant à exempter certaines institutions. L'article 111 de la *Loi sur l'enseignement privé* est rédigé en ces termes :

111. Le gouvernement peut, par règlement . . . :

. . .

7° . . . autoriser [. . .] le ministre à exclure, aux conditions que ce dernier peut déterminer, des personnes, organismes, établissements ou services éducatifs de tout ou partie des dispositions de la présente loi . . .;

[106] Dans l'exercice de ce pouvoir, le gouvernement du Québec a édicté l'art. 22 du *Règlement d'application de la loi sur l'enseignement privé*, RLRQ, c. E-9.1, r. 1, qui permet aux écoles privées d'être exemptées de l'obligation d'enseigner les matières obligatoires :

22. Tout établissement est exempté de l'[obligation d'enseigner les matières obligatoires] pourvu que l'établissement offre des programmes jugés équivalents par le ministre de l'Éducation, du Loisir et du Sport.

[107] When the government inserted the ERC Program into the compulsory curriculum, it did not exclude it from the s. 22 exemption provision. It is therefore open to private religious schools to apply for an exemption from the requirement to teach the ERC Program. Loyola did so, and the Minister refused the exemption, giving rise to this litigation.

[108] The legislative and regulatory scheme imposes a compulsory curriculum, but modifies this by allowing individual schools to obtain exemptions. This allows Quebec to satisfy the educational objectives of the compulsory curriculum, while permitting accommodations for particular schools on the basis of their circumstances or needs. Applied to the ERC Program, this scheme allows Quebec to require that religion be taught from a secular, cultural and phenomenological viewpoint in public schools, while allowing private religious schools to adopt an alternative but equivalent approach that meets the basic objectives of the program but preserves the school's freedom of religion.

[109] The preamble of the Act specifying the Minister's powers and obligations (*An Act respecting the Ministère de l'Éducation, du Loisir et du Sport*, CQLR, c. M-15) confirms that the reliance on the Minister's discretion to approve exemptions is intended to ensure respect for the religious freedoms of individuals and groups. It states:

WHEREAS every child is entitled to the advantage of a system of education conducive to the full development of his personality;

Whereas parents have the right to choose the institutions which, according to their convictions, ensure the greatest respect for the rights of their children;

Whereas persons and groups are entitled to establish autonomous educational institutions and, subject to the requirements of the common welfare, to avail themselves of the administrative and financial means necessary for the pursuit of their ends;

[107] Lorsque le gouvernement a incorporé le programme ÉCR aux matières obligatoires, il ne l'a pas soustrait à l'application de la disposition d'exemption prévue à l'art. 22. Les écoles privées confessionnelles peuvent donc demander à être exemptées de l'obligation d'enseigner ce programme. C'est ce qu'a fait Loyola. La ministre a toutefois refusé de lui accorder l'exemption demandée, d'où le présent litige.

[108] Le régime législatif et réglementaire impose un programme d'enseignement obligatoire, mais il module cette exigence en autorisant les écoles, prises individuellement, à obtenir des exemptions. Cela permet au Québec de faire respecter les objectifs d'apprentissage du programme obligatoire tout en permettant à certaines écoles de bénéficier de mesures d'adaptation eu égard à leur situation ou à leurs besoins. Lorsqu'on l'applique au programme ÉCR, ce régime autorise le Québec à exiger que la religion soit enseignée d'un point de vue laïque, culturel et phénoménologique dans les écoles publiques, tout en permettant aux écoles privées confessionnelles d'adopter une approche différente — mais équivalente — qui répond aux objectifs fondamentaux du programme, mais qui préserve leur liberté de religion.

[109] Le préambule de la loi qui précise les pouvoirs et les obligations du ministre (la *Loi sur le ministère de l'Éducation, du Loisir et du Sport*, RLRQ, c. M-15) confirme que l'existence du pouvoir discrétionnaire du ministre d'approuver des exemptions vise à garantir le respect de la liberté de religion aux particuliers et aux groupes. Il prévoit :

ATTENDU que tout enfant a le droit de bénéficier d'un système d'éducation qui favorise le plein épanouissement de sa personnalité;

Attendu que les parents ont le droit de choisir les établissements qui, selon leur conviction, assurent le mieux le respect des droits de leurs enfants;

Attendu que les personnes et les groupes ont le droit de créer des établissements d'enseignement autonomes et, les exigences du bien commun étant sauves, de bénéficier des moyens administratifs et financiers nécessaires à la poursuite de leurs fins;

[110] The department's own publications support the conclusion that the legislative and regulatory scheme is intended to operate in a way that respects the religious freedoms of individuals and groups in the school system. In a 2005 ministerial proposal, the Minister stated that "[r]especting the fundamental right to the freedom of conscience and religion is the basis of all ethics and religious education": *Establishment of an ethics and religious culture program: Providing future direction for all Québec youth* (2005), at p. 6. To similar effect, the *Ethics and Religious Culture Program* section of the department's website promises that the legislative and regulatory scheme — the generic ERC Program supplemented by the s. 22 exemption provision, which replaced a prior diversity of moral education programs including denominational programs — will "respec[t] the freedom of conscience and religion of parents, students and teachers": "Ethics and Religious Culture Program: Contributing to harmonious social relations in Québec society today" (online).

[111] Indeed, the department's website notes that among the pre-existing programs was a "Catholic Religious and Moral Instruction" program, and states that the ERC Program will replace such programs in order to "offer the same education to all Québec students".

[112] Section 22 functions to ensure the legislative and regulatory scheme's compliance with the freedom of religion guaranteed by s. 2(*a*) of the *Charter*. It guards against the possibility that, in certain situations, the mandatory imposition of a purely secular curriculum may violate the *Charter* rights of a private religious school. This safeguard is consistent with the obligations of the state in a multicultural society. As LeBel J. observed in his concurring reasons in *S.L. v. Commission scolaire des Chênes*, 2012 SCC 7, [2012] 1 S.C.R. 235, in the context of the public school system, "[u]nder the constitutional principles governing state action, the state has neither an obligation to promote religious faith nor a right to discourage religious faith in its public education system" (para. 54). The state

[110] Les publications du ministère lui-même appuient la conclusion selon laquelle le régime législatif et réglementaire est censé s'appliquer dans le respect de la liberté de religion des individus et des groupes qui font partie du réseau scolaire. Dans une proposition présentée en 2005, le ministre a affirmé que « [l]e respect du droit fondamental à la liberté de conscience et de religion constitue l'assise de toute formation dans les domaines de l'éthique et de la religion » : *La mise en place d'un programme d'éthique et de culture religieuse : Une orientation d'avenir pour tous les jeunes du Québec* (2005), p. 6. Dans le même ordre d'idées, la section *Programme Éthique et culture religieuse* du site Web du ministère assure que le régime législatif et réglementaire — le programme ÉCR de référence, complété par la disposition d'exemption de l'art. 22, lequel a remplacé divers programmes d'enseignement moral, notamment des programmes confessionnels — « respect[era] la liberté de conscience et de religion des parents, des élèves et du personnel enseignant » : « Programme Éthique et culture religieuse : Pour vivre ensemble dans le Québec d'aujourd'hui » (en ligne).

[111] En fait, le site Web du ministère indique que l'« enseignement moral et religieux [. . .] catholique » constituait l'un de ces programmes préexistants, et que le programme ÉCR remplacera ceux-ci, de manière à ce qu'« une seule et même formation [soit offerte] à l'ensemble des élèves du Québec ».

[112] L'article 22 vise à garantir que le régime législatif et réglementaire respecte la liberté de religion garantie par l'al. 2*a*) de la *Charte*. Il a pour effet d'empêcher que l'imposition d'un programme obligatoire purement laïque puisse, dans certains cas, porter atteinte aux droits que la *Charte* confère à une école confessionnelle privée. Cette garantie est compatible avec les obligations de l'État au sein d'une société multiculturelle. Comme le souligne le juge LeBel dans les motifs concordants qu'il a rédigés dans l'affaire *S.L. c. Commission scolaire des Chênes*, 2012 CSC 7, [2012] 1 R.C.S. 235, en ce qui concerne le réseau scolaire public, « [d]ans son système d'enseignement public, l'État n'a, en vertu des principes constitutionnels qui régissent son action, ni l'obligation de favoriser la foi religieuse, ni

may not discourage religious faith in the public education system; this obligation has even more resonance in the context of a private religious school.

C. *Analytical Approach Under the Charter*

[113] Section 2(*a*) of the *Charter* protects the right to freedom of religion. The state can limit this right, but only if it can show that the limitation is "reasonable" and "demonstrably justified in a free and democratic society" under s. 1 of the *Charter*. The *Charter* requirement that limits on rights be reasonable and demonstrably justified may be expressed in different ways in different contexts, but the basic constitutional requirement remains the same.

[114] 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 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 is this: did the Minister's decision limit Loyola's right to freedom of religion proportionately — that is, no more than was reasonably necessary?

[115] For reasons that follow, we conclude that both of these issues must be answered in the affirmative.

D. *Loyola's Proposed Equivalent Program*

[116] The nature of Loyola's proposed equivalent program lies at the heart of this appeal. As such, it is worth examining in some detail.

le droit de décourager celle-ci » (par. 54). L'État ne peut décourager la foi religieuse dans le système d'enseignement public; cette obligation trouve davantage écho dans le contexte d'une école confessionnelle privée.

C. *Approche analytique dans le contexte de la Charte*

[113] L'alinéa 2*a*) de la *Charte* protège le droit à la liberté de religion. L'État peut restreindre ce droit, mais seulement s'il est en mesure de démontrer qu'il le fait dans des limites qui sont « raisonnables » et dont « la justification p[eut] se démontrer dans le cadre d'une société libre et démocratique » au sens où il faut l'entendre pour l'application de l'article premier de la *Charte*. L'exigence de la *Charte* selon laquelle les restrictions aux droits doivent être raisonnables et faire l'objet d'une justification qui puisse se démontrer peut être exprimée de différentes façons dans des contextes différents, mais l'exigence constitutionnelle fondamentale reste la même.

[114] Tout d'abord, il faut déterminer si la décision de la ministre a porté atteinte à la liberté de religion de Loyola. Ensuite, il faut se demander si cette décision — selon laquelle seul un programme d'études purement laïque peut équivaloir au programme ÉCR — porte atteinte à ce droit 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 est la suivante : la décision de la ministre a-t-elle 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?

[115] Pour les motifs qui suivent, nous concluons que ces deux questions appellent une réponse affirmative.

D. *Le cours proposé comme équivalent par Loyola*

[116] La nature du programme proposé par Loyola comme équivalent est au cœur du présent pourvoi. Il vaut donc la peine de l'examiner de façon assez détaillée.

[117] The ERC Program has two core objectives: recognition of others and the pursuit of the common good. Furthering these objectives, the program teaches students to develop competencies in understanding religion (the "world religions competency"), reflecting on ethical questions (the "ethics competency"), and engaging in dialogue (the "dialogue competency").

[118] Several sources of information shed light on exactly how Loyola proposes to teach these competencies in its alternative to the ERC Program. On March 30, 2008, Loyola sent its first letter to the Minister requesting an exemption from the ERC Program, which gave a broad overview of the objectives of its proposed equivalent program. Following a request to submit further information, Loyola provided a three-page document with a more detailed summary of its proposed program. After receiving an initial negative response, but before the Minister's final decision to deny an exemption, Loyola sent a further, three-page letter to the Minister on August 25, 2008, containing more details about its proposal.

[119] The precise nature of the proposed equivalent program was further clarified in testimony heard by the application judge, and Loyola's written and oral submissions to this Court. In fairness, these clarifications were not available to the Minister when she rendered her decision. Nevertheless, they are helpful in determining the form and substance of the program Loyola is proposing.

[120] Loyola describes a program of study that achieves the ERC Program's objective of [TRANSLATION] "promot[ing] . . . tolerance and respect for all", but that is delivered "in a manner respectful of the Catholic faith and the moral values that form the cornerstone of our school" (application judge's reasons, at para. 35). The three-page program summary outlines a diverse mix of content that includes doctrinal instruction on Catholic history and dogma,

[117] Le programme ÉCR s'articule autour de deux objectifs fondamentaux : la reconnaissance de l'autre et la poursuite du bien commun. Pour réaliser ces objectifs, le programme enseigne aux élèves à comprendre le phénomène religieux (la « compétence relative aux religions dans le monde »), à réfléchir sur des questions d'éthique (la « compétence en éthique ») et à pratiquer le dialogue (la « compétence relative au dialogue »).

[118] Plusieurs sources d'information permettent de savoir avec précision comment Loyola se propose d'enseigner ces compétences dans le cadre des cours qu'elle suggère d'offrir pour remplacer le programme ÉCR. Le 30 mars 2008, elle a fait parvenir à la ministre une première lettre dans laquelle elle demandait d'être exemptée du programme ÉCR et exposait de façon générale les objectifs du programme proposé comme équivalent. À la suite d'une demande de renseignements complémentaires, elle a soumis un document de trois pages renfermant un exposé plus détaillé du programme qu'elle proposait. Après avoir reçu une première réponse négative, mais avant que la ministre rende sa décision définitive lui refusant l'exemption demandée, Loyola a adressé une autre lettre de trois pages à la ministre le 25 août 2008 pour lui faire part de plus amples détails sur sa proposition.

[119] La nature exacte du programme proposé comme équivalent a été précisée encore plus lors des témoignages entendus par le juge saisi de la demande, ainsi que dans l'argumentation écrite et orale que Loyola a présentée à la Cour. En toute justice, il convient de préciser que la ministre ne disposait pas de ces précisions lorsqu'elle a rendu sa décision. Elles sont néanmoins utiles pour permettre de déterminer la forme et la substance du programme proposé.

[120] Le programme d'études décrit par Loyola permet d'atteindre l'objectif du programme ÉCR relatif à « la promotion de la tolérance et du respect de tous », mais en étant offert « de manière à respecter la foi catholique et les valeurs morales qui forment la pierre angulaire de notre école » (motifs du juge saisi de la demande, par. 35). Dans son résumé de trois pages, Loyola décrit la diversité de matières qu'elle entend enseigner, dont des

comparative study of various world religions, and consideration of an array of ethical and moral issues.

(1) How Loyola's Proposed Program Approaches the World Religions Competency

[121] The world religions aspect of Loyola's program includes content on Judaism, Islam, Buddhism, Hinduism, and North American native spirituality, and teaches students to examine "religious praxis, sacred stories, myths, and rituals found in religious cultures". In correspondence with the Minister, Loyola asserted that its program is actually [TRANSLATION] "much more thorough" than the ERC Program in its approach to understanding religion (application judge's reasons, at para. 38). To ensure that the program achieves the goal of [TRANSLATION] "promoting tolerance and acceptance of others", it goes beyond a "simple explanation" of other religions' external customs to include an examination of their fundamental beliefs (*ibid.*). Loyola's program also "devotes a significant amount of study to Roman Catholic Christianity" (A.F., at para. 13).

[122] Paul Donovan, Loyola's Principal, testified about Loyola's in-depth approach to teaching other religions, giving examples of having a rabbi visit to discuss Judaism or an imam to discuss Islam, to aid students in "getting to know what that faith is really about". Mr. Donovan stated "that's something that we do quite regularly". Loyola's program approaches other religions by reference to the concepts of God and faith "as understood by the tradition under study itself", and to this extent Loyola takes no issue with the professional posture of objectivity that the ERC Program requires of teachers (A.F., at para. 13). As noted by Loyola's counsel in his oral submissions to this Court, "[y]ou can't teach Buddhism from the Catholic point of view" and "there is no issue with the way the program

enseignements doctrinaux portant sur l'histoire et les dogmes de l'Église catholique, une étude comparative des diverses religions dans le monde, ainsi qu'un examen d'une foule de questions relatives à l'éthique et à la morale.

(1) Façon dont le programme proposé par Loyola aborde la compétence relative aux religions dans le monde

[121] Le volet du programme de Loyola relatif aux religions dans le monde traite du judaïsme, de l'islam, du bouddhisme, de l'hindouisme ainsi que de la spiritualité autochtone nord-américaine. Il amène en outre les élèves à se pencher sur [TRADUCTION] « la pratique religieuse, les histoires sacrées, les mythes et les rituels que l'on retrouve dans les cultures religieuses ». Dans les lettres qu'elle a échangées avec la ministre, Loyola a affirmé que son programme aborde la compréhension du phénomène religieux « d'une manière bien plus approfondie » que le programme ÉCR (motifs du juge saisi de la demande, par. 38). Elle ajoute que, pour s'assurer qu'elle atteigne l'objectif de « promouvoir la tolérance et l'acceptation des autres », son programme ne se borne pas à une « simple explication » des coutumes externes des autres religions, mais comporte un examen de leurs croyances fondamentales (*ibid.*). Le programme qu'elle propose [TRADUCTION] « consacre également beaucoup de temps à l'étude du christianisme catholique romain » (m.a., par. 13).

[122] Paul Donovan, directeur de Loyola, a témoigné au sujet de la méthode d'étude approfondie des autres religions préconisée par l'établissement, en citant comme exemple le fait d'inviter un rabbin pour discuter du judaïsme ou un imam pour parler de l'islam, ce qui aide les élèves à [TRADUCTION] « mieux saisir en quoi consiste leur foi ». M. Donovan a affirmé que [TRADUCTION] « c'est une pratique courante chez nous ». Le programme de Loyola aborde les autres religions en fonction des concepts de Dieu et de la foi [TRADUCTION] « tels que les conçoit la tradition à l'étude » et, dans cette mesure, l'école ne s'oppose pas à l'attitude professionnelle d'objectivité que le programme ÉCR exige de la part des enseignants (m.a., par. 13). Comme l'avocat de l'école l'a fait observer dans sa

requires world religions to be taught" (transcript, at p. 4).

[123] Unlike its approach to teaching other religions, Loyola's method of teaching Catholicism is neither neutral nor objective, but rather takes a denominational approach. This approach aims to "provide the students with a sound formation in the basic beliefs, rituals and practices of our Faith", including "the realization that Christianity cannot remain something purely internal, but must express itself in our relationships with others and the world around us". Loyola's program "present[s] its faith in a manner where students are invited to engage with it in a living way, not merely as a subject of detached intellectual curiosity" (A.F., at para. 25), premised on the belief that in "teaching its own faith . . . it must do so from the Catholic perspective" (transcript, at p. 6).

(2) How Loyola's Proposed Program Approaches the Ethics Competency

[124] Loyola readily concedes that, as with its teaching of Catholicism within the world religions competency, the ethics competency is also taught from the Catholic perspective:

> With respect to the ethics component, its central focus is the social teaching of the Roman Catholic Church. . . . [A]s one would expect of a Jesuit school, Loyola proposes the social and ethical teachings of the Catholic Church as a basis on which students are invited to govern themselves. [A.F., at para. 13]

Loyola's program imparts a "Catholic vision" on topics such as "moral decision making, good

plaidoirie devant la Cour : [TRADUCTION] « [o]n ne peut pas enseigner le bouddhisme du point de vue catholique » et « la façon dont le programme exige que l'on enseigne les religions dans le monde ne pose pas problème » (transcription, p. 4).

[123] Contrairement à l'approche préconisée par Loyola pour enseigner les autres religions, la méthode qu'elle utilise pour enseigner le catholicisme n'est ni neutre ni objective, mais repose plutôt sur une démarche confessionnelle. Cette méthode vise à [TRADUCTION] « offrir aux élèves une solide formation en ce qui concerne les convictions, rituels et pratiques fondamentaux de notre foi » et à leur faire « comprendre que la foi chrétienne ne peut demeurer quelque chose de purement intérieur, mais qu'elle doit s'exprimer concrètement dans nos rapports avec les autres et avec le monde qui nous entoure ». Dans son programme, l'école [TRADUCTION] « présente sa religion d'une manière qui invite les élèves à s'y engager d'une manière vivante et non comme une matière à aborder avec détachement comme un objet de simple curiosité intellectuelle » (m.a., par. 25), en partant du principe que, pour [TRADUCTION] « enseigner sa propre religion [. . .], elle doit le faire selon la perspective catholique » (transcription, p. 6).

(2) Façon dont le programme proposé par Loyola aborde la compétence en éthique

[124] Loyola admet volontiers que, tout comme dans le cas de l'enseignement du catholicisme dans le cadre de la compétence relative aux religions dans le monde, la compétence en éthique est enseignée du point de vue catholique :

> [TRADUCTION] En ce qui concerne le volet éthique, il est essentiellement axé sur l'enseignement social de l'Église catholique romaine. [. . .] [C]omme on peut s'y attendre de la part d'un établissement d'enseignement jésuite, Loyola propose les enseignements sociaux et éthiques de l'Église catholique comme cadre de référence à partir duquel les élèves sont invités à régler leur conduite. [m.a., par. 13]

Le programme proposé vise à transmettre une « vision catholique » sur des sujets tels que [TRADUCTION]

conscience-in-action, justice, honesty, respect for persons, respect for creation, reverence for human life, compassion, sexuality, and peacemaking".

[125] However, while the Catholic perspective on ethical issues is given prominence, Loyola's program also includes "[e]xploration of ethical systems as understood by various religions and non-religious value systems". Described in its August 25 submission to the Minister, Loyola's program would have students [TRANSLATION] "explor[e] a range of ethical systems, beliefs and practices", and would encourage them "to think critically" (application judge's reasons, at para. 38). As further clarified in this appeal:

> . . . on all significant ethical questions, students are required to understand not only the position of the Roman Catholic Church, but also those of all major thinkers and viewpoints. . . .
>
> [T]hey are free to criticise the position of the Catholic Church on any given issue and will be graded on the basis of the quality of their reasoning, not on the basis of adherence to the Catholic position in preference to other positions. [A.F., at para. 13]

In all aspects of Loyola's program, including the ethics competency, [TRANSLATION] "the goal of teaching respect for all, regardless of our individual beliefs or customs, is of crucial importance", informed by "our ethical ideal . . . not simply to 'tolerate' others but indeed to 'love' others, as our Christian faith teaches us" (application judge's reasons, at para. 38).

(3) How Loyola's Proposed Program Approaches the Dialogue Competency

[126] None of Loyola's submissions to the Minister explicitly include the word "dialogue", and this was one of the justifications cited by the Minister in denying Loyola's request for an exemption.

« les choix moraux, la sagesse dans l'action, la justice, l'honnêteté, le respect d'autrui, le respect envers la création, le respect pour la vie humaine, la compassion, la sexualité et la recherche de la paix ».

[125] Toutefois, bien qu'il accorde la préséance à la perspective catholique en ce qui a trait aux questions d'éthique, le programme proposé prévoit également [TRADUCTION] « une exploration des systèmes d'éthique tels que les conçoivent diverses religions et systèmes de valeurs non religieux ». Selon la description qu'en donne la lettre du 25 août envoyée par l'école à la ministre, ce programme inviterait les élèves à « explore[r] un éventail de systèmes d'éthique, de croyances et de pratiques » et les inciterait « à penser de manière critique » (motifs du juge saisi de la demande, par. 38). Comme il a été précisé dans le cadre du présent pourvoi :

> [TRADUCTION] . . . sur toutes les questions d'éthique importantes, les élèves sont tenus de comprendre non seulement la position de l'Église catholique romaine, mais également celles de tous les grands penseurs et principaux courants de pensée . . .
>
> [I]ls sont libres de critiquer la position de l'Église catholique sur toute question et ils sont évalués en fonction de la qualité de leur raisonnement et non d'après leur adhésion à la position catholique plutôt qu'à une autre position. [m.a., par. 13]

Sur tous les aspects du programme d'études de Loyola, y compris la compétence en éthique, « le but d'enseigner le respect de tous, peu importe nos croyances ou coutumes individuelles, demeure d'une importance primordiale pour nous » et repose sur « notre idéal d'éthique [qui] n'est pas simplement de "tolérer" les autres, mais bien "d'aimer" les autres, comme nous l'enseigne notre foi chrétienne » (motifs du juge saisi de la demande, par. 38).

(3) Façon dont le programme proposé par Loyola aborde la compétence relative au dialogue

[126] Nulle part dans ses observations à la ministre Loyola ne mentionne expressément le mot « dialogue », et c'est une des raisons invoquées par la ministre dans la lettre signée par sa représentante

However, looking at the materials in context and in their entirety, it is evident that the proposed program contemplates more than students passively listening to a teacher's lecture. The program summary uses active verbs like "students explore" and "[s]tudents examine". Loyola's second letter to the Minister stated that [TRANSLATION] "[w]e have always encouraged our students to think critically, to obtain information, to be aware of the principal ethical issues and to examine popular beliefs and practices" (application judge's reasons, at para. 38). The application judge had no difficulty making the following finding of fact:

[TRANSLATION] In the ERC program, dialogue is defined as consisting of two interactive dimensions, that is, individual deliberation and the exchange of ideas with others.

A simple reading of [Loyola's program summary], supplemented by [Loyola's correspondence with the Minister], unequivocally confirms that the program dispensed by Loyola contains these two dimensions. [Emphasis added; paras. 150-51.]

(4) Does Loyola's Proposed Program Conform to the Objectives of the ERC Program?

[127] In his reasons for judgment, the application judge concluded that

[TRANSLATION] Loyola's program is comparable to the ERC program established by the Minister. . . . [T]eaching . . . Loyola's program in accordance with the Catholic faith does not change its nature or make it lose its status as an equivalent program.

The cultural approach advocated in the ERC program is in no way incompatible or irreconcilable with the denominational approach required by Loyola's religious precepts. [paras. 182-83]

In our view, this finding was open to the application judge, and we see no reason to interfere with it. While Loyola's alternative could perhaps have been more clearly presented in the initial submissions to the Minister, the contours of the program have

pour refuser la demande d'exemption. Toutefois, lorsqu'on examine les documents dans leur contexte et dans leur intégralité, on constate que le programme proposé ne se borne pas à envisager un scénario dans lequel les élèves écouteraient passivement un cours magistral donné par un enseignant. Le résumé du programme emploie des verbes actifs tels que [TRADUCTION] « les élèves explorent » et « les élèves examinent ». La deuxième lettre adressée par Loyola à la ministre précise en outre que : « [n]ous avons toujours encouragé nos élèves à penser de manière critique, à s'informer, à être au courant des principales questions d'éthique et à questionner et examiner les croyances et pratiques populaires » (motifs du juge saisi de la demande, par. 38). Le juge saisi de la demande n'a d'ailleurs pas eu de mal à tirer la conclusion de fait suivante :

Dans le programme ECR, le dialogue est défini comme comportant deux dimensions interactives, à savoir la délibération intérieure et l'échange d'idées avec les autres.

Une simple lecture [du résumé du programme], complétée par les [lettres échangées entre Loyola et la ministre] confirme sans équivoque que le programme offert par Loyola comporte ces deux dimensions. [Nous soulignons; par. 150-151.]

(4) Le programme proposé par Loyola est-il conforme aux objectifs du programme ÉCR?

[127] Dans ses motifs de jugement, le juge saisi de la demande a conclu que

le programme de Loyola est comparable au programme ECR établi par le ministre. L'enseignement de ce programme suivant la confession catholique n'en change pas la nature et ne peut faire perdre le statut d'équivalent au programme de Loyola.

L'approche culturelle préconisée par le programme ECR n'est aucunement incompatible ni inconciliable avec l'approche confessionnelle requise par les préceptes religieux de Loyola. [par. 182-183]

À notre avis, le juge saisi de la demande était justifié de tirer cette conclusion et nous ne voyons aucune raison d'intervenir à l'égard de cette dernière. Même si Loyola aurait peut-être pu présenter son programme de remplacement de façon plus claire dans

been fleshed out more fully in testimony heard before the application judge and in Loyola's submissions on appeal. At its most general level, the program takes the following form: (1) regarding the world religions competency, Loyola will teach Catholicism from the Catholic perspective, but will teach other religions objectively, respectfully and with reference to religious precepts as understood by those other faiths themselves; (2) regarding the ethics competency, Loyola will emphasize the Catholic point of view on ethical questions, but will ensure all ethical points are presented on any given issue, and will welcome disagreement from students on Catholic moral teachings; and (3) regarding the dialogue competency, Loyola will encourage students to think critically and engage with their teachers and with each other in exploring the topics covered in the program.

[128] As is apparent, Loyola's program departs from the generic ERC Program in two key respects. First, Loyola proposes to teach Catholicism from the Catholic perspective. Second, while ensuring that all ethical points are presented and encouraging students to think critically, Loyola proposes an approach that emphasizes the Catholic point of view when discussing ethical questions. In both respects, Loyola's teachers would depart from the strict neutrality required under the ERC Program.

[129] Justice Abella notes in her reasons that "the normative core of Loyola's proposed curriculum is the doctrine and belief system of the Catholic Church" (para. 25). This may be true, but it doesn't tell the whole story. Surrounding that normative core is a rich and full exploration of non-Christian religious beliefs, and of ethical perspectives that do

les premières communications qu'elle a échangées avec la ministre, les paramètres du programme ont été expliqués plus en détail dans des témoignages que le juge saisi de la demande a entendus ainsi que dans les arguments présentés par l'école dans le cadre de l'appel. Du point de vue le plus général, le programme proposé se présente sous la forme suivante : (1) en ce qui concerne la compétence relative aux religions dans le monde, l'école enseignerait le catholicisme du point de vue catholique, mais les autres religions de façon objective, avec respect et en présentant les préceptes religieux tels que les conçoivent les autres religions en question; (2) en ce qui concerne la compétence en éthique, l'école insisterait sur le point de vue catholique pour ce qui est des questions d'éthique, mais s'assurerait que tous les points de vue éthiques seraient présentés sur un sujet donné et accepterait volontiers que les élèves soient en désaccord avec les enseignements moraux de l'Église catholique; (3) en ce qui a trait à la compétence relative au dialogue, l'école 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.

[128] Comme on le constate, le programme proposé s'écarterait du programme ÉCR de référence sous deux aspects essentiels. En premier lieu, Loyola propose d'enseigner le catholicisme selon la perspective catholique. En second lieu, tout en s'assurant que toutes les questions d'éthique seraient présentées et en encourageant les élèves à penser de manière critique, elle propose une démarche qui insisterait sur le point de vue catholique lorsque les questions d'éthique seraient examinées. Sous ces deux rapports, les enseignants de Loyola s'écarteraient de la stricte neutralité exigée par le programme ÉCR.

[129] La juge Abella fait observer, dans ses motifs, que « [l']essence normative [du programme d'études proposé] correspond à la doctrine et aux croyances de l'Église catholique » (par. 25). C'est peut-être vrai, mais cela ne rend pas compte de l'ensemble de la réalité. Cette essence normative s'accompagne d'une étude approfondie et exhaustive de

not mirror Catholic moral teachings. Leaders from other religious communities are welcomed into the classroom to ensure a robust understanding of other faiths and traditions, beyond the neutral description of religious customs and practices envisioned by the ERC Program. Students are allowed, even encouraged, to critique Catholic moral teachings. There is nothing to suggest Loyola's proposal is in any way ill suited to achieve the two key objectives of the ERC Program: recognition of others and the pursuit of the common good. Nor does it fail to address the competencies of understanding religion, reflecting on ethical questions, and engaging in dialogue.

convictions religieuses non chrétiennes et de perspectives éthiques qui ne correspondent pas aux enseignements moraux catholiques. Des représentants d'autres communautés de croyants seraient invités à prendre la parole en salle de classe pour permettre aux élèves d'acquérir une compréhension solide des autres fois et traditions — en offrant davantage qu'une description neutre des coutumes et des pratiques religieuses prévue par le programme ÉCR. Les élèves seraient autorisés, voire encouragés, à critiquer les enseignements moraux catholiques. Rien ne permet de penser que la proposition de Loyola serait de quelque façon que ce soit mal adaptée pour permettre de réaliser les deux objectifs essentiels du programme ÉCR : la reconnaissance de l'autre et la poursuite du bien commun. On ne peut pas non plus lui reprocher de ne pas traiter des compétences relatives à la compréhension du phénomène religieux, à la réflexion sur des questions d'éthique et à la pratique du dialogue.

E. *Analysis of Loyola's Religious Freedom Claim*

E. *Analyse de l'argument relatif à la liberté de religion de Loyola*

[130] Loyola challenges the Minister's denial of an exemption from the ERC Program as an infringement of its religious freedom. As we have explained, Loyola is entitled to the freedom of religion protected by s. 2(*a*) of the *Charter*. This is not to say that the religious freedoms of other actors are not implicated by the Minister's denial. To the extent that the ERC Program would require Loyola's teachers to express a neutral viewpoint on religious matters, their religious freedom may be at issue. The religious freedom of the parents of Loyola's students may be implicated, as they have the right to seek moral and religious education for their children. Perhaps even the religious freedom of Loyola's students themselves is raised by the denial of an exemption for Loyola to implement its alternative program.

[130] Loyola conteste le refus de la ministre de l'exempter du programme ÉCR en affirmant qu'il s'agit d'une atteinte à sa liberté de religion. Comme nous l'avons déjà expliqué, Loyola a droit à la liberté de religion protégée par l'al. 2*a*) de la *Charte*. Cela ne veut toutefois pas dire que le refus de la ministre n'a pas d'incidence sur la liberté de religion d'autres intervenants. Dans la mesure où le programme ÉCR obligerait les enseignants de cette école à exprimer un point de vue neutre sur des questions religieuses, leur liberté de religion pourrait être en jeu. La liberté de religion des parents des élèves de Loyola pourrait également être touchée, car ils ont le droit d'assurer l'éducation morale et religieuse de leurs enfants. Le refus d'exempter Loyola pour lui permettre d'enseigner son propre programme de remplacement pourrait même avoir des incidences sur la liberté de religion de ses élèves.

[131] It is not necessary to conclusively decide these matters. Deciding the case on the basis of the religious freedom of Loyola itself is sufficient to dispose of this appeal. Similarly, it is not necessary

[131] Il n'est toutefois pas nécessaire de régler définitivement ces questions. La liberté de religion de Loyola elle-même suffit pour trancher le présent pourvoi. Il n'est pas nécessaire non plus de se

to consider whether any different analysis or result would arise under s. 3 of the *Quebec Charter*.

(1) The Extent of Religious Freedom Under Section 2(*a*) of the *Charter*

[132] 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. As this Court held in *Big M*, "[t]he essence of the concept of freedom of religion" includes "the right to manifest religious belief . . . by teaching and dissemination" (p. 336). Thus, Loyola's expressed desire to teach its curriculum in accordance with Catholic beliefs falls within the scope of s. 2(*a*)'s protection.

[133] *Big M* also affirms that the interpretation of the religious freedom guarantee should be "a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection" (p. 344).

(2) Did the Minister's Decision Infringe Loyola's Rights Under Section 2(*a*) of the *Charter*?

[134] In *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256, — another case involving religious freedom in the education context — this Court restated the test for determining whether the rights guaranteed by s. 2(*a*) have been infringed:

> . . . in order to establish that his or her freedom of religion has been infringed, the claimant must demonstrate (1) that he or she sincerely believes in a practice or belief that has a nexus with religion, and (2) that the impugned conduct of a third party interferes, in a manner that is non-trivial or not insubstantial, with his or her ability to act in accordance with that practice or belief. [para. 34]

demander si l'art. 3 de la *Charte québécoise* mènerait à une analyse ou à un résultat différent.

(1) Portée de la liberté de religion protégée par l'al. 2*a*) de la *Charte*

[132] 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. Comme la Cour l'a affirmé dans *Big M*, « [l]e concept de la liberté de religion se définit essentiellement comme [. . .] le droit de manifester ses croyances religieuses [. . .] par leur enseignement et leur propagation » (p. 336). Ainsi, la volonté déclarée de Loyola d'enseigner son programme d'études en conformité avec ses convictions catholiques relève du champ de la protection conférée par l'al. 2*a*).

[133] L'arrêt *Big M* confirme également que l'interprétation du droit à la liberté de religion « doit être libérale plutôt que formaliste et viser à réaliser l'objet de la garantie et à assurer que les citoyens bénéficient pleinement de la protection accordée par la *Charte* » (p. 344).

(2) La décision de la ministre a-t-elle porté atteinte aux droits garantis à Loyola par l'al. 2*a*) de la *Charte*?

[134] Dans l'arrêt *Multani c. Commission scolaire Marguerite-Bourgeoys*, 2006 CSC 6, [2006] 1 R.C.S. 256, — une autre affaire portant sur la liberté de religion dans le domaine de l'éducation —, la Cour a reformulé le critère permettant de déterminer s'il y a eu atteinte aux droits garantis par l'al. 2*a*) :

> . . . pour démontrer l'existence d'une atteinte à sa liberté de religion, le demandeur doit établir (1) qu'il croit sincèrement à une pratique ou à une croyance ayant un lien avec la religion, et (2) que la conduite qu'il reproche à un tiers nuit d'une manière plus que négligeable ou insignifiante à sa capacité de se conformer à cette pratique ou croyance. [par. 34]

(a) *Applying the Legal Test to an Organizational Claimant*

[135] As we have explained, the religious freedom guarantee contained in the *Charter* protects not only natural persons but also certain legal persons such as Loyola. The Attorney General of Quebec argued against this result, in part because an organization lacks the capacity for abstract thought and emotion and therefore cannot *believe* in something. While we are not persuaded that this precludes extending s. 2(*a*) to cover certain categories of organizations, we recognize that where the claimant is an organization rather than an individual, the "sincerity of belief" inquiry required by our jurisprudence poses some difficulties. The existing test need not be abandoned, but a few clarifications are warranted.

[136] The two-part test for determining whether a claimant's freedom of religion under s. 2(*a*) has been infringed was first set down in *Amselem*. That case offers considerable guidance on how to determine a claimant's sincerity of belief:

> Assessment of sincerity is a question of fact that can be based on several non-exhaustive criteria, including the credibility of a claimant's testimony . . ., as well as an analysis of whether the alleged belief is consistent with his or her other current religious practices. It is important to underscore, however, that it is inappropriate for courts rigorously to study and focus on the past practices of claimants in order to determine whether their current beliefs are sincerely held. Over the course of a lifetime, individuals change and so can their beliefs. Religious beliefs, by their very nature, are fluid and rarely static. [Emphasis added; para. 53.]

In brief compass, courts are counseled to determine sincerity of belief based on the credibility of a claimant's testimony, and whether the claimed belief is consistent with his or her current religious practices, while being mindful that these criteria are

a) *Application du test juridique à une organisation demanderesse*

[135] Comme nous l'avons déjà expliqué, la liberté de religion garantie par la *Charte* protège non seulement les personnes physiques, mais également certaines personnes morales comme Loyola. Le procureur général du Québec s'est opposé à ce résultat en faisant valoir notamment qu'une organisation n'est pas en mesure de formuler une pensée abstraite ou de ressentir des émotions et qu'elle ne peut donc pas *croire* en quelque chose. Bien que nous ne soyons pas convaincus que cela empêche d'étendre la protection conférée par l'al. 2*a*) à certaines catégories d'organisations, nous reconnaissons que, lorsque le demandeur est une organisation plutôt qu'une personne physique, l'analyse de la « sincérité de la croyance » exigée par notre jurisprudence pose certains problèmes. Il n'y a pas lieu pour autant de renoncer au test actuel, mais certaines clarifications s'imposent.

[136] C'est dans *Amselem* qu'a été énoncé pour la première fois le test à deux volets permettant de déterminer s'il a été porté atteinte au droit à la liberté de religion d'un demandeur protégée par l'al. 2*a*). Cet arrêt fournit des indications fort utiles pour juger de la sincérité des croyances d'un demandeur :

> L'appréciation de la sincérité est une question de fait qui repose sur une liste non exhaustive de critères, notamment la crédibilité du témoignage du demandeur [. . .] et la question de savoir si la croyance invoquée par le demandeur est en accord avec les autres pratiques religieuses courantes de celui-ci. Cependant il est important de souligner qu'il ne convient pas que le tribunal analyse rigoureusement les pratiques antérieures du demandeur pour décider de la sincérité de ses croyances courantes. Tout comme une personne change au fil des ans, ses croyances peuvent elles aussi changer. De par leur nature même, les croyances religieuses sont fluides et rarement statiques. [Nous soulignons; par. 53.]

En résumé, les tribunaux sont invités à juger de la sincérité de la croyance en se fondant sur la crédibilité du témoignage du demandeur et en se demandant si sa croyance invoquée est en accord avec ses pratiques religieuses courantes. Ils doivent, en outre,

non-exhaustive. In the context of an individual, a rigorous scrutiny of *past* practices is disfavoured, because religious beliefs frequently evolve over time.

[137] Determining which indicators are relevant is necessarily influenced by the facts of each case, and will depend on the specific claimant and the specific religious practice or belief that is at issue. Ultimately, a court's inquiry is not aimed at exposing the breadth and depth of a person's religious convictions to judicial scrutiny. The goal is more practical and limited: ". . . the court's role in assessing sincerity is intended only to ensure that a presently asserted religious belief is in good faith, neither fictitious nor capricious, and that it is not an artifice" (*Amselem*, at para. 52).

[138] There is no reason why the expressed belief of an organization cannot be examined to ensure it is made in good faith and is neither a fiction nor an artifice. We have already concluded that, as a threshold matter, an organization seeking to assert a religious freedom claim under the *Charter* must at a minimum demonstrate that its purpose is primarily religious, and that it operates in accordance with this purpose. Rather than demonstrating a sincere belief — which we readily concede a mere *legal* person is incapable of doing — an organizational claimant must show that the claimed belief or practice is consistent with both the purpose and operation of the organization.

[139] In evaluating this consistency between the claimed belief or practice and the organization's purpose and operation, the same non-exhaustive criteria from *Amselem* can be relied on. While an organization itself cannot testify, the credibility of officials and representatives who give testimony on the organization's behalf will form part of the assessment. Objective indicators will perhaps play a more prominent role. It is proper to assess the claimed belief or practice in light of objective facts such as the organization's other practices, policies

rester conscients du fait que ces critères ne sont pas exhaustifs. Dans le cas d'une personne physique, un examen rigoureux des pratiques *antérieures* est déconseillé, car il arrive souvent que les croyances religieuses des individus évoluent au fil du temps.

[137] La détermination des indicateurs pertinents est nécessairement influencée par les faits de l'espèce et varie selon le demandeur et les pratiques ou les croyances religieuses en cause. En fin de compte, l'analyse à laquelle le tribunal procède ne vise pas à soumettre à un examen judiciaire rigoureux l'ampleur et la profondeur des convictions religieuses de l'intéressé. L'objectif est plus pratique et plus circonscrit : « . . . dans l'appréciation de la sincérité, le tribunal doit uniquement s'assurer que la croyance religieuse invoquée est avancée de bonne foi, qu'elle n'est ni fictive ni arbitraire et qu'elle ne constitue pas un artifice » (*Amselem*, par. 52).

[138] Rien n'empêche d'examiner la croyance exprimée par une organisation pour s'assurer qu'elle est avancée de bonne foi et qu'elle n'est pas fictive et ne constitue pas un artifice. Nous avons déjà conclu que, dans un premier temps, l'organisation qui cherche à revendiquer le droit à la liberté de religion protégée par la *Charte* doit à tout le moins démontrer que sa mission est d'abord et avant tout religieuse et que ses activités sont conformes à cette mission. Au lieu de démontrer la sincérité de ses croyances — ce que, comme nous l'admettons sans peine, une simple société est incapable de faire —, l'organisation demanderesse doit démontrer que la croyance ou la pratique qu'elle revendique s'accorde tant avec sa mission qu'avec ses activités.

[139] Pour apprécier la conformité de la croyance ou de la pratique invoquée avec la mission et les activités de l'organisation, le tribunal peut se fonder sur les mêmes critères non exhaustifs que ceux énoncés dans l'arrêt *Amselem.* Bien qu'une organisation ne puisse elle-même témoigner, la crédibilité des dirigeants et des représentants qui témoigneront en son nom fera partie de cette analyse. Des indicateurs objectifs joueront peut-être un rôle plus important. Il convient d'évaluer la croyance ou la pratique revendiquées à la lumière de faits objectifs tels que

and governing documents. The beliefs and practices of an organization may also reasonably be expected to be more static and 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.

[140] The two-part test from *Amselem* and *Multani*, modified to apply to an organization, yields the following questions: (1) Is Loyola's claimed belief that it must teach ethics and its own religion from the Catholic perspective consistent with its organizational purpose and operation? (2) Does the Minister's decision to deny Loyola an exemption from the ERC Program interfere with Loyola's ability to act in accordance with this belief, in a manner that is more than trivial or insubstantial? We are guided by the extensive findings of fact made by the application judge in answering both of these questions.

(b) *Loyola's Religious Beliefs Are Consistent With Its Organizational Purpose and Operation*

[141] 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 purpose. The application judge made strong findings of fact, amply supported by the record before him:

[TRANSLATION] In the present case, the evidence is clear and uncontradicted. Loyola and its members, including Principal Donovan and President Fr. Brennan, are sincerely convinced that, to accomplish their mission as a Catholic educational institution, Loyola must teach ERC with its own program and according to the precepts of the Catholic religion.

The testimony of Loyola's principal, Mr. Donovan, was unequivocal. The ten principles explained in the

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 plus statiques et 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.

[140] Voici les questions que l'on obtient en modifiant le test à deux volets des arrêts *Amselem* et *Multani* pour l'appliquer à une organisation : (1) La croyance de Loyola suivant laquelle elle doit enseigner l'éthique et sa propre religion selon la perspective catholique est-elle conforme à sa mission et à ses activités? (2) La décision de la ministre de refuser de lui accorder une exemption du programme ÉCR nuit-elle d'une manière plus que négligeable ou insignifiante à la capacité de Loyola de se conformer à cette croyance? Nous répondrons à ces deux questions en nous fondant sur les conclusions de fait détaillées tirées par le juge saisi de la demande.

b) *Les croyances religieuses de Loyola sont conformes à sa mission et à ses activités*

[141] 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 croyance est exprimée de mauvaise foi ou dans un but inavoué. Le juge saisi de la demande a d'ailleurs tiré à cet égard de solides conclusions de fait qui étaient amplement étayées par le dossier dont il disposait :

En l'occurrence, la preuve est claire et non contredite. Loyola et ses membres, dont le directeur, Donovan, et son président, le Révérend Brennan, sont sincèrement convaincus que pour réaliser leur mission en tant qu'établissement d'enseignement confessionnel catholique, Loyola doit enseigner la matière ECR avec son propre programme et selon les préceptes de la religion catholique.

Le témoignage du principal de Loyola, monsieur Donovan, est sans équivoque. Les 10 principes qui sont

booklet "What makes a Jesuit High School Jesuit?" are present in all the activities of the school and in the teaching of all the courses, not only the religion course. The precepts of the Catholic religion are omnipresent at Loyola. [paras. 265-66]

[142] The application judge heard testimony from senior officials within Loyola's organization, and found it to be credible. He also considered objective evidence, including a comparison of Loyola's present classroom practices with the underlying principles of Jesuit education. Loyola's claimed belief was not contested by the Attorney General of Quebec. Accordingly, we see no reason to disturb the application judge's factual findings.

(c) *The Minister's Decision Substantially Interferes With Loyola's Ability to Act in Accordance With Its Religious Beliefs*

[143] 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*.

[144] Again, this conclusion is compelled by the application judge's extensive findings of fact. After hearing testimony from Loyola's principal, as well as experts in theology, religion, and philosophy, he determined that [TRANSLATION] "the ERC program is incompatible with a Catholic education", and that "Loyola would violate the fundamental and mandatory laws of the Catholic Church that govern it by teaching the ERC subject with the program established by the Minister" (paras. 55 and 61). The application judge concluded that "the Minister's decision, both intrinsically and through its effects, interferes with the freedom of religion guaranteed

exposés dans le livret « What makes a Jesuit High School Jesuit? » sont présents dans toutes les activités de l'école et dans l'enseignement de tous les cours et non pas seulement dans l'enseignement du cours de religion. Les préceptes de la religion catholique sont omniprésents au sein de Loyola. [par. 265-266]

[142] Le juge saisi de la demande a entendu et jugé crédibles les témoignages livrés par des cadres supérieurs de l'école. Il a également examiné des éléments de preuve objectifs, notamment une comparaison entre les pratiques actuelles utilisées en classe par l'école et les principes fondamentaux d'une éducation jésuite. Par ailleurs, le procureur général du Québec n'a pas contesté la croyance revendiquée par Loyola. Nous ne voyons donc aucune raison de modifier les conclusions de fait tirées par le juge saisi de la demande.

c) *La décision de la ministre entrave substantiellement la capacité de Loyola de se conformer à ses croyances religieuses*

[143] 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 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*.

[144] Encore une fois, cette conclusion s'impose compte tenu des conclusions de fait détaillées tirées par le juge saisi de la demande. Après avoir entendu le témoignage du directeur de l'école, ainsi que celui d'experts en théologie, en religion et en philosophie, le juge saisi de la demande a conclu que « le programme ECR est incompatible avec l'enseignement confessionnel catholique » et que l'école « Loyola enfreindrait les règles fondamentales et obligatoires de l'Église catholique qui [la] régissent en enseignant la matière ECR avec le programme établi par la ministre » (par. 55 et 61). À son avis, « la décision de la ministre, tant intrinsèquement que

to Loyola" (para. 289). These findings are in accordance with the evidence presented, much of which was not contested by the Attorney General of Quebec.

[145] We conclude that the Minister's decision limited Loyola's freedom of religion in violation of s. 2(*a*) of the *Charter*.

(3) Is the Minister's Decision Justified by Section 1 as a Reasonable Limit on Loyola's Religious Freedom?

[146] As discussed earlier, the core issue on this appeal is whether the Minister's insistence on a purely secular program of study to qualify for an exemption limited Loyola's right to religious freedom no more than reasonably necessary to achieve the ERC Program's goals. The government bears the burden of showing this. If it fails to do so, the Minister's decision is unconstitutional and must be set aside.

[147] The Minister denied Loyola's request for an exemption from the generic ERC Program after department staff conducted an analysis of Loyola's proposed program to determine whether it was equivalent. This analysis was conducted in accordance with a direction from Jacques Pettigrew, a senior civil servant, that for a course to have an equivalent approach to the ERC Program it must be [TRANSLATION] "cultural and non-denominational" (application judge's reasons, at para. 94). Although the refusal letter to Loyola cited a variety of justifications, it is apparent that, at its core, the Minister's denial flowed from this definition of "equivalent".

[148] In our view, 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

par ses effets, porte atteinte à la liberté de religion garantie à Loyola » (par. 289). Ces conclusions s'accordent avec la preuve présentée, preuve que le procureur général du Québec n'a, pour l'essentiel, pas contestée.

[145] Nous concluons donc que la décision de la ministre a restreint la liberté de religion de Loyola en contravention de l'al. 2*a*) de la *Charte*.

(3) La décision de la ministre est-elle justifiée au regard de l'article premier en tant que limite raisonnable imposée à la liberté de religion de Loyola?

[146] Comme nous l'avons vu, le présent pourvoi pose essentiellement la question de savoir si 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. C'est au gouvernement d'en faire la preuve, à défaut de quoi la décision de la ministre est inconstitutionnelle et doit être annulée.

[147] La ministre a refusé la demande présentée par Loyola en vue d'être exemptée de l'obligation d'enseigner le programme ÉCR de référence, et ce, après que le personnel de son ministère eut procédé à une analyse du programme proposé pour déterminer s'il s'agissait d'un programme équivalent. Cette analyse a été menée conformément à une directive de M. Jacques Pettigrew, un haut fonctionnaire, suivant laquelle l'approche d'un cours devait être « culturelle et non confessionnelle » pour être considérée équivalente à celle du programme ÉCR (motifs du juge saisi de la demande, par. 94). Bien que la lettre adressée à Loyola ait cité diverses raisons pour justifier le refus, il est clair que, essentiellement, ce refus de la ministre s'explique par cette définition du terme « équivalent ».

[148] À notre avis, 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

a cultural and non-denominational approach. As we noted earlier in discussing the legislative and regulatory scheme, 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, in our view, 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.

[149] And yet it was, because the Minister premised her denial on the flawed determination that only a cultural and non-denominational approach could serve as equivalent. This effectively negated the flexible approach contemplated by the legislative and regulatory scheme, and set a standard that would tolerate no more than a minimal deviation from the generic ERC Program. The application judge summarized the impossible position in which Loyola was placed:

> [TRANSLATION] Loyola is placed in an untenable position because of the Minister's decision. Either Loyola dispenses the ERC course according to the Minister's program and . . . violates the supreme principles governing its freedom of religion, or it teaches the subject with its Catholic program and violates the Act. [para. 271]

[150] 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

dans le monde, éthique et dialogue) qui exige que l'on adopte une démarche culturelle et non confessionnelle. Comme nous l'avons déjà fait observer lors de notre examen du régime législatif et réglementaire, l'intention du gouvernement était de permettre aux établissements d'enseignement confessionnels d'offrir 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 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, à notre avis, constituer un cours équivalent au programme en cause. Dans la mesure où la proposition de Loyola satisfait à ces critères, elle n'aurait pas dû être rejetée d'emblée.

[149] C'est pourtant le sort qui lui a été réservé, parce que la ministre a fait reposer son refus sur la prémisse erronée suivant laquelle seule une démarche culturelle et non confessionnelle pouvait être considérée comme équivalente. Cette façon de voir allait en réalité à l'encontre de la souplesse préconisée par le régime législatif et réglementaire et établissait une norme qui ne tolérait que de légères dérogations par rapport au programme ÉCR de référence. Le juge saisi de la demande a résumé la situation impossible dans laquelle Loyola était placée :

> . . . Loyola est placé[e] dans une position intenable suite à la décision de la ministre : ou bien [elle] dispense le cours ECR selon le programme de la ministre, et [elle] viole alors [. . .] les principes suprêmes qui régissent sa liberté de religion, ou bien [elle] enseigne cette matière avec son programme confessionnel catholique, et alors [elle] viole la loi. [par. 271]

[150] 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

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 s. 22 exemption provision was rendered illusory.

[151] 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 the religious freedom of Loyola. 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.

F. *The Appropriate Scope of an Equivalent Program*

[152] The content and approach of Loyola's proposed program were not precisely framed in its initial proposal to the Minister. Rather, they have been fleshed out over the course of this litigation. Given our conclusion that the Minister's construction of the exemption provision was too narrow, we think it would be useful to outline the appropriate limits that could be placed on an equivalent program. We do so not to obviate the Minister's appropriate use of case-by-case discretion in future cases, but to guide the exercise of that discretion, while also providing finality to resolve the protracted dispute between the parties in this case.

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 comme équivalente, la ministre a rendu illusoire la protection envisagée par la disposition d'exemption énoncée à l'art. 22.

[151] 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 s'assurer l'atteinte des objectifs du programme ÉCR. Cette façon de procéder s'est traduite par conséquent 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 garantie à Loyola par l'al. 2*a*).

F. *Portée appropriée d'un programme équivalent*

[152] Le contenu et la démarche du programme proposé par Loyola n'étaient pas formulés avec précision dans la proposition initiale qui a été soumise à la ministre. Ils ont plutôt été étoffés au cours du présent litige. Compte tenu de notre conclusion suivant laquelle l'interprétation que la ministre a faite de la disposition d'exemption était trop restrictive, nous estimons qu'il serait utile de définir les limites qu'il conviendrait d'imposer à un programme équivalent. Ce faisant, nous ne cherchons pas à rendre inutile l'exercice, par le ministre, de son pouvoir discrétionnaire d'examen au cas par cas à l'avenir, mais souhaitons plutôt guider l'exercice de ce pouvoir tout en mettant un terme à ce litige qui oppose les parties depuis trop longtemps.

[153] Determining whether a proposed program is sufficiently equivalent to the generic ERC Program is a fact-based exercise, and the Minister may, in the exercise of his or her discretion, make this determination on a case-by-case basis. However, this case illustrates the difficulty that making such a determination can pose. In the course of this protracted litigation between Loyola and the government of Quebec, this Court and courts below have received extensive testimony, documentary evidence and oral submissions regarding Loyola's proposal and the objectives of the ERC Program. It is therefore appropriate to delineate rough boundaries within which Loyola's proposed alternative program must be delivered, in order to strike the balance required between Loyola's right to religious freedom under s. 2(*a*) of the *Charter*, and the need to meet the objectives of the ERC Program. These boundaries should also serve as general principles to guide future exercises of ministerial discretion, while recognizing that each request for an exemption must be considered individually and with regard to all of the particular circumstances.

[153] Déterminer si un programme proposé est suffisamment équivalent au programme ÉCR de référence suppose de procéder à une analyse axée sur les faits. Pour ce faire, le ministre peut, en vertu de son pouvoir discrétionnaire, se prononcer au cas par cas. Toutefois, la présente affaire illustre à quel point cette décision peut être difficile. Au cours de ce long procès entre Loyola et le gouvernement du Québec, la Cour et les juridictions inférieures ont entendu de nombreux témoignages, examiné une abondante preuve documentaire et pris connaissance de multiples plaidoiries au sujet du programme proposé par Loyola et des objectifs du programme ÉCR. Il convient donc de définir le cadre général à l'intérieur duquel le programme proposé comme équivalent par Loyola doit être donné pour atteindre l'équilibre requis entre, d'une part, le droit de l'école à la liberté de religion garantie par l'al. 2*a*) de la *Charte* et, d'autre part, la nécessité de respecter les objectifs du programme ÉCR. Tout en reconnaissant que chaque demande d'exemption doit être examinée individuellement et en tenant compte de l'ensemble des circonstances de l'espèce, nous estimons que ce cadre pourra s'avérer utile grâce aux principes généraux qu'il contient et permettra à l'avenir de guider le ministre lorsqu'il exercera son pouvoir discrétionnaire.

[154] In assuring compliance with the *Charter*, an exemption must take into account the practical classroom realities posed by the ERC Program's topics. While Loyola's complaint rests on its Catholic identity, this identity has implications throughout the ERC Program. In our view, it would be insufficient to merely grant an exemption for Loyola to teach Catholicism from a Catholic perspective, while requiring an unmodified curriculum and a neutral posture in all other aspects of the program. Binding Loyola to a secular perspective at all times, other than during their discussion of the Catholic religion, offers scant protection to Loyola's freedom of religion, and would be unworkable in practice.

[154] Pour garantir la conformité à la *Charte*, une exemption doit tenir compte des réalités pratiques que comporte l'enseignement en classe des matières inscrites au programme ÉCR. Bien que la plainte formulée par Loyola repose sur son identité catholique, cette identité se répercute sur l'ensemble du programme ÉCR. À notre avis, il serait insuffisant de se contenter de dispenser l'école pour qu'elle puisse enseigner le catholicisme du point de vue catholique, tout en l'obligeant à enseigner le reste du programme sans y apporter de modifications, et en l'obligeant à faire preuve de neutralité en ce qui concerne tous les autres aspects de ce dernier. Obliger Loyola à adopter un point de vue non confessionnel en tout temps sauf lorsqu'il s'agit de discuter de la religion catholique n'offre qu'une faible protection à la liberté de religion de cet établissement et s'avérerait impossible à appliquer en pratique.

[155] Loyola proposes to teach the ethics competency in a way that recognizes its Catholic perspective. It does not want its teachers to be forced to remain neutral — or more realistically, mum — in the face of ethical positions that do not accord with the Catholic faith. Rather, Loyola proposes to have its teachers facilitate respectful and open-minded debate, where all positions are presented, but where students evaluate ethics and morals not in a vacuum but with knowledge of the Catholic perspective.

[156] Requiring Loyola's teachers to maintain a neutral posture on ethical questions poses serious practical difficulties and represents a significant infringement on how Loyola transmits an understanding of the Catholic faith. It is inevitable that ethical standards that do not comport with Catholic beliefs will be raised for discussion. Faced with a position that is fundamentally at odds with the Catholic faith, Loyola's teachers would be coerced into adopting a false and facile posture of neutrality. The net effect would be to render them mute during large portions of the ethics discussion — a discussion that is, as the ERC Program presupposes, crucial to developing a civilized and tolerant society.

[157] As an example, one can anticipate that students may wish to debate the appropriate expressions of intimacy between young people, and discuss the topic of premarital sex. It is inconceivable that a Catholic teacher could sincerely express a neutral viewpoint on this subject — nor, in our view, should he or she be required to do so. The practical effect would be the teacher's coerced silence. This silence would, however, extend only until the teacher turned to the discussion of Catholicism under the world religions competency, at which point he or she would be free to engage in an uninhibited dialogue — respectful and open to disagreement, but able to explain why such a life choice does not comport with Catholic morality. This delayed ability to express honest beliefs and actively moderate the classroom discussion does not illustrate a tolerable

[155] Loyola propose d'enseigner la compétence en éthique d'une façon qui reconnaît son point de vue catholique. Elle ne veut pas que ses enseignants soient forcés de demeurer neutres — ou de façon plus réaliste, silencieux — quant à des positions éthiques incompatibles avec la foi catholique. Elle propose plutôt de faire en sorte que ses enseignants facilitent la tenue d'un débat respectueux et ouvert, durant lequel tous les points de vue seraient présentés et les élèves examineraient l'éthique et la morale non pas en vase clos, mais en étant au courant du point de vue catholique.

[156] Obliger les enseignants de Loyola à conserver une attitude neutre sur les questions d'éthique pose de sérieuses difficultés d'ordre pratique et porte considérablement atteinte à la façon dont l'établissement transmet sa conception de la foi catholique. Il est inévitable que des normes éthiques qui ne correspondent pas aux croyances catholiques fassent l'objet d'un débat. Confrontés à des positions qui heurtent de front la foi catholique, les enseignants de Loyola se verraient forcés d'adopter une attitude de neutralité fausse et superficielle. En définitive, ils seraient ainsi réduits au silence pendant une grande partie du débat portant sur l'éthique, un débat qui, comme le programme ÉCR le présuppose, est essentiel pour développer une société civilisée et tolérante.

[157] À titre d'exemple, on peut imaginer que des élèves souhaiteraient débattre des modes d'expression appropriés de l'intimité entre jeunes et qu'ils voudraient aborder la question des relations sexuelles avant le mariage. Il est inconcevable qu'un enseignant catholique puisse exprimer sincèrement un point de vue neutre sur ce sujet et, à notre avis, on ne devrait pas l'obliger à le faire, au risque, en pratique, de le forcer à garder le silence. Il ne serait toutefois tenu au silence que jusqu'à ce qu'il fasse porter le débat sur le catholicisme sous le volet de la compétence relative aux religions dans le monde, moment à partir duquel il pourrait engager le dialogue sans contrainte — un dialogue respectueux et ouvert à la dissidence, mais où il serait en mesure d'expliquer les raisons pour lesquelles ce choix de vie n'est pas conforme à la moralité catholique. Cette

compromise between the state's interest in furthering the objectives of the ERC Program and Loyola's freedom of religion. Rather, it illustrates the unsuitability and unworkability of such a framework.

[158] As we understand Loyola's proposal, on a topic such as premarital sex, Loyola wishes to present the moral and ethical implications from a Catholic point of view. Presumably, the teacher would present a modern Catholic understanding of the subject, informed by its biblical underpinnings and supplemented by more recent theological and philosophical consideration. Loyola has also committed, however, to ensure that on every major ethical topic, students "understand not only the position of the Roman Catholic Church, but also those of all major thinkers and viewpoints" (A.F., at para. 13). In the context of this topic, Loyola's teachers would discuss with students the fact that some other religions — in fact, some strands of Christianity — do not strictly proscribe sexual intimacy between unmarried individuals. They would discuss with the students that, outside of the religious context, the dominant secular viewpoint in Western society tolerates, and even encourages sex outside of marriage. Students would be encouraged to think critically about the different views. Teachers would clearly identify the Catholic position, and the justifications for it, while respectfully considering the other points of view. If asked a question challenging the Catholic point of view, teachers would be free to answer and defend that position — again, in the context of an open-minded and respectful conversation, but one that is grounded in the inescapable reality that Loyola is a Catholic high school whose students and parents have voluntarily selected an education infused with Catholic beliefs and values.

obligation de suspendre pour un temps sa capacité d'exprimer honnêtement ses convictions et d'animer activement un débat en classe ne saurait constituer un compromis acceptable entre, d'une part, l'intérêt de l'État à promouvoir les objectifs du programme ÉCR et, d'autre part, la liberté de religion de Loyola. Elle illustre plutôt à quel point ce cadre de travail serait inadéquat et irréaliste.

[158] Si nous avons bien compris sa proposition, sur un sujet comme celui des relations sexuelles avant le mariage, Loyola souhaiterait en présenter les implications sur le plan moral et éthique du point de vue catholique. Vraisemblablement, l'enseignant présenterait une conception catholique moderne du sujet, à la lumière des fondements bibliques, en la complétant par des considérations théologiques et philosophiques plus récentes. Loyola s'est toutefois engagée aussi à s'assurer que, sur chaque grand sujet éthique, les élèves [TRADUCTION] « comprennent non seulement la position de l'Église catholique romaine, mais également celle de tous les grands penseurs et principaux courants de pensée » (m.a., par. 13). Sur le sujet en question, les enseignants de l'école discuteraient avec les étudiants du fait que certaines religions — en fait, certaines branches du christianisme — n'interdisent pas strictement l'intimité sexuelle entre les personnes non mariées. Ils discuteraient avec les élèves du fait qu'en dehors du contexte religieux, le point de vue laïque dominant dans la société occidentale tolère, voire encourage les relations sexuelles en dehors du mariage. Les élèves seraient incités à examiner de façon critique les divers points de vue. Les enseignants présenteraient clairement la position catholique et ses justifications tout en exposant de façon respectueuse les autres points de vue. Si un étudiant lui posait une question remettant en cause le point de vue catholique, l'enseignant serait libre de répondre et de défendre cette position, là encore, dans le contexte d'un dialogue ouvert et respectueux, sans jamais perdre de vue la réalité incontournable que Loyola est un collège catholique dont les élèves et les parents ont volontairement fait le choix d'une éducation imprégnée des convictions et des valeurs catholiques.

[159] Rejecting this framework and imposing a neutrality requirement on Loyola's teachers would not only prove undesirable from the perspective of religious freedom, it would also diminish the attainment of the ERC Program's own objectives. The dialogue competency requires teachers to honestly and actively participate in the classroom conversation. For Catholic teachers at a Catholic school, the forced neutral posture poses an unenviable choice: they can express a neutral (and therefore insincere) viewpoint on an ethical question that touches on a precept of the Catholic faith, or they can simply remain silent. Neither insincerity nor silence is conducive to the ERC Program's objectives of promoting individual deliberation and the exchange of ideas.

[160] There are subtle but important distinctions to make between the respectful treatment of differing viewpoints that Loyola proposes, and the strict neutrality required under the generic ERC Program, unalleviated by a s. 22 exemption. The ERC Program compels teachers to adopt a professional posture of strict neutrality, such that all points of view and all religious perspectives are presented as equally valid. The Minister's denial appears to be rooted in the assumption that this posture is vital to attaining the objectives of the ERC Program. If a religious perspective is offered, then all other viewpoints that do not conform to it will necessarily be derogated and disrespected. This position presents a false dichotomy. Loyola has strongly and repeatedly expressed that its proposed alternative program would treat other religious viewpoints with respect — going to the extent of inviting religious leaders from other faiths into the classroom to ensure students have a rich and full understanding of differing perspectives. However, requiring a religious school to present the viewpoints of other religions as equally legitimate and equally credible is incompatible with religious freedom. Indeed, presenting fundamentally incompatible religious doctrines as equally legitimate and equally credible could imply that they are both equally false. Surely

[159] Rejeter ce cadre et obliger les enseignants de Loyola à rester neutres s'avérerait non seulement peu souhaitable du point de vue de la liberté de religion, mais nuirait aussi à l'atteinte des objectifs du programme ÉCR lui-même. La compétence relative à la pratique du dialogue oblige les enseignants à participer honnêtement et activement aux discussions en classe. S'agissant d'un établissement d'enseignement catholique, l'obligation d'adopter une attitude neutre placerait les enseignants catholiques devant un choix peu enviable : ou bien ils exprimeraient un point de vue neutre — qui, par conséquent, ne serait pas sincère — sur une question éthique touchant un précepte de la foi catholique, ou bien ils garderaient le silence. Or, ni le manque de sincérité ni le silence ne favoriserait les objectifs du programme ÉCR, en l'occurrence la promotion de la réflexion chez l'individu et l'échange d'idées.

[160] Il y a de subtiles, mais importantes distinctions à faire entre le traitement respectueux des divers points de vue que propose Loyola, d'une part, et la stricte neutralité exigée par le programme ÉCR de référence en l'absence de l'exemption prévue à l'art. 22, d'autre part. Le programme ÉCR oblige les enseignants à adopter une attitude professionnelle de stricte neutralité qui fait en sorte que tous les points de vue et toutes les perspectives religieuses sont présentés sur un pied d'égalité. Le refus de la ministre semble reposer sur l'hypothèse que cette façon de faire est essentielle pour atteindre des objectifs du programme ÉCR. Si un point de vue religieux est présenté, tous les autres points de vue qui n'y sont pas conformes seraient nécessairement dénigrés et déconsidérés. Cette façon de voir repose sur une fausse dichotomie. Loyola a affirmé catégoriquement et à plusieurs reprises que le programme de remplacement qu'elle propose traiterait les autres points de vue religieux avec respect, au point d'inviter des chefs religieux d'autres confessions dans ses salles de classe pour s'assurer que les élèves acquerraient des connaissances approfondies et exhaustives sur divers points de vue. Toutefois, obliger un établissement d'enseignement confessionnel à présenter le point de vue d'autres religions comme étant tout aussi légitime et crédible

this cannot be a perspective that a religious school can be compelled to adopt.

[161] Additionally, this dichotomy does not accord with principles of interfaith cooperation and collaboration, which brings together people with deeply held commitments to their own faiths (and who therefore, by implication, have rejected other religious doctrines as "equally legitimate" or "equally credible") but who are nonetheless able to foster deep ties based on sincere mutual respect. As Loyola submitted in its letter to the Minister, [TRANSLATION] "our ethical ideal is not simply to 'tolerate' others but indeed to 'love' others, as our Christian faith teaches us" (application judge's reasons, at para. 38).

[162] With the foregoing in mind, we offer the following guidelines to delineate the boundaries of a s. 22 exemption in this case, and to inform the Minister's evaluation of future exemption applications:

- Loyola's teachers must be permitted to describe and explain Catholic doctrine and ethical beliefs from the Catholic perspective, and cannot be required to adopt a neutral position.

- 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 — both by conveying their own

que celui de la religion au centre de sa mission serait incompatible avec la liberté de religion. En effet, présenter des doctrines religieuses fondamentalement incompatibles comme étant aussi légitimes et crédibles l'une que l'autre pourrait impliquer qu'elles sont toutes les deux également fausses. Assurément, on ne peut obliger un établissement d'enseignement confessionnel à adopter une telle perspective.

[161] De plus, cette dichotomie est incompatible avec les principes de coopération et de collaboration interconfessionnelles qui bâtissent des ponts entre des gens qui sont tous solidement engagés dans leur propre foi — et qui, par conséquent, implicitement, ont rejeté les autres doctrines religieuses qu'ils ne considèrent pas comme étant « également légitimes » ou « également crédibles » —, mais qui sont néanmoins capables de chercher à forger des liens solides fondés sur un respect mutuel sincère. Comme Loyola l'explique dans une de ses lettres à la ministre, « notre idéal d'éthique n'est pas simplement de "tolérer" les autres mais bien "d'aimer" les autres, comme nous l'enseigne notre foi chrétienne » (motifs du juge saisi de la demande, par. 38).

[162] Compte tenu de ce qui précède, nous proposons les lignes directrices suivantes pour circonscrire les limites de l'exemption prévue à l'art. 22 qui doit être accordée en l'espèce et pour guider l'évaluation que le ministre pourrait faire à l'avenir en réponse aux demandes du même type qui lui seront soumises :

- Les enseignants de Loyola seront autorisés à exposer et à expliquer la doctrine et les croyances éthiques catholiques du point de vue catholique et ne seront pas tenus d'adopter une position neutre.

- 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, en

contributions in a respectful way, and by ensuring the classroom dialogue proceeds in accordance with respect, tolerance and understanding for those with different beliefs and practices.

- Where the context of the classroom discussion requires it, Loyola's teachers may identify what Catholic beliefs are, why Catholics follow those beliefs, and the ways in which another specific ethical or doctrinal proposition does not accord with those beliefs, be it in the context of a particular different religion or an ethical position considered in the abstract.

- Loyola's teachers cannot be expected to teach ethics or religious doctrines that are contrary to the Catholic faith in a way that portrays them as equally credible or worthy of belief. Respect, tolerance, and understanding are all properly required, and the highlighting of differences must not give rise to denigration or derision. However, ensuring that all viewpoints are regarded as equally credible or worthy of belief would require a degree of disconnect from, and suppression of, Loyola's own religious perspective that is incompatible with freedom of religion.

G. *Remedy*

[163] We have concluded that the Minister's decision infringes Loyola's right to religious freedom under s. 2(*a*) of the *Charter*, in a manner that cannot be justified under s. 1. The Court is empowered by s. 24(1) of the *Charter* to craft an appropriate remedy in light of all of the circumstances.

[164] In *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134, this Court was presented with a similar situation — an exercise of a minister's statutory

y contribuant eux-mêmes d'une façon respectueuse et en s'assurant que le dialogue en classe se déroule dans le respect, la tolérance et la compréhension pour ceux dont les croyances et les pratiques sont différentes.

- Lorsque le contexte de la discussion en classe l'exigera, les enseignants de Loyola 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 précises sont incompatibles avec ces convictions, que ce soit dans le contexte d'une autre religion en particulier ou dans celui d'une position éthique considérée dans l'abstrait.

- On ne pourra s'attendre à ce que les enseignants de Loyola enseignent des doctrines éthiques ou religieuses contraires à la foi catholique en les présentant comme étant aussi crédibles ou dignes de foi que celles auxquelles ils adhèrent. Le respect, la tolérance et la compréhension sont légitimement nécessaires et le fait de faire ressortir les différences ne devra pas donner lieu au dénigrement ou à la dérision. Toutefois, le fait d'exiger que tous les points de vue soient considérés comme étant également crédibles ou dignes de foi exigerait de la part de l'école une dissociation et une suppression de sa propre perspective religieuse qui serait incompatible avec sa liberté de religion.

G. *Réparation*

[163] Nous en sommes arrivés à la conclusion que la décision de la ministre a porté atteinte au droit à la liberté de religion garanti à Loyola par l'al. 2*a*) de la *Charte* d'une manière qui ne peut se justifier au regard de l'article premier. Le paragraphe 24(1) de la *Charte* habilite la Cour à déterminer la réparation appropriée compte tenu de l'ensemble des circonstances.

[164] Dans *Canada (Procureur général) c. PHS Community Services Society*, 2011 CSC 44, [2011] 3 R.C.S. 134, la Cour avait à trancher une situation semblable, en l'occurrence, une affaire où en

discretion in declining to grant an exemption, resulting in a violation of the *Charter* rights of the claimants. In that case, the Court declined to send the matter back for reconsideration by the Minister, but rather granted an order in the nature of mandamus, compelling the Minister to grant the exemption: *PHS*, at para. 150.

[165] We find it 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, we conclude that the only constitutional response to Loyola's application for an exemption would be to grant it. Accordingly, we would order the Minister to grant an exemption to Loyola, as contemplated under s. 22 of the regulation at issue, to offer an equivalent course to the ERC Program in line with Loyola's proposal and the guidelines we have outlined.

Appeal allowed.

Solicitors for the appellants: Borden Ladner Gervais, Montréal.

Solicitors for the respondent: Bernard, Roy & Associés, Montréal.

Solicitors for the intervener the Canadian Council of Christian Charities: Barry W. Bussey, Elmira, Ontario; Canadian Council of Christian Charities, Elmira, Ontario.

Solicitors for the intervener the Evangelical Fellowship of Canada: Vincent Dagenais Gibson, Ottawa; Evangelical Fellowship of Canada, Richmond Hill, Ontario.

exerçant le pouvoir discrétionnaire que lui conférait une loi, un ministre avait refusé d'accorder une exemption, ce qui avait entraîné une violation des droits reconnus aux demandeurs par la *Charte.* Dans cette affaire, la Cour avait refusé de renvoyer l'affaire au ministre pour réexamen et avait plutôt rendu une ordonnance de la nature d'un bref de *mandamus* et forcé le ministre à accorder l'exemption demandée : *PHS*, par. 150.

[165] Nous estimons qu'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. Nous fondant sur les conclusions de fait tirées par le juge saisi de la demande et tenant compte du dossier et des observations des parties, nous concluons que la seule réponse à la demande d'exemption de l'école qui soit conforme à la Constitution consiste à lui donner une suite favorable. Par conséquent, nous sommes d'avis d'ordonner au ministre d'accorder à Loyola l'exemption prévue à l'art. 22 du règlement en cause, permettant ainsi à cet établissement d'enseignement d'offrir un programme équivalent au programme ÉCR conformément à la proposition qu'elle a soumise et aux lignes directrices que nous avons exposées.

Pourvoi accueilli.

Procureurs des appelants : Borden Ladner Gervais, Montréal.

Procureurs de l'intimé : Bernard, Roy & Associés, Montréal.

Procureurs de l'intervenant le Conseil canadien des œuvres de charité chrétiennes : Barry W. Bussey, Elmira, Ontario; Conseil canadien des œuvres de charité chrétiennes, Elmira, Ontario.

Procureurs de l'intervenante l'Alliance évangélique du Canada : Vincent Dagenais Gibson, Ottawa; Alliance évangélique du Canada, Richmond Hill, Ontario.

Solicitors for the intervener the Christian Legal Fellowship: Robert E. Reynolds, Montréal; Christian Legal Fellowship, Burlington, Ontario.

Solicitors for the intervener the World Sikh Organization of Canada: Shergill & Company, Surrey.

Solicitors for the intervener the Association of Christian Educators and Schools Canada: Kuhn, Abbotsford.

Solicitors for the intervener the Canadian Civil Liberties Association: Davies Ward Phillips & Vineberg, Montréal.

Solicitors for the interveners the Catholic Civil Rights League, Association des parents catholiques du Québec, the Faith and Freedom Alliance and Association de la communauté copte orthodoxe du grand Montréal: Bennett Jones, Toronto.

Solicitors for the intervener the Faith, Fealty and Creed Society: Benefic, Vancouver.

Solicitors for the intervener the Home School Legal Defence Association of Canada: Côté Avocats Inc., Sainte-Julie, Quebec; Home School Legal Defence Association of Canada, London, Ontario.

Solicitors for the interveners the Seventh-day Adventist Church in Canada and the Seventh-day Adventist Church — Quebec Conference: Miller Thomson, Calgary.

Solicitors for the interveners Corporation archiépiscopale catholique romaine de Montréal and Archevêque catholique romain de Montréal: Famularo Fernandes Levinson Inc., Montréal.

Procureurs de l'intervenante l'Alliance des chrétiens en droit : Robert E. Reynolds, Montréal; Alliance des chrétiens en droit, Burlington, Ontario.

Procureurs de l'intervenante World Sikh Organization of Canada : Shergill & Company, Surrey.

Procureurs de l'intervenante Association of Christian Educators and Schools Canada : Kuhn, Abbotsford.

Procureurs de l'intervenante l'Association canadienne des libertés civiles : Davies Ward Phillips & Vineberg, Montréal.

Procureurs des intervenantes la Ligue catholique des droits de l'homme, l'Association des parents catholiques du Québec, Faith and Freedom Alliance et l'Association de la communauté copte orthodoxe du grand Montréal : Bennett Jones, Toronto.

Procureurs de l'intervenante Faith, Fealty and Creed Society : Benefic, Vancouver.

Procureurs de l'intervenante Home School Legal Defence Association of Canada : Côté Avocats Inc., Sainte-Julie, Québec; Home School Legal Defence Association of Canada, London, Ontario.

Procureurs des intervenantes l'Église adventiste du septième jour au Canada et l'Église adventiste du septième jour — Fédération du Québec : Miller Thomson, Calgary.

Procureurs des intervenants la Corporation archiépiscopale catholique romaine de Montréal et l'Archevêque catholique romain de Montréal : Famularo Fernandes Levinson Inc., Montréal.

TAB 6

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° 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

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

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*?

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.

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.

(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.

(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.

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.

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

a worse position after the relationship ends than would a married or civil union spouse in a similar patrimonial situation.

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.

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

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.

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.

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

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

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

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.

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.

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

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.

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.

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

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

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

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,

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

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

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.

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.

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,

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.

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.

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

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

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

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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POURVOIS contre un arrêt de la Cour d'appel du Québec (les juges Beauregard, Dutil et Giroux), 2010 QCCA 1978, [2010] R.J.Q. 2259, [2010] R.D.F. 659, 89 R.F.L. (6th) 1, [2010] J.Q. nº 11091 (QL), 2010 CarswellQue 11317, SOQUIJ AZ-50685017, qui a confirmé en partie une décision de la juge Hallée, 2009 QCCS 3210, [2009] R.J.Q. 2070, [2009] R.D.F. 545, 67 R.F.L. (6th) 315, [2009] J.Q. nº 7153 (QL), 2009 CarswellQue 6874, SOQUIJ AZ-50566038. Pourvois du procureur

allowed, appeal of A dismissed, Deschamps, Cromwell and Karakatsanis JJ. dissenting in part in the result and Abella J. dissenting in the result.

Benoît Belleau and *Hugo Jean*, for the appellant/respondent the Attorney General of Quebec.

Guy J. Pratte and *Mark Phillips*, for the appellant/respondent A.

Pierre Bienvenu, *Suzanne H. Pringle*, *Catherine Martel* and *Azim Hussain*, for the appellant/respondent B.

Gaétan Migneault, for the intervener the Attorney General of New Brunswick.

Robert J. Normey, for the intervener the Attorney General of Alberta.

Jocelyn Verdon, *Dominique Goubau* and *Mireille Pélissier-Simard*, for the intervener Fédération des associations de familles monoparentales et recomposées du Québec.

Martha McCarthy and *Johanne Elizabeth O'Hanlon*, for the intervener the Women's Legal Education and Action Fund.

English version of the judgment of LeBel, Fish, Rothstein and Moldaver JJ. delivered by

LeBel J. —

I. Introduction

[1] The issue raised by the parties in these appeals is whether it is valid to exclude *de facto* spouses from the patrimonial and support rights granted to married and civil union spouses. Does this exclusion violate the right to equality guaranteed by s. 15 of the *Canadian Charter of Rights and Freedoms* ("*Charter*")?

[2] The Court must determine whether the provisions of the *Civil Code of Québec*, S.Q. 1991,

général du Québec et de B accueillis, pourvoi de A rejeté, les juges Deschamps, Cromwell et Karakatsanis sont dissidents en partie quant au résultat et la juge Abella est dissidente quant au résultat.

Benoît Belleau et *Hugo Jean*, pour l'appelant/intimé le procureur général du Québec.

Guy J. Pratte et *Mark Phillips*, pour l'appelante/intimée A.

Pierre Bienvenu, *Suzanne H. Pringle*, *Catherine Martel* et *Azim Hussain*, pour l'appelant/intimé B.

Gaétan Migneault, pour l'intervenant le procureur général du Nouveau-Brunswick.

Robert J. Normey, pour l'intervenant le procureur général de l'Alberta.

Jocelyn Verdon, *Dominique Goubau* et *Mireille Pélissier-Simard*, pour l'intervenante la Fédération des associations de familles monoparentales et recomposées du Québec.

Martha McCarthy et *Johanne Elizabeth O'Hanlon*, pour l'intervenant le Fonds d'action et d'éducation juridiques pour les femmes.

Le jugement des juges LeBel, Fish, Rothstein et Moladaver a été rendu par

Le juge LeBel —

I. Introduction

[1] Dans les présents pourvois, les parties soulèvent le problème de la validité de l'exclusion des conjoints de fait, des droits alimentaires et patrimoniaux accordés aux conjoints mariés ou en union civile. Cette exclusion viole-t-elle la garantie d'égalité établie par l'art. 15 de la *Charte canadienne des droits et libertés* (« *Charte* »)?

[2] La Cour doit déterminer si les dispositions du *Code civil du Québec*, L.Q. 1991, ch. 64 (« *C.c.Q.* »),

c. 64 ("*C.C.Q.*"), dealing with the family residence (arts. 401 *et seq.*), the family patrimony (arts. 414 *et seq.*), the compensatory allowance (arts. 427 *et seq.*), the partnership of acquests (arts. 432 *et seq.*) and the obligation of spousal support (art. 585) infringe s. 15(1) of the *Charter* because their application is limited to private legal relationships between married spouses and civil union spouses (see arts. 521.6 and 521.8 *C.C.Q.*).

[3] The Court must therefore decide whether the exclusion of *de facto* spouses from the scope of these provisions is discriminatory within the meaning of s. 15(1). For the reasons that follow, I am of the opinion that the exclusion is not discriminatory within the meaning of s. 15(1) and accordingly does not violate the right to equality guaranteed by s. 15 of the *Charter*.

II. The Dispute

[4] Parties Ms. A and Mr. B met in 1992 in A's native country. A, who was 17 years old at the time, was living with her parents and attending secondary school. B, who was 32 years old, was running a large international business. From 1992 to 1994, the parties 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 parties agreed that A would come to live in Quebec, where B lived.

[5] The parties broke up for the first time in late July 1995. They saw each other again during the holiday season, and then again in February 1996. A then became pregnant with her first child. The couple had three children together, born in 1996, 1999 and 2001. During the time they lived together, A did not hold employment. She regularly accompanied B on his trips, and he provided for all her needs and for the children's needs. A wanted to get married, but B told her that he did not believe in the institution of marriage and that he might consider getting married after living with her for 25 years. The parties separated in 2002. They had lived together for a total of seven years.

portant sur la résidence familiale (art. 401 et suiv.), le patrimoine familial (art. 414 et suiv.), la prestation compensatoire (art. 427 et suiv.), la société d'acquêts (art. 432 et suiv.) et l'obligation alimentaire entre conjoints (art. 585) portent atteinte au par. 15(1) de la *Charte*, parce que leur application est limitée aux rapports juridiques privés des conjoints mariés et des conjoints unis civilement (voir art. 521.6 et 521.8 *C.c.Q.*).

[3] La Cour doit ainsi décider si l'exclusion des conjoints de fait du champ d'application de ces dispositions est discriminatoire au sens du par. 15(1). Pour les motifs qui suivent, je suis d'avis que cette exclusion n'est pas discriminatoire au sens du par. 15(1) et ne porte donc pas atteinte à la garantie d'égalité prévue à l'art. 15 de la *Charte*.

II. Le litige

[4] Les parties, M^me^ A et M. B, se rencontrent au pays natal de A en 1992. Cette dernière, alors âgée de 17 ans, vit chez ses parents et poursuit ses études secondaires. B, âgé de 32 ans, dirige une entreprise internationale importante. De 1992 à 1994, les parties voyagent ensemble à travers le monde plusieurs fois par année. B soutient A financièrement pour la poursuite de ses études. Au début de l'année 1995, les parties conviennent que A viendra vivre au Québec, où demeure B.

[5] Une première rupture survient à la fin du mois de juillet 1995. Les parties se revoient à la période des Fêtes et, à nouveau, en février 1996. A devient alors enceinte d'un premier enfant. De leur union naissent trois enfants en 1996, 1999 et 2001. Pendant la vie commune, A n'occupe pas d'emploi. Elle accompagne régulièrement B dans ses voyages et ce dernier pourvoit à tous ses besoins et à ceux des enfants. A souhaite se marier, mais B lui répond qu'il ne croit pas à l'institution du mariage et qu'il envisagerait peut-être un mariage après 25 ans de vie commune. En 2002, les parties se séparent. Au total, leur vie commune a duré sept ans.

[6] In February 2002, A filed a motion in the Quebec Superior Court seeking custody of the children, support, a lump sum, use of the family residence, a provision for costs and an interim order. 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* in order to obtain the same legal regime for *de facto* spouses that existed for married spouses. More specifically, A 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 claim concerning the use of the family residence was settled in an agreement between A and B.

[7] Since the constitutionality of the provisions relating to child custody and the child support obligation had not been challenged, the Superior Court awarded the parties joint custody of the children and awarded A $34,260.24 a month in child support and a provision for costs on May 16, 2006. The court also made a series of orders requiring B to pay certain specific expenses, including the children's tuition fees, expenses related to their extracurricular activities, the salaries of two nannies and the salary of a cook working for A. As well, the court ordered B to continue paying all costs, school and municipal taxes, home insurance premiums and general maintenance and renovation costs required for the residence where the parties had agreed that A and the children would live. B remained the owner of that residence.

[8] The appeals relate solely to the constitutional aspect of the case and concern only the provisions of the *Civil Code of Québec* alleged by A to be invalid under s. 15 of the *Charter*. Hallée J. of the Superior Court ruled on the constitutional issues on July 16, 2009. She found that the impugned provisions did not violate the right to equality guaranteed by s. 15(1), and she denied A's requests for a declaration of constitutional invalidity, which

[6] En février 2002, A dépose, en Cour supérieure du Québec, une « Requête pour garde d'enfants, pension alimentaire, somme globale, usage de la résidence familiale, provision pour frais et ordonnance intérimaire ». 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* afin d'obtenir, pour les conjoints de fait, le même régime juridique que celui prévu pour les conjoints mariés. Précisément, A réclame 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.

[7] La constitutionnalité des dispositions portant sur la garde d'enfants et sur l'obligation alimentaire pour enfants n'étant pas contestée, la Cour supérieure, le 16 mai 2006, ordonne la garde partagée des enfants entre les parties, puis accorde à A une pension alimentaire pour ces derniers de 34 260,24 $ par mois et une provision pour frais. La cour prononce en outre une série d'ordonnances imposant à B l'obligation d'assumer certains frais particuliers, notamment les frais de scolarité des enfants et les dépenses reliées à leurs activités parascolaires, les salaires de deux gardiennes, ainsi que la rémunération d'une cuisinière affectée au service de A. La cour ordonne également à B de continuer à payer tous les frais, taxes scolaires et municipales, les assurances habitation, ainsi que les frais d'entretien général et de rénovations nécessaires de la résidence où les parties ont convenu que demeurent A et les enfants. B reste propriétaire de cette résidence.

[8] Les pourvois portent uniquement sur le volet constitutionnel du dossier et ne concernent que les dispositions du *Code civil du Québec* dont l'appelante soulève l'invalidité en vertu de l'art. 15 de la *Charte*. Le 16 juillet 2009, la juge Hallée de la Cour supérieure se prononce sur ces questions constitutionnelles. Elle conclut alors que les dispositions contestées ne portent pas atteinte au droit à l'égalité garanti au par. 15(1) et rejette les

had been opposed by B and the Attorney General of Quebec. A then appealed to the Quebec Court of Appeal.

[9] On November 3, 2010, the Quebec Court of Appeal allowed A's appeal in part. Dutil J.A., with whom Giroux J.A. concurred, declared art. 585 *C.C.Q.*, which provides for the obligation of spousal support, to be of no force or effect on the basis of an unjustified infringement of the right to equality set out in s. 15(1) of the *Charter*. However, Dutil J.A. 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. In her opinion, those provisions are not discriminatory and therefore do not infringe s. 15(1). Dutil J.A. also suspended the declaration of constitutional invalidity of art. 585 for 12 months to give the Quebec legislature time to amend the provision in order to make it consistent with the *Charter*. Beauregard J.A. dissented on the issue of the appropriate remedy. He concluded that the declaration of constitutional invalidity of arts. 511 and 585 *C.C.Q.* should apply immediately so that A could benefit from the obligation of spousal support without delay.

[10] In this Court, B and the Attorney General of Quebec are appealing the Court of Appeal's decision to strike down art. 585 on the obligation of spousal support. A is also appealing that decision. She takes issue with the conclusion that the *Civil Code*'s provisions concerning the family residence, the family patrimony, the compensatory allowance and the partnership of acquests are constitutionally valid. To ensure that the issues in these appeals are fully understood, I will begin by reviewing the proceedings in the Superior Court and the Court of Appeal in greater detail.

demandes de déclaration d'inconstitutionnalité présentées par A auxquelles s'étaient opposés B et le procureur général du Québec. A se pourvoit alors devant la Cour d'appel du Québec.

[9] Le 3 novembre 2010, la Cour d'appel du Québec accueille en partie l'appel de A. La juge Dutil, avec le concours du juge Giroux, déclare inopérant l'art. 585 *C.c.Q.* portant sur l'obligation alimentaire entre conjoints parce que cet article contreviendrait de manière injustifiée au droit à l'égalité prévu au par. 15(1) de la *Charte*. La juge Dutil maintient toutefois la décision de la Cour supérieure quant à la constitutionnalité des dispositions portant sur la résidence familiale, le patrimoine familial, la prestation compensatoire et la société d'acquêts. À son avis, ces dispositions ne sont pas discriminatoires et ne portent donc pas atteinte au par. 15(1). De plus, la juge Dutil suspend la déclaration d'invalidité constitutionnelle de l'art. 585 pour une période de 12 mois, laissant ainsi au législateur québécois le temps de modifier la disposition afin de la rendre conforme à la *Charte*. Le juge Beauregard est dissident sur la question de la réparation appropriée. Il conclut à l'application immédiate de la déclaration d'inconstitutionnalité à l'égard des art. 511 et 585 *C.c.Q.*, pour que l'appelante bénéficie sans délai de l'obligation alimentaire entre conjoints.

[10] Devant notre Cour, 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 relatif à l'obligation alimentaire entre conjoints. De son côté, A porte également cette décision en appel. Elle attaque la confirmation de la validité constitutionnelle des dispositions du *Code civil* portant sur la résidence familiale, le patrimoine familial, la prestation compensatoire et la société d'acquêts. Pour la bonne compréhension des enjeux de ces pourvois, j'examinerai d'abord avec plus de précision les débats judiciaires qui se sont déroulés devant la Cour supérieure et la Cour d'appel du Québec.

III. Judicial History

A. *Quebec Superior Court, 2009 QCCS 3210, [2009] R.J.Q. 2070*

[11] This case came before Hallée J. by way of a *Charter* motion. In addition to her claims based on s. 15 of the *Charter*, A originally made certain arguments concerning the division of constitutional powers between Parliament and the provincial legislatures as regards the definition of marriage. Hallée J. rejected all those arguments, and A abandoned them on appeal. In this Court, the only remaining issues have to do with the equality guarantee set out in the *Charter*.

[12] Hallée J. began with an overview of the legal situation of *de facto* spouses in Quebec. She noted that they cannot bring support proceedings against one another or partition the family patrimony, and that they are not governed by a legal matrimonial regime. However, they are treated in the same way as married spouses for the purposes of life insurance (art. 2419 *C.C.Q.*), annuities (art. 2380 *C.C.Q.*) and the protective supervision of incapable or vulnerable persons (arts. 264, 266 and 269 *C.C.Q.*). Moreover, they are authorized by art. 15 *C.C.Q.* to consent to care for a person of full age who is incapable of giving consent. Hallée J. added that the Quebec legislature has enacted a number of social or tax laws (including the *Act respecting the Québec Pension Plan*, R.S.Q., c. R-9, and the *Taxation Act*, R.S.Q., c. I-3) that grant *de facto* spouses benefits similar to the ones already available to married spouses. With these exceptions, only a cohabitation agreement can govern the rights of *de facto* spouses. In such an agreement, *de facto* spouses can provide for, among other things, an obligation of support in the event of a breakdown.

[13] Hallée J. then summarized the most relevant points from the expert reports filed by the parties. Although none of the experts had been heard during the trial, some of them had been examined out of court. Hallée J. found on the basis of these reports that *de facto* unions were a growing phenomenon in contemporary Quebec society:

III. Historique judiciaire

A. *Cour supérieure du Québec, 2009 QCCS 3210, [2009] R.J.Q. 2070*

[11] La juge Hallée est saisie de cette affaire par voie de requête fondée sur la *Charte*. Outre ses allégations fondées sur l'art. 15 de la *Charte*, A soumettait à l'origine certains moyens portant sur le partage des compétences constitutionnelles entre le Parlement fédéral et les législatures provinciales à l'égard de la définition du mariage. La juge Hallée a rejeté l'ensemble de ces arguments et A les a abandonnés en appel. Devant notre Cour, seules les questions relatives à la garantie d'égalité prévue par la *Charte* sont encore en débat.

[12] La juge Hallée rappelle d'abord la situation juridique des conjoints de fait au Québec. Elle note que les conjoints de fait ne possèdent aucun recours alimentaire l'un contre l'autre. Ils ne peuvent non plus partager le patrimoine familial et ne sont régis par aucun régime matrimonial légal. Toutefois, les conjoints de fait sont assimilés à des époux en matière d'assurance vie (art. 2419 *C.c.Q.*), de rentes (art. 2380 *C.c.Q.*) et de régimes de protection des personnes incapables ou vulnérables (art. 264, 266 et 269 *C.c.Q.*). L'article 15 *C.c.Q.* reconnaît aussi leur capacité d'agir en matière de consentement aux soins destinés à un majeur inapte. Par ailleurs, la juge mentionne que le législateur québécois a adopté plusieurs lois à caractère social ou fiscal (*Loi sur le régime de rentes du Québec*, L.R.Q., ch. R-9, *Loi sur les impôts*, L.R.Q., ch. I-3, et autres) où il accorde aux conjoints de fait des avantages similaires à ceux dont bénéficient déjà les époux. Sous ces réserves, seul un contrat de cohabitation (contrat de vie commune) peut régir les droits des conjoints de fait. Les conjoints de fait peuvent notamment y prévoir une obligation alimentaire en cas de rupture.

[13] La juge Hallée résume ensuite les éléments les plus pertinents des rapports d'experts produits par les parties. Bien qu'aucun expert n'ait été entendu lors du procès, certains d'entre eux furent interrogés hors cour. De ces expertises, elle retient l'importance croissante du phénomène des unions de fait dans la société québécoise moderne :

[TRANSLATION] After having read the expert reports attentively, the Court finds that the phenomenon of *de facto* unions is growing in Quebec. From 1981 to 2006, the proportion of couples living in a *de facto* union grew from 7.9% to 34.6%.

The 2006 Statistics Canada census indicates that 34.6% of Quebekers live in a *de facto* union, while an average of 18.4% of couples throughout Canada choose to live in this type of relationship. Thus, Quebec is far in the lead in terms of the number of couples living in a *de facto* union. Moreover, according to the Institut de la statistique du Québec, 60% of children in Quebec are born out of wedlock.

Some experts would therefore like to see the legislature intervene to regulate these unions, while others believe that further study is required before drawing [actual] conclusions about this phenomenon. [paras. 59-61]

[14] Hallée J. then noted that, in *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, this Court had adopted a two-part test for finding that a distinction is discriminatory in the constitutional sense: (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?

[15] Hallée J. added that marital status has been recognized as a ground analogous to the grounds of discrimination enumerated in s. 15(1). She also noted that, to find that s. 15(1) has been infringed, it is not enough to establish the existence of a legislative distinction based on an analogous ground. According to the case law, the claimant must prove that the differential treatment has a purpose or effect that discriminates in a substantive sense.

[16] In this case, Hallée J. concluded that A had not shown that the distinction between *de facto* spouses and married spouses resulting from the impugned provisions had substantively discriminatory effects and added that the lack of evidence in this regard was fatal to A's action. Hallée J. stressed the limitations of the expert reports filed by the parties. Those reports indicated that living conditions were

Après avoir fait une lecture attentive des différentes expertises, le Tribunal retient que le phénomène des unions de fait est grandissant au Québec. De 1981 à 2006, la proportion de couples vivant en union de fait est passée de 7,9 % à 34,6 %.

Le dernier recensement 2006 de Statistique Canada indique que 34,6 % des Québécois et Québécoises vivent en union de fait tandis qu'en moyenne, au Canada, 18,4 % des couples choisissent de vivre en union libre. Le Québec demeure ainsi largement en tête dans le nombre de couples vivant en union libre. De plus, selon l'Institut de la statistique du Québec, 60 % des enfants du Québec naissent hors mariage.

Certains experts voudraient donc voir le Législateur intervenir aux fins d'encadrer ces unions, tandis que d'autres estiment nécessaire la tenue d'études plus approfondies pour tirer des conclusions proprement dites de ce phénomène. [par. 59-61]

[14] Puis, la juge Hallée rappelle que la Cour a adopté dans l'arrêt *R. c. Kapp*, 2008 CSC 41, [2008] 2 R.C.S. 483, un critère à deux volets pour conclure à l'existence d'une distinction discriminatoire au sens constitutionnel : (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?

[15] La juge ajoute que l'état matrimonial est reconnu comme un motif analogue aux motifs de discrimination énumérés au par. 15(1). Elle rappelle également qu'il ne suffit pas de démontrer l'existence d'une distinction législative fondée sur un motif analogue pour conclure à la violation du par. 15(1). À cet égard, la jurisprudence oblige la requérante à prouver que la différence de traitement poursuit un objectif ou produit des effets réellement discriminatoires.

[16] En l'espèce, la juge Hallée conclut que A n'a pas réussi à démontrer l'existence d'effets discriminatoires réels découlant de la distinction créée par les dispositions contestées entre les conjoints de fait et les conjoints mariés et que cette absence de preuve est fatale à son recours. Elle insiste sur les limites des expertises produites par les parties. Ces expertises indiqueraient dans

by and large better for intact married families than for the new forms of family, but they did not assess the impact of the impugned provisions, particularly in the event of a breakdown. Hallée J. found on the basis of this evidence that *de facto* spouses in Quebec are not subject to [TRANSLATION] "any stereotypical disadvantages or prejudice". In her opinion, "the legislature's purpose in preserving a distinction between marriage and *de facto* union is to safeguard freedom of choice and to respect the dignity and autonomy of *de facto* spouses" (para. 222). Finally, she concluded that A had not established concrete effects of the distinctions between *de facto* and married spouses either during the conjugal relationship or upon its breakdown.

[17] However, Hallée J. did not stop there. She also took the precedential value of *Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83, [2002] 4 S.C.R. 325, into account. In that case, this Court had held that, when the rights and obligations of common law spouses *vis-à-vis each other* are in issue, the spouses' choice to marry or not to marry becomes the most important factor for the purposes of s. 15(1) of the *Charter*. Since the distinctions between the rights and obligations of married spouses and those of common law spouses reflect choices made by those individuals, the consequences of the choices do not infringe s. 15. In short, Hallée J. found that *Walsh* fully disposed of A's *Charter*-based constitutional arguments. In her view, *Walsh* showed that the possibility for *de facto* spouses to make such choices is consistent with the fundamental purpose of s. 15 of the *Charter*:

> [TRANSLATION] In the view of this Court, this is the fundamental point in *Walsh*. Whether to establish an identical protective regime, regardless of the choice made regarding marital status, is not a decision that falls within the purview of the courts, provided the choices made by the legislature are not discriminatory. It is the legislature's task to determine whether it is necessary to impose, in whole or in part, a universal and standardized protective regime that does not take into account the matrimonial status of the *de facto* spouses. [para. 249]

l'ensemble que les familles mariées intactes bénéficient de conditions de vie plus favorables que celles des nouvelles formes de famille, sans toutefois faire l'étude de l'impact des dispositions contestées, notamment en cas de rupture. Sur la base de cette preuve, la juge constate que les conjoints de fait au Québec ne font l'objet d'« aucun désavantage stéréotypé ou préjugé ». Selon elle, « l'objectif du législateur, en conservant une distinction entre le mariage et l'union de fait, est de préserver le libre choix et de respecter la dignité et l'autonomie des conjoints de fait » (par. 222). Enfin, elle conclut que A n'a pas établi les effets concrets des distinctions entre conjoints de fait et époux tant durant la relation qu'au moment de la rupture de l'union conjugale.

[17] La juge Hallée ne s'arrête toutefois pas à ces seuls commentaires. Elle prend également en compte la valeur précédentielle de l'arrêt *Nouvelle-Écosse (Procureur général) c. Walsh*, 2002 CSC 83, [2002] 4 R.C.S. 325. Dans ce jugement, notre Cour a décidé que, dans le cas de la détermination des droits et obligations des conjoints de fait *entre eux*, le choix des conjoints de se marier ou de ne pas se marier devient le facteur le plus important pour l'application du par. 15(1) de la *Charte*. Comme les distinctions entre les droits et obligations des conjoints mariés et ceux des conjoints de fait reflètent les choix effectués par ces personnes, les conséquences de ces choix ne porteraient pas atteinte à l'art. 15. En somme, la juge Hallée estime que l'arrêt *Walsh* dispose entièrement des arguments constitutionnels de A fondés sur la *Charte*. À son avis, il ressort de l'arrêt *Walsh* que la possibilité laissée aux conjoints de fait de faire de semblables choix respecte l'objectif fondamental de l'art. 15 de la *Charte* :

> Le Tribunal est d'avis qu'il s'agit ici de l'élément fondamental de l'arrêt *Walsh*. La décision d'instaurer un régime de protection identique, sans égard à l'état matrimonial choisi, ne relève dès lors pas des tribunaux, dans la mesure où le choix qui est fait par le législateur n'est pas discriminatoire. Il revient en effet au législateur de déterminer s'il est nécessaire d'imposer, en partie ou en totalité, un régime de protection universel et uniforme qui ne tient pas compte de l'état matrimonial des conjoints de fait. [par. 249]

[18] Hallée J. then rejected A's argument that *Walsh* could be distinguished from the case at bar because there was an obligation of support between common law spouses in Nova Scotia that does not exist in Quebec law. In her opinion, the majority's reasons in *Walsh* were not based on the existence of such an obligation in Nova Scotia. Hallée J. found that *Walsh* instead reflected the fundamental importance of freedom of choice and that this factor is just as applicable in Quebec as in Nova Scotia. The rights of married couples are not denied to *de facto* spouses, who can choose to benefit from them in different ways, by, for example, contracting a civil union or entering into an agreement. In addition to freedom of choice, Hallée J. stated, other contextual factors supported the finding that there was no discrimination in the instant case. As in *Walsh*, the evidence showed that distinctions exist between married and *de facto* couples, and that there is significant heterogeneity within the group consisting of *de facto* spouses. Moreover, the legislative history of the *Civil Code*, like that of the legislation at issue in *Walsh*, shows that the legislature's consistent and considered purpose for the past 30 years has been to respect the freedom of every individual to choose whether or not to marry. As a result, Hallée J. found that the differential treatment of *de facto* spouses and married persons with respect to the obligation of support and the partition of property does not perpetuate prejudice or result from stereotyping.

[19] For all these reasons, Hallée J. denied the constitutional conclusions sought by A and found that the provisions of the *Civil Code of Québec* A challenges are constitutional.

B. *Quebec Court of Appeal, 2010 QCCA 1978, [2010] R.J.Q. 2259*

(1) Reasons of Dutil J.A.

[20] Dutil J.A. considered A's appeal in reasons concurred in by Giroux J.A. She found first that the main issues raised by the appeal concerned, on the one hand, the obligation of support of *de facto*

[18] La juge Hallée rejette alors la prétention de A selon laquelle l'arrêt *Walsh* se distingue du présent cas puisqu'il existait une obligation alimentaire entre conjoints de fait en Nouvelle-Écosse, alors que le droit québécois ne reconnaît pas cette obligation. Selon elle, l'existence d'une telle obligation en Nouvelle-Écosse ne constituait pas le fondement des motifs majoritaires dans *Walsh*. La juge Hallée estime que l'arrêt *Walsh* reflète plutôt l'importance fondamentale accordée à la liberté de choix. Or, ce dernier facteur s'applique aussi bien au Québec qu'en Nouvelle-Écosse. Les droits accordés aux couples mariés ne sont pas niés aux conjoints de fait. En effet, ceux-ci peuvent choisir d'en bénéficier sous différentes formes, en recourant notamment au régime de l'union civile ou par convention. Outre la liberté de choix, la juge Hallée déclare que d'autres facteurs contextuels appuient une conclusion d'absence de discrimination en l'espèce. Comme dans *Walsh*, la preuve démontre des distinctions entre les couples mariés et les conjoints de fait, ainsi qu'une grande hétérogénéité au sein du groupe composé de conjoints de fait. De plus, à l'instar de la loi en cause dans *Walsh*, l'historique législatif du *Code civil* démontre que le but poursuivi par le législateur, depuis 30 ans, consiste de façon constante et réfléchie à respecter le libre choix de chacun de se marier ou non. Elle conclut ainsi que la différence de traitement des conjoints de fait par rapport aux personnes mariées en regard de l'obligation alimentaire et de la répartition des biens, ne perpétue aucun préjugé et ne résulte pas de l'application de stéréotypes.

[19] Pour l'ensemble de ces motifs, la juge Hallée rejette les conclusions constitutionnelles recherchées par A et reconnaît la validité constitutionnelle des dispositions du *Code civil du Québec* qu'elle attaque.

B. *Cour d'appel du Québec, 2010 QCCA 1978, [2010] R.J.Q. 2259*

(1) Opinion de la juge Dutil

[20] La juge Dutil examine le pourvoi de A dans une opinion qui reçoit l'accord du juge Giroux. Elle estime d'abord que les questions principales soulevées par le pourvoi portent, d'une part, sur

spouses and, on the other hand, the partition of property upon separation, that is, the right to partition of the family patrimony, protection of the family residence, the partnership of acquests and the compensatory allowance.

[21] According to Dutil J.A., the trial judge had been correct in concluding that this Court's decision in *Walsh* is binding on the Quebec courts with respect to the partition of property between *de facto* spouses upon separation. She explained this as follows:

> [TRANSLATION] In the case before us, the impugned C.C.Q. provisions pertaining to the division of property govern patrimonial relations between married spouses. On this issue, the Supreme Court has spoken clearly, stating that the freedom to choose whether to marry or not is paramount. Although in Quebec the legislature has stipulated that the C.C.Q. provisions governing the effects of marriage are of public order (article 391 C.C.Q.), while in Nova Scotia married spouses can choose not to be subject to the *MPA* [*Matrimonial Property Act*], this does not in my opinion permit *Walsh* to be distinguished from the present case on this point.
>
> The Quebec legislature has addressed the issue of conjugal status and *de facto* unions on a number of occasions (1980, 1989, 1991, 1999, 2002) and has deliberately decided to allow spouses the freedom to choose the type of relationship they wish. If the issue is to be revisited from the perspective of the division of assets, this should be done by the legislature in light of the changes that have taken place in society, since the Supreme Court has determined that the legislative choice already made on this issue does not contravene section 15 of the Charter. [paras. 59-60]

[22] Dutil J.A. then considered the obligation of support provided for in art. 585 *C.C.Q.* She disagreed with the trial judge on this point, finding that *Walsh* does not have precedential value with respect to the obligation of spousal support. On the one hand, she noted that common law spouses already had an obligation of support under the Nova Scotia legislation considered by this Court in *Walsh*. On the other hand, she found that there is an important distinction between the obligation of support and the provisions on partition of property. In her view, [TRANSLATION] "support payments exist to

l'obligation alimentaire entre conjoints de fait et, d'autre part, sur le partage des biens lorsque survient une séparation, c'est-à-dire sur le droit au partage du patrimoine familial, à la protection de la résidence familiale, à la société d'acquêts et à la prestation compensatoire.

[21] Selon la juge Dutil, la juge de première instance a eu raison de conclure que l'arrêt rendu par la Cour dans *Walsh* lie les tribunaux québécois en ce qui a trait au partage des biens entre conjoints de fait lors d'une séparation. Elle explique à ce propos :

> En l'espèce, les dispositions contestées du C.C.Q. qui touchent le partage des biens règlent les rapports patrimoniaux entre conjoints mariés. Sur cette question, la Cour suprême exprime clairement l'opinion que la liberté de choix de se marier est primordiale. Or, bien qu'au Québec le législateur ait édicté que les dispositions du C.C.Q. sur les effets du mariage sont d'ordre public (art. 391 C.C.Q.), alors qu'en Nouvelle-Écosse les conjoints mariés peuvent choisir de ne pas être soumis à la MPA [*Matrimonial Property Act*], cela ne fait pas en sorte, à mon avis, de permettre de distinguer l'arrêt *Walsh* de la présente affaire sur cette question.
>
> Le législateur québécois a abordé la question des statuts conjugaux et de l'union de fait à plusieurs reprises (1980, 1989, 1991, 1999, 2002) et a délibérément décidé de laisser le libre choix aux conjoints quant à la forme d'engagement qu'ils souhaitent. Si cette question doit être revisitée quant au partage des biens, ce sera à lui de le faire, à la lumière de l'évolution de la société, puisque la Cour suprême a jugé que son choix législatif sur cette question ne contrevenait pas à l'article 15 de la charte. [par. 59-60]

[22] La juge Dutil se penche ensuite sur la question de l'obligation alimentaire comprise à l'art. 585 *C.c.Q.* Contrairement à la juge de première instance, la juge Dutil conclut que l'arrêt *Walsh* n'a pas l'autorité d'un précédent au sujet de l'obligation alimentaire entre conjoints. D'une part, elle rappelle qu'une obligation alimentaire entre conjoints de fait existait déjà dans le contexte législatif néo-écossais étudié par notre Cour dans *Walsh*. D'autre part, elle considère qu'une distinction importante existe entre l'obligation alimentaire et les dispositions prévoyant le partage des biens. Selon elle, « la pension

meet basic needs and represent an aspect of social solidarity, whereas the division of property is contractual in origin" (para. 68).

[23] Dutil J.A. therefore considered whether art. 585 *C.C.Q.* infringes s. 15(1) of the *Charter*. Applying the test established by this Court in *Kapp*, she concluded that the first stage of the analysis was not problematic, since marital status had already been held to be a ground of discrimination analogous to the ones enumerated in s. 15(1). The case therefore turned on the second stage of the analysis, namely whether the distinction created a disadvantage by perpetuating prejudice or stereotyping. She concluded that by failing to mention *de facto* spouses in art. 585 *C.C.Q.*, the legislature had created a disadvantage by stereotyping and by expressing a prejudice.

[24] Although she acknowledged that the legislative disadvantages that once existed for *de facto* spouses have become less significant and that the *de facto* union is now socially acceptable, Dutil J.A. concluded that [TRANSLATION] "the fact remains that the legislature's failure to include them within the protection afforded by article 585 C.C.Q. perpetuates the stereotype that these types of unions are less durable and serious than marriage and civil unions, which are recognized by means of a formal act" (para. 98). She stated that her conclusion concerning the existence of such a stereotype was based on the opinion expressed by McLachlin J. in *Miron v. Trudel*, [1995] 2 S.C.R. 418, which Bastarache J. had reproduced in *Walsh*, about the historical disadvantage suffered by *de facto* spouses. She also relied on the fact that "concubinage" had been considered a reprehensible lifestyle choice before the 1980 family law reform. She added that, in enacting the new *Civil Code*, the legislature had deliberately refrained from including the *de facto* union in the provisions on the family because it considered such unions to be less stable than marriage. She relied in this regard on certain remarks made by the Quebec Minister of Justice in September and November 1991 in the course of the study of Bill 125 on the *C.C.Q.* by a parliamentary committee. Finally,

alimentaire répond à des besoins de base et participe de la solidarité sociale, alors que le partage des biens a une origine contractuelle » (par. 68).

[23] La juge Dutil recherche donc si l'art. 585 *C.c.Q.* porte atteinte au par. 15(1) de la *Charte*. Appliquant la méthode d'analyse établie par notre Cour dans l'arrêt *Kapp*, elle conclut que le premier volet de l'analyse ne pose aucun problème, l'état matrimonial ayant été reconnu comme un motif de discrimination analogue à ceux énumérés au par. 15(1). Le débat porte donc sur le deuxième volet de l'analyse; c'est-à-dire, si la distinction crée un désavantage résultant de la perpétuation d'un préjugé ou de l'application de stéréotypes. Elle conclut qu'en omettant de mentionner les conjoints de fait à l'art. 585 *C.c.Q.*, le législateur crée un désavantage par l'application d'un stéréotype et l'expression d'un préjugé.

[24] Bien qu'elle reconnaisse que les désavantages législatifs d'autrefois pour les conjoints de fait ont diminué et que l'union de fait est maintenant acceptable socialement, la juge Dutil conclut qu'« il n'en reste pas moins que l'omission par le législateur de les inclure à la protection qu'offre l'article 585 C.C.Q. perpétue le stéréotype que ces unions sont moins durables et sérieuses que celles dont la reconnaissance passe par un acte solennel, soit le mariage et l'union civile » (par. 98). Elle affirme que sa conclusion quant à l'existence d'un tel stéréotype repose sur l'opinion de la juge McLachlin dans *Miron c. Trudel*, [1995] 2 R.C.S. 418, reprise par le juge Bastarache dans *Walsh*, au sujet du désavantage historique subi par les conjoints de fait. Elle se fonde également sur le fait qu'avant la réforme du droit de la famille de 1980, le « concubinage » était considéré comme un mode de vie condamnable. Elle ajoute que, lors de l'adoption du nouveau *Code civil*, le législateur aurait omis à dessein de traiter de l'union de fait dans les dispositions touchant la famille parce que, selon son opinion, elle ne présentait pas la même stabilité que le mariage. À cet effet, la juge s'appuie sur certains propos du ministre de la Justice du Québec tenus en septembre et en novembre 1991, lors de l'étude du projet de loi 125 sur le *C.c.Q.* en commission parlementaire. Enfin, malgré de

although many recommendations had been made by an interdepartmental committee that considered the situation of *de facto* spouses in 1996, the Quebec legislature had not passed a bill to structure their mutual relationships.

[25] According to Dutil J.A., other signs of the disadvantages suffered by *de facto* spouses are still present in the *Civil Code*. For example, a *de facto* spouse can inherit from his or her spouse only by will (arts. 653 *C.C.Q. et seq.*) and cannot make gifts of future property (arts. 1818 and 1819 *C.C.Q.*). Finally, referring to *M. v. H.*, [1999] 2 S.C.R. 3, in which this Court explained that one factor which may demonstrate that a distinction violates a person's dignity is the vulnerability of the group in question, Dutil J.A. stated that *de facto* spouses are vulnerable just as same-sex spouses were. In her opinion, since the legislature had not made the obligation of support provided for in art. 585 applicable to *de facto* spouses, it deemed them less worthy of the protection afforded to married spouses even though *de facto* unions may be similar in several respects to the other types of conjugal relationships.

[26] Dutil J.A. referred to Gonthier J.'s comment in *Walsh* that the obligation of support has an important social objective that differs from the objective of the division of property. By providing in art. 585 *C.C.Q.* that spouses and relatives in the direct line in the first degree owe each other support, the Quebec legislature also recognized that the obligation of support is different. According to Dutil J.A., it [TRANSLATION] "is not solely the consequence of a contractual agreement; rather, it is a social obligation toward members of the immediate family unit" (para. 101). In Quebec, the family unit concept now also includes families formed by *de facto* spouses. In ignoring such families, the Quebec legislature excluded more than a third of Quebec couples from the application of a measure that exists precisely to protect the family unit. Dutil J.A. also found that, by requiring marriage or civil union as a precondition for the right to support, the legislature had failed to consider social realities. The purpose of an obligation of support of former spouses is to enable an economically

nombreuses recommandations formulées par un comité interministériel chargé de se pencher sur la situation des conjoints de fait en 1996, le législateur québécois n'a adopté aucun projet de loi pour encadrer leurs rapports mutuels.

[25] Selon la juge Dutil, le *Code civil* conserve d'autres signes des désavantages subis par les conjoints de fait. Ainsi, ils ne peuvent hériter de leur conjoint que par testament (art. 653 *C.c.Q.* et suiv.). Ils ne peuvent faire de donations de biens à venir (art. 1818 et 1819 *C.c.Q.*). Enfin, référant à l'arrêt *M. c. H.*, [1999] 2 R.C.S. 3, où la Cour explique qu'un des facteurs susceptibles de démontrer que la distinction porte atteinte à la dignité est la vulnérabilité dont souffre le groupe en question, la juge Dutil affirme que les conjoints de fait sont vulnérables, comme l'étaient les conjoints de même sexe. Selon elle, faute de leur rendre applicable l'obligation alimentaire prévue à l'art. 585, le législateur les considère comme moins dignes de la protection offerte aux conjoints mariés, même si les unions de fait peuvent présenter plusieurs similitudes avec les autres types d'union conjugale.

[26] La juge Dutil rappelle les propos du juge Gonthier dans *Walsh*, où ce dernier a affirmé que l'obligation alimentaire a un objectif social important et différent du partage des biens. En disposant à l'art. 585 *C.c.Q.* que les conjoints et les parents en ligne directe au premier degré se doivent des aliments, le législateur québécois reconnaît aussi que l'obligation alimentaire est d'une autre nature. Selon la juge Dutil, elle « ne découle [. . .] pas uniquement d'un engagement contractuel, il s'agit plutôt d'une obligation sociale envers les membres de la cellule familiale rapprochée » (par. 101). La cellule familiale québécoise actuelle comprend aussi celle formée par les conjoints de fait, et en les ignorant, le législateur québécois exclut plus du tiers des couples québécois de l'application d'une mesure de protection qui vise pourtant cette cellule familiale. La juge Dutil estime aussi que le critère retenu par le législateur pour reconnaître un droit à des aliments, soit la conclusion d'un mariage ou d'une union civile, ne tient pas compte de la réalité sociale. La raison d'être d'une obligation

dependent person to obtain support, following the breakdown of a conjugal relationship, from a former spouse who is capable of paying it. The nature of the couple's relationship, be it a *de facto* union, civil union or marriage, does not alter the extent to which one of the former spouses needs support after they separate.

[27] Rather, Dutil J.A. noted that a *de facto* union that lasts a certain length of time and produces children is very similar to marriage. Finally, she disagreed with the trial judge that the lack of evidence about the concrete effects of the distinction between *de facto* spouses and married spouses was fatal to A's action. She referred in this regard to *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, in which this Court had stated that it will often be evident on the basis of facts of which judicial notice is taken and logical reasoning that a distinction is discriminatory within the meaning of s. 15(1) of the *Charter*. In her opinion, Hallée J. should therefore have taken judicial notice of the concrete effects of the distinction made by the legislature between *de facto* spouses and married spouses. She concluded that the Quebec legislature's differential treatment of *de facto* spouses and married or civil union spouses with respect to the obligation of support has a substantive impact on *de facto* spouses. More specifically, in her view, art. 585 *C.C.Q.* deprives certain individuals of a right — the ability to meet basic financial needs following the breakdown of a relationship — however fundamental it may be, since they cannot claim support from a former spouse following separation. This exclusion exists regardless of the length of the union, the birth of children or the creation of a situation of economic dependence.

[28] Having concluded, in light of certain contextual factors, that the exclusion of *de facto* spouses from art. 585 *C.C.Q.* is discriminatory, Dutil J.A. held that this legislative provision is not justified under s. 1 of the *Charter*. As a result, she decided that the appropriate constitutional remedy in this case would be a declaration that art. 585 *C.C.Q.*

alimentaire entre ex-conjoints est de permettre que la personne en situation de dépendance économique, à la suite de la rupture d'une union conjugale, puisse obtenir un soutien alimentaire d'un ex-conjoint capable de le payer. Que le couple ait vécu en union de fait, en union civile ou dans le cadre d'un mariage ne change rien aux besoins alimentaires d'un des ex-conjoints lorsque survient une séparation.

[27] La juge Dutil souligne plutôt que les unions de fait d'une certaine durée et desquelles naissent des enfants présentent une forte similitude avec les mariages. Enfin, elle ne partage pas l'opinion de la juge de première instance selon laquelle l'absence de preuve sur les effets concrets de la distinction entre les conjoints de fait et les conjoints mariés est fatale au recours de A. Elle renvoie à cet égard à l'arrêt *Law c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1999] 1 R.C.S. 497, où notre Cour affirme qu'il sera souvent évident au vu de la connaissance d'office et du raisonnement logique qu'une distinction est discriminatoire au sens du par. 15(1) de la *Charte*. À son avis, la juge Hallée aurait donc dû prendre connaissance d'office des effets concrets qu'entraîne la distinction faite par le législateur entre les conjoints de fait et les conjoints mariés. Elle conclut que la différence de traitement imposée par le législateur québécois entre les conjoints de fait, d'une part, et les conjoints mariés ou unis civilement, d'autre part, en ce qui concerne l'obligation alimentaire, entraîne des effets réels sur les conjoints de fait. Plus précisément, selon elle, l'art. 585 *C.c.Q.* exclut certaines personnes d'un droit pourtant fondamental, soit la capacité de subvenir à ses besoins financiers de base après une rupture, puisque ces personnes ne peuvent demander des aliments à un ex-conjoint après une séparation. Cette exclusion existe sans égard à la durée de l'union, à la naissance d'enfants ou à la création d'une situation de dépendance économique.

[28] Ayant conclu, à la lumière de certains facteurs contextuels, au caractère discriminatoire de l'exclusion des conjoints de fait de l'art. 585 *C.c.Q.*, la juge Dutil estime que cette disposition législative n'est pas justifiée en vertu de l'article premier de la *Charte*. Dès lors, la juge Dutil décide qu'une déclaration d'invalidité de l'art. 585 *C.c.Q.*,

is invalid; this declaration was to be suspended for 12 months without any exemption for A.

(2) Reasons of Beauregard J.A.

[29] Beauregard J.A. agreed that, because *de facto* spouses in Quebec are excluded from the right to support after separation, they are discriminated against in violation of s. 15(1) of the *Charter* and that this discrimination cannot be justified under s. 1.

[30] However, Beauregard J.A. disagreed with Dutil J.A. about the appropriate remedy, since many *de facto* spouses would be deprived of support during the period in which the declaration of invalidity of art. 585 *C.C.Q.* was to be suspended. To avoid this result, he would have ordered that art. 585 *C.C.Q.*, which provides for the obligation of support, and art. 511 *C.C.Q.*, which allows a court to order the payment of support at the time of separation from bed and board, be immediately interpreted as applying to *de facto* spouses.

IV. Analysis

A. *Issues*

[31] After the parties appealed to this Court, the Chief Justice stated the following constitutional questions:

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*?

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*?

[32] A added the following question concerning the immediate application of a declaration of constitutional invalidity:

suspendue pour une période de 12 mois, sans exemption pour A, constitue la réparation constitutionnelle appropriée en l'espèce.

(2) Opinion du juge Beauregard

[29] Le juge Beauregard se déclare également d'avis qu'en raison de leur exclusion du droit à des aliments après une séparation, les conjoints de fait au Québec font l'objet d'un traitement discriminatoire en violation du par. 15(1) de la *Charte* qui n'est pas justifié en vertu de l'article premier.

[30] Cependant, le juge Beauregard exprime son désaccord avec la conclusion de la juge Dutil quant à la réparation appropriée, puisque de nombreux conjoints de fait se trouveront privés de pension alimentaire pendant la suspension de l'effet de la déclaration d'invalidité de l'art. 585 *C.c.Q.* Pour éviter ce résultat, il ordonne que les art. 585 et 511 *C.c.Q.*, prévoyant d'une part l'obligation alimentaire et d'autre part la possibilité pour un tribunal d'ordonner le versement d'aliments lors de la séparation de corps, soient interprétés immédiatement comme incluant les conjoints de fait.

IV. Analyse

A. *Les questions en litige*

[31] Suite aux pourvois des parties devant notre Cour, la Juge en chef a formulé les questions constitutionnelles 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*?

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*?

[32] A ajoute la question suivante au sujet de l'application immédiate d'une déclaration d'inconstitutionnalité :

3. [TRANSLATION] Did the majority of the Court of Appeal err in the choice of remedy, in particular by failing to immediately enable all Quebeckers to benefit from a remedy rectifying the constitutional invalidity in issue, and also with respect to the question of an individual remedy for the claimant?

[33] In determining whether the *Civil Code*'s provisions on the relationship between spouses are consistent with the equality guarantee of s. 15(1) of the *Charter*, it will be necessary to consider certain questions related to this main issue. First, I will review the development of the framework for the legal relationship between spouses in Quebec, Quebec's legislative policy as regards the distinction between married or civil union spouses and *de facto* spouses, and the development of the *de facto* union in Quebec society. Second, I will discuss the nature and application of the right to equality. Third, I will consider the nature and precedential value of *Walsh*. Lastly, I will go on to discuss the constitutional issues raised by the parties.

B. *Positions of the Parties*

(1) A

[34] A submits that the Court of Appeal properly struck down art. 585 *C.C.Q.*, which provides for the obligation of spouses to support one another, on the ground that it unjustifiably infringes s. 15(1) of the *Charter*. She also argues that the Court of Appeal erred in finding that the provisions on partition of property are not inconsistent with s. 15(1). In her opinion, both the provisions on partition of property and the provision concerning the obligation of spousal support unjustifiably infringe the right to equality guaranteed by s. 15(1).

[35] A adds that it was an error to apply this Court's reasoning in *Walsh* to the provisions on partition of property. She submits that the Quebec scheme differs from the Nova Scotia scheme considered by this Court in *Walsh* and that *Walsh* did

3. La Cour d'appel a-t-elle erré, à la majorité, dans le choix de la réparation, notamment, d'une part, en ne faisant pas bénéficier immédiatement l'ensemble des Québécois et Québécoises d'une réparation corrigeant de manière immédiate l'invalidité inconstitutionnelle en cause et, d'autre part, quant à la question de la réparation individuelle de la demanderesse?

[33] L'examen de la conformité des dispositions du *Code civil* relatives aux rapports entre conjoints à la garantie d'égalité prévue au par. 15(1) de la *Charte* requiert l'étude de certaines questions rattachées à ce problème principal. En premier lieu, je rappellerai dans ces motifs l'évolution de l'encadrement des rapports juridiques entre conjoints au Québec, la politique législative du Québec au sujet de la distinction établie entre les conjoints mariés ou unis civilement et les conjoints de fait, ainsi que l'évolution de l'union de fait dans la société québécoise. En deuxième lieu, j'exposerai la nature et la mise en œuvre du droit à l'égalité. Puis, en troisième lieu, j'étudierai la nature et la portée précédentielle de l'arrêt *Walsh*. Enfin, je passerai à l'étude des questions constitutionnelles soulevées par les parties.

B. *Les positions des parties*

(1) A

[34] A considère que la Cour d'appel a invalidé à bon droit l'art. 585 *C.c.Q.* concernant l'obligation alimentaire entre conjoints au motif que cette disposition porterait atteinte au par. 15(1) de la *Charte* de manière injustifiée. A plaide aussi que la Cour d'appel s'est trompée en concluant que les dispositions prévoyant le partage des biens ne contreviennent pas au par. 15(1). Selon elle, tant les dispositions relatives au partage des biens que celle prévoyant l'obligation alimentaire entre conjoints portent atteinte de manière injustifiée à la garantie d'égalité du par. 15(1).

[35] A ajoute que l'application du raisonnement de l'arrêt *Walsh* aux dispositions sur le partage des biens constituait une erreur. En effet, elle estime que le régime québécois diffère du régime néo-écossais évalué par la Cour dans *Walsh* et que cet

not resolve the issues in the case at bar. She also challenges its precedential value.

[36] A further argues that the theory of freedom of choice, consensualism or autonomy of the will relied on by the Attorney General and B to support the constitutional validity of the *Civil Code* provisions she is challenging does not correspond to reality. This Court cannot permit a legislature to justify discriminatory treatment by relying on a theory that has no connection with the reality of the persons being discriminated against. Such an approach would favour the recognition of distinctions based on prejudice and exempt the legislature from the obligation to ensure the substantive equality promised by s. 15 of the *Charter*. A argues that the exclusion of *de facto* spouses from the protection the *Civil Code* affords the family in relation to both the partition of property and the obligation of support disregards their actual situation and their needs.

[37] In short, A argues that it was up to the Attorney General to defend the legislation by showing that it is not based on prejudice or stereotypes. In her opinion, far from combatting stereotypes, the Attorney General and B are relying on them and basing their arguments on them.

[38] According to A, the appropriate remedy in this case would be for this Court to read *de facto* spouses into the impugned provisions. Her case would then have to be remitted to the Superior Court to determine the amount and duration of the support owed to her and partition the parties' property.

(2) Attorney General of Quebec

[39] The Attorney General of Quebec submits that the Court of Appeal did not err in finding that the provisions on partition of property are not inconsistent with s. 15(1) of the *Charter*. However, he argues that the Court of Appeal erred in striking down art. 585 *C.C.Q.*, which provides for the obligation of spousal support, on the ground that it

arrêt ne règle pas les questions en litige dans la présente affaire. Elle remet d'ailleurs en cause sa valeur précédentielle.

[36] De plus, A soutient que la théorie du libre choix, du consensualisme ou de l'autonomie de la volonté mise de l'avant par le procureur général et par B pour défendre la validité constitutionnelle des dispositions du *Code civil* qu'elle conteste est inexacte dans les faits. Dès lors, notre Cour ne saurait permettre à un législateur de justifier un traitement discriminatoire en vertu d'une théorie sans lien avec la réalité vécue par les personnes visées. Une telle méthode favoriserait la reconnaissance de distinctions fondées sur des préjugés et soustrairait le législateur à l'obligation d'assurer l'égalité réelle promise par l'art. 15 de la *Charte*. A affirme que l'exclusion des conjoints de fait des protections du *Code civil* consacrées à la famille, tant sur le plan du partage des biens que sur celui de l'obligation alimentaire, ne tient pas compte de leur véritable situation et de leurs besoins.

[37] En somme, A plaide qu'il appartenait au procureur général de défendre la législation, en démontrant qu'elle n'est pas fondée sur des préjugés ou des stéréotypes. Or, à son avis, loin de combattre des stéréotypes, le procureur général et B s'en réclament et en font la base de leur argumentation.

[38] D'après A, la réparation appropriée en l'espèce devrait consister dans l'interprétation large par cette Cour des dispositions contestées, pour y inclure les conjoints de fait. Il faudrait ensuite renvoyer son dossier à la Cour supérieure afin que celle-ci puisse fixer le montant et la durée de la pension alimentaire qui lui est due et procéder au partage des biens des parties.

(2) Procureur général du Québec

[39] Le procureur général du Québec considère que la Cour d'appel n'a pas commis d'erreur en concluant que les dispositions prévoyant le partage des biens ne contreviennent pas au par. 15(1) de la *Charte*. Cependant, le procureur général allègue que la Cour d'appel a erré en invalidant l'art. 585 *C.c.Q.* relatif à l'obligation alimentaire entre

unjustifiably infringes s. 15(1). In his opinion, the right to equality guaranteed by s. 15(1) is violated by neither the provisions on partition of property nor the provision concerning the obligation of spousal support.

[40] The Attorney General submits that, in light of the evidence and in accordance with this Court's reasons in *Walsh*, the exclusion of *de facto* spouses from the impugned provisions of the *Civil Code* is not discriminatory. In his view, it does not create a disadvantage by perpetuating prejudice or stereotyping. According to the Attorney General, the reasons and principles stated by the majority in *Walsh* apply to all the impugned statutory provisions, including the one on the obligation of spousal support. He argues that any other conclusion would be illogical and contradictory. Otherwise, the respect shown by the legislature in the *Civil Code* for the freedom of choice of partners to marry or not to marry would on the one hand be interpreted as a legislative choice that is not based on stereotyping of or prejudice against the *de facto* union in the case of the matrimonial regime and the partition of property, whereas on the other hand, the same legislative choice would be considered to be tainted by stereotyping of or prejudice against the *de facto* union in the case of the obligation of support.

[41] The Attorney General submits that, with regard to both the obligation of support and the patrimony of the spouses, the Quebec legislature's objective is the same one the Nova Scotia legislature was pursuing in *Walsh*: to respect individual autonomy. In other words, both for the obligation of spousal support and for patrimonial property, the exclusion of *de facto* spouses is intended to respect the freedom of every individual to choose whether to marry and thus whether to participate in the statutory scheme applicable to marriage and accept the specific legal consequences flowing from that scheme. According to the Attorney General, the distinction between married or civil union spouses and *de facto* spouses can be explained by the fact that the former have chosen to make a commitment

conjoints au motif que cette disposition porterait atteinte au par. 15(1) de manière injustifiée. Selon lui, ni les dispositions relatives au partage des biens ni celle prévoyant l'obligation alimentaire entre conjoints ne violent la garantie d'égalité établie par le par. 15(1).

[40] Le procureur général soutient qu'au regard de la preuve et conformément aux motifs énoncés par notre Cour dans l'arrêt *Walsh*, le non-assujettissement des conjoints de fait aux dispositions contestées du *Code civil* n'est pas discriminatoire. En effet, il ne crée pas, selon lui, un désavantage résultant de la perpétuation d'un préjugé ou de l'application de stéréotypes. De l'avis du procureur général, les motifs et les principes énoncés par la majorité dans *Walsh* s'appliquent à l'ensemble des dispositions législatives contestées, y compris l'obligation alimentaire entre époux. Suivant son argumentation, toute autre conclusion serait illogique et contradictoire. Car, s'il en allait autrement, le fait que le législateur respecte, dans le *Code civil*, la liberté de choix des partenaires de se marier ou non serait interprété comme un choix législatif ne reposant pas sur des stéréotypes ou sur des préjugés à l'égard de l'union libre lorsqu'il s'agit du régime matrimonial et du partage des biens. Par contre, ce même choix législatif serait considéré comme vicié par des stéréotypes ou des préjugés à l'égard de l'union libre, lorsqu'il s'agit de l'obligation alimentaire.

[41] Selon le procureur général, l'objectif recherché par le législateur québécois tant à l'égard de l'obligation alimentaire qu'à l'égard du patrimoine des conjoints demeure le même que celui poursuivi par le législateur de la Nouvelle-Écosse dans *Walsh* : le respect de l'autonomie individuelle. Autrement dit, tant à l'égard de l'obligation alimentaire entre époux qu'à l'égard des biens patrimoniaux, l'exclusion des conjoints de fait vise à respecter la liberté de choix de chaque personne de se marier ou non et, par le fait même, d'adhérer ou non au régime législatif du mariage et aux conséquences juridiques spécifiques qui en découlent. D'après le procureur général, la distinction entre les personnes mariées ou unies civilement et les conjoints de fait s'explique par le fait que les premières ont

the nature of which legally entails a certain number of rights and obligations, while the latter have not done so. Under the Quebec scheme, a decision to live together is not enough to show an intention to make such a commitment.

[42] In short, the Attorney General argues that to extend the *Civil Code*'s provisions on the rights and obligations of marriage, including the obligation of support, to persons in *de facto* unions is a societal choice that falls within the political and not the judicial realm. However, if the Court were to conclude that some of the impugned provisions unjustifiably infringe s. 15, the Attorney General is opposed to reading in as a solution and prefers to have the declaration of invalidity suspended to enable the legislature to correct the constitutional defect. The Attorney General is also opposed to granting A an individual remedy during any period in which the declaration of invalidity is suspended.

(3) B

[43] B adopts the Attorney General's positions on the validity of the Quebec legislative scheme and on the remedy the Court should grant if it reaches the conclusion proposed by A on the constitutional questions.

[44] B also argues that the evidence adduced in the Superior Court, this Court's determinative case law on discrimination based on marital status, and an analysis of the relevant contextual factors lead necessarily to the conclusion that the impugned distinctions under Quebec law between *de facto* unions and marriage or civil unions are not discriminatory, as they do not perpetuate prejudice and do not result from stereotyping. Moreover, according to B, the principles from *Walsh* are directly applicable in the instant case, and the Court of Appeal erred in holding that they do not apply to the obligation of support.

choisi de conclure un engagement dont la nature emporte juridiquement un certain nombre de droits et d'obligations, tandis que les seconds n'ont pris aucune mesure de cet ordre. Dans le cadre du régime québécois, la décision de faire vie commune ne suffit pas à démontrer une intention de prendre des engagements de ce type.

[42] En somme, l'extension de la portée des dispositions du *Code civil* sur les droits et obligations du mariage, y compris l'obligation alimentaire, pour y inclure les personnes en union de fait représente, selon le procureur général, un choix de société qui relève du domaine politique et non judiciaire. Cependant, si la Cour devait conclure que certaines des dispositions contestées portent atteinte de manière injustifiée à l'art. 15, le procureur général s'oppose à la solution d'une interprétation large et favorise la suspension de la déclaration d'invalidité pour permettre au législateur de corriger le vice constitutionnel. Il s'oppose également à une réparation individuelle en faveur de A durant une période de suspension d'une déclaration d'invalidité.

(3) B

[43] B adopte la position du procureur général quant à la validité du régime législatif québécois et quant au choix de la réparation que la Cour devrait privilégier si elle devait conclure comme le propose A au sujet des questions constitutionnelles.

[44] B plaide aussi que la preuve administrée en Cour supérieure, la jurisprudence déterminante de notre Cour portant sur la discrimination fondée sur l'état matrimonial et une analyse des facteurs contextuels pertinents imposent la conclusion que les distinctions attaquées opérées par le droit québécois entre l'union de fait et le mariage ou l'union civile ne sont pas discriminatoires. En effet, ces distinctions ne perpétuent aucun préjugé et ne reposent pas sur l'application de stéréotypes. De plus, selon B, les principes de l'arrêt *Walsh* s'appliquent directement en l'espèce et la Cour d'appel a erré en les écartant à propos de l'obligation alimentaire.

[45] B points out that he and A, in their own way and for their own reasons, chose to live together outside the institution of marriage. For deeply personal reasons, he never wanted to participate in that institution. As for A, she chose to live with B in a conjugal relationship without making marriage a precondition to their cohabitation.

(4) Interveners

[46] In this Court, four interveners stated their positions on the constitutional challenge.

[47] Although New Brunswick has established a support remedy for common law spouses, the Attorney General of that province submits that the respect for freedom of choice shown by the Court in *Walsh* must apply in relation to both the provisions on partition of property and those on spousal support. In her view, freedom of choice characterizes the type of union contracted by the spouses, so there is no reason to distinguish the obligation of support from obligations with respect to the partition of property in the case of *de facto* unions.

[48] The Attorney General of Alberta, whose province also imposes an obligation of support on common law spouses, intervened only with respect to the provisions on partition of property. In his view, the Court disposed of the issue adequately in *Walsh* by stressing the importance of the factor of freedom of choice in the analysis under s. 15 of the *Charter*.

[49] The Women's Legal Education and Action Fund, adopting some of A's arguments, contends that spousal relationships are marked by gender inequality and that the Court should take that inequality into account in determining whether the impugned statutory provisions are discriminatory. Finally, this intervener asks that the *Civil Code* provisions relating to the obligation of support and the partition of property be applied to *de facto* spouses.

[45] B rappelle qu'à leur façon et pour des motifs qui leur sont propres, A et B ont choisi de vivre ensemble en marge de l'institution du mariage. B n'a jamais voulu adhérer à cette institution, pour des raisons profondément personnelles. Quant à A, elle a choisi de vivre en relation conjugale avec B sans faire du mariage une condition préalable à cette cohabitation.

(4) Les intervenants

[46] Devant notre Cour, quatre intervenants ont fait connaître leur position quant au litige constitutionnel.

[47] Bien que le Nouveau-Brunswick ait créé un recours alimentaire entre conjoints de fait, la procureure générale de cette province estime que le respect de la liberté de choix reconnu par la Cour dans *Walsh* s'impose tant à l'égard des dispositions concernant le partage des biens qu'à l'égard de celles prévoyant l'obligation alimentaire entre conjoints. Selon elle, la liberté de choix caractérise le type d'union contractée; il n'y a donc pas lieu de distinguer les obligations de soutien alimentaire de celles relatives au partage des biens dans le cas des unions libres.

[48] De son côté, le procureur général de l'Alberta, dont la province reconnaît également une obligation alimentaire entre conjoints de fait, limite son intervention aux dispositions concernant le partage des biens. Selon lui, la Cour a adéquatement disposé de la question en jeu dans l'arrêt *Walsh*, en soulignant l'importance du facteur de la liberté de choix dans l'analyse requise sous l'art. 15 de la *Charte*.

[49] Adoptant certains des arguments mis de l'avant par A, le Fonds d'action et d'éducation juridiques pour les femmes soutient que les relations conjugales sont marquées par l'inégalité entre les sexes. Dès lors, la Cour devrait tenir compte de ces inégalités lors de son évaluation du caractère discriminatoire des dispositions législatives contestées. Enfin, cet intervenant demande que les conjoints de fait bénéficient de l'application des articles du *Code civil* concernant l'obligation alimentaire ainsi que le partage des biens.

[50] Similarly, the Fédération des associations de familles monoparentales et recomposées du Québec supports A's arguments concerning the infringement of the right to equality that results from the exclusion of *de facto* spouses from art. 585 on the obligation of support. Disagreeing with the weight attached to freedom of choice by the Attorney General and B, it disputes the validity of this factor. Moreover, as with the obligation of support, the Fédération submits that the exclusion of *de facto* spouses from the provisions on protection of the family residence discriminates against them and cannot be justified under s. 1 of the *Charter*. The Fédération also argues that this Court should consider the impact on children of the discrimination against their parents.

[50] D'une manière analogue, la Fédération des associations de familles monoparentales et recomposées du Québec appuie les arguments de A au sujet de l'atteinte au droit à l'égalité causée par l'exclusion des conjoints de fait de l'art. 585 prévoyant l'obligation alimentaire. En désaccord avec l'importance attachée par le procureur général et par B à la liberté de choix, elle conteste le bien-fondé de ce facteur. De plus, selon la Fédération, tout comme dans le cas de l'obligation alimentaire, l'exclusion des conjoints de fait du bénéfice des dispositions concernant la protection de la résidence familiale est discriminatoire à leur égard et ne peut être justifiée en vertu de l'article premier de la *Charte*. La Fédération plaide également que notre Cour devrait prendre en considération l'impact sur les enfants de la discrimination subie par les parents.

C. *Changes in the Framework for Legal Relationships Between Spouses in Quebec Since 1980*

C. *L'évolution de l'encadrement des rapports juridiques entre conjoints depuis 1980 au Québec*

[51] This case centres on the exclusion of *de facto* spouses from the scope of certain provisions of the *Civil Code of Québec* that shape legal relationships between spouses. To determine whether the provisions in question are discriminatory, it will be necessary to consider them in the relevant historical and legislative context. For this purpose, I will discuss the framework applicable to legal relationships between spouses in Quebec, Quebec legislative policy with respect to the distinction between *de facto* spouses and married or civil union spouses, and the development of the *de facto* union in Quebec society.

[51] Le cœur du litige en l'espèce se retrouve dans l'exclusion des conjoints de fait du champ d'application de certaines dispositions du *Code civil du Québec* qui ont pour effet de moduler les rapports juridiques entre les conjoints. Pour déterminer si ces dispositions ont un caractère discriminatoire, il est nécessaire de les étudier dans leur contexte historique et législatif pertinent. Dans ce but, j'examinerai l'encadrement des rapports juridiques entre conjoints au Québec, la politique législative québécoise quant à la distinction entre les conjoints de fait et les conjoints mariés ou en union civile ainsi que l'évolution de l'union de fait dans la société québécoise.

(1) Married Spouses

(1) Les conjoints mariés

(a) *Historical Review of the Situation of Married Spouses and Development of the Legal Framework for Their Relationships*

a) *Rappel historique de la situation des conjoints mariés et développement du cadre juridique de leurs rapports*

[52] Before discussing the situation of *de facto* spouses, I must review the civil law's matrimonial regimes for legally married spouses. On enacting the *Civil Code of Lower Canada* ("*C.C.L.C.*") in

[52] L'examen de la situation des conjoints de fait exige, au départ, l'étude des régimes matrimoniaux établis pour les époux légalement mariés en droit civil. Après l'adoption, en 1866, du *Code civil du*

1866, the legislature gave spouses a choice, at the time of their marriage, between two principal matrimonial regimes: community of property and separation of property. Originally, under the 1866 *Code*, the choice made at the time of marriage was irrevocable for the duration of the marriage.

[53] The legal matrimonial regime, that is, the regime that applied where the spouses did not enter into a marriage contract choosing another regime, was that of "community of moveables and acquests" ("community of property"). The community of property was administered by the husband. [TRANSLATION] "[T]he regime was organized around the supremacy of the husband . . ., the head of the community": B. Lefebvre, "L'évolution de la notion de conjoint en droit québécois", in P.-C. Lafond and B. Lefebvre, eds., *L'union civile: nouveaux modèles de conjugalité et de parentalité au 21e siècle* (2003), 3, at p. 11. In 1931, to give the wife some autonomy in relation to her husband, the legislature created the category of "reserved property" of the wife. Reserved property was property the wife acquired by working outside the household and over which she had certain powers of administration: *An Act to amend the Civil Code and the Code of Civil Procedure respecting the civil rights of women*, S.Q. 1931, c. 101, s. 27. After that, the *Civil Code of Lower Canada* provided that upon being dissolved, the community, including the wife's reserved property, was partitioned equally between the spouses. If the wife renounced the partition, she kept only her reserved property.

[54] Alternatively, the spouses could enter into a marriage contract before a notary to establish a regime of separation of property. Under this regime, the spouses' assets did not constitute a mass of community created during the marriage. Thus, for spouses who opted out of the regime of community of property, there was no partition upon dissolution; they therefore kept their respective patrimonies. In addition, the *Civil Code of Lower Canada* authorized a variety of stipulations that might change the scope of the regimes. The basic choice was

Bas Canada (« *C.c.B.C.* »), le législateur offrait aux époux, lors de leur mariage, le choix entre deux régimes matrimoniaux principaux, la communauté de biens et la séparation de biens. À l'origine, en vertu du *Code* de 1866, le choix fait au moment du mariage était irrévocable pendant toute la durée du mariage.

[53] Le régime matrimonial légal, c'est-à-dire le régime qui s'appliquait lorsque les époux n'avaient pas conclu de contrat de mariage choisissant un autre régime, était celui de la communauté de meubles et acquêts (« communauté de biens »). La communauté de biens était administrée par l'époux. « [L]e régime s'orchestre autour de la suprématie du mari, [. . .] le chef de la communauté » : B. Lefebvre, « L'évolution de la notion de conjoint en droit québécois », dans P.-C. Lafond et B. Lefebvre, dir., *L'union civile : nouveaux modèles de conjugalité et de parentalité au 21e siècle* (2003), 3, p. 11. En 1931, pour accorder un peu d'autonomie à l'épouse vis-à-vis de son mari, le législateur crée la catégorie des « biens réservés » de la femme, constituée des biens acquis par son travail à l'extérieur du ménage et sur lesquels elle conserve certains pouvoirs d'administration : *Loi modifiant le Code civil et le Code de procédure civile, relativement aux droits civils de la femme*, S.Q. 1931, ch. 101, art. 27. Le *Code civil du Bas Canada* prévoit alors qu'à sa dissolution, la communauté, incluant les biens réservés de la femme, est partagée en parts égales entre les époux. Si l'épouse renonce au partage, elle ne conserve que ses biens réservés.

[54] Alternativement, les époux peuvent conclure devant un notaire un contrat de mariage établissant un régime de séparation de biens. Ce régime se caractérise par l'absence de masse commune de biens créée pendant le mariage. Ainsi, pour les époux se soustrayant à la communauté de biens, aucun partage n'a lieu à la dissolution; ils conservent alors leur patrimoine respectif. De plus, le *Code civil du Bas Canada* permettait des stipulations variées susceptibles de modifier la portée des régimes. Néanmoins, le choix fondamental

nevertheless between separation of property and community of property.

[55] New trends in the implementation of matrimonial regimes began emerging in the 1930s. Wives increasingly adopted the conventional regime of separation of property even though the vast majority of them did not have paid employment outside the home through which they could accumulate property. In 1932, 43% of couples chose separation of property; this rose to 70% by 1970: A. Roy, *Le contrat de mariage réinventé: Perspectives socio-juridiques pour une réforme* (2002), at pp. 58-62; J. Pineau and D. Burman, *Effets du mariage et régimes matrimoniaux* (1984), at p. 123. As a result, in the event of separation from bed and board or, more rarely, of divorce, wives who had chosen the regime of separation of property, and who had probably not accumulated patrimonies because they did not work outside the home, were not entitled to partition of the property owned by their husbands.

[56] Several explanations have been advanced for this trend, at first glance surprising, in favour of the regime of separation of property during that period. They include rejection of the patriarchal nature of the regime of community of property, the incompatibility of this regime with women's newly acquired legal capacity, the risk represented by the community of property in the event of bankruptcy and, more generally, the fact that an effective divorce procedure was not accessible.

[57] According to many commentators, this change could be explained as a reaction to the fact that wives had no power under the regime of community of property. Since the regime of separation of property gave wives some powers of administration over their patrimonies, it seemed to guarantee them more autonomy than that of community of property: see, *inter alia*, M. Tétrault, *Droit de la famille* (4th ed. 2010), vol. 1, at p. 562; D. Burman, "Politiques législatives québécoises dans l'aménagement des rapports pécuniaires entre époux: d'une justice bien pensée à un semblant de justice — un juste sujet

demeurait l'option entre la séparation de biens et la communauté de biens.

[55] Des tendances nouvelles commencent à apparaître à partir des années 1930 dans la mise en œuvre des régimes matrimoniaux. Les femmes, bien que n'occupant, pour la très grande majorité, aucun emploi rémunéré à l'extérieur du foyer leur permettant d'accumuler des biens, adoptent de plus en plus le régime conventionnel de séparation de biens. Dès 1932, 43 % des couples choisissent la séparation de biens; ce pourcentage atteint 70 % en 1970 : A. Roy, *Le contrat de mariage réinventé : Perspectives socio-juridiques pour une réforme* (2002), p. 58-62; J. Pineau et D. Burman, *Effets du mariage et régimes matrimoniaux* (1984), p. 123. De ce fait, en cas de séparation de corps, ou plus rarement, en cas de divorce, les épouses ayant choisi le régime de la séparation de biens et n'ayant vraisemblablement accumulé aucun patrimoine puisqu'elles ne travaillaient pas à l'extérieur du foyer, ne bénéficient d'aucun droit au partage des biens dont leur époux est propriétaire.

[56] Plusieurs raisons sont mises de l'avant pour expliquer ce phénomène à première vue surprenant que représente la progression de la séparation de biens durant cette période. On invoque notamment le rejet du caractère patriarcal de la communauté de biens, l'incompatibilité de ce régime avec la capacité juridique nouvellement acquise par les femmes, le risque que la communauté représente en cas de faillite et, plus généralement, l'absence d'accès à une procédure efficace de divorce.

[57] Pour de nombreux commentateurs, cette évolution s'expliquait par une réaction à l'absence de pouvoir des épouses au sein de la communauté de biens. Comme le régime de séparation de biens reconnaît à l'épouse quelques pouvoirs d'administration sur son patrimoine, il paraît alors garant de plus d'autonomie que dans le cas de la communauté : voir notamment M. Tétrault, *Droit de la famille* (4e éd. 2010), vol. 1, p. 562; D. Burman, « Politiques législatives québécoises dans l'aménagement des rapports pécuniaires entre époux : d'une justice bien pensée à un semblant

de s'alarmer" (1988), 22 *R.J.T.* 149, at pp. 151-52 and 155.

[58] Moreover, when the *Act respecting the legal capacity of married women*, S.Q. 1964, c. 66, came into force, wives obtained the legal capacity to freely dispose of their property and to perform the same acts in relation to it as a person of full age. The concept of "authority of the husband", which was based on the obedience owed by wives to their husbands, also disappeared from the *Civil Code* at that time. [TRANSLATION] "As a result, there was a clear dichotomy between the legal regime — community of property, which was administered by the husband — and this new legal capacity": Lefebvre, at p. 12. The regime of community of property, which failed to reflect this new reality, was therefore abandoned in favour of that of separation of property.

[59] Another explanation is that, as pointed out by a number of notaries at the time, the regime of separation of property protected a wife if her husband went bankrupt after going into business: see, *inter alia*, Burman, at p. 151; Tétrault, *Droit de la famille*, at p. 562. It may therefore have seemed prudent in such situations to opt for the regime of separation rather than that of community of property.

[60] Finally, the *Divorce Act*, S.C. 1967-68, c. 24, did not come into force in Canada until 1968. Before then, divorce was not accessible to the vast majority of the population, since it could be obtained only through a private Act. Some authors assume that many wives viewed separation or the possible dissolution of their union as an unrealistic prospect: see, *inter alia*, J. Jarry, *Les conjoints de fait au Québec: vers un encadrement légal* (2008), at p. 87. In such circumstances, the choice of a particular matrimonial regime could have seemed to be of no practical consequence.

[61] Whatever the reasons for the choice of the regime of separation of property and for its growing popularity, the fact remains that, in a context in which wives were not engaged in remunerative

de justice — un juste sujet de s'alarmer » (1988), 22 *R.J.T.* 149, p. 151-152 et 155.

[58] D'autre part, à la suite de l'entrée en vigueur de la *Loi sur la capacité juridique de la femme mariée*, S.Q. 1964, ch. 66, les épouses obtenaient la capacité juridique de disposer librement de leurs biens et de poser à leur égard les mêmes actes qu'une personne majeure. La notion de « puissance maritale » fondée sur l'obéissance que doit l'épouse à son mari disparaît aussi à cette occasion du *Code civil*. « Dès lors, il existe manifestement une dichotomie entre le régime légal, la communauté de biens qui est administrée par le mari, et cette nouvelle capacité juridique » : Lefebvre, p. 12. La communauté, qui reflète mal cette nouvelle réalité, est alors délaissée au profit du régime de séparation de biens.

[59] Une autre explication découle du fait que la séparation de biens, tel que le rappelaient à l'époque plusieurs notaires, offre une protection à l'épouse en cas de faillite d'un époux qui s'est lancé en affaires : voir notamment Burman, p. 151; Tétrault, *Droit de la famille*, p. 562. Ainsi, dans de telles situations, il pouvait paraître prudent d'opter pour un régime séparatiste plutôt que communautaire.

[60] Finalement, la *Loi sur le divorce*, S.C. 1967-1968, ch. 24, n'entre en vigueur au Canada qu'en 1968. Avant cette date, le divorce était inaccessible pour une très grande majorité de la population, celui-ci ne pouvant être obtenu que par loi privée. Certains auteurs supposent que, pour plusieurs épouses, la perspective d'une séparation ou d'une dissolution éventuelle de leur union semblait peu réaliste : voir notamment J. Jarry, *Les conjoints de fait au Québec : vers un encadrement légal* (2008), p. 87. Dans un tel contexte, le choix d'un régime matrimonial particulier pouvait paraître sans conséquences pratiques.

[61] Indépendamment des raisons motivant le choix du régime de la séparation de biens et de la popularité croissante de celui-ci, il n'en demeure pas moins que les conséquences de ce régime,

activities outside the matrimonial home, the consequences of this regime could be devastating in the event of separation or divorce. The effects of this choice of regime became clear after the *Divorce Act* came into force.

[62] To try to reverse this "separatist" trend that often caused serious problems for married women when their unions were dissolved, the Quebec legislature "modernized" the legal regime of community of property [TRANSLATION] "to make it more attractive": A. Roy, "Le régime juridique de l'union civile: entre symbolisme et anachronisme", in Lafond and Lefebvre, 165, at p. 184; see also S. Massé, "Les régimes matrimoniaux au Canada — Analyse comparative des législations provinciales" (1985), 88 *R. du N.* 103, at p. 148. Thus, the legal matrimonial regime of partnership of acquests came into existence on July 1, 1970 with the coming into force of the *Act respecting matrimonial regimes*, S.Q. 1969, c. 77. From then on, the community consisted only of property acquired by the spouses during the marriage. Professor Tétrault explains this change as follows:

> [TRANSLATION] The change of legal regime from community of property to partnership of acquests is easily explained by the main characteristic of the regime of community of property, which concentrated the administration of the regime in the husband's hands. This approach was difficult to reconcile with the goals of feminist movements and the granting of full legal capacity to women.

(*Droit de la famille*, at p. 511)

[63] Under the new legal regime, each spouse had the full administration of his or her property during the union, and most of the property acquired during the marriage could be partitioned upon dissolution. This regime distinguished two categories of property: acquests, which could be partitioned upon dissolution of the regime, and private property, of which the legislature provided an exhaustive list and which could not be partitioned. Acquests were property acquired during the marriage by either spouse, while private property was property owned

dans un contexte où les épouses n'exerçaient pas d'activités rémunératrices en dehors du foyer conjugal, pouvaient être dévastatrices en cas de séparation ou de divorce. Les effets de ce choix de régime sont apparus clairement après l'entrée en vigueur de la *Loi sur le divorce*.

[62] Pour tenter de renverser cette tendance « séparatiste » porteuse de difficultés souvent graves pour les épouses à l'occasion d'une dissolution de leur union, le législateur québécois a procédé à une « modernisation » du régime légal de la communauté « pour le rendre plus attrayant » : A. Roy, « Le régime juridique de l'union civile : entre symbolisme et anachronisme », dans Lafond et Lefebvre, 165, p. 184; voir également S. Massé, « Les régimes matrimoniaux au Canada — Analyse comparative des législations provinciales » (1985), 88 *R. du N.* 103, p. 148. Le régime matrimonial légal de la société d'acquêts voit ainsi le jour le 1er juillet 1970 avec l'entrée en vigueur de la *Loi concernant les régimes matrimoniaux*, L.Q. 1969, ch. 77. La communauté se réduit désormais aux biens acquis par les conjoints durant le mariage. Le professeur Tétrault explique ainsi ce changement :

> Le changement du régime légal, de la communauté de biens à la société d'acquêts, s'explique facilement par la caractéristique principale de la communauté de biens qui concentrait entre les mains du mari l'administration du régime. Cette façon de voir les choses se concilie mal avec les objectifs des mouvements féministes et la reconnaissance de la pleine capacité juridique de la femme.

(*Droit de la famille*, p. 511)

[63] Ce nouveau régime légal offre à chaque époux la pleine administration de ses biens durant l'union, tout en permettant un partage de la grande majorité des biens acquis durant le mariage lors de la dissolution. Ce régime établit deux catégories de biens : les acquêts, partageables lors de la dissolution du régime, et les propres, énumérés de façon limitative par le législateur et non partageables. Les biens acquis durant le mariage par l'un ou l'autre des époux sont acquêts, alors que les biens possédés avant le mariage ou acquis après le mariage, mais

before the marriage or property acquired after the marriage that was intrinsically personal, such as clothing or work tools.

[64] The creation of this legal matrimonial regime was accompanied by the repudiation of the principle of immutability of marriage agreements. Until 1970, once a marriage had been solemnized, the matrimonial regime could not be modified, even by mutual agreement of the spouses. Only one type of change was permitted by the legislature at that time: a wife to whom the regime of community of property applied could, subject to certain conditions, ask a court for permission to opt for the regime of separation of property: see E. Caparros, *Les régimes matrimoniaux au Québec* (3rd ed. 1988), at p. 97.

[65] The reason why spouses had been prohibited from amending their marriage agreements while married lay, in part, in the idea that only contracts entered into before marriage were entered into by independent persons capable of making the agreements they wished to make. Once the couple were married, since the wife fell legally under her husband's power, her interests could not be validly defended if she entered into contracts with him. This was why spouses were prohibited from amending agreements entered into before marriage: see Roy, *Le contrat de mariage réinventé*, at pp. 99-100; P.-B. Mignault, *Le droit civil canadien*, vol. 6 (1902), at pp. 128-29; L. Faribault, *Traité de droit civil du Québec*, vol. 10 (1952), at pp. 44-45; R. Comtois, *Traité théorique et pratique de la communauté de biens* (1964), at p. 195.

[66] Like the rules under which the husband was responsible for the administration of the property of the community of property, the principle of immutability was hard to reconcile with the full legal capacity of married women and the end of the "authority of the husband", according to which wives had been required to obey their husbands: see Roy, *Le contrat de mariage réinventé*, at p. 125. The creation of the regime of partnership of acquests was therefore accompanied by the introduction of a principle of mutability of matrimonial agreements,

de nature intrinsèquement personnelle, tels les vêtements ou outils de travail, sont propres.

[64] La création de ce régime matrimonial légal s'accompagne de l'abrogation du principe de l'immutabilité des conventions matrimoniales. Jusqu'en 1970, une fois le mariage célébré, le régime matrimonial ne pouvait être modifié, même du commun accord des époux. Un seul type de changement était alors permis par le législateur : l'épouse mariée sous le régime de la communauté de biens pouvait, en cours de régime et à certaines conditions, demander à un tribunal la permission d'opter pour le régime de la séparation de biens : voir E. Caparros, *Les régimes matrimoniaux au Québec* (3e éd. 1988), p. 97.

[65] L'interdiction faite aux époux de modifier leurs conventions matrimoniales en cours de mariage découlait notamment de la perspective selon laquelle seuls les contrats passés avant le mariage étaient le fait de personnes indépendantes capables de conclure les conventions qu'elles désirent. Après le mariage, puisque l'épouse tombait juridiquement sous le pouvoir de son mari, ses intérêts ne pouvaient être valablement défendus lors de la conclusion de contrats entre époux, d'où l'interdiction pour ceux-ci de modifier les conventions conclues avant le mariage : voir Roy, *Le contrat de mariage réinventé*, p. 99-100; P.-B. Mignault, *Le droit civil canadien*, t. 6 (1902), p. 128-129; L. Faribault, *Traité de droit civil du Québec*, t. 10 (1952), p. 44-45; R. Comtois, *Traité théorique et pratique de la communauté de biens* (1964), p. 195.

[66] Comme dans le cas des règles qui attribuent l'administration des biens de la communauté de biens au mari, le principe d'immutabilité se concilie mal avec la pleine capacité juridique de la femme mariée, ainsi qu'avec la fin de la « puissance maritale » en vertu de laquelle l'épouse devait obéissance à son mari : voir Roy, *Le contrat de mariage réinventé*, p. 125. Dès lors, la création de la société d'acquêts s'accompagne de l'introduction d'un principe de mutabilité des conventions matrimoniales selon lequel les époux peuvent

which allowed spouses to change their regime in whole or in part during their marriage: see Caparros, *Les régimes matrimoniaux au Québec*, at p. 97.

[67] However, as Professor Burman points out, [TRANSLATION] "[a]t the time of the reform of matrimonial regimes, the new legal regime of partnership of acquests was given a very chilly reception, with spouses continuing to prefer that of separation of property" (p. 156). Thus, between 1971 and 1980, 48% of couples chose the legal regime of partnership of acquests, while 52% chose the regime of separation of property: Roy, *Le contrat de mariage réinventé*, at pp. 63-64. However, this trend gradually reversed itself during the 1980s, with the result that fewer than 1% of couples chose the regime of separation as to property between 1995 and 2005: A. Roy, "Le contrat de mariage en droit québécois: un destin marqué du sceau du paradoxe" (2006), 51 *McGill L.J.* 665, at p. 668.

[68] Since the regime of partnership of acquests was neither retroactive nor mandatory, its introduction did not change the situation of wives who had chosen the regime of separation of property either before or after 1970. It should be borne in mind that, at the time, married women had not yet joined the labour market in large numbers. As the Committee on Matrimonial Regimes Committee of the Civil Code Revision Office pointed out in its report of May 20, 1968, "[i]t is still usual in Quebec households for the wife to devote all her time to the care of the family and for the husband to be the only one able to amass an estate by his work": *Report on Matrimonial Regimes* (1968), at p. 9.

[69] In 1981, the legislature undertook a major new reform of family law. The *Act to establish a new Civil Code and to reform family law*, S.Q. 1980, c. 39, established a primary regime of public order and provided for certain effects of marriage for spouses. This regime applied to all future marriages and to marriages already entered into regardless of the matrimonial regime that had previously been chosen. The reform introduced the principle that spouses had equal rights and obligations in marriage. This principle of equality was reflected

changer totalement ou partiellement de régime au cours de leur mariage : voir Caparros, *Les régimes matrimoniaux au Québec*, p. 97.

[67] Toutefois, comme le souligne la professeure Burman, « [l]orsque fut mise en vigueur la réforme des régimes matrimoniaux, le nouveau régime légal de société d'acquêts reçut un accueil des plus froid, les époux continuant à lui préférer la séparation de biens » (p. 156). Ainsi, entre 1971 et 1980, 48 % des couples choisissent le régime légal de la société d'acquêts et 52 % choisissent le régime de la séparation de biens : Roy, *Le contrat de mariage réinventé*, p. 63-64. Cette tendance se renverse par contre progressivement au cours des années 1980, si bien qu'entre 1995 et 2005, moins de 1 % des couples choisissent le régime de la séparation de biens : A. Roy, « Le contrat de mariage en droit québécois : un destin marqué du sceau du paradoxe » (2006), 51 *R.D. McGill* 665, p. 668.

[68] Le régime de la société d'acquêts n'ayant aucun effet rétroactif ou obligatoire, son introduction ne modifie pas la situation dans laquelle se trouvent les épouses ayant choisi le régime de la séparation de biens avant comme après 1970. Je rappelle qu'à l'époque, les épouses ne se sont toujours pas intégrées massivement dans le marché du travail. Comme le signale le Comité des régimes matrimoniaux de l'Office de révision du Code civil, dans son rapport du 20 mai 1968, « [i]l est encore normal dans les ménages québécois que la femme consacre tout son temps aux soins familiaux et que le mari reste le seul à pouvoir gagner des biens par son travail » : *Rapport sur les régimes matrimoniaux* (1968), p. 8.

[69] En 1981, le législateur procède à une nouvelle et importante réforme du droit de la famille. La *Loi instituant un nouveau Code civil et portant réforme du droit de la famille*, L.Q. 1980, ch. 39, établit un régime primaire d'ordre public prévoyant certains effets du mariage pour les époux. Ce régime s'applique à tous les mariages à venir, ainsi qu'aux mariages déjà contractés, quel que soit le régime matrimonial déjà choisi. La réforme introduit un principe d'égalité de droits et d'obligations entre les époux dans le mariage. Ce principe d'égalité

in, among other things, the spouses' obligation to take in hand the moral and material direction of the family together and to choose the family residence together. Other new measures were adopted to ensure adherence to the principle of joint direction by requiring the consent of both spouses for certain acts, such as alienation of the family residence by the spouse who owned it. To the obligations arising out of marriage before the reform, namely fidelity, cohabitation, assistance and succour, the legislature added an obligation for each spouse to contribute toward the expenses of the marriage in proportion to his or her means, including through activities within the home.

[70] The legislature also dealt directly with the situation of women who had married under the regime of separation of property rather than that of community of property or partnership of acquests during the preceding decades. To remedy their vulnerability, it created the compensatory allowance mechanism, which entitled each spouse to claim compensation for his or her contribution, in property or services, to the enrichment of the other spouse's patrimony. Payment of such compensation could be ordered by a court in the course of proceedings leading to the spouses' separation. However, this measure proved ineffective after a few years, as the Minister of Justice and the Minister for the Status of Women explained in 1988:

[TRANSLATION] As for the compensatory allowance, it has not proved effective enough to fully remedy the problems experienced by certain married spouses, particularly those who have chosen separation of property as their matrimonial regime. Thus, according to the majority of the jurisprudence, the work performed by a spouse within the home does not entitle that spouse to a compensatory allowance if the spouse was merely fulfilling his or her obligation to contribute towards the expenses of the marriage; in asserting his or her right, the co-operating spouse encounters major evidentiary difficulties that, in some cases, render the remedy illusory . . . .

(H. Marx and M. Gagnon Tremblay, *Les droits économiques des conjoints* (1988), document tabled for consultation, at p. 10.)

se manifeste notamment par l'obligation pour les époux d'assumer ensemble la direction morale et matérielle de la famille et de choisir de concert la résidence familiale. D'autres mesures nouvelles assurent le respect de cette direction commune, en exigeant le consentement des deux époux pour certains actes, comme l'aliénation de la résidence familiale par l'époux propriétaire. Aux effets obligatoires du mariage antérieur à la réforme, soit la fidélité, la cohabitation, l'assistance et le secours, le législateur ajoute l'obligation pour chaque époux de contribuer aux charges du mariage en proportion de ses facultés, y compris par ses activités au foyer.

[70] Le législateur visait aussi directement la situation des épouses mariées en séparation de biens plutôt qu'en communauté de biens ou en société d'acquêts au cours des décennies précédentes. Pour porter remède à leur vulnérabilité, le législateur crée le mécanisme de la prestation compensatoire. Chacun des époux a dès lors le droit de réclamer une indemnité en compensation de sa contribution, en biens ou en services, à l'enrichissement du patrimoine de l'autre époux. Le paiement de cette indemnité peut être ordonné par un tribunal lors des procédures donnant lieu à la séparation des époux. Cependant, cette mesure s'est révélée inefficace après quelques années, comme l'expliquent, en 1988, les ministres de la Justice et de la Condition féminine :

Quant à la prestation compensatoire, elle ne s'est pas avérée suffisamment efficace pour remédier complètement aux problèmes vécus par certains conjoints mariés, notamment ceux qui ont choisi, comme régime matrimonial, la séparation de biens. Ainsi, le travail au foyer accompli par l'un des époux ne lui confère pas, selon le courant jurisprudentiel majoritaire, de droit à une prestation compensatoire s'il s'agissait là uniquement de l'exécution de son obligation aux charges du mariage; pour faire valoir son droit, le conjoint collaborateur se bute à d'importantes difficultés de preuve qui, dans certains cas, sont de nature à rendre le recours illusoire . . .

(H. Marx et M. Gagnon Tremblay, *Les droits économiques des conjoints* (1988), document présenté à la consultation, p. 10.)

[71] In 1989, because the compensatory allowance had not had the intended effect, the Quebec National Assembly passed the *Act to amend the Civil Code of Québec and other legislation in order to favour economic equality between spouses*, S.Q. 1989, c. 55, which introduced the concept of family patrimony into the *Civil Code*. As a result, "a marriage has the immediate effect . . . of establishing a family patrimony, and it creates a claim that can be asserted upon separation from bed and board or upon dissolution of the marriage": *M.T. v. J.-Y.T.*, 2008 SCC 50, [2008] 2 S.C.R. 781, at para. 14 (emphasis added). Like all the other effects of marriage, such as the obligation to provide assistance and succour, the family patrimony was of public order and applied regardless of the legal or conventional matrimonial regime chosen by the parties to govern their patrimonial relationship.

[72] The claim so created provided a basis for equal partition of the net value of certain property, such as the family's residences, the household furniture used by the family, the vehicles used by the family and rights under retirement plans, regardless of which spouse had a right of ownership in that property. Residences, furniture and vehicles were included in the family patrimony regardless of whether they were acquired before or during the marriage, but in the case of rights under a retirement plan, only those accrued during the marriage were part of that patrimony.

[73] The transitional provisions enacted by the legislature indicated that the articles concerning the family patrimony applied to spouses who had married before the Act came into force. However, the legislature allowed such spouses to opt out of the family patrimony provisions by mutual agreement. They had 18 months after the Act came into force to make that choice and record it in an agreement.

[74] There were three objectives underlying this further reform of the rights and obligations of spouses *vis-à-vis* one another. The legislature

[71] La prestation compensatoire n'ayant pas eu les effets escomptés, l'Assemblée nationale du Québec adopte en 1989 la *Loi modifiant le Code civil du Québec et d'autres dispositions législatives afin de favoriser l'égalité économique des époux*, L.Q. 1989, ch. 55. Cette loi introduit dans le *Code civil* la notion de patrimoine familial. Dès lors, « la conclusion du mariage entraîne comme effet immédiat la formation d'un patrimoine familial [. . .] et crée un droit de créance qui s'ouvre à la séparation de corps ou à la dissolution du mariage » : *M.T. c. J.-Y.T.*, 2008 CSC 50, [2008] 2 R.C.S. 781, par. 14 (je souligne). Comme tous les autres effets du mariage, par exemple, les obligations d'assistance et de secours, le patrimoine familial est d'ordre public et s'applique sans égard au régime matrimonial légal ou conventionnel choisi par les parties pour régir leurs rapports patrimoniaux.

[72] Ce droit de créance donne ouverture à un partage, en parties égales, de la valeur nette de certains biens tels les résidences de la famille, les meubles affectés à l'usage du ménage, les véhicules utilisés par ce dernier, ainsi que les droits au titre de régimes de retraite, et ce, sans égard à l'identité de celui des deux époux qui détient un droit de propriété sur ces biens. Alors que les résidences, meubles et véhicules sont inclus dans le patrimoine familial, qu'ils aient été acquis avant ou pendant le mariage, seuls les droits au titre d'un régime de retraite accumulés durant le mariage font partie de ce patrimoine.

[73] Les dispositions transitoires décrétées par le législateur prévoient que les articles relatifs au patrimoine familial s'appliquent aux époux déjà mariés avant l'entrée en vigueur de la loi. Cependant, le législateur permet à ces époux de se soustraire d'un commun accord à l'application du patrimoine familial. Ceux-ci ont alors 18 mois à compter de l'entrée en vigueur de la loi pour effectuer ce choix et le consigner au sein d'une convention d'exclusion.

[74] Trois objectifs motivent cette réforme additionnelle des droits et obligations que les époux possèdent l'un envers l'autre. Le législateur voulait

wanted to remedy the problems encountered by women who had married under the regime of separation of property, make up for the ineffectiveness of the compensatory allowance and redefine marriage.

[75] First, as Baudouin J.A. of the Quebec Court of Appeal explained in a decision rendered shortly after the creation of the family patrimony,

> [TRANSLATION] [b]y introducing into our law the partition of the family patrimony (*An Act to amend the Civil Code of Québec and other legislation in order to favour economic equality between spouses* [S.Q. 1989, c. 55]), the legislature intended to remedy injustices that could be suffered by a certain category of married women and to recognize the value of work done in the home. Upon divorce or separation from bed and board, women who were married under the regime of separation of property were sometimes severely disadvantaged from an economic standpoint when the time came to liquidate the patrimony accumulated while the spouses were living together.
>
> Through Bill 146, the legislature wanted to correct the sometimes perverse effects of choosing the regime of separation of property . . . .
>
> Indeed, these injustices had sometimes been pointed out by this Court [*Droit de la famille — 67*, [1985] C.A. 135], which had always found that, in the absence of specific provisions on this point, the courts had no power to change the freely chosen matrimonial regime to alleviate such inequities.

(*Droit de la famille — 977*, [1991] R.J.Q. 904, at pp. 907-8; see also Tétrault, *Droit de la famille*, at pp. 152-53; Roy, "Le contrat de mariage en droit québécois: un destin marqué du sceau du paradoxe", at pp. 668-69; Roy, "Le régime juridique de l'union civile: entre symbolisme et anachronisme", at p. 180; E. Caparros, "Le patrimoine familial: une qualification difficile" (1994), 25 *R.G.D.* 251, at p. 253.)

[76] As well, spouses who had previously chosen the regime of separation of property now had a claim on the value of the family patrimony. The legislature was, in a sense, giving wives an

remédier aux difficultés subies par les femmes mariées en séparation de biens, pallier l'inefficacité de la prestation compensatoire et redéfinir le mariage.

[75] Premièrement, et comme l'explique le juge Baudouin de la Cour d'appel du Québec, dans un arrêt prononcé peu après la création du patrimoine familial :

> Le législateur, en introduisant dans notre droit le partage du patrimoine familial (*Loi modifiant le Code civil du Québec et d'autres dispositions législatives afin de favoriser l'égalité économique des époux* [L.Q. 1989, ch. 55]), a entendu remédier à des injustices dont une certaine catégorie de femmes mariées pouvaient être victimes et reconnaître la valeur du travail au foyer. Les femmes mariées en séparation de biens, au moment d'un divorce ou d'une séparation de corps, se retrouvaient en effet parfois sévèrement désavantagées sur le plan économique lorsque venait le temps de liquider le patrimoine accumulé pendant la vie commune.
>
> Le législateur, avec la loi 146, a voulu corriger les effets parfois pervers du choix du régime de la séparation de biens . . .
>
> Ces injustices avaient d'ailleurs été parfois signalées par notre Cour [*Droit de la famille — 67*, [1985] C.A. 135], qui a toujours estimé, par ailleurs, que en l'absence de dispositions spécifiques à cet égard, les tribunaux n'avaient pas le pouvoir de modifier le régime matrimonial librement choisi pour pallier ces iniquités.

(*Droit de la famille — 977*, [1991] R.J.Q. 904, p. 907-908; voir également Tétrault, *Droit de la famille*, p. 152-153; Roy, « Le contrat de mariage en droit québécois : un destin marqué du sceau du paradoxe », p. 668-669; Roy, « Le régime juridique de l'union civile : entre symbolisme et anachronisme », p. 180; E. Caparros, « Le patrimoine familial : une qualification difficile » (1994), 25 *R.G.D.* 251, p. 253.)

[76] De même, les époux qui auraient préalablement choisi le régime de séparation de biens détiennent désormais un droit de créance sur la valeur du patrimoine familial. En quelque sorte,

opportunity to change the impact of the choice of matrimonial regime they had made in the past by making the regime of separation of property inapplicable to a large portion of the family patrimony, which now became subject to a form of partition. However, this change was not irrevocable, since a wife could choose to renounce her rights in the family patrimony upon the dissolution of their union (art. 423 *C.C.Q.*).

[77] Second, "[t]hat Act represented a partial response to the disappointment and difficulties that had resulted from the implementation of the compensatory allowance in the years prior to its enactment": *M.T. v. J.-Y.T.*, at para. 17; see also L. Langevin, "Liberté de choix et protection juridique des conjoints de fait en cas de rupture: difficile exercice de jonglerie" (2009), 54 *McGill L.J.* 697, at p. 714; Lefebvre, at p. 17.

[78] Third, the legislature redefined marriage by means of the Act. From the time the Act came into force, marriage became not only a union of persons, but also an egalitarian economic union with a number of patrimonial consequences. In *M.T. v. J.-Y.T.*, I elaborated on the basis for the legislature's objective in introducing the family patrimony:

Marriage represents, first and foremost, a union of persons. However, the legislature also wanted it to be a partial economic union or an association of interests (D. Burman and J. Pineau, *Le "patrimoine familial" (projet de loi 146)* (1991), No. 31). The adoption of the partnership of acquests as the suppletive matrimonial regime that is to apply unless the spouses make another choice shows that this is what the legislature intended. The creation of the family patrimony confirms that intention even more clearly.

Marriage results in the establishment of a form of economic union to which both spouses must contribute as best they can (Kasirer, at p. 572). Article 396 *C.C.Q.* clearly imposes on the spouses a legal obligation to contribute toward the expenses of the marriage "in proportion to their respective means". It also provides that "[t]he spouses may make their respective contributions

le législateur offre la possibilité aux épouses de modifier les effets du choix de régime matrimonial qu'elles avaient effectué auparavant en soustrayant à l'application du régime de séparation de biens une part importante du patrimoine du ménage, qui se trouve désormais assujetti à une forme de partage. Cette modification n'est toutefois pas irrévocable, car les épouses peuvent choisir de renoncer à leurs droits dans le patrimoine familial à compter de la dissolution de leur union (art. 423 *C.c.Q.*).

[77] Deuxièmement, « [l]'adoption de cette loi répon[d] en partie aux déceptions et aux difficultés qui avaient marqué la mise en application de la prestation compensatoire au cours des années précédentes » : *M.T. c. J.-Y.T.*, par. 17; voir également L. Langevin, « Liberté de choix et protection juridique des conjoints de fait en cas de rupture : difficile exercice de jonglerie » (2009), 54 *R.D. McGill* 697, p. 714; Lefebvre, p. 17.

[78] Troisièmement, par cette loi, le législateur redéfinit le mariage. À partir de l'entrée en vigueur de la loi, le mariage devient non seulement une union de personnes mais aussi une union économique égalitaire emportant un certain nombre de conséquences patrimoniales. Dans l'arrêt *M.T. c. J.-Y.T.*, j'explique davantage le fondement de l'objectif poursuivi par le législateur avec l'introduction du patrimoine familial :

Le mariage représente d'abord une union de personnes. Cependant, le législateur a aussi voulu qu'il constitue une union économique partielle ou une association d'intérêts (D. Burman et J. Pineau, *Le « patrimoine familial » (projet de loi 146)* (1991), nº 31). L'adoption de la société d'acquêts comme régime matrimonial supplétif à défaut d'un autre choix par les conjoints témoigne de cette volonté législative. La création du patrimoine familial la confirme encore plus nettement.

Le mariage entraîne la création d'une forme d'union économique à laquelle les époux sont appelés à contribuer de leur mieux (Kasirer, p. 572). L'article 396 *C.c.Q.* impose clairement aux conjoints une obligation légale de contribuer aux charges du mariage « à proportion de leurs facultés respectives ». Il prévoit aussi que « [c]haque époux peut s'acquitter de sa contribution par son activité

by their activities within the home." The law is not really concerned with the size or nature of the contributions, and in fact presumes them to be equal (*Droit de la famille — 1893*, [1993] R.J.Q. 2806 (C.A.), at p. 2809). [Emphasis added; paras. 21-22.]

[79] As a result of this reform, spouses who decided to marry were required to accept [TRANSLATION] "a partnership model" (B. Moore, "Culture et droit de la famille: de l'institution à l'autonomie individuelle" (2009), 54 *McGill L.J.* 257, at p. 268) that involved a willingness to partition: *Droit de la famille — 977*, at p. 908. It can therefore be concluded that [TRANSLATION] "[i]n 1989, [the legislature] transformed marriage into a primarily economic partnership by creating a family patrimony": M. Tétrault, "L'union civile: j'me marie, j'me marie pas", in Lafond and Lefebvre, 101, at p. 111.

[80] In Quebec, marriage thus became not only a union, but also, "as this Court held in *Moge* (at p. 870), . . . a 'joint endeavour', a socio-economic partnership": *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, at para. 49. From the time of the legislative reform in which the family patrimony was created, any person who chose to marry was deemed to want to create this socio-economic partnership on the basis of a number of provisions of public order that established the effects of marriage, such as those governing acts involving the family residence and the spouses' proportional contributions to the expenses of the marriage. In return for this obligation to form an economic partnership, the new definition of marriage provided for mechanisms of public order to apportion the patrimonial consequences of dissolution of the partnership, such as the partition of the family patrimony and the awarding of support following the breakdown of the marriage. Conversely, persons who did not wish to be subject to these effects or to create a joint endeavour or economic union with a partially predetermined content could choose to remain in a *de facto* union outside marriage.

au foyer. » La loi ne s'attache pas particulièrement à la mesure des contributions ou à leur nature. D'ailleurs, elle les présume égales (*Droit de la famille — 1893*, [1993] R.J.Q. 2806 (C.A.), p. 2809). [Je souligne; par. 21-22.]

[79] Par cette réforme, les conjoints qui décident de se marier adhèrent obligatoirement à « un modèle associationniste » (B. Moore, « Culture et droit de la famille : de l'institution à l'autonomie individuelle » (2009), 54 *R.D. McGill* 257, p. 268) qui emporte une volonté de partage : *Droit de la famille — 977*, p. 908. Il devient ainsi possible de conclure qu'« [e]n 1989, [le législateur] transforme le mariage en une association principalement économique en créant un patrimoine familial » : M. Tétrault, « L'union civile : j'me marie, j'me marie pas », dans Lafond et Lefebvre, 101, p. 111.

[80] Au Québec, le mariage devient alors non seulement une union, mais aussi « [c]omme notre Cour l'a conclu dans *Moge* (à la p. 870), [. . .] une "entreprise commune", une association socio-économique » : *Bracklow c. Bracklow*, [1999] 1 R.C.S. 420, par. 49. À partir de la réforme législative créant le patrimoine familial, toute personne qui choisit de se marier est réputée vouloir créer cette association socio-économique organisée sur la base d'un certain nombre de dispositions d'ordre public prescrivant les effets du mariage, tels la réglementation des actes posés en regard de la résidence familiale et la contribution proportionnelle aux charges du mariage. En contrepartie de cette obligation de former une association économique, la nouvelle définition du mariage prévoit des mécanismes d'ordre public destinés à répartir les conséquences patrimoniales découlant de la dissolution de l'association, tels le partage du patrimoine familial et l'octroi d'une pension alimentaire post-rupture. *A contrario*, les personnes ne voulant pas s'assujettir à ces effets ou ne désirant pas créer d'entreprise commune ou d'union économique au contenu partiellement prédéterminé peuvent choisir de demeurer en union libre, hors du mariage.

[81] In sum, whereas the legislature's first two objectives in introducing the family patrimony related to the existing economic context, its third objective was decidedly forward-looking, as it proposed a new definition of marriage, which now included an economic union or partnership.

(b) *Legal Framework for Marriage*

[82] As a result of the reforms outlined above, marriage is now subject to a legal framework that governs the mutual relationships of spouses. This framework is made up of a primary regime and a legal or conventional matrimonial regime the effects of which are felt both during the marriage and when it ends. However, before looking at the effects of each of these regimes during and after marriage, I note that, aside from the death of a spouse, marriage can end as a result of separation from bed and board under the *Civil Code of Québec* or divorce under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.).

(i) Primary Regime

[83] The *Civil Code of Québec* establishes a primary regime in a chapter that defines the fundamental effects of marriage. The provisions setting out these effects are mandatory, since the spouses may not derogate from or renounce them in a marriage contract:

391. In no case may spouses derogate from the provisions of this chapter, whatever their matrimonial regime.

[84] The primary regime thus governs certain aspects of the spouses' relationship with one another and creates mutual rights, duties and obligations for the spouses. During the marriage, the spouses "owe each other respect, fidelity, succour and assistance" and "are bound to live together" (art. 392, paras. 2 and 3 *C.C.Q.*). "[They] together take in hand the moral and material direction of the family" (art. 394 *C.C.Q.*), they "choose the family residence together" (art. 395, para. 1 *C.C.Q.*) and

[81] En somme, tandis que les deux premiers objectifs que poursuit le législateur avec l'introduction du patrimoine familial visent des situations conjoncturelles, son troisième objectif est résolument tourné vers l'avenir. En effet, il propose une nouvelle définition du mariage, qui inclut désormais une union ou association économique.

b) *Cadre juridique du mariage*

[82] Aujourd'hui, à la suite des réformes que je viens de résumer, le mariage entraîne l'imposition d'un cadre juridique destiné à régir les rapports mutuels des conjoints. Ce cadre est composé d'un régime primaire et d'un régime matrimonial légal ou conventionnel dont les effets se manifestent tant durant le mariage qu'à la rupture. Cependant, avant d'examiner les effets de chacun de ces régimes pendant et après le mariage, je rappelle qu'outre le décès d'un des époux, la rupture du mariage peut prendre la forme d'une séparation de corps, régie par le *Code civil du Québec*, ou d'un divorce, en vertu de la *Loi sur le divorce*, L.R.C. 1985, ch. 3 (2e suppl.).

(i) Régime primaire

[83] Le *Code civil du Québec* établit un régime primaire qui définit les effets fondamentaux du mariage. Ces effets sont impératifs, les époux ne pouvant y déroger ou y renoncer par contrat de mariage :

391. Les époux ne peuvent déroger aux dispositions du présent chapitre, quel que soit leur régime matrimonial.

[84] Le régime primaire gouverne ainsi certains aspects des rapports entre les époux et leur impose des droits, des devoirs et des obligations mutuels. Durant le mariage, les époux « se doivent mutuellement respect, fidélité, secours et assistance » et « sont tenus de faire vie commune » (art. 392, al. 2 et 3 *C.c.Q.*). « Ensemble, [ils] assurent la direction morale et matérielle de la famille » (art. 394 *C.c.Q.*), « choisissent de concert la résidence familiale » (art. 395, al. 1 *C.c.Q.*) et

they "contribute towards the expenses of the marriage in proportion to their respective means" (art. 396, para. 1 *C.C.Q.*). And arts. 401 to 408 *C.C.Q.* limit the exercise of each spouse's right of ownership in the family residence and the movable property serving for the use of the household during the marriage. Certain acts of alienation, hypothec and lease may not be performed by one spouse without the other spouse's consent. In addition, as we have seen, "[m]arriage entails the establishment of a family patrimony consisting of certain property of the spouses regardless of which of them holds a right of ownership in that property" (art. 414 *C.C.Q.*).

[85] Some of these duties are moral or extrapatrimonial in nature. For example, the duty of assistance concerns a person's obligation to support his or her spouse through affection, help, care and devotion: M. D.-Castelli and D. Goubau, *Le droit de la famille au Québec* (5th ed. 2005), at pp. 98-99; J. Pineau and M. Pratte, *La famille* (2006), at p. 132; Tétrault, *Droit de la famille*, at pp. 134-35; J.-P. Senécal, *Droit de la famille québécois*, vol. 1 (loose-leaf), ¶ 11-615.

[86] The duty of succour is economic in nature and involves providing the other spouse with the resources or support required for subsistence on the basis of his or her needs: Senécal, vol. 1, ¶ 11-625; Pineau and Pratte, at pp. 132-33 and 156-57; D.-Castelli and Goubau, at p. 99. More specifically, it relates to the spouses' *obligation of support* to one another: arts. 392 and 585 to 596.1 *C.C.Q.*

[87] The duty of succour lasts until the marriage is dissolved. Since separation from bed and board — although it loosens the marital bond by releasing the spouses from the obligation to live together — does not terminate the marriage, it does not terminate the other effects of marriage, including the duty of succour: art. 507 *C.C.Q.* This explains why a court granting a separation from bed and board may order either spouse to pay support to the other: art. 511 *C.C.Q.* Since the duty of succour is based solely on the respective needs of the spouses, an award of support is never automatic but depends

« contribuent aux charges du mariage à proportion de leurs facultés respectives » (art. 396, al. 1 *C.c.Q.*). Toujours durant le mariage, les art. 401 à 408 *C.c.Q.* limitent l'exercice du droit de propriété de chaque époux sur la résidence familiale et les meubles qui servent à l'usage du ménage. À ce titre, certains actes d'aliénation, d'hypothèque et de location ne peuvent être effectués par un époux sans le consentement de l'autre. De surcroît, comme nous l'avons vu, « [l]e mariage emporte constitution d'un patrimoine familial formé de certains biens des époux sans égard à celui des deux qui détient un droit de propriété sur ces biens » (art. 414 *C.c.Q.*).

[85] Certains de ces devoirs sont de nature morale ou extrapatrimoniale. Ainsi, le devoir d'assistance réfère à l'obligation d'apporter à son époux l'appui de son affection, de son aide, de ses soins et de son dévouement : M. D.-Castelli et D. Goubau, *Le droit de la famille au Québec* (5e éd. 2005), p. 98-99; J. Pineau et M. Pratte, *La famille* (2006), p. 132; Tétrault, *Droit de la famille*, p. 134-135; J.-P. Senécal, *Droit de la famille québécois*, vol. 1 (feuilles mobiles), ¶ 11-615.

[86] D'ordre économique, le devoir de secours vise la fourniture à l'autre époux des ressources ou aliments nécessaires à sa subsistance en fonction de ses besoins : Senécal, vol. 1, ¶ 11-625; Pineau et Pratte, p. 132-133 et 156-157; D.-Castelli et Goubau, p. 99. Plus précisément, il s'agit de l'*obligation alimentaire* entre époux : art. 392 et 585 à 596.1 *C.c.Q.*

[87] Ce devoir de secours dure jusqu'à la dissolution du mariage. Puisque la séparation de corps, bien qu'elle distende le lien matrimonial en libérant les époux de l'obligation de faire vie commune, ne rompt pas le mariage, elle ne met pas fin à ses autres effets, notamment au devoir de secours : art. 507 *C.c.Q.* Ceci explique pourquoi un tribunal prononçant la séparation de corps peut ordonner à l'un des époux de verser des aliments à son conjoint : art. 511 *C.c.Q.* Comme le devoir de secours ne s'exerce qu'en fonction des besoins respectifs des époux, l'octroi d'une pension

on each spouse's needs and ability to pay: arts. 512 and 587 *C.C.Q.*

[88] Unlike separation from bed and board, divorce dissolves marriage: art. 516 *C.C.Q.* This is why [TRANSLATION] "in the context of a divorce . . . the right to support is no longer based on the duty of succour, which is an effect of marriage, but derives from ss. 15.2 and 17 [of the *Divorce Act*]": Senécal, vol. 2, ¶ 65-770; see also Pineau and Pratte, at pp. 132-33; *Bracklow*, at paras. 20-21. At this stage, a support award will depend on the condition, means, needs and other circumstances of each spouse, including the length of time the spouses cohabited and the functions performed by each spouse during cohabitation.

[89] In the event of separation from bed and board or of divorce, the primary regime has consequences other than a possible support award. First, the value of the family patrimony is divided equally between the spouses: art. 416 *C.C.Q.* Second, a compensatory allowance may be awarded by a court on the application of either spouse: art. 427 *C.C.Q.* Third, where applicable, a court may award to either spouse the lease of the family residence (art. 409 *C.C.Q.*) and the ownership or use of certain movable property (art. 410 para. 1 *C.C.Q.*), or, to a spouse who has custody of the children, the use of the family residence (art. 410, para. 2 *C.C.Q.*).

(ii) Matrimonial Regime

[90] After deciding to marry and thus to be subject to the primary regime, spouses must choose a matrimonial regime to govern the rest of their financial relationship. They are free to select the regime they consider the most appropriate. As the Quebec Court of Appeal has pointed out, [TRANSLATION] "the matrimonial regime concept [is] based on the spouses' *freedom of choice* of regime": *G.B. v. C.C.*, [2001] R.J.Q. 1435, at para. 22 (emphasis in original). Spouses are also free to change their matrimonial regime by mutual agreement during their marriage: art. 438 *C.C.Q.*

alimentaire n'est jamais automatique. Il dépend des besoins et de la capacité de payer des conjoints : art. 512 et 587 *C.c.Q.*

[88] Contrairement à la séparation de corps, le divorce dissout le mariage : art. 516 *C.c.Q.* C'est pourquoi « en matière de divorce [. . .] le droit aux aliments tire son fondement, non plus dans le devoir de secours, qui est un effet du mariage, mais des articles 15.2 et 17 [de la *Loi sur le divorce*] » : Senécal, vol. 2, ¶ 65-770; voir également Pineau et Pratte, p. 132-133; *Bracklow*, par. 20-21. À ce stade, l'octroi d'une pension alimentaire dépendra des ressources, des besoins et de la situation générale de chaque époux, incluant la durée de la cohabitation et les fonctions qu'ont remplies les époux au cours de celle-ci.

[89] En cas de séparation de corps ou de divorce, outre l'octroi possible d'une pension alimentaire, le régime primaire entraîne certaines conséquences additionnelles. Premièrement, la rupture provoque la division, en parts égales, de la valeur du patrimoine familial : art. 416 *C.c.Q.* Deuxièmement, une prestation compensatoire peut être accordée par un tribunal sur demande de l'un des époux : art. 427 *C.c.Q.* Troisièmement, un tribunal peut, le cas échéant, attribuer à l'un des époux le bail de la résidence familiale (art. 409 *C.c.Q.*), la propriété ou l'usage de certains meubles (art. 410, al. 1 *C.c.Q.*), ainsi que l'usage de la résidence familiale si l'époux le réclamant exerce la garde des enfants (art. 410, al. 2 *C.c.Q.*).

(ii) Régime matrimonial

[90] Après avoir pris la décision de se marier et donc de se soumettre au régime primaire, les époux doivent choisir un régime matrimonial régissant le reste de leurs rapports pécuniaires. À cet effet, ils demeurent libres de sélectionner le régime qui leur semble le plus approprié. Comme l'indique la Cour d'appel du Québec, « la notion de régime matrimonial [est] fondée sur le concept de *liberté de choix* du régime par les époux » : *G.B. c. C.C.*, [2001] R.J.Q. 1435, par. 22 (en italique dans l'original). Ceux-ci sont d'ailleurs libres de modifier, d'un commun accord, leur régime matrimonial en cours de mariage : art. 438 *C.c.Q.*

[91] The *Civil Code* provides that spouses who, before the solemnization of their marriage, have not fixed their matrimonial regime in a marriage contract are subject by default to the legal regime of partnership of acquests, under which [TRANSLATION] "each spouse has the administration and free disposal of all his or her property, both private property and acquests, while subject to the regime but is required to partition the value of his or her acquests equally with the other spouse on the date of separation or dissolution": Roy, "Le régime juridique de l'union civile: entre symbolisme et anachronisme", at p. 183; arts. 432, 461 and 467 *C.C.Q.*

[91] Le *Code civil* dispose que les époux qui, avant la célébration du mariage, n'ont pas fixé par contrat de mariage leur régime matrimonial sont soumis, par défaut, au régime légal de la société d'acquêts, en vertu duquel « chaque époux conserve, durant le régime, l'administration et la libre disposition de tous ses biens, propres et acquêts, mais est tenu, au jour de la séparation ou de la dissolution, de partager également la valeur de ses acquêts avec l'autre conjoint » : Roy, « Le régime juridique de l'union civile : entre symbolisme et anachronisme », p. 183; art. 432, 461 et 467 *C.c.Q.*

[92] Alternatively, spouses who decide to enter into a marriage contract are free to organize their patrimonial relationship through "[a]ny kind of stipulation . . . subject to the imperative provisions of law and public order": art. 431 *C.C.Q.*

[92] Alternativement, les époux qui décident de conclure un contrat de mariage sont libres d'organiser leurs rapports patrimoniaux selon « toutes sortes de stipulations, sous réserve des dispositions impératives de la loi et de l'ordre public » : art. 431 *C.c.Q.*

[93] Spouses may also prefer the regime of conventional separation as to property to that of partnership of acquests, and can establish it by including a declaration to this effect in their marriage contract: art. 485 *C.C.Q.* Under this regime, the spouses, individually, have the administration, enjoyment and free disposal of all their property both during marriage and upon its breakdown: art. 486 *C.C.Q.* No distinction is drawn between private property and acquests, and no partition occurs at the time of separation or divorce, except in the case of property held in co-ownership and property over which neither spouse is able to establish an exclusive right of ownership. The latter type of property is presumed to be held by both spouses in undivided co-ownership: art. 487 *C.C.Q.*

[93] Au régime de la société d'acquêts, les époux peuvent en outre préférer le régime de séparation conventionnelle de biens en incluant une déclaration faite à cet effet dans leur contrat de mariage : art. 485 *C.c.Q.* Sous ce régime, chaque époux conserve l'administration, la jouissance et la libre disposition de tous ses biens tant durant le mariage qu'à la rupture : art. 486 *C.c.Q.* Aucune distinction n'est effectuée entre propres et acquêts et aucun partage ne survient lors de la séparation ou du divorce, sauf en ce qui a trait aux biens détenus en copropriété et sauf aux biens sur lesquels aucun des époux ne peut établir un droit exclusif de propriété qui seront alors présumés appartenir aux deux époux indivisément : art. 487 *C.c.Q.*

(2) Civil Union Spouses

(2) Les conjoints unis civilement

[94] On June 7, 2002, the Quebec legislature passed the *Act instituting civil unions and establishing new rules of filiation*, S.Q. 2002, c. 6. This Act provided same-sex couples, in particular, with a first mechanism for making their unions official, namely the civil union, which would also be available to opposite-sex couples. As Professor

[94] Le 7 juin 2002, le législateur québécois adopte la *Loi instituant l'union civile et établissant de nouvelles règles de filiation*, L.Q. 2002, ch. 6. Cette loi offre en particulier aux couples de même sexe un premier mécanisme pour officialiser leur union. Il s'agit de l'union civile qui est aussi accessible aux couples de sexe différent. Comme le

Tétrault notes, [TRANSLATION] "[a]t the time of its enactment, the Quebec legislature was responding to the fact that Parliament did not recognize the right of persons of the same sex to marry": *Droit de la famille*, at p. 571. That recognition would come three years later when Parliament enacted the *Civil Marriage Act*, S.C. 2005, c. 33.

[95] A civil union is defined as "a commitment by two persons 18 years of age or over who express their free and enlightened consent to live together and to uphold the rights and obligations that derive from that status": art. 521.1, para. 1 *C.C.Q.* Unlike marriage, which must be dissolved judicially, a civil union may be dissolved by way of a notarized joint declaration, provided that the spouses consent to the dissolution and settle all the consequences of the dissolution in an agreement: art. 521.13 *C.C.Q.* However, "[i]n the absence of a joint declaration dissolving the civil union executed before a notary or where the interests of the common children of the spouses are at stake, the dissolution of the union must be pronounced by the court": art. 521.17, para. 1 *C.C.Q.* It has also been possible, since the coming into force of the *Act to amend the Civil Code as regards marriage*, S.Q. 2004, c. 23, s. 7, for spouses to dissolve their civil union by getting married. In such a case, the effects of the civil union are maintained and are considered to be effects of the marriage from the date of the civil union, and the spouses' civil union regime becomes their marriage regime: art. 521.12, para. 2 *C.C.Q.*

[96] Article 521.6 *C.C.Q.* provides that civil union has significant mandatory effects and refers, for certain principles, to the *Civil Code*'s provisions on the effects of marriage:

521.6. The spouses in a civil union have the same rights and obligations.

They owe each other respect, fidelity, succour and assistance.

They are bound to live together.

The effects of the civil union as regards the direction of the family, the exercise of parental authority,

remarque le professeur Tétrault, « [a]u moment de son adoption, il s'agissait de la réponse du législateur québécois à l'absence de reconnaissance par le législateur fédéral du droit pour les personnes de même sexe de se marier » : *Droit de la famille*, p. 571. Cette reconnaissance viendra trois ans plus tard avec l'adoption par le Parlement canadien de la *Loi sur le mariage civil*, L.C. 2005, ch. 33.

[95] L'union civile est définie comme « l'engagement de deux personnes âgées de 18 ans ou plus qui expriment leur consentement libre et éclairé à faire vie commune et à respecter les droits et obligations liés à cet état » : art. 521.1, al. 1 *C.c.Q.* À la différence du mariage, dont la dissolution doit être judiciaire, l'union civile peut être dissoute par déclaration commune notariée si les conjoints y consentent et en règlent toutes les conséquences dans un accord : art. 521.13 *C.c.Q.* Cependant, « [à] défaut d'une déclaration commune de dissolution reçue devant notaire ou lorsque les intérêts des enfants communs des conjoints sont en cause, la dissolution doit être prononcée par le tribunal » : art. 521.17, al. 1 *C.c.Q.* Il est également permis, depuis l'entrée en vigueur de la *Loi modifiant le Code civil relativement au mariage*, L.Q. 2004, ch. 23, art. 7, de dissoudre l'union civile par le mariage subséquent des parties. Dans un tel cas, les effets de l'union civile sont maintenus et considérés comme des effets du mariage subséquent à compter de la date de l'union civile et le régime d'union civile des conjoints devient le régime matrimonial des époux : art. 521.12, al. 2 *C.c.Q.*

[96] Tel que prévu à l'art. 521.6 *C.c.Q.*, cette union civile emporte d'importants effets obligatoires et renvoie, pour certains principes, aux dispositions du *Code civil* traitant des effets du mariage :

521.6. Les conjoints ont, en union civile, les mêmes droits et les mêmes obligations.

Ils se doivent mutuellement respect, fidélité, secours et assistance.

Ils sont tenus de faire vie commune.

L'union civile, en ce qui concerne la direction de la famille, l'exercice de l'autorité parentale, la contribution

contribution towards expenses, the family residence, the family patrimony and the compensatory allowance are the same as the effects of marriage, with the necessary modifications.

Whatever their civil union regime, the spouses may not derogate from the provisions of this article.

[97] While in their union, civil union spouses are subject to the duty of succour and therefore owe each other support. The duty of succour ends with the dissolution of the union. However, on application by either spouse, a court may, upon or after pronouncing the dissolution, order one of the spouses to pay support to the other: art. 521.17, para. 3 *C.C.Q.*

[98] I note in passing that no factors specific to civil union spouses for determining the amount of support are set out in the *Civil Code*. The courts must therefore refer to the general principles stated in art. 587 *C.C.Q.*: see, *inter alia*, Senécal, vol. 2, ¶ 65-815; Tétrault, *Droit de la famille*, at p. 587.

[99] In addition to being subject on a mandatory basis to this primary regime, civil union spouses have a legal regime that is identical to the matrimonial regime of partnership of acquests that applies to married spouses. Should they wish to do so, persons planning to enter into a civil union can also opt out of this legal regime by way of a contract prepared before the solemnization of their union and adopt a regime of separation as to property:

521.8. A civil union regime may be created by and any kind of stipulation may be made in a civil union contract, subject to the imperative provisions of law and public order.

Spouses who, before the solemnization of their civil union, have not so fixed their civil union regime are subject to the regime of partnership of acquests.

Civil union regimes, whether legal or conventional, and civil union contracts are subject to the same rules as are applicable to matrimonial regimes and marriage contracts, with the necessary modifications.

aux charges, la résidence familiale, le patrimoine familial et la prestation compensatoire, a, compte tenu des adaptations nécessaires, les mêmes effets que le mariage.

Les conjoints ne peuvent déroger aux dispositions du présent article quel que soit leur régime d'union civile.

[97] Pendant la durée de l'union, les conjoints unis civilement sont soumis au devoir de secours et se doivent donc des aliments. Ce devoir de secours prend fin avec la dissolution de l'union. Toutefois, sur demande d'un des conjoints, il est possible pour un tribunal, au moment où il prononce la dissolution ou après celle-ci, d'ordonner à l'un des conjoints de verser des aliments à l'autre : art. 521.17, al. 3 *C.c.Q.*

[98] Je remarque au passage que le *Code civil* ne prévoit pas de facteurs de fixation d'aliments propres à l'union civile. Les tribunaux doivent donc se référer aux principes généraux contenus à l'art. 587 *C.c.Q.* : voir notamment Senécal, vol. 2, ¶ 65-815; Tétrault, *Droit de la famille*, p. 587.

[99] Outre cet assujettissement impératif au régime primaire, l'union civile propose aux conjoints unis civilement un régime légal identique au régime matrimonial de la société d'acquêts qui s'applique aux époux. Il est également possible pour les personnes qui désirent s'unir civilement de déroger à ce régime légal par un contrat préparé avant la célébration de leur union, pour s'assujettir, s'ils le veulent, à un régime de séparation de biens :

521.8. Il est permis, par voie contractuelle, d'établir un régime d'union civile et de faire toutes sortes de stipulations, sous réserve des dispositions impératives de la loi et de l'ordre public.

Les conjoints qui, avant la célébration de leur union, n'ont pas ainsi fixé leur régime sont soumis au régime de la société d'acquêts.

Le régime d'union civile, qu'il soit légal ou conventionnel, et le contrat d'union civile sont, compte tenu des adaptations nécessaires, soumis aux règles applicables respectivement aux régimes matrimoniaux et au contrat de mariage.

(3) *De Facto* Spouses

(a) *Historical Review of the Situation of De Facto Spouses Under the Civil Code of Lower Canada Before the 1980 Reforms*

[100] It should be noted at the outset that, until the family law reform and the coming into force of part of the draft *Civil Code of Québec* in 1981, the legislative treatment of the *de facto* union, then referred to as "concubinage", was negative. As several authors have pointed out, the *de facto* union, as an [TRANSLATION] "obstacle to family stability and peace", was considered to be suspect and "contrary to public order and good morals", and had an "unfavourable" if not "immoral" character that the government could not encourage: see, *inter alia*, E. Deleury and M. Cano, "Le concubinage au Québec et dans l'ensemble du Canada: Deux systèmes juridiques, deux approches", in J. Rubellin-Devichi, ed., *Des concubinages dans le monde* (1990), 85, at p. 88; A. Cossette, "Le concubinage au Québec" (1985), 88 *R. du N.* 42, at pp. 45 and 53; Tétrault, "L'union civile: j'me marie, j'me marie pas", at p. 127; Lefebvre, at p. 11; Tétrault, *Droit de la famille*, at pp. 839-49.

[101] This disapproval of the *de facto* union was expressed in legislation in two ways: one concerned the relationships of *de facto* spouses, the other the treatment of the children born of such unions. With regard to the former, art. 768 *C.C.L.C.* limited "[g]ifts *inter vivos* made in favor of the person with whom the donor has lived in concubinage . . . to maintenance". In this way, the legislature prohibited *de facto* spouses from organizing their patrimonial relationships. The law denied them the possibility of establishing a legal framework for their cohabitation and limited their freedom of contract. Notary Jean Sylvestre described the impact of this prohibition as follows:

[TRANSLATION] Agreements between concubinaries were, for all practical purposes, unthinkable until [1981].

By prohibiting all gifts *inter vivos* between concubinaries and persons who had lived in concubinage, art. 768

(3) Les conjoints de fait

a) *Rappel historique de la situation des conjoints de fait sous le Code civil du Bas Canada jusqu'aux réformes de 1980*

[100] Au départ, rappelons que jusqu'à la réforme du droit de la famille et à l'entrée en vigueur d'une partie du projet de *Code civil du Québec* en 1981, l'union de fait, alors dénommée « concubinage », faisait l'objet d'un traitement législatif défavorable. Comme le signalent plusieurs auteurs, cette union, en tant qu'« obstacle à la stabilité et à la paix des familles », était considérée suspecte, « contraire à l'ordre public et aux bonnes mœurs » et était entachée d'un « caractère péjoratif » sinon « immoral » que l'État ne pouvait favoriser : voir notamment E. Deleury et M. Cano, « Le concubinage au Québec et dans l'ensemble du Canada : Deux systèmes juridiques, deux approches », dans J. Rubellin-Devichi, dir., *Des concubinages dans le monde* (1990), 85, p. 88; A. Cossette, « Le concubinage au Québec » (1985), 88 *R. du N.* 42, p. 45 et 53; Tétrault, « L'union civile : j'me marie, j'me marie pas », p. 127; Lefebvre, p. 11; Tétrault, *Droit de la famille*, p. 839-849.

[101] Sur le plan législatif, cette désapprobation à l'égard de l'union de fait se manifeste alors sous deux aspects touchant d'une part aux rapports des conjoints de fait entre eux et, d'autre part, au traitement des enfants issus de ces unions. En ce qui a trait aux rapports entre conjoints de fait, l'art. 768 *C.c.B.C.* limitait « [l]es donations entre vifs faites par le donateur à celui ou à celle avec qui il a vécu en concubinage [. . .] à des aliments ». De ce fait, le législateur interdisait tout aménagement des rapports patrimoniaux entre conjoints de fait. La loi leur niait la possibilité de donner un encadrement légal à leur vie commune et limitait leur liberté contractuelle. Le notaire Jean Sylvestre décrit ainsi l'impact de cette prohibition :

Jusqu'[en 1981], il était, à toutes fins pratiques, impensable de prévoir des accords entre concubins.

En effet, l'article 768 C.C.B.-C., en prohibant toutes donations entre vifs entre concubins et entre personnes

C.C.L.C. closed the door on all financial arrangements between persons in a *de facto* union that were gratuitous or in the nature of a liberality or gift.

Since one or more of these characteristics was almost always present in what were known as agreements between spouses or concubinaries, it was impossible to consider making such agreements between concubinaries.

("Les accords entre concubins", [1981] *C.P. du N.* 195, at paras. 1-3)

[102] Moreover, the children of *de facto* spouses, or "natural" children, were denied a number of rights granted to "legitimate" children, those whose parents were married: see J.-L. Baudouin, "Examen critique de la situation juridique de l'enfant naturel" (1966), 12 *McGill L.J.* 157, at p. 158. Historically, unless they were legitimated by their parents' getting married, natural children could not inherit from their parents unless the latter had provided for them in a will. Nor could they claim from their parents performance of the obligations of maintenance and education that married spouses had to their legitimate children. The [TRANSLATION] "*Civil Code of Lower Canada* [thus] distinguished legitimate, natural, adulterine and incestuous children": Moore, at p. 266. Professor Jean-Louis Baudouin, as he then was, explained the rationale for this distinction:

[TRANSLATION] The legal reasons given to justify ignoring the natural family group can be seen clearly upon reading our Code . . .: a desire to protect the rights of legitimate families, a refusal to condone conduct contrary to good morals, a refusal to encourage the proliferation of *de facto* unions, etc. [pp. 157-58]

[103] When it enacted the *Act to establish a new Civil Code and to reform family law*, the legislature moved away from this negative, even hostile, view of the *de facto* union. The prohibition against gifts *inter vivos* was removed by repealing art. 768 *C.C.L.C. De facto* spouses became free to organize their relationships with one another through legally valid and binding agreements. From that time on, it was open to them [TRANSLATION]

ayant vécu en concubinage, fermait la porte à tous arrangements financiers quelconques entre personnes vivant en union libre, revêtant un caractère de libéralité, de gratuité, ou de don.

Or, puisqu'on retrouve presque toujours l'un ou l'autre de ces caractères dans ce qu'il est convenu d'appeler des accords entre conjoints ou concubins, il était impossible de penser à convenir de tels accords entre concubins.

(« Les accords entre concubins », [1981] 1 *C.P. du N.* 195, par. 1-3)

[102] Par ailleurs, les enfants des conjoints de fait ou « enfants naturels » étaient privés d'un certain nombre de droits octroyés aux « enfants légitimes », soit ceux dont les parents étaient mariés : voir J.-L. Baudouin, « Examen critique de la situation juridique de l'enfant naturel » (1966), 12 *R.D. McGill* 157, p. 158. Historiquement, et à moins d'être légitimés par le mariage subséquent de leurs parents, les enfants naturels ne pouvaient hériter de leurs parents à moins que ceux-ci n'aient testé en leur faveur. Ils ne pouvaient non plus réclamer de leurs parents l'exécution des obligations relatives à l'entretien et à l'éducation que les conjoints mariés devaient à leurs enfants légitimes. Le « *Code civil du Bas Canada* établissait [ainsi] une distinction entre les enfants légitimes, naturels, adultérins et incestueux » : Moore, p. 266. Jean-Louis Baudouin, alors professeur de droit, explique la raison d'être d'une telle distinction :

Les raisons juridiques qui ont été invoquées pour justifier l'ignorance du groupe de la famille naturelle transparaissent clairement à la lecture de notre Code [. . .] : désir de protéger les droits de la famille légitime, refus de sanctionner une conduite contraire aux bonnes mœurs, refus d'encourager la prolifération des unions libres, etc. [p. 157-158]

[103] En adoptant la *Loi instituant un nouveau Code civil et portant réforme du droit de la famille*, le législateur s'écarte de cette vision négative hostile à l'union de fait. La prohibition des donations entre vifs est levée par l'abrogation de l'art. 768 *C.c.B.C.* Les conjoints de fait deviennent alors libres d'organiser leurs rapports mutuels à l'aide d'ententes juridiquement valides et exécutoires. Dès lors, il leur est permis « de convenir librement,

"to enter into agreements freely [in what was] virtually the equivalent of a matrimonial regime for them": Sylvestre, at para. 8. According to Professor Benoît Moore, this change confirmed the disappearance of the legislature's hostility toward the *de facto* union: p. 267.

[104] The legislature also eliminated the distinctions between legitimate, natural, adulterine and incestuous children. It thus established the principle that children are equal regardless of the circumstances of their birth and the nature of their filiation. Article 522 *C.C.Q.* now codifies the principle that all children whose filiation is established have the same rights and obligations. The rules on parental authority (arts. 597 *C.C.Q. et seq.*), the obligation of support (art. 585 *C.C.Q.*) and intestate succession (art. 655 *C.C.Q.*) therefore apply to all children. In addition, art. 604 *C.C.Q.* provides that, "[i]n the case of difficulties relating to the exercise of parental authority, the person having parental authority may refer the matter to the court, which will decide in the interest of the child after fostering the conciliation of the parties". Thus, when *de facto* spouses cease living together, a court can rule on child custody and access in the same way as it might in a case involving the separation of married spouses. According to D. Goubau, G. Otis and D. Robitaille, [TRANSLATION] "the Civil Code [thus] reflects the fact that marriage is no longer required as a framework for the family": "La spécificité patrimoniale de l'union de fait: le libre choix et ses 'dommages collatéraux'" (2003), 44 *C. de D.* 3, at p. 13.

(b) *Legislative Policy Respecting the De Facto Union Following the 1980 Reform*

[105] In the 1980 reform, the Quebec legislature established the rule of freedom of contract for *de facto* spouses in organizing their relationships with one another. At the same time, as I mentioned above, it redefined the mandatory content of marriage by introducing a primary regime that no spouse could opt out of. Whether the *de facto* union should be redefined by imposing a similar mandatory

quasiment l'équivalent d'un régime matrimonial entre eux » : Sylvestre, par. 8. Pour le professeur Benoît Moore, ce changement confirme la disparition de l'hostilité législative envers l'union de fait : p. 267.

[104] Le législateur élimine également les distinctions entre enfants légitimes, naturels, adultérins et incestueux. Il établit alors le principe de l'égalité des enfants quelles que soient les circonstances de leur naissance et la nature de leur filiation. L'article 522 *C.c.Q.* codifie désormais le principe selon lequel les enfants dont la filiation est établie possèdent les mêmes droits et obligations. Dès lors, les règles relatives à l'autorité parentale (art. 597 *C.c.Q.* et suiv.), à l'obligation alimentaire (art. 585 *C.c.Q.*) et à la succession *ab intestat* (art. 655 *C.c.Q.*) s'appliquent à tous les enfants. L'article 604 *C.c.Q.* prévoit aussi qu'« [e]n cas de difficultés relatives à l'exercice de l'autorité parentale, le titulaire de l'autorité parentale peut saisir le tribunal qui statuera dans l'intérêt de l'enfant après avoir favorisé la conciliation des parties ». C'est ainsi que lors de la cessation de la vie commune des conjoints de fait, un tribunal peut statuer sur la garde des enfants et les droits d'accès comme il aurait été appelé à le faire en cas de séparation de conjoints mariés. Selon les auteurs D. Goubau, G. Otis et D. Robitaille, c'est ainsi que « le Code civil reconnaît [. . .] que le mariage n'est plus le cadre obligé de la famille » : « La spécificité patrimoniale de l'union de fait : le libre choix et ses "dommages collatéraux" » (2003), 44 *C. de D.* 3, p. 13.

b) *Politique législative à l'égard de l'union de fait à la suite de la réforme de 1980*

[105] Par la réforme de 1980, le législateur québécois consacre la liberté contractuelle des conjoints de fait dans l'aménagement de leurs rapports mutuels. Au même moment, comme je l'ai exposé précédemment, il redéfinit le contenu impératif du mariage en introduisant un régime primaire auquel nul époux ne peut déroger. L'opportunité de redéfinir l'union de fait en lui imposant également

legislative framework on it was also discussed in the Quebec National Assembly at that time.

[106] One proposal that had already been made by the Civil Code Revision Office was to require *de facto* spouses to contribute proportionately toward household expenses: *Report on the Québec Civil Code* (1978), vol. II — *Commentaries*, t. 1, at pp. 113 and 206; see also Lefebvre, at p. 18. With this in mind, the Office proposed art. 338 in its draft *Civil Code*:

338. *De facto* consorts owe each other support as long as they live together.

However, if exceptional circumstances justify it, the court may order a *de facto* consort to pay support to his spouse once they no longer live together.

(*Report on the Québec Civil Code* (1978), vol. I — *Draft Civil Code*, at p. 119)

[107] However, Quebec's Conseil du statut de la femme, an independent agency created by the legislature in 1973 to advise the government on all matters relating to the status of women, was against imposing a mandatory legislative framework to govern relationships between *de facto* spouses. Criticizing the proposals of the Civil Code Revision Office on the basis that they limited the freedom of *de facto* spouses, the Conseil stated that

[TRANSLATION] . . . this approach violates the animating principle of *de facto* spouses, namely freedom of choice. To respect the will of the parties involved, the [Conseil] recommends that no obligations result from a *de facto* union.

. . .

Our position on the *de facto* union is based on true recognition of the equality and autonomy of individuals. This is why we consider it essential to emphasize the non-institutionalization of this type of union and to respect the will of the parties involved.

(*Mémoire présenté à la Commission parlementaire sur la réforme du droit de la famille* (1979), at

un tel cadre législatif impératif fait alors l'objet de discussions à l'Assemblée nationale du Québec.

[106] Déjà, l'Office de révision du Code civil avait proposé notamment d'instaurer entre les conjoints de fait une obligation de contribution proportionnelle aux charges du ménage : *Rapport sur le Code civil du Québec* (1978), vol. II — *Commentaires*, t. 1, p. 115 et 208; voir également Lefebvre, p. 18. Dans cette perspective, l'art. 338 du projet de *Code civil* de l'Office propose que :

338. Les époux de fait se doivent des aliments tant qu'ils font vie commune.

Toutefois, le tribunal peut, si des circonstances exceptionnelles le justifient, ordonner à un époux de fait de verser des aliments à l'autre après la cessation de la vie commune.

(*Rapport sur le Code civil du Québec* (1978), vol. I — *Projet de Code civil*, p. 119)

[107] Cependant, le Conseil du statut de la femme du Québec, organisme indépendant créé par le législateur en 1973 pour conseiller le gouvernement sur l'ensemble des questions relatives à la condition des femmes, s'opposait à l'imposition d'un cadre législatif impératif régissant les relations entre conjoints de fait. Critiquant les propositions de l'Office de révision du Code civil parce qu'elles limitent la liberté des conjoints de fait, le Conseil déclare que :

. . . cette attitude constitue une atteinte au principe du libre choix qui anime les conjoints de fait. Le [Conseil] préconise qu'aucune obligation ne doive résulter de l'union de fait pour respecter la volonté des parties en cause.

. . .

Notre prise de position concernant l'union de fait repose sur une véritable reconnaissance de l'égalité des personnes et leur autonomie. C'est pourquoi il nous apparaît essentiel d'insister sur la non-institutionnalisation de ce genre d'union et de respecter la volonté des parties en présence.

(*Mémoire présenté à la Commission parlementaire sur la réforme du droit de la famille* (1979),

pp. 23-24; see also *Mémoire du Conseil du statut de la femme présenté lors de la consultation générale sur les droits économiques des conjoints* (1988), at p. 40.)

[108] At the end of the parliamentary debate, the then Minister of Justice rejected the recommendation that a legislative framework be imposed on *de facto* unions. Instead, he decided to preserve the freedom of individuals to choose a form of union whose content was not predetermined. He stated the following:

[TRANSLATION] Another case requiring a concrete application of the principle that individuals should be free to choose how to organize their family unit is that of the *de facto* union. Most of the briefs submitted to the parliamentary justice committee on family law reform in March 1979 asked the legislature to respect the desire of unmarried couples to distinguish their choice of lifestyle from marriage. We therefore considered it appropriate not to interfere with this freely chosen lifestyle; there is thus no need to institutionalize or regulate it.

Moreover, to fully respect this option, it seemed reasonable to put *de facto* spouses on the same footing as other individuals by proposing the abolition of the restrictions that continue to apply to them today under article 768 of the Civil Code, which limits their right to make gifts to each other.

(National Assembly, *Journal des débats*, vol. 23, No. 15, 6th Sess., 31st Leg., December 4, 1980, at p. 608 (second reading of Bill 89). This position was supported by the then leader of the official Opposition, who stated the following at p. 663: [TRANSLATION] "Regarding the *de facto* union, therefore, I think we should proceed very carefully. If people do not want to give their union a legal or statutory status themselves, such a status cannot be forced on them either.")

[109] The legislature would debate but reaffirm this position several times during the successive reforms that have modified Quebec family law since 1980. On the occasion of each reform, the legislature reiterated its choice not to regulate the

p. 23-24; voir également *Mémoire du Conseil du statut de la femme présenté lors de la consultation générale sur les droits économiques des conjoints* (1988), p. 40.)

[108] Au terme des débats parlementaires, le ministre de la Justice de l'époque rejette la recommandation d'imposer un cadre législatif à l'union de fait. Il décide plutôt de préserver la liberté des individus de choisir une forme d'union dont le contenu n'est pas prédéterminé. Il s'exprime ainsi :

Une autre application concrète du principe de la liberté des individus dans le choix de la forme d'organisation de leur cellule familiale doit également exister à l'égard de l'union de fait. Lors de la commission parlementaire de la justice sur la réforme du droit de la famille en mars 1979, la plupart des mémoires soumis demandaient aux législateurs de respecter cette volonté des couples non mariés de distinguer leur choix de formule de vie par rapport au mariage. Il nous a donc paru opportun de ne pas intervenir à l'égard de ce mode de vie librement décidé; il n'y a donc pas lieu de l'institutionnaliser ou de le réglementer.

Par ailleurs, dans la logique du respect absolu de cette formule, il a paru raisonnable de placer les personnes qui vivent en union de fait sur le même pied que les autres justiciables en proposant d'abolir les restrictions que leur impose encore aujourd'hui l'article 768 du Code civil qui limite leur droit de se faire des donations.

(Assemblée nationale, *Journal des débats*, vol. 23, nº 15, 6e sess., 31e lég., 4 décembre 1980, p. 608 (deuxième lecture du projet de loi 89). Cette position est appuyée par le chef de l'Opposition officielle de l'époque. À la p. 663, celui-ci s'exprime ainsi : « Sur l'union de fait, par conséquent, je pense qu'il faut procéder avec beaucoup de prudence. Si les personnes ne veulent pas conférer elles-mêmes un caractère juridique ou légal à leur union, il ne peut pas être question de le leur imposer de force, non plus. »)

[109] Cette position sera discutée mais réaffirmée à plusieurs reprises par le législateur au cours des réformes qui ont modifié successivement le droit de la famille québécois depuis 1980. À l'occasion de chaque réforme, le législateur réitère son choix de

private relationships of *de facto* spouses on the basis that their individual autonomy and freedom should be respected: see, for example, the remarks of the Minister for the Status of Women at the time of the creation of the family patrimony (National Assembly, *Journal des débats*, vol. 30, No. 125, 2nd Sess., 33rd Leg., June 8, 1989, at p. 6487), of the Minister of Justice two years later in the context of the reform of the *Civil Code* (National Assembly, Subcommittee on Institutions, *Journal des débats*, No. 22, 1st Sess., 34th Leg., November 19, 1991, at p. 859), of the Minister of Justice at the time of the recognition of same-sex *de facto* spouses in social legislation (National Assembly, *Journal des débats*, No. 197, 2nd Sess., 35th Leg., June 18, 1998, at pp. 12069-70), and of the Minister of Justice at the time of the establishment of the civil union (National Assembly, Standing Committee on Institutions, *Journal des débats*, vol. 37, No. 46, 2nd Sess., 36th Leg., February 12, 2002, at pp. 4-5).

[110] At the time of the establishment of the civil union in 2002, the Minister of Justice clearly stated that Quebec law now [TRANSLATION] "recognizes three types of conjugality: that of married spouses, that of civil union spouses and that of *de facto* spouses". He also confirmed that the bill instituting the civil union [TRANSLATION] "does not propose any amendments that affect the conditions under which *de facto* spouses live together. They remain free to establish the terms and conditions governing their relationships": National Assembly, *Journal des débats*, vol. 37, No. 96, 2nd Sess., 36th Leg., May 7, 2002, at p. 5816.

(c) *Relationships Between De Facto Spouses: A Regime of Freedom of Contract*

[111] As we have seen, married and civil union spouses are, both during the marriage or union and upon its breakdown, subject to the mandatory application of the primary regime and the suppletive application of the regime of partnership of acquests. The situation is very different for *de facto* spouses.

ne pas réglementer les rapports privés des conjoints de fait sur la base du respect de leur autonomie et liberté individuelles : voir, à titre d'exemple, les propos de la ministre de la Condition féminine tenus à l'époque de la création du patrimoine familial (Assemblée nationale, *Journal des débats*, vol. 30, nº 125, 2e sess., 33e lég., 8 juin 1989, p. 6487), ceux du ministre de la Justice tenus, deux ans plus tard, dans un contexte de réforme du *Code civil* (Assemblée nationale, Sous-commission des institutions, *Journal des débats*, nº 22, 1re sess., 34e lég., 19 novembre 1991, p. 859), ceux du ministre de la Justice tenus lors de la reconnaissance des conjoints de fait de même sexe au sein des lois sociales (Assemblée nationale, *Journal des débats*, nº 197, 2e sess., 35e lég., 18 juin 1998, p. 12069-12070) et ceux du ministre de la Justice tenus lors de la création de l'union civile (Assemblée nationale, Commission permanente des institutions, *Journal des débats*, vol. 37, nº 46, 2e sess., 36e lég., 12 février 2002, p. 4-5).

[110] Lors de la création de l'union civile en 2002, le ministre de la Justice affirme clairement que le droit québécois « reconnaît [maintenant] trois types de conjugalité : celle des conjoints unis en mariage, celle des conjoints en union civile et celle des conjoints de fait ». Il confirme également que le projet de loi instituant l'union civile « ne propose aucune modification touchant la modalité de vie commune des conjoints de fait qui conservent ainsi la liberté d'établir les modalités régissant leur couple » : Assemblée nationale, *Journal des débats*, vol. 37, nº 96, 2e sess., 36e lég., 7 mai 2002, p. 5816.

c) *Relations entre conjoints de fait : un régime de liberté contractuelle*

[111] On a vu que les relations entre époux et entre conjoints unis civilement, tant durant la relation qu'à la rupture, sont soumises à l'application impérative du régime primaire ainsi qu'à l'application supplétive de la société d'acquêts. La situation diffère considérablement en ce qui concerne les conjoints de fait.

[112] As I mentioned above, the *Civil Code of Québec* does not lay down the terms of the union of *de facto* spouses. The law imposes no duty of assistance and succour on them, and thus no obligation of support. The sharing of household expenses is left to their discretion; they are not required to contribute toward those expenses in proportion to their respective means. Nor are they required to choose the family residence together. No mandatory provisions apply to limit the exercise of their rights of ownership in the family residence. A *de facto* spouse who is the sole owner of the residence can therefore sell it or lease it without the other spouse's consent. A *de facto* union does not create a family patrimony, is not subject to the legal matrimonial regime of partnership of acquests and does not entitle a spouse to a compensatory allowance.

[113] A *de facto* spouse continues, both while living with the other spouse and after their relationship breaks down, to own any property he or she acquired before or during their union. Any change in this situation must be consented to by the spouse whose rights are affected. Thus, under the *Act respecting the Québec Pension Plan*, an application for the partition of pensionable earnings accrued during the period in which *de facto* spouses lived together requires the consent of both of them. Similarly, the *Supplemental Pension Plans Act*, R.S.Q., c. R-15.1, which establishes the legal framework for private pension plans, permits former *de facto* spouses to partition benefits accumulated under a member's pension plan only if both of them consent.

[114] 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: on the possible content of such agreements, see Tétrault, "L'union civile: j'me marie, j'me marie pas", at pp. 133-34; Tétrault, *Droit de la famille*, at pp. 870-71; A. Roy, "La charte de vie commune

[112] Comme je l'ai souligné, le *Code civil du Québec* n'encadre pas les termes de l'union entre conjoints de fait. La loi n'impose à ces conjoints aucun devoir d'assistance et de secours, donc d'obligation alimentaire. Le partage des charges du ménage est laissé à leur discrétion; ils ne sont pas tenus d'y contribuer à proportion de leurs facultés respectives. Ils n'ont pas d'obligation de choisir de concert la résidence familiale. L'exercice de leurs droits de propriété sur cette dernière n'est pas limité par l'application de dispositions impératives. Dès lors, un conjoint de fait propriétaire peut vendre ou louer la résidence dont il est l'unique propriétaire sans obtenir le consentement de l'autre conjoint. L'union de fait ne crée pas de patrimoine familial. Elle échappe aussi au régime matrimonial légal de la société d'acquêts et ne donne pas ouverture à l'octroi d'une prestation compensatoire.

[113] Tant durant la vie commune qu'à la rupture, le conjoint de fait demeure le propriétaire des biens qu'il a acquis avant ou pendant la vie commune. Toute modification de cet état de fait nécessite le consentement du conjoint dont les droits sont affectés. Ainsi, en vertu de la *Loi sur le régime de rentes du Québec*, le consentement de chacun des conjoints de fait qui se séparent est requis afin de demander le partage des gains admissibles accumulés au cours de la période de vie commune. De même, la *Loi sur les régimes complémentaires de retraite*, L.R.Q., ch. R-15.1, qui établit le cadre juridique des régimes de retraite privés, ne permet aux ex-conjoints de fait de partager entre eux les droits accumulés au titre du régime de retraite du participant que lorsque chacun d'eux y consent.

[114] 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 : pour le contenu potentiel de telles ententes, voir Tétrault, « L'union civile : j'me marie, j'me marie pas », p. 133-134; Tétrault, *Droit de la famille*, p. 870-871; A. Roy, « La charte de vie commune ou

ou l'émergence d'une pratique réflexive du contrat conjugal" (2007), 41 *R.J.T.* 399. Such agreements are commonly referred to as "cohabitation agreements".

[115] As some authors have noted, in light of the Quebec jurisprudence, [TRANSLATION] "there is no longer any doubt that contracts between *de facto* spouses are valid": Jarry, at p. 134. The Quebec courts have held that *de facto* spouses can validly enter into contracts that provide that the rules on partition of the family patrimony will apply should their relationships break down (*Couture v. Gagnon*, [2001] R.J.Q. 2047 (C.A.), leave to appeal refused, [2002] 3 S.C.R. vii), contracts that contemplate an obligation to pay spousal support should cohabitation cease (*Ponton v. Dubé*, 2005 QCCA 413 (CanLII)), and contracts that grant a right to exclusive use of the family residence after separation (*Bourbonnais v. Pratt*, 2006 QCCS 5611, [2007] R.D.F. 124). According to the Quebec Court of Appeal, [TRANSLATION] "[s]uch agreements can even provide for the equivalent of a compensatory allowance": *M.B. v. L.L.*, [2003] R.D.F. 539, at para. 30.

[116] In the absence of such agreements, the general law applies to any patrimonial dispute that results from the end of the spouses' cohabitation. Since each of the *de facto* spouses continues to own any property he or she acquired individually before or while they lived together, a spouse who proves his or her sole ownership of movable property can revendicate it. Where property is owned in undivided co-ownership, either spouse can force the other to proceed to the partition and licitation of the undivided property, since no one is bound to remain in indivision (art. 1030 *C.C.Q.*).

[117] Finally, *de facto* spouses who believe that they were wronged when their union broke down can bring an action based on unjust enrichment, the rules for which have been codified in arts. 1493 to 1496 *C.C.Q.* since 1994. That unjust enrichment is applicable to relationships between *de facto* spouses was confirmed by this Court in *Peter v. Beblow*, [1993] 1 S.C.R. 980. The principle of unjust enrichment must be interpreted cautiously

l'émergence d'une pratique réflexive du contrat conjugal » (2007), 41 *R.J.T.* 399. Ces ententes sont communément appelées « contrat de vie commune » ou « contrat de cohabitation ».

[115] Comme le constatent certains auteurs, la jurisprudence québécoise « ne laisse plus de doute sur la validité des contrats entre conjoints de fait » : Jarry, p. 134. En effet, les tribunaux québécois ont reconnu que les conjoints de fait peuvent validement conclure des contrats qui prévoient l'application des règles de partage du patrimoine familial à la rupture (*Couture c. Gagnon*, [2001] R.J.Q. 2047 (C.A.), autorisation d'appel refusée, [2002] 3 R.C.S. vii), qui envisagent l'octroi d'une obligation alimentaire entre conjoints après la fin de la cohabitation (*Ponton c. Dubé*, 2005 QCCA 413 (CanLII)) ou qui accordent un droit d'usage exclusif de la résidence familiale après la séparation (*Bourbonnais c. Pratt*, 2006 QCCS 5611, [2007] R.D.F. 124). Selon la Cour d'appel du Québec, « [d]e telles conventions peuvent même prévoir l'équivalent d'une prestation compensatoire » : *M.B. c. L.L.*, [2003] R.D.F. 539, par. 30.

[116] À défaut de telles ententes, le droit commun s'applique à tout conflit patrimonial découlant de la fin de la vie commune. Puisque les conjoints de fait demeurent chacun propriétaires des biens qu'ils ont acquis individuellement avant ou pendant leur vie commune, le conjoint qui prouve être propriétaire unique d'un bien meuble pourra le revendiquer. En cas d'indivision, chacun des conjoints pourra forcer l'autre à procéder au partage et licitation des biens indivis, nul n'étant tenu de demeurer dans l'indivision (art. 1030 *C.c.Q.*).

[117] Finalement, les conjoints de fait qui se croient lésés lors la rupture de leur union disposent du recours fondé sur l'enrichissement injustifié, codifié depuis 1994 aux art. 1493 à 1496 *C.c.Q.* L'applicabilité de cette doctrine aux rapports entre conjoints de fait a été confirmée par notre Cour dans l'arrêt *Peter c. Beblow*, [1993] 1 R.C.S. 980. Le principe de l'enrichissement injustifié doit toutefois recevoir une interprétation prudente, généreuse,

but generously, in a manner consistent with the conditions originally established by the Court in *Cie Immobilière Viger Ltée v. Lauréat Giguère Inc.*, [1977] 2 S.C.R. 67, which are now set out in art. 1493 *C.C.Q.* As Dalphond J.A. of the Quebec Court of Appeal explained, it should be used [TRANSLATION] "solely to compensate one party for a contribution, in property or services, that enabled the other party to be in a better position than he or she would have been in had the parties not lived together, in short, that enriched the other party": *M.B. v. L.L.*, at para. 39.

[118] To obtain compensation under arts. 1493 *C.C.Q. et seq.*, a *de facto* spouse alleging unjust enrichment must therefore prove on a balance of probabilities that the following conditions are met: an enrichment, an impoverishment, a correlation between the enrichment and the impoverishment, and the absence of justification, of evasion of the law and of any other remedy: *Cie Immobilière Viger*; *Peter v. Beblow*; *M.B. v. L.L.*, at para. 34; J.-L. Baudouin and P.-G. Jobin, *Les obligations* (6th ed. 2005), by P.-G. Jobin with N. Vézina, at paras. 566 *et seq.*

[119] As this Court held in *Peter v. Beblow*, a *de facto* spouse can benefit from certain rebuttable presumptions that make it easier to discharge his or her burden of proof. For example, in the case of a long-term *de facto* union, a court can presume, on the one hand, that there is a correlation between the enrichment of one spouse and the impoverishment of the other and, on the other hand, that there was no reason for the enrichment: *Peter v. Beblow*, at pp. 1013 and 1018; *M.B. v. L.L.*, at para. 37; *Benzina v. Le*, 2008 QCCA 803 (CanLII), at para. 7; *Barrette v. Falardeau*, 2010 QCCA 989 (CanLII), at paras. 26-27. Finally, when these conditions are met, the *de facto* spouse's action will be allowed in the lesser of the following two amounts: that of the enrichment of his or her spouse and that of his or her own impoverishment (*Cie Immobilière Viger*, at p. 77).

[120] In a recent decision written by Dalphond J.A. with the concurrence of Côté J.A., the Court of Appeal reiterated the principles of the doctrine

mais fidèle aux conditions initialement établies par la Cour dans l'arrêt *Cie Immobilière Viger Ltée c. Lauréat Giguère Inc.*, [1977] 2 R.C.S. 67, et que l'on retrouve maintenant à l'art. 1493 *C.c.Q.* Comme l'explique le juge Dalphond de la Cour d'appel du Québec, cette doctrine doit servir « uniquement à compenser une partie pour un apport, en biens ou en services, qui a permis à l'autre de se trouver en une position supérieure à celle qui aurait été la sienne n'eût été la vie commune, bref de l'enrichir » : *M.B. c. L.L.*, par. 39.

[118] Pour obtenir un dédommagement en application des art. 1493 *C.c.Q.* et suiv., un conjoint de fait qui invoque l'enrichissement injustifié doit ainsi démontrer, par prépondérance des probabilités, qu'il a satisfait aux conditions suivantes : un enrichissement, un appauvrissement, une corrélation entre ceux-ci, et l'absence de justification, de fraude à la loi et d'un autre recours : *Cie Immobilière Viger*; *Peter c. Beblow*; *M.B. c. L.L.*, par. 34; J.-L. Baudouin et P.-G. Jobin, *Les obligations* (6e éd. 2005), par P.-G. Jobin avec la collaboration de N. Vézina, par. 566 et suiv.

[119] Comme l'a décidé notre Cour dans l'arrêt *Peter c. Beblow*, le conjoint de fait peut bénéficier de certaines présomptions simples lui permettant de s'acquitter plus aisément de son fardeau de preuve. Ainsi, dans le cas d'une union de fait de longue durée, le tribunal peut présumer, d'une part, qu'il existe une corrélation entre l'enrichissement d'un conjoint et l'appauvrissement de l'autre et, d'autre part, qu'il y a absence de motifs à l'enrichissement : *Peter c. Beblow*, p. 1013 et 1018; *M.B. c. L.L.*, par. 37; *Benzina c. Le*, 2008 QCCA 803 (CanLII), par. 7; *Barrette c. Falardeau*, 2010 QCCA 989 (CanLII), par. 26-27. Enfin, lorsque ces conditions se trouvent réunies, le recours du conjoint de fait est maintenu pour la moindre des deux sommes suivantes : l'enrichissement de son conjoint ou son propre appauvrissement (*Cie Immobilière Viger*, p. 77).

[120] La Cour d'appel, dans un arrêt récent rédigé par le juge Dalphond avec le concours de la juge Côté, réitère les principes de la doctrine

of unjust enrichment with respect to *de facto* spouses and the importance of the presumptions in the plaintiff's favour: *C.L. v. J.Le.*, 2010 QCCA 2370 (CanLII), at paras. 10-15, quoted in full in *Droit de la famille — 121120*, 2012 QCCA 909 (CanLII), at para. 65. The Court of Appeal correctly noted that a court hearing [TRANSLATION] "a claim by a *de facto* spouse for compensation for unjust enrichment [must] undertake a broad, overall analysis of the parties' circumstances, taking into account all contributions made by the spouses during the time they lived together": *C.L. v. J.Le.*, at para. 12 (emphasis added). As well, rather than a simple accounting exercise, [TRANSLATION] "the analysis of the factual and legal aspects requires a particular flexibility adapted to the nature of relationships between spouses (*Lacroix v. Valois*, [1990] 2 S.C.R. 1259, at p. 1279)": *C.L. v. J.Le*, at para. 13 (emphasis added).

(d) *Treatment of De Facto Spouses in the Same Way as Married and Civil Union Spouses in Various Statutes*

[121] For the dealings that couples have with third parties, and more particularly with the government, there are a number of social statutes in which a distinction is no longer drawn between marriage, civil union and *de facto* union: see, *inter alia*, *Workers' Compensation Act*, R.S.Q., c. A-3; *An Act respecting industrial accidents and occupational diseases*, R.S.Q., c. A-3.001; *An Act respecting financial assistance for education expenses*, R.S.Q., c. A-13.3; *An Act respecting legal aid and the provision of certain other legal services*, R.S.Q., c. A-14; *Automobile Insurance Act*, R.S.Q., c. A-25; *An Act respecting insurance*; R.S.Q., c. A-32; *An Act respecting financial services cooperatives*, R.S.Q., c. C-67.3; *An Act respecting trust companies and savings companies*, R.S.Q., c. S-29.01; *An Act respecting school elections*, R.S.Q., c. E-2.3; *An Act respecting duties on transfers of immovables*, R.S.Q., c. D-15.1; *Cooperatives Act*, R.S.Q., c. C-67.2; *Taxation Act*, R.S.Q., c. I-3; *An Act respecting the Québec sales tax*, R.S.Q., c. T-0.1; *An Act respecting labour standards*, R.S.Q., c. N-1.1; *Courts of Justice Act*, R.S.Q., c. T-16; *An Act respecting the Québec Pension*

de l'enrichissement injustifié entre conjoints de fait et l'importance des présomptions favorables au demandeur : *C.L. c. J.Le.*, 2010 QCCA 2370 (CanLII), par. 10-15, cité intégralement dans *Droit de la famille — 121120*, 2012 QCCA 909 (CanLII), par. 65. À ce titre, la cour rappelle à bon droit que le tribunal saisi « d'une demande d'indemnité pour enrichissement injustifié par le/la conjoint(e) de fait [doit] se livrer à une analyse libérale et globale de la situation des parties, prenant en compte tous les apports des conjoints durant la vie commune » : *C.L. c. J.Le.*, par. 12 (je souligne). De plus, à l'opposé du simple exercice de comptabilité, « il faut adopter dans l'analyse des éléments factuels et juridiques une souplesse particulière qui sied à la nature des rapports entre des conjoints (*Lacroix c. Valois*, [1990] 2 R.C.S. 1259, p. 1279) » : *C.L. c. J.Le.*, par. 13 (je souligne).

d) *Assimilation des conjoints de fait aux époux et aux conjoints unis civilement dans des lois diverses*

[121] Dans le cas des rapports que les couples entretiennent avec des tiers, plus particulièrement l'État, à l'égard de l'application de plusieurs lois à caractère social, le législateur n'effectue plus de distinction entre mariage, union civile et union de fait : voir notamment *Loi sur les accidents du travail*, L.R.Q., ch. A-3; *Loi sur les accidents du travail et les maladies professionnelles*, L.R.Q., ch. A-3.001; *Loi sur l'aide financière aux études*, L.R.Q., ch. A-13.3; *Loi sur l'aide juridique et sur la prestation de certains autres services juridiques*, L.R.Q., ch. A-14; *Loi sur l'assurance automobile*, L.R.Q., ch. A-25; *Loi sur les assurances*; L.R.Q., ch. A-32; *Loi sur les coopératives de services financiers*, L.R.Q., ch. C-67.3; *Loi sur les sociétés de fiducie et les sociétés d'épargne*, L.R.Q., ch. S-29.01; *Loi sur les élections scolaires*, L.R.Q., ch. E-2.3; *Loi concernant les droits sur les mutations immobilières*, L.R.Q., ch. D-15.1; *Loi sur les coopératives*, L.R.Q., ch. C-67.2; *Loi sur les impôts*, L.R.Q., ch. I-3; *Loi sur la taxe de vente du Québec*, L.R.Q., ch. T-0.1; *Loi sur les normes du travail*, L.R.Q., ch. N-I.1; *Loi sur les tribunaux judiciaires*, L.R.Q., ch. T-16; *Loi sur le régime de rentes du Québec*; *Loi*

Plan; *An Act respecting the Government and Public Employees Retirement Plan*, R.S.Q., c. R-10; *An Act respecting the Civil Service Superannuation Plan*, R.S.Q., c. R-12; *Supplemental Pension Plans Act*; *An Act respecting the conditions of employment and the pension plan of the Members of the National Assembly*, R.S.Q., c. C-52.1; *An Act respecting the Pension Plan of Certain Teachers*, R.S.Q., c. R-9.1; *An Act respecting the Pension Plan of Peace Officers in Correctional Services*, R.S.Q., c. R-9.2; *An Act respecting the Pension Plan of Elected Municipal Officers*, R.S.Q., c. R-9.3; *An Act respecting the Teachers Pension Plan*, R.S.Q., c. R-11; *Individual and Family Assistance Act*, R.S.Q., c. A-13.1.1.

sur le régime de retraite des employés du gouvernement et des organismes publics, L.R.Q., ch. R-10; *Loi sur le régime de retraite des fonctionnaires*, L.R.Q., ch. R-12; *Loi sur les régimes complémentaires de retraite*; *Loi sur les conditions de travail et le régime de retraite des membres de l'Assemblée nationale*, L.R.Q., ch. C-52.1; *Loi sur le régime de retraite de certains enseignants*, L.R.Q., ch. R-9.1; *Loi sur le régime de retraite des agents de la paix en services correctionnels*, L.R.Q., ch. R-9.2; *Loi sur le régime de retraite des élus municipaux*, L.R.Q., ch. R-9.3; *Loi sur le régime de retraite des enseignants*, L.R.Q., ch. R-11; *Loi sur l'aide aux personnes et aux familles*, L.R.Q., ch. A-13.1.1.

[122] As Professors D.-Castelli and Goubau explain, [TRANSLATION] "[p]rovided that a union meets the specific conditions of a statute, the situation of *de facto* spouses is exactly the same as that of married or civil union spouses under Quebec civil law for the purposes of that statute": p. 173. In this regard, the Quebec Court of Appeal has stated that [TRANSLATION] "a review of these statutes . . . shows that the legislature intended to treat *de facto* spouses and married spouses on an equal basis": *Couture v. Gagnon*, at para. 32.

[122] Comme l'expliquent les professeurs D.-Castelli et Goubau, « [d]ès lors qu'une union répond aux conditions particulières d'une loi, l'assimilation de la situation des conjoints de fait à celle des conjoints mariés ou unis civilement est complète en droit québécois pour l'application de cette loi » : p. 173. À ce propos, la Cour d'appel du Québec énonce qu'« une revue de ces lois [. . .] démontre une intention du législateur de traiter conjoints de fait et conjoints mariés sur la même base » : *Couture c. Gagnon*, par. 32.

[123] It should be noted that, since the 1999 enactment of the *Act to amend various legislative provisions concerning de facto spouses*, S.Q. 1999, c. 14, the *de facto* spouse concept has been extended in these statutes to include same-sex *de facto* spouses. Moreover, as a result of the enactment in 2002 of the *Act instituting civil unions and establishing new rules of filiation*, s. 143, the definition of spouse in the *Interpretation Act*, R.S.Q., c. I-16, s. 61.1, includes same-sex spouses.

[123] Mentionnons que depuis l'adoption, en 1999, de la *Loi modifiant diverses dispositions législatives concernant les conjoints de fait*, L.Q. 1999, ch. 14, la définition de conjoints de fait comprise au sein de ces lois est étendue aux conjoints de fait de même sexe. De plus, à la suite de l'adoption, en 2002, de la *Loi instituant l'union civile et établissant de nouvelles règles de filiation*, la notion de conjoint définie par la *Loi d'interprétation*, L.R.Q., ch. I-16, art. 61.1, inclut le conjoint de même sexe.

[124] This tendency in social statutes to treat *de facto* spouses in the same way as married and civil union spouses can also be seen in certain civil law matters involving interaction between *de facto* spouses and third parties. For example, a *de facto* spouse, like a married or civil union spouse, can consent to care required by his or her spouse who is incapable of giving consent (art. 15 *C.C.Q.*); where his or her spouse alone signed a lease for a

[124] Cette assimilation des conjoints de fait, des époux et des conjoints unis civilement dans le domaine du droit social se manifeste également dans certaines matières relevant du droit civil où les conjoints de fait interagissent avec des tiers. Ainsi, le conjoint de fait, tout comme l'époux ou le conjoint uni civilement, peut consentir aux soins requis par son conjoint inapte (art. 15 *C.c.Q.*); être maintenu dans les lieux et devenir locataire lorsque

dwelling and subsequently leaves the dwelling or dies, maintain occupancy and become the lessee (art. 1938 *C.C.Q.*); repossess a dwelling in an immovable owned jointly with his or her spouse (art. 1958 *C.C.Q.*); participate in meetings of relatives, persons connected by marriage or a civil union and friends during the process of appointing a curator for his or her spouse (art. 266 *C.C.Q.*); avoid the seizure of part of his or her salary if supporting his or her spouse (art. 553 of the *Code of Civil Procedure*, R.S.Q., c. C-25); and bring a direct action in liability where his or her spouse dies (abolition of the rule in art. 1056 *C.C.L.C.*).

D. *Demographic and Sociological Evolution of the De Facto Union in Quebec Since 1980*

[125] Parallel to the evolution of family law in Quebec, it is interesting to see how the social position of the *de facto* union in that province has changed. On the basis of data collected by Statistics Canada and the Institut de la statistique du Québec that are studied in some of the expert reports submitted by the parties, some demographic trends with respect to the *de facto* union can be observed. First, over the last 30 years, the development of the *de facto* union has taken place largely in Quebec. In Canada, it is in that province that the *de facto* union has spread most widely. Between 1981 and 2006, the proportion of Quebec couples in *de facto* unions increased from 7.9% to 34.6%. By comparison, 18.4% of couples in Canada as a whole were in such a relationship in 2006. Also, 60% of Quebec children are now apparently being born out of wedlock. The 2011 census confirms these trends. According to the now available data, 20% of Canadian couples live in *de facto* unions. In Quebec, the proportion rises to 37.8%.

[126] The statistics analyzed by the experts suggest that *de facto* unions are more common among young Quebeckers under the age of 35 than among Canadians in that age group as a whole. Young Quebeckers opt for *de facto* unions in much higher proportions (51%) than do young Canadians

son conjoint, seul signataire du bail, quitte le logement ou décède (art. 1938 *C.c.Q.*); reprendre un logement situé au sein d'un immeuble dont il est propriétaire avec son conjoint (art. 1958 *C.c.Q.*); participer aux assemblées de parents, d'alliés ou d'amis lors du processus de nomination d'un curateur à son conjoint (art. 266 *C.c.Q.*); éviter la saisie d'une partie de son salaire s'il pourvoit aux besoins de son conjoint (art. 553 du *Code de procédure civile*, L.R.Q., ch. C-25); et intenter un recours direct en responsabilité en cas de décès de son conjoint (abolition de la règle contenue à l'art. 1056 *C.c.B.C.*).

D. *L'évolution démographique et sociologique de l'union de fait au Québec depuis 1980*

[125] Parallèlement à l'évolution du droit de la famille au Québec, il est intéressant d'observer les changements survenus dans la situation sociale de l'union de fait dans cette province. Les données colligées par Statistique Canada et par l'Institut de la statistique du Québec, que certains rapports d'expertise soumis par les parties ont étudiées, permettent d'observer quelques tendances démographiques au sujet de l'union de fait. On constate d'abord qu'au cours des 30 dernières années, le phénomène de l'union de fait s'est largement développé au Québec. C'est dans cette province que l'union de fait s'est davantage répandue au Canada. Entre 1981 et 2006, la proportion de couples québécois vivant en union de fait est passée de 7,9 % à 34,6 %. À titre de comparaison, en 2006, pour l'ensemble du Canada, 18,4 % des couples vivaient en union de fait. D'autre part, il appert qu'actuellement 60 % des enfants du Québec naissent hors mariage. Le recensement de 2011 confirme les mêmes tendances. Selon les données maintenant disponibles, 20 % des couples canadiens vivent en union libre. Au Québec, la proportion atteint 37,8 %.

[126] Les statistiques analysées par les experts suggèrent que la vie en union de fait est plus répandue chez les jeunes Québécois âgés de moins de 35 ans que pour l'ensemble des Canadiens du même âge. Les jeunes Québécois optent pour l'union de fait dans des proportions nettement supérieures

as a whole (29%). In Quebec, and to a lesser extent in Canada as a whole, *de facto* unions remain proportionately more common among couples in their third unions than among couples in their first.

[127] Whereas the purely demographic aspect of the *de facto* union is easily quantified, the same is not true of its sociological or socio-demographic character. In the instant case, four of the eight expert reports filed by the parties at trial relate specifically to this sociological perspective. Among other things, these experts discuss how conjugality is depicted in Quebec, the differences and similarities between marriage and the *de facto* union, and how Quebec couples organize themselves. Because of the methodological limitations of the studies, their small sample sizes and the general lack of quantitative data on which to base hypotheses, it seems impossible in the context of this case to draw any definitive conclusions about several aspects of this social phenomenon, including why this type of relationship is chosen and how it functions from an economic standpoint.

[128] It will be helpful here to quote some remarks made by Professors Le Bourdais and Lapierre-Adamcyk, at pp. 3 and 4 of their report, on the state of the research on *de facto* unions in Quebec:

[TRANSLATION] Very little research based on large samples representative of the population as a whole has been conducted into the meaning of the *de facto* union in relation to marriage and the meaning of the commitment made by the spouses to one another. Moreover, the research that has been done has not gone into detail about the mechanisms underlying the choice of type of union for unions formed recently, that is, since the mid-1990s. Many unknowns remain, and since the circumstances are changing, relationships that seem to be well established for a given period may no longer be valid for a subsequent period. . . .

(51 %) à celles de l'ensemble des jeunes Canadiens (29 %). Au Québec, et dans une moindre mesure dans l'ensemble du Canada, l'union de fait demeure proportionnellement plus fréquente chez les couples qui sont engagés dans une troisième union que chez ceux qui en sont à leur première union.

[127] Si l'aspect purement démographique de l'union de fait est aisément quantifiable, il en va autrement de son caractère sociologique ou socio-démographique. En l'espèce, quatre des huit rapports d'expertise déposés par les parties en première instance portent spécifiquement sur ce point de vue sociologique. Ces expertises se penchent notamment sur les représentations de la conjugalité au Québec, sur les différences et similitudes entre le mariage et l'union de fait et sur la gestion interne des couples québécois. En raison des limites méthodologiques de ces études, de l'étroitesse de leur échantillonnage et du manque généralisé de données quantitatives sur lesquelles elles pouvaient émettre des hypothèses, il apparaît impossible dans le contexte de ce dossier de tirer des conclusions définitives à l'égard de plusieurs aspects de ce phénomène social, notamment quant aux motifs du choix de ce type de relation et à son mode de fonctionnement économique.

[128] Je crois utile de citer à cette occasion quelques observations des professeures Le Bourdais et Lapierre-Adamcyk, en p. 3 et 4 de leur rapport, au sujet de l'état de la recherche relative aux unions de fait au Québec :

L'état de la recherche basée sur de larges échantillons représentatifs de la population dans son ensemble est particulièrement peu avancé en ce qui concerne la signification de l'union de fait par rapport au mariage, et le sens de l'engagement que les conjoints prennent l'un à l'égard de l'autre. De plus, la recherche existante n'a pas produit d'examen approfondi des mécanismes sous-jacents au choix du type d'union pour les unions formées récemment, soit depuis le milieu des années 1990. De nombreuses inconnues demeurent, et comme les phénomènes sont en pleine évolution, des relations qui paraissent bien établies pour une période donnée peuvent n'être plus valables pour une période subséquente. . .

[With regard to certain links observed among various facts], the reliable data needed to analyze them correctly are often unavailable. Thus, the link between financial independence and the choice of type of union continues to be the subject of speculation, since prospective longitudinal data following individuals as they advance through their lives, which would make it possible to observe their financial situations at the times they have to make choices, are only rarely or partially available.

Furthermore, in areas like money management by couples or the depictions of conjugality, which have been addressed qualitatively in the studies examined here, quantitative data on large samples are sorely lacking in Quebec and in Canada, making it impossible to compare couples in *de facto* unions with married couples or to take account of all relevant groups regardless of their stage in the life cycle (at the beginning of the relationship, after several years of living together or the arrival of a child, or immediately after separating). Research on other societies, where it exists, may suggest some elements of an answer, but it does not suffice to shed a satisfactory light on the Canadian reality. [Joint Record, vol. 14, at pp. 7-8]

[129] Finally, as the trial judge pointed out, none of the expert reports submitted by the parties discusses the concrete effects of the breakdown of a relationship for *de facto* spouses or for married or civil union spouses.

E. *Scope of A's Claim*

[130] Before considering the nature and application of the right to equality in the context of this appeal, I must review the scope of A's claim. All its effects must be understood in order to assess their impact on the application of the right to equality.

[131] First, by arguing that arts. 401 to 430, 432, 433, 448 to 484 and 585 *C.C.Q.* 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. On this basis, she is seeking to partition the family patrimony and reserve her right to claim

[En ce qui a trait à certains liens observés entre différents phénomènes], souvent on ne dispose pas des données fiables requises pour les analyser correctement. C'est ainsi que le lien entre indépendance financière et choix du mode d'union continue d'être l'objet de spéculation, car les données longitudinales prospectives, suivant les individus à mesure qu'ils avancent dans leur vie, qui permettraient d'observer la situation financière des personnes au moment où elles ont à faire un choix, ne sont que rarement ou partiellement disponibles.

De plus, dans des domaines comme la gestion de l'argent au sein des couples ou les représentations de la conjugalité qui ont été abordés de manière qualitative dans les études examinées ici, les données quantitatives portant sur de grands échantillons font cruellement défaut au Québec ou au Canada, rendant impossibles la comparaison des couples en union de fait et des couples mariés, ou la prise en compte de tous les groupes pertinents, quelle que soit l'étape atteinte dans le cycle de vie (en début d'union, après plusieurs années de vie commune ou l'arrivée d'un enfant, ou au lendemain d'une séparation). La recherche portant sur d'autres sociétés, lorsqu'elle existe, peut suggérer des éléments de réponse mais ne suffit pas à donner un éclairage satisfaisant sur la réalité canadienne. [Dossier conjoint, vol. 14, p. 7-8]

[129] Finalement, à l'instar de la juge de première instance, je remarque qu'aucune des expertises soumises par les parties n'étudie les effets concrets de la rupture pour les couples en union de fait et pour les couples mariés ou unis civilement.

E. *La portée de la demande de A*

[130] Avant d'examiner la nature et la mise en œuvre du droit à l'égalité dans le contexte de cet appel, il importe de rappeler la portée de la demande de A. Il faut en comprendre tous les effets pour apprécier leur impact sur la mise en œuvre du droit à l'égalité.

[131] En plaidant que les art. 401 à 430, 432, 433, 448 à 484 et 585 *C.c.Q.* contreviennent au par. 15(1) de la *Charte* et ne sont pas justifiés en vertu de l'article premier, A réclame en premier lieu l'application de certains attributs du régime primaire applicable en cas de séparation de corps, de divorce ou de dissolution de l'union civile. À ce titre, elle demande le partage du patrimoine familial

a compensatory allowance. She also submits that she is entitled to support for herself and to a lump sum.

[132] Although A is challenging the constitutionality of the provisions protecting the family residence, she makes no specific claim concerning those provisions in this case. The issues relating to the place of residence of A and the parties' children appear to have been dealt with in an agreement the parties entered into before the trial.

[133] Second, along with the application of certain parts of the primary regime, A is seeking the automatic and mandatory application of the legal matrimonial regime of partnership of acquests. As I mentioned above, in the case of marriage and civil union, the legal regime applies automatically only if the spouses do not enter into a marriage contract or a civil union contract. Under Quebec civil law, the regime of partnership of acquests is suppletive and applies only if there is no contract designating a regime of separation as to property or containing stipulations tailored to the spouses' personal circumstances. In essence, as regards matrimonial regimes, A wants her *de facto* union to be treated not only like a marriage, but like a marriage entered into without a marriage contract. She is therefore asking this Court to recognize the retroactive creation of a partnership of acquests that applies on a mandatory basis to her relationship with B.

[134] When a marriage breaks down, the dissolution of a legal regime of partnership of acquests results in partition of the value of the acquests between the spouses to whom the regime applies. Partition is of relatively little consequence to couples whose main assets are part of the family patrimony, but it can acquire great significance where, for example, one of the spouses is actively involved in business ventures. Having made this clarification, I will now turn to s. 15(1) of the *Charter*, which is at the heart of this case. How it is interpreted and applied will determine the outcome

ainsi qu'une réserve de ses droits pour demander une prestation compensatoire. Elle plaide aussi qu'elle a droit à une pension alimentaire pour elle-même ainsi qu'à une somme globale.

[132] Bien que A conteste la constitutionnalité des dispositions portant sur les mesures de protection de la résidence familiale, ces dernières ne font pas l'objet d'une demande précise au sein du présent litige. Il apparaît que les questions touchant le lieu de résidence de A et des enfants des parties ont fait l'objet d'une entente conclue entre ces dernières avant le procès.

[133] En plus de l'application de certaines mesures propres au régime primaire, A réclame en second lieu l'application automatique et obligatoire du régime matrimonial légal de la société d'acquêts. Rappelons que, dans le cas du mariage et de l'union civile, ce régime ne s'applique de façon automatique aux époux et aux conjoints unis civilement que lorsque ceux-ci omettent de conclure un contrat de mariage ou d'union civile. Dans le droit civil québécois, la société d'acquêts est supplétive et ne s'impose qu'en l'absence de contrat désignant un régime de séparation de biens ou comprenant des stipulations contractuelles adaptées à la situation personnelle des conjoints. Essentiellement, au chapitre des régimes matrimoniaux, A veut que l'on traite son union de fait non seulement comme un mariage, mais comme un mariage conclu sans contrat de mariage. Elle demande donc que notre Cour constate la création rétroactive d'une société d'acquêts impérativement applicable à sa relation avec B.

[134] À la rupture, la dissolution du régime légal de société d'acquêts entraîne entre les époux qui y sont assujettis un partage de la valeur des acquêts. Ce partage importe relativement peu pour les couples dont les principaux actifs font partie du patrimoine familial, mais il peut devenir très significatif lorsqu'un des conjoints est engagé activement dans des entreprises commerciales, par exemple. Après cette précision, je passe maintenant à l'examen du par. 15(1) de la *Charte* qui se situe au cœur du présent litige. Son interprétation et son application régleront le sort des demandes constitutionnelles de

of A's constitutional claims and, as a result, the scope of her support and patrimonial rights in relation to B.

F. *Development of the Jurisprudence on Section 15*

(1) Underlying Values of Section 15: Equality, Dignity, Freedom and Personal Autonomy

[135] Section 15(1) of the *Charter* provides that "[e]very 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." To understand the meaning and content of this guarantee as well as its impact on government action, it is necessary to clearly understand the nature of what McIntyre J. called "the broad range of values embraced by s. 15": *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 171. The recognition of these values aids in the interpretation of s. 15(1) and in the overall assessment of the merits of claims that the right to equality has been violated: *Law*, at para. 54; *Walsh*, at para. 63.

[136] In *Andrews*, the first case in which this Court considered the application of s. 15, McIntyre J. stated emphatically that the equality guarantee is intended to ensure the recognition of the equal worth of all human beings in Canadian society:

> It is clear that the purpose of s. 15 is to ensure equality in the formulation and application of the law. The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration. [p. 171]

(See also R. Dworkin, *Taking Rights Seriously* (1977), at pp. 272-73.)

A et, en conséquence, détermineront l'étendue de ses droits alimentaires et patrimoniaux à l'égard de B.

F. *L'évolution de la conception jurisprudentielle de l'art. 15*

(1) Les valeurs sous-jacentes à l'art. 15 : égalité, dignité, liberté et autonomie de la personne

[135] Le paragraphe 15(1) de la *Charte* dispose que « [l]a 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. » Pour saisir la signification et le contenu de cette garantie, ainsi que son impact sur l'action gouvernementale, il faut bien comprendre la nature de ce que le juge McIntyre a appelé « la vaste gamme des valeurs englobées par l'art. 15 » : *Andrews c. Law Society of British Columbia*, [1989] 1 R.C.S. 143, p. 171. La reconnaissance de ces valeurs facilite l'interprétation du par. 15(1) et contribue à l'appréciation générale du bien-fondé des allégations de violation de la garantie d'égalité : *Law*, par. 54; *Walsh*, par. 63.

[136] Dans l'arrêt *Andrews*, où notre Cour a étudié pour la première fois l'application de l'art. 15, le juge McIntyre affirme avec force que la garantie d'égalité veut assurer la reconnaissance d'une même valeur à tous les êtres humains dans la société canadienne :

> Il est clair que l'art. 15 a pour objet de garantir l'égalité dans la formulation et l'application de la loi. Favoriser 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. [p. 171]

(Voir également R. Dworkin, *Taking Rights Seriously* (1977), p. 272-273.)

[137] According to McIntyre J., the establishment of formal equality does not suffice to meet the objectives underlying the adoption of the equality guarantee. Section 15 instead introduces a concept of substantive equality.

[138] As this Court has pointed out on several occasions, this value of substantive equality at the heart of s. 15 is closely tied to the concept of human dignity: *Miron*, at paras. 145-46; *Law*, at paras. 52 and 54; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, at para. 77; *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429, at para. 20. The innate and equal dignity of every individual is invariably an "essential value underlying the s. 15 equality guarantee": *Kapp*, at para. 21. Indeed, the Court has said that "the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom" (*Law*, at para. 51) and to eliminate any possibility of a person being treated in substance as "less worthy" than others: *Gosselin*, at para. 22. In other words:

> This principle recognizes the dignity of each human being and each person's freedom to develop his body and spirit as he or she desires, subject to such limitations as may be justified by the interests of the community as a whole. It recognizes that society is based on individuals who are different from each other, and that a free and democratic society must accommodate and respect these differences.
>
> (*Miron*, at para. 145)

[139] The principle of personal autonomy or self-determination, to which self-worth, self-confidence and self-respect are tied, is an integral part of the values of dignity and freedom that underlie the equality guarantee: *Law*, at para. 53; *Gosselin*, at para. 65. Safeguarding personal autonomy implies the recognition of each individual's right to make decisions regarding his or her own person, to control his or her bodily integrity and to pursue his or her own conception of a full and rewarding life free from government interference with fundamental personal choices: *R. v. Big M Drug Mart Ltd.*,

[137] Selon le juge McIntyre, l'établissement d'une égalité formelle ne rencontre pas les objectifs de l'adoption de la garantie d'égalité. L'article 15 introduit plutôt un concept d'égalité réelle.

[138] Comme la Cour l'a souligné à plusieurs reprises, cette valorisation de l'égalité réelle au cœur de l'art. 15 est intimement liée à la notion de dignité humaine : *Miron*, par. 145-146; *Law*, par. 52 et 54; *Blencoe c. Colombie-Britannique (Human Rights Commission)*, 2000 CSC 44, [2000] 2 R.C.S. 307, par. 77; *Gosselin c. Québec (Procureur général)*, 2002 CSC 84, [2002] 4 R.C.S. 429, par. 20. La dignité inhérente égale de chaque individu constitue invariablement une « valeur essentielle qui sous-tend le droit à l'égalité garanti par l'art. 15 » : *Kapp*, par. 21. La Cour a d'ailleurs affirmé que « le par. 15(1) a pour objet d'empêcher toute atteinte à la dignité et à la liberté humaines essentielles » (*Law*, par. 51) et d'éliminer toute possibilité qu'une personne soit réellement traitée comme « une personne de moindre valeur » : *Gosselin*, par. 22. Autrement dit :

> Ce principe reconnaît la dignité de chaque être humain et la liberté que chaque personne a de développer son corps et son esprit comme elle le désire, sous réserve de restrictions justifiées par les intérêts de l'ensemble de la collectivité. Il reconnaît également que la société se compose de personnes toutes différentes les unes des autres et qu'une société libre et démocratique doit composer avec ces différences et les respecter.
>
> (*Miron*, par. 145)

[139] Le principe d'autonomie personnelle ou d'autodétermination, auquel se rattachent l'estime, la confiance et le respect de soi, fait partie intégrale des valeurs de dignité et de liberté qui sous-tendent la garantie d'égalité : *Law*, par. 53; *Gosselin*, par. 65. La préservation de l'autonomie personnelle implique la reconnaissance du droit de chacun de prendre des décisions concernant sa propre personne, de maîtriser son intégrité personnelle et de réaliser sa propre conception d'une vie bien remplie, sans ingérence de l'État dans des choix personnels fondamentaux : *R. c. Big M Drug Mart Ltd.*,

[1985] 1 S.C.R. 295, at p. 346, *per* Dickson J; *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at p. 164, *per* Wilson J.; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at p. 554, *per* Lamer C.J., at pp. 587-88, *per* Sopinka J.; *Blencoe*, at para. 77, *per* Bastarache J.

[140] In the application of s. 15, promotion of the values of equality, dignity, freedom and autonomy requires "the remedying of discriminatory treatment" based on the personal characteristics enumerated in s. 15(1) or characteristics analogous to them: *Law*, at para. 52. Under the *Charter*, it is unfair to limit an individual's full participation in society solely because the individual has one of these personal characteristics: *Miron*, at para. 146; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at paras. 72-73. Likewise, it is unacceptable to refuse on the basis of these characteristics to treat a person as a full member of society who deserves to realize his or her full human potential: *Miron*, at para. 146; *Gosselin*, at para. 23.

[141] Since *Andrews*, this Court has endeavoured to identify types of situations involving discrimination contrary to s. 15(1) and to establish an analytical framework to help the courts deal with claims for application of the equality guarantee. Having a framework that can be used to identify discriminatory distinctions is of fundamental importance in light of the fact that the drawing of distinctions lies at the heart of legislative action: *Andrews*, at pp. 168-69. Virtually all legislation distinguishes and makes categories. Without a coherent analytical framework, every distinction involving an enumerated or analogous ground of discrimination would be suspect and would need to be justified, even those relating to fundamental and essential measures, such as the prohibition against driving while intoxicated: *Andrews*, at pp. 181-82. Such a framework makes it possible for a court to combat discrimination effectively without succumbing to the temptation to redefine legislative solutions that do not violate the s. 15 equality guarantee: *Hodge v. Canada (Minister of Human Resources Development)*, 2004 SCC

[1985] 1 R.C.S. 295, p. 346, le juge Dickson; *R. c. Morgentaler*, [1988] 1 R.C.S. 30, p. 164, la juge Wilson; *Rodriguez c. Colombie-Britannique (Procureur général)*, [1993] 3 R.C.S. 519, p. 554, le juge en chef Lamer, p. 587-588, le juge Sopinka; *Blencoe*, par. 77, le juge Bastarache.

[140] Dans la mise en œuvre de l'art. 15, la promotion des valeurs d'égalité, de dignité, de liberté et d'autonomie passe par « l'élimination du traitement discriminatoire » fondé sur les caractéristiques personnelles énumérées au par. 15(1) ou sur celles qui leur sont analogues : *Law*, par. 52. La *Charte* reconnaît qu'il est injuste de limiter la pleine participation d'une personne dans la société pour le seul motif qu'elle présente une de ces caractéristiques personnelles : *Miron*, par. 146; *Eldridge c. Colombie-Britannique (Procureur général)*, [1997] 3 R.C.S. 624, par. 72-73. De même, il est inadmissible d'invoquer ces caractéristiques pour refuser de traiter une personne comme un membre à part entière de la société, qui mérite de réaliser tout son potentiel humain : *Miron*, par. 146; *Gosselin*, par. 23.

[141] Depuis *Andrews*, la Cour s'est efforcée d'identifier les types de situations présentant un caractère discriminatoire contraire au par. 15(1) et d'établir un cadre analytique susceptible de faciliter le traitement jurisprudentiel des demandes d'application de la garantie d'égalité. L'existence d'un cadre capable de définir les distinctions discriminatoires est d'une importance fondamentale du fait que la formulation de distinctions se situe au cœur de l'action législative : *Andrews*, p. 168-169. Pratiquement tous les textes législatifs distinguent et établissent des catégories. En l'absence d'un cadre analytique cohérent, toutes les distinctions mettant en jeu un motif de discrimination énuméré ou un motif analogue deviendraient suspectes et devraient être justifiées même lorsqu'elles portent sur des mesures élémentaires et indispensables, comme l'interdiction de conduire faite aux personnes en état d'ébriété : *Andrews*, p. 181-182. Un cadre de cette nature permet de combattre efficacement la discrimination en évitant toutefois la tentation de redéfinir judiciairement des solutions législatives qui ne contreviennent pas à la garantie

65, [2004] 3 S.C.R. 357, at para. 26. Since the analytical framework developed by this Court has been discussed, reformulated and enriched many times over the past two decades, I must summarize the changes made to it in order to better describe its current form.

(2) Creation of an Analytical Framework

(a) *Andrews*

[142] In *Andrews*, the Court was considering an alleged infringement of s. 15(1) by a legislative provision under which Canadian citizenship was required for admission to the British Columbia Bar. The Court concluded that the provision was contrary to s. 15(1) because it barred a class of persons from certain types of employment solely on the ground that they were not Canadian citizens, and without consideration of their qualifications or of their individual attributes or merits. Although he dissented on the application of s. 1 to the case, McIntyre J. laid the foundations of the analytical framework that is indispensable when considering an alleged violation of s. 15(1).

[143] McIntyre J. acknowledged at the outset that not every differentiation in the treatment of individuals under the law will result in inequality, "[n]or will a law necessarily be bad because it makes distinctions": *Andrews*, at p. 167; see also pp. 164, 168 and 182. He thus refused to conclude that the *Charter* prohibits any form of inequality between humans. Rather, it is a tool for combating certain forms of inequality that are considered discriminatory. On the basis of s. 15, which states that the right to equality must apply "without discrimination", McIntyre J. identified the existence of discrimination as the fundamental requirement for application of the protection afforded by s. 15(1). Therefore, according to him, s. 15(1) is deemed to limit or qualify itself, since it condemns only distinctions that are "discriminatory":

d'égalité de l'art. 15 : *Hodge c. Canada (Ministre du Développement des ressources humaines)*, 2004 CSC 65, [2004] 3 R.C.S. 357, par. 26. Comme le cadre analytique développé par notre Cour a été débattu, reformulé et enrichi à maintes reprises au cours des deux dernières décennies, il m'apparaît nécessaire d'en résumer l'évolution, pour en dégager la structure actuelle.

(2) La création d'un cadre analytique

a) *Andrews*

[142] Dans l'arrêt *Andrews*, la Cour examinait une allégation de violation du par. 15(1) par une disposition législative qui réservait l'admission au Barreau de la Colombie-Britannique aux seuls citoyens canadiens. La Cour a conclu que la disposition portait atteinte au par. 15(1) parce qu'elle excluait une catégorie de personnes de certains types d'emplois au seul motif qu'elles ne possédaient pas la citoyenneté canadienne et ce, sans égard à leurs compétences, qualités ou mérites individuels. Bien qu'il ait été dissident à propos de l'application de l'art. 1, le juge McIntyre a alors mis en place les bases du cadre analytique indispensable lors de l'étude d'une allégation de violation du par. 15(1).

[143] Le juge McIntyre reconnaît, d'entrée de jeu, que les différences de traitement entre des individus prévues par la loi ne produiront pas toutes des situations d'inégalité, « [p]as plus qu'une loi sera nécessairement mauvaise parce qu'elle établit des distinctions » : *Andrews*, p. 167; voir également p. 164, 168 et 182. Le juge McIntyre se refuse ainsi à conclure que toute forme d'inégalité entre les personnes humaines est interdite par la *Charte*. Celle-ci constitue plutôt un instrument de lutte contre des formes d'inégalité reconnues comme discriminatoires. En effet, à la lecture de l'art. 15, qui énonce que le droit à l'égalité doit exister « indépendamment de toute discrimination », le juge McIntyre identifie la présence de la discrimination comme l'exigence fondamentale de la mise en œuvre de la protection offerte au par. 15(1). Ainsi, selon le juge McIntyre, le par. 15(1) est réputé contenir sa propre limite ou réserve, puisqu'il ne condamne que les distinctions « discriminatoires » :

A complainant under s. 15(1) must show not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection or benefit accorded by law but, in addition, must show that the legislative impact of the law is discriminatory. [p. 182]

(See also *Egan v. Canada*, [1995] 2 S.C.R. 513, at paras. 33-34, *per* L'Heureux-Dubé J., dissenting.)

[144] McIntyre J. then stated that discrimination under s. 15(1) is based on the grounds enumerated in that provision or grounds analogous to them. Determining whether a ground of distinction is an analogous ground and can therefore support a discrimination claim involves a contextual inquiry to determine whether it gives rise to questions of stereotyping, historical disadvantage or prejudice: *Andrews*, at pp. 180-81; see also *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at paras. 12-13. It can also be asked whether the complainant is a member of a discrete and insular minority, many of which will be disadvantaged, like some of the groups covered by the grounds enumerated in s. 15(1). Thus, discrimination "epitomizes the worst effects of the denial of equality": *Andrews*, at p. 172.

[145] McIntyre J. added that s. 15(1) limits prohibited distinctions or differentiations in treatment to those which involve prejudice or disadvantage. In *Andrews*, the members of the Court agreed that the legislative provision challenged by the complainant infringed s. 15 because it imposed a specific burden on non-citizens. According to McIntyre J., "[n]on-citizens, lawfully permanent residents of Canada, are . . . a good example of a 'discrete and insular minority' who come within the protection of s. 15": *Andrews*, at p. 183. The Court was divided only on the application of s. 1, and not on this finding of a discriminatory infringement of the right to equality.

Un plaignant en vertu du par. 15(1) doit démontrer non seulement qu'il ne bénéficie pas d'un traitement égal devant la loi et dans la loi, ou encore que la loi a un effet particulier sur lui en ce qui concerne la protection ou le bénéfice qu'elle offre, mais encore que la loi a un effet discriminatoire sur le plan législatif. [p. 182]

(Voir également *Egan c. Canada*, [1995] 2 R.C.S. 513, par. 33-34, la juge L'Heureux-Dubé, dissidente.)

[144] Le juge McIntyre affirme ensuite que la discrimination, au sens du par. 15(1), porte sur les motifs énumérés dans cette disposition ou sur des motifs qui leur sont analogues. Pour déterminer si un motif de distinction est analogue et peut donc soutenir une allégation de discrimination, il faut en effectuer un examen contextuel portant sur les questions de stéréotype, de désavantage historique et de préjugé qu'il soulève : *Andrews*, p. 180-181; voir également *Corbiere c. Canada (Ministre des Affaires indiennes et du Nord canadien)*, [1999] 2 R.C.S. 203, par. 12-13. Cet examen peut aussi inclure la considération de l'appartenance possible du plaignant à une minorité distincte et isolée, souvent défavorisée, comme le sont certains des groupes visés par les motifs énumérés au par. 15(1). C'est ainsi que la discrimination « incarne les pires effets de la dénégation de l'égalité » : *Andrews*, p. 172.

[145] Le juge McIntyre ajoute que le par. 15(1) limite les distinctions ou différences de traitement prohibées à celles qui entraînent un préjudice ou un désavantage. Dans l'affaire *Andrews*, la Cour s'entendait pour reconnaître que la disposition législative contestée par le plaignant portait atteinte à l'art. 15 parce qu'elle imposait un fardeau particulier aux non-citoyens. Selon le juge McIntyre, « [c]eux qui n'ont pas la citoyenneté et qui résident légalement en permanence au Canada constituent un bon exemple [. . .] d'une [TRADUCTION] "minorité discrète et isolée" visée par la protection de l'art. 15 » : *Andrews*, p. 183. La Cour ne s'est divisée que sur l'application de l'article premier et non sur ce constat d'une atteinte discriminatoire à la garantie d'égalité.

(b) *From Andrews to Law*

[146] As several authors have noted, McIntyre J.'s reasons left some room for uncertainty about what constitutes discriminatory treatment under s. 15: see, *inter alia*, P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp. (loose-leaf)), vol. 2, at p. 55-26; L. B. Tremblay, "Promoting Equality and Combating Discrimination Through Affirmative Action: The Same Challenge? Questioning the Canadian Substantive Equality Paradigm" (2012), 60 *Am. J. Comp. L.* 181, at p. 185; B. J. Cameron, "A Work in Progress: The Supreme Court and the *Charter*'s Equation of Rights and Limits", in D. M. McAllister and A. M. Dodek, eds., *The Charter at Twenty: Law and Practice 2002* (2002), 31, at p. 34; C. D. Bredt and A. M. Dodek, "Breaking the *Law*'s Grip on Equality: A New Paradigm for Section 15" (2003), 20 *S.C.L.R.* (2d) 33, at p. 56; D. G. Réaume, "Discrimination and Dignity" (2003), 63 *La. L. Rev.* 645, at pp. 652-53.

[147] Taken out of context, some passages from the decision might suggest that every adverse distinction based on an enumerated or analogous ground is a form of discrimination prohibited by s. 15. However, McIntyre J. stated elsewhere in his reasons that "[d]istinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed": *Andrews*, at pp. 174-75 (emphasis added). He added that discrimination cannot be identified solely by determining whether the alleged ground is one of those enumerated in s. 15(1) or an analogous ground thereto: *Andrews*, at p. 182. McIntyre J. therefore seemed to leave open the question of how to identify situations in which an adverse distinction based on an enumerated or analogous ground is not discriminatory.

[148] The Court gave two separate answers in what has been called "the 1995 trilogy" of *Miron*,

b) *L'évolution d'Andrews à Law*

[146] Comme plusieurs auteurs l'ont écrit, les motifs du juge McIntyre laissaient place à une marge d'incertitude quant à ce que constitue un traitement discriminatoire au sens de l'art. 15 : voir notamment P. W. Hogg, *Constitutional Law of Canada* (5e éd. suppl. (feuilles mobiles)), vol. 2, p. 55-26; L. B. Tremblay, « Promoting Equality and Combating Discrimination Through Affirmative Action : The Same Challenge? Questioning the Canadian Substantive Equality Paradigm » (2012), 60 *Am. J. Comp. L.* 181, p. 185; B. J. Cameron, « A Work in Progress : The Supreme Court and the *Charter*'s Equation of Rights and Limits », dans D. M. McAllister et A. M. Dodek, dir., *The Charter at Twenty : Law and Practice 2002* (2002), 31, p. 34; C. D. Bredt et A. M. Dodek, « Breaking the *Law*'s Grip on Equality : A New Paradigm for Section 15 » (2003), 20 *S.C.L.R.* (2d) 33, p. 56; D. G. Réaume, « Discrimination and Dignity » (2003), 63 *La. L. Rev.* 645, p. 652-653.

[147] Certains passages de la décision, lus hors de leur contexte, peuvent laisser entendre que toute distinction préjudiciable effectuée sur la base d'un motif énuméré ou analogue constitue une forme de discrimination interdite par l'art. 15. Cependant, le juge McIntyre affirme ailleurs dans ses motifs que « [l]es distinctions fondées sur des caractéristiques personnelles attribuées à un seul individu en raison de son association avec un groupe sont presque toujours taxées de discriminatoires, alors que celles fondées sur les mérites et capacités d'un individu le sont rarement » : *Andrews*, p. 174-175 (je souligne). De plus, il indique qu'il ne suffit pas à la cour de décider si le motif allégué en est un qui est énuméré au par. 15(1) ou analogue à ceux-ci pour déceler l'existence de discrimination : *Andrews*, p. 182. Dès lors, le juge McIntyre paraît laisser ouverte la question de la méthode d'identification de ces situations où une distinction désavantageuse fondée sur un motif énuméré ou analogue ne sera pas discriminatoire.

[148] Deux réponses distinctes sont données par la Cour à l'occasion de ce que certains appellent

Egan and *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627. According to Lamer C.J. and La Forest, Gonthier and Major JJ., adverse differential treatment is discriminatory only if the alleged enumerated or analogous ground is irrelevant to the legislative goals or the values underlying the impugned provision. If the ground for excluding a group of persons from certain benefits arising from a law is relevant to the goals and values of that law, the exclusion will therefore not be discriminatory within the meaning of s. 15.

[149] According to Sopinka, Cory, McLachlin and Iacobucci JJ., and to some extent to L'Heureux-Dubé J., differential treatment that disadvantages the complainant will be discriminatory only if it conflicts with the purpose of s. 15. They explained that the purpose of s. 15 is "to prevent the violation of human dignity and freedom through the imposition of limitations, disadvantages or burdens through the stereotypical application of presumed group characteristics, rather than on the basis of merit, capacity or circumstance": *Miron*, at para. 140, *per* McLachlin J. In other words, an adverse distinction based on an enumerated or analogous ground will be discriminatory only if it is "contrary to s. 15's aim of protecting human dignity": *Egan*, at para. 180, *per* Cory and Iacobucci JJ. (dissenting). According to McLachlin J., requiring that a provision be found to violate the purpose of s. 15(1) before it can be characterized as discriminatory averts a trivialization of s. 15: *Miron*, at para. 131.

(c) *Synthesis in Law*

[150] In 1999, Iacobucci J., writing for a unanimous Court, reaffirmed the substance of the approach taken by Cory J. in *Egan* and McLachlin J. in *Miron*. According to Iacobucci J., the Court had 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": *Law*, at para. 41. In his view, "the goal of [s. 15(1) is to assure] human dignity by the remedying of discriminatory treatment": *Law*, at para. 52. He

« la trilogie de 1995 », soit les arrêts *Miron*, *Egan* et *Thibaudeau c. Canada*, [1995] 2 R.C.S. 627. Pour le juge en chef Lamer et les juges La Forest, Gonthier et Major, une différence de traitement préjudiciable n'est discriminatoire que si le motif énuméré ou analogue allégué n'est pas pertinent eu égard aux objectifs législatifs ou aux valeurs sous-tendant la disposition contestée. En conséquence, si le motif justifiant l'exclusion d'un groupe de personnes de certains bénéfices découlant d'une loi est pertinent par rapport aux objectifs et valeurs de la loi contestée, cette exclusion ne sera pas discriminatoire au sens de l'art. 15.

[149] Pour les juges Sopinka, Cory, McLachlin et Iacobucci, et dans une certaine mesure pour la juge L'Heureux-Dubé, une différence de traitement causant un désavantage au plaignant ne sera discriminatoire que si elle entre en conflit avec l'objectif de l'art. 15. Ces juges expliquent que cet objectif est d'« empêcher que la dignité et la liberté de la personne soient violées par l'imposition de restrictions, de désavantages ou de fardeaux fondés sur une application stéréotypée de présumées caractéristiques de groupe plutôt que sur les mérites, les capacités ou les circonstances » : *Miron*, par. 140, la juge McLachlin. Autrement dit, une distinction désavantageuse fondée sur un motif énuméré ou analogue ne sera discriminatoire que si elle est « contraire au but de l'art. 15 de protéger la dignité humaine » : *Egan*, par. 180, les juges Cory et Iacobucci (dissidents). Pour la juge McLachlin, s'assurer qu'une disposition contrevienne à l'objectif du par. 15(1) avant de la qualifier de discriminatoire évite de banaliser l'art. 15 : *Miron*, par. 131.

c) *La synthèse de Law*

[150] En 1999, le juge Iacobucci, pour une Cour unanime, reprend l'essentiel de l'approche adoptée par le juge Cory dans *Egan* et la juge McLachlin dans *Miron*. D'après lui, la Cour reconnaît « qu'il fa[ut] absolument qu'il y ait conflit entre la loi contestée et l'objet du par. 15(1) pour fonder une allégation de discrimination » : *Law*, par. 41. À son avis, « le but [du par. 15(1) est] de préserver la dignité humaine au moyen de l'élimination du traitement discriminatoire » : *Law*, par. 52. Il adopte

adopted an analytical approach based on a concept of substantive equality that will be violated only where adverse differential treatment by the government has a negative effect on the claimant's human dignity. On this basis, *Law* proposed a three-stage analytical framework to be used by the courts in ruling on a discrimination claim under s. 15(1).

[151] First, the court must determine whether the law treats the claimant differently than others either in purpose or effect. To do so, the court must ask whether the impugned law draws a formal distinction between the claimant and others on the basis of one or more personal characteristics, or whether it fails to take into account the claimant's already disadvantaged position within Canadian society, thereby giving rise to substantively differential treatment between the claimant and others on the basis of one or more personal characteristics. Bastarache J., discussing the nature of such differential treatment in a subsequent case, stated that "it is clear that Iacobucci J. [was] talking only about a detrimental purpose or effect, since it is nonsensical to think that a claimant might establish that a beneficial or benign purpose or effect infringes s. 15(1)": *Gosselin*, at para. 243 (emphasis in original).

[152] Second, the court must determine whether one or more of the grounds enumerated in s. 15(1), or analogous grounds, are the basis for the differential treatment.

[153] Third, the court must then determine whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee by making the following inquiry:

> 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

une démarche analytique fondée sur un concept d'égalité réelle qui ne sera violée que si le traitement différentiel désavantageux prévu par l'État a une incidence négative sur la dignité humaine du demandeur. Sur cette base, l'arrêt *Law* propose un cadre analytique en trois étapes permettant à une cour de se prononcer sur une allégation de discrimination fondée sur le par. 15(1).

[151] Premièrement, la cour vérifie si la loi a pour objet ou pour effet d'imposer une différence de traitement entre le demandeur et d'autres personnes. Pour répondre à cette question, la cour doit se demander si la loi contestée établit une distinction formelle entre le demandeur et d'autres personnes en raison d'une ou de plusieurs caractéristiques personnelles, ou si elle omet de tenir compte de la situation défavorisée dans laquelle le demandeur se trouve déjà dans la société canadienne en créant ainsi une différence de traitement réelle entre lui et d'autres personnes en raison d'une ou de plusieurs caractéristiques personnelles. Alors qu'il étudiait la nature de cette différence de traitement dans un autre arrêt, le juge Bastarache a précisé plus tard qu'« il est évident que le juge Iacobucci ne vise que les objets ou effets préjudiciables, puisqu'il est absurde de penser qu'un demandeur puisse prouver qu'un objet ou effet bénéfique ou bénin contrevient au par. 15(1) » : *Gosselin*, par. 243 (souligné dans l'original).

[152] Deuxièmement, la cour détermine si la différence de traitement est fondée sur un ou plusieurs des motifs énumérés au par. 15(1) ou des motifs analogues.

[153] Troisièmement, la cour doit alors étudier si la loi en question a un objet ou un effet discriminatoire au sens de la garantie d'égalité, en se posant la question suivante :

> 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

Canadian society, equally deserving of concern, respect, and consideration?

(*Law*, at para. 88(3)(C))

[154] To resolve the third issue and thus determine whether the differential treatment discriminates in a substantive sense and brings the purpose of s. 15(1) into play, the court must undertake a full contextual inquiry concerning the circumstances of the claimant's claim. This inquiry must be undertaken from the point of view of a reasonable person in circumstances similar to those of the claimant who takes the relevant context into account. Whereas the claimant must prove on a balance of probabilities that the impugned provision discriminates in a substantive sense, the court can take judicial notice of certain facts or matters but must be careful not to use judicial notice to recognize social phenomena that may not truly exist.

[155] Iacobucci J. identified four factors that are relevant to a contextual analysis of a discrimination claim. According to him, these factors may overlap, are not exhaustive and do not all have to be assessed in every case involving an alleged violation of s. 15(1). They can nevertheless guide the court in determining whether the law in question discriminates in a substantive sense.

[156] The first contextual factor he identified is pre-existing disadvantage experienced by the claimant or the group of which the claimant is a member. This factor suggests an inquiry into whether the individual or group might have experienced a historical disadvantage, vulnerability, stereotyping or prejudice. According to Iacobucci J., "[i]t is logical to conclude that, in most cases, further differential treatment will contribute to the perpetuation or promotion of their unfair social characterization, and will have a more severe impact upon [these individuals], since they are already vulnerable": *Law*, at para. 63. However, the existence of a pre-existing disadvantage does not give rise to a presumption that the adverse treatment of historically disadvantaged persons is necessarily discriminatory: *Law*, at para. 67.

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?

(*Law*, par. 88(3)(C))

[154] Pour répondre à la troisième question et ainsi déterminer si la différence de traitement est réellement discriminatoire et fait intervenir l'objet du par. 15(1), il faut entreprendre un examen contextuel approfondi de la situation visée par l'allégation du demandeur. Cet examen doit se faire du point de vue de la personne raisonnable qui se trouve dans une situation semblable à celle du demandeur et qui tient compte du contexte pertinent. Bien qu'il incombe au demandeur de faire la preuve par prépondérance des probabilités que la disposition attaquée est réellement discriminatoire, la cour peut prendre connaissance d'office de certains faits ou éléments, tout en se gardant d'admettre, de cette façon, l'existence de phénomènes sociaux qui peuvent être absents en réalité.

[155] Le juge Iacobucci identifie quatre facteurs pertinents à l'examen du contexte d'une allégation de discrimination. Selon lui, ces facteurs peuvent se chevaucher, ne sont pas exhaustifs et n'ont pas tous à être évalués dans chaque cas d'allégation d'atteinte au par. 15(1). Ils sont néanmoins utiles pour déterminer si la loi en question est réellement discriminatoire.

[156] Le premier facteur contextuel identifié est celui du désavantage préexistant subi par le demandeur ou le groupe auquel il appartient. Ce facteur suggère l'examen d'un possible désavantage historique, d'une vulnérabilité, de stéréotypes ou de préjugés subis par la personne ou le groupe. Selon le juge Iacobucci, « [i]l s'ensuit logiquement que, dans la plupart des cas, une différence de traitement additionnelle contribuera à la perpétuation ou à l'accentuation de leur caractérisation sociale injuste et aura sur [ces personnes] un effet plus grave puisqu'elles sont déjà vulnérables » : *Law*, par. 63. Toutefois, l'existence d'un désavantage préexistant ne crée pas de présomption à l'effet qu'un traitement préjudiciel à l'égard de personnes historiquement défavorisées soit nécessairement discriminatoire : *Law*, par. 67.

[157] The second factor is the correspondence, or lack thereof, between the ground or grounds on which the discrimination claim is based and the actual needs, capacity or circumstances of the claimant or the affected group. Acceptance of the need for correspondence as a contextual factor is logical, since it will be more difficult to prove that a person's dignity has been violated if the legislation in question takes into account the claimant's actual circumstances, needs or capacity. In a subsequent decision, McLachlin C.J., writing for a majority of the Court, clarified the nature of this factor as follows:

> The fact that some people may fall through a program's cracks does not show that the law fails to consider the overall needs and circumstances of the group of individuals affected, or that distinctions contained in the law amount to discrimination in the substantive sense intended by s. 15(1).

(*Gosselin*, at para. 55)

[158] The third factor is whether the impugned law has an ameliorative purpose or effect for certain members of society. Thus, a law that draws distinctions in order to alleviate certain inequalities affecting disadvantaged groups is less likely to be found to violate the dignity of more fortunate individuals to whom the measures do not apply.

[159] The fourth factor concerns the nature or scope of the benefit or interest which the claimant feels he or she has been denied. As Iacobucci J. explained, "[t]he 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)": *Law*, at para. 88(9)(D). Such consequences arise where the distinction restricts access to a fundamental social institution or impedes full membership in Canadian society.

[157] Le deuxième facteur est celui de la correspondance, ou de l'absence de celle-ci, entre le ou les motifs sur lesquels l'allégation de discrimination est fondée et les besoins, les capacités ou la situation propres au demandeur ou au groupe touché. La reconnaissance de cet élément contextuel est logique parce qu'il sera plus difficile de prouver l'existence d'une atteinte à la dignité d'une personne lorsque la mesure législative en question prend en compte la situation réelle du demandeur, ses besoins ou ses capacités. Dans un arrêt subséquent, la juge en chef McLachlin, pour une majorité de la Cour, formule une précision additionnelle quant à la nature de ce facteur :

> Le fait que certaines personnes soient victimes des lacunes d'un programme ne prouve pas que la mesure législative en cause ne tient pas compte de l'ensemble des besoins et de la situation du groupe de personnes touché, ni que la distinction établie par cette mesure crée une discrimination réelle au sens du par. 15(1).

(*Gosselin*, par. 55)

[158] Le troisième facteur vise à déterminer si la loi contestée a un objet ou un effet améliorateur pour certains membres de la société. Ainsi, lorsqu'une loi opère des distinctions afin de réduire certaines inégalités qui affectent des groupes défavorisés, elle risque moins d'être considérée comme portant atteinte à la dignité de personnes plus favorisées auxquelles ces mesures ne s'appliquent pas.

[159] Le quatrième facteur implique un examen de la nature ou de l'étendue de l'avantage ou du droit dont le demandeur s'estime privé. Le juge Iacobucci explique que « [p]lus 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) » : *Law*, par. 88(9)(D). De tels effets peuvent être observés lorsque la distinction restreint l'accès à une institution sociale fondamentale ou lorsqu'elle nuit à la pleine appartenance à la société canadienne.

(d) *Application of the Equality Guarantee in Kapp and Withler*

[160] Nearly 10 years after *Law*, the Court, in reasons written by McLachlin C.J. and Abella J., reviewed the synthesis proposed by Iacobucci J.: see *Kapp*. Almost three years after *Kapp*, the Court continued that review in *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396, a unanimous decision written, once again, by McLachlin C.J. and Abella J.

[161] In those two decisions, the Court observed that, despite the changes made to the s. 15 analysis over the years, the concept of substantive equality had remained central to the analytical framework for that provision: *Kapp*, at para. 15. The Court also noted that, although the analytical framework adopted in *Andrews* had been enriched since that case, including by Iacobucci J. in *Law*, it had never been abandoned: *Kapp*, at para. 14. The Court added that the purpose of s. 15(1) is "the elimination from the law of measures that impose or perpetuate substantial inequality": *Withler*, at para. 40.

[162] In *Kapp*, the Court reworked the three-stage analytical framework from *Law* in light of the purpose of s. 15, namely to promote substantive equality, reshaping it into a two-part test for showing discrimination under s. 15(1). Where a violation of s. 15(1) is alleged, a court must ask 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?" (*Kapp*, at para. 17). If the answer to each of these questions is yes, it can be concluded that the impugned legislative provision violates the equality guarantee in s. 15(1). The Court stated that this two-part test was, "in substance, the same" as the test from *Law* and that *Law* had confirmed the approach to substantive equality set out in *Andrews*: *Kapp*, at paras. 17 and 24.

d) *La mise en œuvre de la garantie d'égalité selon les arrêts Kapp et Withler*

[160] Près de 10 ans après *Law*, la Cour, dans une opinion rédigée par la juge en chef McLachlin et la juge Abella, revoit la synthèse proposée par le juge Iacobucci : voir *Kapp*. Ce réexamen se poursuit dans l'arrêt *Withler c. Canada (Procureur général)*, 2011 CSC 12, [2011] 1 R.C.S. 396, rendu près de trois ans après *Kapp*, l'opinion unanime de la Cour étant rédigée à nouveau par la juge en chef McLachlin et par la juge Abella.

[161] Dans ces deux décisions, la Cour remarque que malgré les modifications apportées à l'analyse requise par l'art. 15 à travers les années, le concept d'égalité réelle est demeuré au cœur du cadre analytique propre à cette disposition : *Kapp*, par. 15. La Cour constate également que bien qu'il ait été enrichi depuis *Andrews*, notamment par le juge Iacobucci dans *Law*, le cadre analytique adopté dans l'arrêt *Andrews* n'a jamais été abandonné : *Kapp*, par. 14. Ensuite, la Cour affirme que l'objectif du par. 15(1) demeure « l'élimination des mesures législatives qui ont pour effet d'imposer ou de perpétuer une inégalité réelle » : *Withler*, par. 40.

[162] Gardant à l'esprit l'objet de l'art. 15, soit la promotion de l'égalité réelle, l'arrêt *Kapp* remanie le cadre analytique en trois étapes proposé par *Law*. Il le réaménage en une analyse à deux volets, destinée à déceler l'existence d'une discrimination au sens du par. 15(1). Devant une allégation d'atteinte au par. 15(1), une cour doit dès lors poser les 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? » (*Kapp*, par. 17). Une réponse affirmative à chacune de ces questions entraîne la conclusion que la disposition législative attaquée constitue une atteinte à la garantie d'égalité prévue au par. 15(1). La Cour précise que ce cadre en deux volets est « essentiellement le même » que les critères de *Law*, et que ce dernier arrêt confirmait l'approche relative à l'égalité réelle établie dans *Andrews* : *Kapp*, par. 17 et 24.

[163] As the Court has acknowledged, the review of the analytical framework for s. 15(1) that began in *Kapp* and continued in *Withler* was also a response to criticism of the framework proposed in *Law* and the subsequent application of that framework, and in particular of the use of the violation of human dignity test, of the application of the contextual factors and of the comparison required by the framework.

[164] The Court began by stressing the importance of the value of human dignity. It stated that "[t]here can be no doubt that human dignity is an essential value underlying the s. 15 equality guarantee": *Kapp*, at para. 21. However, it noted that several difficulties had arisen from attempts to employ this concept as a legal test as proposed in *Law*. On the one hand, human dignity is a value that underlies all *Charter* rights: see *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 136. In this sense, its relevance is not limited to the equality guarantee: see, *inter alia*, D. Greschner, "The Purpose of Canadian Equality Rights" (2002), 6 *Rev. Const. Stud.* 291; D. Proulx, "Le concept de dignité et son usage en contexte de discrimination: deux Chartes, deux modèles", [2003] *R. du B.* (numéro spécial) 485. On the other hand, as I mentioned above, dignity is not the only value underlying s. 15. Other values associated with it include freedom and personal autonomy.

[165] Rather than emphasizing the identification of a violation of the complainant's dignity as an independent factor, the Court proposed that the analysis to determine whether a claimant has been discriminated against be focused on the context of the claim. At that time, the Court reaffirmed the importance of context and the relevance of the contextual factors set out in *Law*. Pre-existing disadvantage and the nature of the affected interest are therefore factors to be applied to determine whether a distinction creates a disadvantage by perpetuating prejudice. Correspondence between the ground or grounds on which the claim is based and

[163] Comme le reconnaît la Cour, la révision du cadre analytique de l'application du par. 15(1) entreprise dans *Kapp* et continuée dans *Withler* réagissait aussi à quelques critiques formulées à propos du cadre proposé par *Law* et de son application subséquente, notamment, au sujet de l'utilisation du critère d'atteinte à la dignité humaine, de la méthode d'application des facteurs contextuels et de l'impératif de comparaison au sein de ce cadre analytique.

[164] Au départ, la Cour insiste sur l'importance de la valeur que représente la dignité humaine. Elle affirme qu'« [i]l ne fait aucun doute que la dignité humaine est une valeur essentielle qui sous-tend le droit à l'égalité garanti par l'art. 15 » : *Kapp*, par. 21. Toutefois, elle remarque que ce concept soulève plusieurs difficultés d'application, lorsque l'on tente de l'utiliser comme un critère juridique tel que le prévoyait l'arrêt *Law*. D'une part, la dignité humaine constitue une valeur sous-tendant l'ensemble des droits garantis par la *Charte* : voir *R. c. Oakes*, [1986] 1 R.C.S. 103, p. 136. En ce sens, elle n'est pas pertinente seulement à l'égard de la garantie d'égalité : voir notamment D. Greschner, « The Purpose of Canadian Equality Rights » (2002), 6 *R. études const.* 291; D. Proulx, « Le concept de dignité et son usage en contexte de discrimination : deux Chartes, deux modèles », [2003] *R. du B.* (numéro spécial) 485. D'autre part, comme nous l'avons vu plus haut dans ces motifs, la dignité ne représente pas la seule valeur sous-tendant l'art. 15. Celui-ci y associe notamment des valeurs de liberté et d'autonomie de la personne.

[165] Plutôt que de mettre l'accent sur la recherche d'une atteinte à la dignité du plaignant comme facteur indépendant, la Cour propose de concentrer l'analyse sur le contexte de la réclamation afin de déterminer la présence d'une situation de discrimination. À cette occasion, la Cour réaffirme l'importance du contexte et la pertinence des facteurs contextuels expliqués dans *Law*. Ainsi, l'existence d'un désavantage préexistant et la nature du droit touché permettront d'évaluer si la distinction crée un désavantage par la perpétuation d'un préjugé. Le facteur de correspondance entre le ou les motifs sur lesquels l'allégation est fondée et la situation propre

the actual circumstances of the claimant or the affected group is a factor to be applied to determine whether a distinction creates a disadvantage by stereotyping: *Kapp*, at para. 23. Next, the Court attributed two main functions to the ameliorative factor referred to in *Law*. First, the ameliorative purpose or effect of a law may bring it within the purview of s. 15(2), which preserves the right of governments to implement specific programs aimed at helping disadvantaged groups without fear of challenge under s. 15(1): *Kapp*, at para. 16. Second, the Court explained alternatively that, "[w]here the impugned law is part of a larger benefits scheme . . . the ameliorative effect of the law on others and the multiplicity of interests it attempts to balance will also colour the discrimination analysis [under s. 15(1)]": *Withler*, at para. 38.

[166] According to the Court, regardless of whether the s. 15 analysis focuses on perpetuating disadvantage or stereotyping,

> the analysis involves looking at the circumstances of members of the group and the negative impact of the law on them. The analysis is contextual, not formalistic, grounded in the actual situation of the group and the potential of the impugned law to worsen their situation.

(*Withler*, at para. 37)

The Court thus noted that the contextual factors that are relevant at this stage of the analysis will vary with the nature of the case. "Just as there will be cases where each and every factor need not be canvassed, so too will there be cases where factors not contemplated in *Law* will be pertinent to the analysis": *Withler*, at para. 66. In both *Kapp* and *Withler*, the Court warned against an inflexible application of these factors that does not take into account their concrete effects in their larger social, political and legal contexts.

[167] The Court also recognized that it may be helpful at the stage of determining whether a distinction exists to compare the group of which the

au demandeur ou au groupe touché permettra d'évaluer si la distinction crée un désavantage par l'application de stéréotypes : *Kapp*, par. 23. Puis, la Cour attribue deux fonctions principales au facteur d'amélioration mentionné dans *Law*. D'une part, l'objet ou l'effet améliorateur d'une mesure peut venir placer celle-ci sous le coup du par. 15(2), qui protège le droit des gouvernements de mettre en œuvre des programmes spécifiques destinés à aider des groupes défavorisés sans s'exposer à des contestations fondées sur le par. 15(1) : *Kapp*, par. 16. D'autre part, la Cour explique qu'alternativement, « [l]orsque la mesure contestée s'inscrit dans un vaste régime de prestations, [. . .] 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 [sous le par. 15(1)] » : *Withler*, par. 38.

[166] Selon la Cour, 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.

(*Withler*, par. 37)

La Cour rappelle ainsi que les facteurs contextuels pertinents à cette étape de l'analyse varieront selon la nature de l'affaire. « Dans certains cas, il ne sera pas nécessaire d'examiner expressément chacun des facteurs, alors que dans d'autres, certains facteurs non envisagés dans l'arrêt *Law* seront pertinents pour l'analyse » : *Withler*, par. 66. Tant dans *Kapp* que dans *Withler*, la Cour met en garde contre une application rigide de ces facteurs qui ne tiendrait pas compte de leurs effets concrets dans l'ensemble de leurs contextes social, politique et juridique.

[167] La Cour reconnaît également qu'une comparaison entre le groupe auquel appartient le demandeur et d'autres groupes peut s'avérer

claimant is a member with other groups. However, it observed that a formalistic or artificial approach to comparison may prevent a court from adequately addressing the issue raised at the second stage of the analysis, namely whether the law has a purpose or effect that discriminates in a substantive sense: *Withler*, at paras. 62-65. Thus, it appears that a

> mirror comparator group analysis may fail to capture substantive inequality, may become a search for sameness, may shortcut the second stage of the substantive equality analysis, and may be difficult to apply. In all these ways, such an approach may fail to identify — and, indeed, thwart the identification of — the discrimination at which s. 15 is aimed.

(*Withler*, at para. 60)

[168] At this second stage, therefore, rather than limiting its analysis to a formalistic comparison of particular groups, the Court must endeavour to take the contextual factors relevant to the case into account: *Kapp*, at paras. 22-23. Although comparison may bolster the understanding of the context, "[t]he probative value of comparative evidence, viewed in [a] contextual sense, will depend on the circumstances": *Withler*, at para. 65.

[169] The Court thus acknowledged the general usefulness of comparison in determining whether a distinction exists and gaining a better contextual understanding of the claimant's place within the legislative scheme at issue and within society. The Court nonetheless made the use of the comparative approach more flexible by emphasizing the need to assess the impact of the impugned scheme on substantive equality. In so doing, it moved away from the rigid comparative analytical approach based on the identification of comparator groups that had been adopted in some of its decisions: see, *inter alia*, *Hodge*, at para. 17. Once a distinction is found to exist, therefore, the main question must always be the same: does the distinction create a disadvantage by perpetuating prejudice or stereotyping? In other words, if there is a distinction, is it discriminatory? The Court therefore stressed

utile à l'étape de savoir si une distinction existe. Cependant, elle souligne qu'un emploi formaliste ou artificiel de cette méthode peut empêcher de répondre adéquatement à la question soulevée à la deuxième étape de l'analyse, soit celle de déterminer si la loi a un objet ou un effet réellement discriminatoire : *Withler*, par. 62-65. Ainsi, il apparaît qu'une

> analyse fondée sur la comparaison avec un groupe aux caractéristiques identiques ne permet pas toujours de détecter l'inégalité réelle et risque de se muer en recherche de la similitude, de court-circuiter le deuxième volet de l'analyse de l'égalité réelle et de se révéler difficile à appliquer. Pour toutes ces raisons, il se peut qu'une telle démarche ne permette pas — voire empêche — la reconnaissance de la discrimination à laquelle l'art. 15 est censé remédier.

(*Withler*, par. 60)

[168] À cette deuxième étape, la Cour ne doit donc pas s'arrêter à une comparaison formaliste de groupes particuliers. Elle cherchera plutôt à tenir compte de facteurs contextuels pertinents : *Kapp*, par. 22-23. Bien que la comparaison puisse favoriser une meilleure compréhension du contexte, « [l]a valeur probante de la preuve comparative, considérée dans [une] perspective contextuelle, dépendra des circonstances » : *Withler*, par. 65.

[169] La Cour reconnaît ainsi l'utilité générale de la comparaison pour évaluer l'existence d'une distinction et pour mieux comprendre le contexte de la situation du demandeur au sein du régime législatif en cause et de la société. Néanmoins, la Cour assouplit la méthode d'utilisation de la perspective comparative, en insistant sur la recherche d'une évaluation de l'impact du régime contesté sur l'égalité réelle. Ce faisant, elle s'éloigne d'une approche analytique comparative rigide et basée sur l'identification de groupes de comparaison qu'avaient adoptée certains de ses arrêts : voir notamment *Hodge*, par. 17. Dès lors, une fois l'existence d'une distinction reconnue, la question principale doit toujours demeurer la même : la distinction crée-t-elle un désavantage par la perpétuation d'un préjugé ou l'application de stéréotypes? Autrement dit, s'il existe une

the importance of the factors of perpetuation of prejudice and stereotyping. While it did not make them the only factors, it determined that they were crucial to the identification of discrimination and to the application of the analytical framework for s. 15.

(e) *Meaning and Scope of Kapp and Withler*

[170] In *Kapp* and *Withler*, the Court reworked and provided important clarifications to the analytical framework for applying the s. 15(1) equality guarantee. However, some authors argue that those decisions did not eliminate all uncertainty concerning the concepts of disadvantage, prejudice and stereotyping in this framework: S. Moreau, "*R. v. Kapp*: New Directions for Section 15" (2008-2009), 40 *Ottawa L. Rev.* 283, at pp. 286 and 291-92; J. Koshan and J. W. Hamilton, "Meaningless Mantra: Substantive Equality after *Withler*" (2011), 16 *Rev. Const. Stud.* 31, at pp. 48-51; Tremblay, at p. 188.

[171] In *Kapp*, the Court reiterated the fundamental principle that "[s]ection 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": para. 16; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 106. The language used by the Court is clear: s. 15(1) prevents governments from establishing "discriminatory distinctions that impact adversely" on members of groups on the basis of enumerated or analogous grounds (para. 106 (emphasis added)). Section 15 applies not only to laws enacted with discriminatory intent, but also, even if there is no such intent, to laws with discriminatory effects. Section 15(1) therefore does not prohibit distinctions that have an adverse impact unless they are discriminatory. In other words, the adverse impact or "disadvantage" must be discriminatory. What is a discriminatory disadvantage? As can be seen from the analytical framework as articulated in *Kapp*, a discriminatory disadvantage is as a general rule one that perpetuates prejudice or that stereotypes:

distinction, est-elle discriminatoire? La Cour insiste alors sur l'importance des facteurs que sont la perpétuation d'un préjugé ou l'application de stéréotypes. Si elle ne leur attribue pas un rôle exclusif, elle leur reconnaît une fonction cruciale dans l'identification des situations de discrimination et dans le fonctionnement du cadre analytique de l'art. 15.

e) *Le sens et la portée de Kapp et de Withler*

[170] Les arrêts *Kapp* et *Withler* 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). Cependant, certains auteurs soutiennent que ces arrêts n'ont pas dissipé toute incertitude au sujet des concepts de désavantage, de préjugé et de stéréotype dans ce cadre analytique : S. Moreau, « *R. v. Kapp* : New Directions for Section 15 » (2008-2009), 40 *R.D. Ottawa* 283, p. 286 et 291-292; J. Koshan et J. W. Hamilton, « Meaningless Mantra : Substantive Equality after *Withler* » (2011), 16 *R. études const.* 31, p. 48-51; Tremblay, p. 188.

[171] Dans *Kapp*, la Cour a réitéré le principe fondamental selon lequel « [l]e 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 » : par. 16; *Alberta c. Hutterian Brethren of Wilson Colony*, 2009 CSC 37, [2009] 2 R.C.S. 567, par. 106. Le vocabulaire employé par la Cour est clair : le par. 15(1) empêche les gouvernements d'établir, sur la base de motifs énumérés ou analogues, des « distinctions discriminatoires ayant un effet négatif » (par. 106 (je souligne)). L'article 15 ne vise pas seulement les lois adoptées avec une intention discriminatoire, mais aussi celles qui ont des effets discriminatoires, même en l'absence d'une telle intention. Le paragraphe 15(1) n'interdit donc les distinctions ayant un effet négatif que si celles-ci sont discriminatoires. Autrement dit, l'effet négatif ou le « désavantage » doit être discriminatoire. Qu'est-ce qu'un désavantage discriminatoire? Comme le prévoit le cadre analytique formulé dans *Kapp*, en règle générale, un désavantage discriminatoire est celui qui perpétue un préjugé ou qui applique un stéréotype :

(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? [Emphasis added; para. 17.]

[172] In *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9, [2009] 1 S.C.R. 222, Rothstein J. applied this analytical framework to dismiss a claim that the right to equality had been infringed in the context of the relationship between Aboriginal communities and the federal government. Rothstein J. summed up the Court's position as follows:

This Court's equality jurisprudence makes it clear that not all distinctions are discriminatory. Differential treatment of different groups is not in and of itself a violation of s. 15(1). As this Court stated in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 182 (restated in *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 28), a complainant must show "not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection or benefit accorded by law but, in addition, must show that the legislative impact of the law is discriminatory" (emphasis added). The analysis, as established in *Andrews*, consists of two questions: first, does the law create a distinction based on an enumerated or analogous ground; and second, does the distinction create a disadvantage by perpetuating prejudice or stereotyping. [para. 188.]

[173] This analytical framework has been reaffirmed by the Court in other recent decisions: *Hutterian*, at para. 106; *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 S.C.R. 181, at paras. 109 and 150. The Court further explained the nature of the framework in *Withler*, in which it stated that there are usually two ways for a claimant to prove that a law containing an adverse distinction based on an enumerated or analogous ground "discriminates in a substantive sense". On the one hand, the claimant can show that the impugned law perpetuates prejudice against members of a group. On the other hand, the claimant can show that the disadvantage imposed by the law

(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? [Je souligne; par. 17.]

[172] Dans l'arrêt *Bande et nation indiennes d'Ermineskin c. Canada*, 2009 CSC 9, [2009] 1 R.C.S. 222, le juge Rothstein a repris ce cadre d'analyse pour conclure au rejet d'une allégation de violation du droit à l'égalité, dans le contexte des relations entre des communautés autochtones et le gouvernement fédéral. Le juge Rothstein résumait ainsi la position de notre Cour :

La jurisprudence de notre Cour sur le droit à l'égalité établit clairement que toute distinction n'est pas discriminatoire. Le fait que des groupes soient traités différemment ne constitue pas en soi une atteinte aux droits garantis au par. 15(1). Comme notre Cour l'a dit dans l'arrêt *Andrews c. Law Society of British Columbia*, [1989] 1 R.C.S. 143, p. 182 (et réaffirmé dans l'arrêt *R. c. Kapp*, 2008 CSC 41, [2008] 2 R.C.S. 483, par. 28), le plaignant doit démontrer « non seulement qu'il ne bénéficie pas d'un traitement égal devant la loi et dans la loi, ou encore que la loi a un effet particulier sur lui en ce qui concerne la protection ou le bénéfice qu'elle offre, mais encore que la loi a un effet discriminatoire sur le plan législatif » (je souligne). La méthode d'analyse établie dans l'arrêt *Andrews* comporte deux volets : premièrement, la loi établit-elle une distinction fondée sur un motif énuméré ou analogue et, deuxièmement, la distinction crée-t-elle un désavantage par la perpétuation d'un préjugé ou l'application de stéréotypes? [par. 188.]

[173] Ce cadre analytique a été repris par la Cour dans d'autres arrêts récents : *Hutterian*, par. 106; *A.C. c. Manitoba (Directeur des services à l'enfant et à la famille)*, 2009 CSC 30, [2009] 2 R.C.S. 181, par. 109 et 150. Dans *Withler*, la Cour explique davantage la nature de ce cadre. Selon cette décision, le demandeur possède habituellement deux voies pour prouver qu'une mesure comportant une distinction désavantageuse fondée sur un motif énuméré ou analogue est « réellement discriminatoire ». D'une part, le demandeur peut démontrer que la mesure contestée perpétue un préjugé à l'égard des membres d'un groupe. D'autre part, il peut établir que le désavantage imposé par une telle

is based on a stereotype. If either of these things is shown, the impugned law will be found to violate s. 15(1): *Withler*, at paras. 34-36. I would add that there will no doubt be cases in which prejudice and stereotyping are both involved, and reinforce one another.

[174] It was stated in *Kapp* and reiterated in *Withler* that a discriminatory distinction is an adverse distinction that perpetuates prejudice or that stereotypes. I will now discuss the uncertainty that results from certain passages from *Kapp* and *Withler*, after which I will consider the meaning and scope of the concepts of disadvantage, prejudice and stereotyping.

[175] I note that in certain passages from *Kapp* and *Withler*, the Court used varying terminology that strayed from the language used to describe the recommended test. In particular, some of these passages might suggest that a violation of the right to equality can be established simply by proof of a disadvantage based on an enumerated or analogous ground, without having to establish that the disadvantage is discriminatory by showing that it results from the perpetuation of prejudice or from stereotyping: see, *inter alia*, *Kapp*, at para. 25; *Withler*, at paras. 35, 37, 65 and 71.

[176] It would be wrong to ascribe such a meaning to the passages in question. The words "discriminates by perpetuating disadvantage or prejudice" in para. 71 of *Withler* (emphasis added) actually refer only to the importance of pre-existing disadvantage as a contextual factor for the purpose of identifying prejudice in the sense of circumstances in which certain individuals are not recognized at law as human beings fully deserving of concern, respect and consideration: *Andrews*, at p. 171. In *Law*, Iacobucci J. explained the relevance of this link between disadvantage and prejudice as follows:

> As has been consistently recognized throughout this Court's jurisprudence, probably the most compelling factor favouring a conclusion that differential treatment imposed by legislation is truly discriminatory will be,

mesure repose sur un stéréotype. L'une ou l'autre de ces démonstrations mènera à la conclusion que la mesure attaquée porte atteinte au par. 15(1) : *Withler*, par. 34-36. J'ajoute qu'il surviendra sans doute des cas où le préjugé et le stéréotype seraient tous deux présents et se renforceront.

[174] Selon l'arrêt *Kapp*, repris par l'arrêt *Withler*, une distinction discriminatoire est une distinction désavantageuse qui perpétue un préjugé ou applique un stéréotype. J'examinerai la signification et les contours des notions de désavantage, de préjugé et de stéréotype après avoir discuté de l'incertitude découlant de certains passages des arrêts *Kapp* et *Withler*.

[175] Je note que quelques passages de *Kapp* et *Withler* emploient un vocabulaire varié dont la lettre s'éloigne du langage utilisé pour décrire la méthode d'analyse recommandée. Notamment, certains de ces passages peuvent suggérer que la preuve d'un désavantage fondé sur un motif énuméré ou analogue puisse à elle seule établir une violation du droit à l'égalité, et ce, sans qu'il soit nécessaire d'établir le caractère discriminatoire du désavantage en démontrant qu'il découle de la perpétuation d'un préjugé ou de l'application d'un stéréotype : voir notamment *Kapp*, par. 25; *Withler*, par. 35, 37, 65 et 71.

[176] Il serait inexact de donner une telle portée à ces passages. L'expression « discrimination en perpétuant un désavantage ou un préjugé » comprise au par. 71 de *Withler* (je souligne) n'évoque en fait que l'importance du facteur contextuel de désavantage préexistant pour le repérage de préjugés, au sens de situations où la loi ne reconnaît pas certains individus comme des êtres humains méritant pleinement respect, déférence et considération : *Andrews*, p. 171. Dans l'arrêt *Law*, le juge Iacobucci a expliqué la pertinence de ce lien entre désavantage et préjugé de la façon suivante :

> Comme la jurisprudence de notre Cour l'a reconnu de façon constante, le facteur qui sera probablement le plus concluant pour démontrer qu'une différence de traitement imposée par une disposition législative

where it exists, pre-existing disadvantage, vulnerability, stereotyping, or prejudice experienced by the individual or group: see, e.g., *Andrews*, *supra*, at pp. 151-53, *per* Wilson J., p. 183, *per* McIntyre J., pp. 195-97, *per* La Forest J.; *Turpin*, *supra*, at pp. 1331-33; *Swain*, *supra*, at p. 992, *per* Lamer C.J.; *Miron*, *supra*, at paras. 147-48, *per* McLachlin J.; *Eaton*, *supra*, at para. 66. These factors are relevant because, to the extent that the claimant is already subject to unfair circumstances or treatment in society by virtue of personal characteristics or circumstances, persons like him or her have often not been given equal concern, respect, and consideration. It is logical to conclude that, in most cases, further differential treatment will contribute to the perpetuation or promotion of their unfair social characterization, and will have a more severe impact upon them, since they are already vulnerable. [para. 63]

[177] The existence of a pre-existing or historical disadvantage will thus make it easier to prove prejudice or a stereotype. However, the existence or perpetuation of a disadvantage cannot in itself make a distinction discriminatory. The following comment by McLachlin C.J. from a recent case more clearly summarizes the need for a link between disadvantage and prejudice, on the one hand, and between disadvantage and stereotype, on the other:

Laws and government acts that perpetuate disadvantage and prejudice, or that single out individuals or groups for adverse treatment on the basis of stereotypes, violate s. 15(1) and are invalid, subject to justification under s. 1 of the *Charter*: *Kapp*; *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396. [Emphasis added.]

(*Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37, [2011] 2 S.C.R. 670, at para. 39)

[178] The interpretation according to which there cannot as a rule be substantive discrimination, despite the existence of a disadvantage, without prejudice or stereotyping is consistent with this

est vraiment discriminatoire sera, le cas échéant, la préexistence d'un désavantage, de vulnérabilité, de stéréotypes ou de préjugés subis par la personne ou par le groupe: voir p. ex., *Andrews*, précité, aux pp. 151 à 153, le juge Wilson, à la p. 183, le juge McIntyre, aux pp. 195 à 197, le juge La Forest; *Turpin*, précité, aux pp. 1331 à 1333; *Swain*, précité, à la p. 992, le juge en chef Lamer; *Miron*, précité, aux par. 147 et 148, le juge McLachlin; *Eaton*, précité, au par. 66. Ces facteurs sont pertinents parce que, dans la mesure où le demandeur se trouve déjà dans une situation injuste ou fait déjà l'objet d'un traitement inéquitable dans la société du fait de caractéristiques ou d'une situation qui lui sont propres, il est arrivé souvent que des personnes dans la même situation n'aient pas fait l'objet du même intérêt, du même respect et de la même considération. Il s'ensuit logiquement que, dans la plupart des cas, une différence de traitement additionnelle contribuera à la perpétuation ou à l'accentuation de leur caractérisation sociale injuste et aura sur elles un effet plus grave puisqu'elles sont déjà vulnérables. [par. 63]

[177] Ainsi, 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. Des commentaires de la juge en chef McLachlin, dans un arrêt récent, résument plus clairement la nécessité du lien qui doit exister entre désavantage et préjugé d'une part, ou entre désavantage et stéréotype de l'autre :

Les lois et les actes gouvernementaux qui perpétuent un désavantage et un préjugé, ou qui imposent à certains individus ou groupes un traitement préjudiciable fondé sur des stéréotypes, violent le par. 15(1) et sont invalides, dans la mesure où ils ne sont pas justifiés au regard de l'article premier de la *Charte* : *Kapp*; *Withler c. Canada (Procureur général)*, 2011 CSC 12, [2011] 1 R.C.S. 396. [Je souligne.]

(*Alberta (Affaires autochtones et Développement du Nord) c. Cunningham*, 2011 CSC 37, [2011] 2 R.C.S. 670, par. 39)

[178] L'interprétation selon laquelle il ne peut y avoir, en règle générale, de réelle discrimination sans préjugé ou stéréotype, et ce, malgré l'existence d'un désavantage, respecte la jurisprudence de

Court's case law on the meaning and application of s. 15(1). As McLachlin C.J. has stated, "not every adverse distinction made on the basis of an enumerated or analogous ground constitutes discrimination": *Gosselin*, at para. 21. More recently, Rothstein J. stated that, "even if [there] is a disadvantage, the legislation will violate s. 15(1) only if that disadvantage is one that is discriminatory, that is, if it perpetuates prejudice or stereotyping": *Ermineskin*, at para. 192.

[179] This position is also consistent with the approach taken by this Court to substantive equality, the promotion of which "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": *Kapp*, at para. 15, quoting *Andrews*, at p. 171; see also Tremblay, at pp. 189-92. In the context of s. 15(1), substantive equality is promoted by eliminating discrimination. The central question is not whether one person receives less than another, but whether one person obtains less than another as a result of prejudice or stereotyping. This is the essence of the wrong or injustice that s. 15(1) is intended to prevent. As Professor Moreau puts it,

> [n]o plausible theory of equality maintains that what is objectionable about unequal treatment is the mere fact that some individuals end up with more or less than others. Rather, such theories hold that unequal treatment is objectionable when, and to the extent that, this treatment is unfair.
>
> ("The Wrongs of Unequal Treatment" (2004), 54 *U.T.L.J.* 291, at p. 293)

[180] Thus, 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:

> We think of discrimination not just as any sort of differential treatment but as a particular kind of differential treatment: to be discriminated against is not just to be

notre Cour sur le sens et l'application du par. 15(1). Comme l'a déjà affirmé la juge en chef McLachlin, « toute distinction préjudiciable fondée sur un motif énuméré ou analogue ne constitue pas une mesure discriminatoire » : *Gosselin*, par. 21. Plus récemment, le juge Rothstein précisait que « même si la loi [. . .] crée de ce fait un désavantage, elle ne porte atteinte aux droits garantis au par. 15(1) que lorsque ce désavantage est discriminatoire, c'est-à-dire s'il perpétue un préjugé ou l'application de stéréotypes » : *Ermineskin*, par. 192.

[179] Cette position correspond également à la conception de l'égalité réelle que retient notre Cour et dont la promotion « 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 » : *Kapp*, par. 15, citant *Andrews*, p. 171; voir également Tremblay, p. 189-192. Dans le cadre du par. 15(1), cette promotion de l'égalité réelle passe par l'élimination de la discrimination. La question centrale n'est pas celle de savoir si une personne reçoit moins qu'une autre, mais plutôt si celle-ci obtient moins qu'une autre en raison de préjugés ou de stéréotypes. L'essence du mal ou de l'injustice que le par. 15(1) tente de combattre se situe là. Comme l'exprime la professeure Moreau,

> [TRADUCTION] [a]ucune théorie plausible de l'égalité ne considère qu'un traitement inégal est répréhensible du seul fait que certaines personnes reçoivent plus ou moins que d'autres. Au contraire, selon de telles théories, un traitement inégal est répréhensible lorsqu'il est injuste, et dans la mesure de cette injustice.
>
> (« The Wrongs of Unequal Treatment » (2004), 54 *U.T.L.J.* 291, p. 293)

[180] Ainsi, 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 :

> [TRADUCTION] La discrimination ne constitue pas, à nos yeux, n'importe quelle sorte de traitement différent, mais plutôt un type particulier de traitement différent;

denied something that others have but to be denied it in a way that is objectionable or unfair.

(S. Moreau, "The Promise of *Law v. Canada*" (2007), 57 *U.T.L.J.* 415, at p. 426)

[181] Finally, I would like to make one more point about the principle of creation of a "disadvantage by perpetuating prejudice". The use of the word "perpetuating" might seem to suggest that there can be discrimination within the meaning of s. 15(1) only where the prejudice has a historical origin: see, *inter alia*, Koshan and Hamilton, at p. 51.

[182] But this view is incorrect. Although it can be helpful, in order to establish that an impugned law imposes a disadvantage by perpetuating prejudice, to show that certain individuals or classes of persons have historically been victims of prejudice, it is not necessary to do so. As Iacobucci J. explained in *Law*, at paras. 65-67, the historical contextual factors of vulnerability, past exposure to prejudice or stereotyping and pre-existing disadvantage are useful, but if they do not apply, this does not necessarily mean that the legislative provision at issue is currently free of prejudice. Moreover, a proper assessment of a disadvantageous law's impact on substantive equality will in most cases require evidence of discrimination focused on the adverse effects as of the date of the claim, as opposed to the date the impugned law came into force: see, *inter alia*, Réaume, at p. 687. As well, historical prejudices can change; some disappear, while new ones may emerge. The concept of immutability on which my colleagues Deschamps and Abella JJ. rely in their respective reasons, on the basis in particular of *Corbiere*, is not synonymous with eternity. Although this concept of immutability may underline the fact that certain factors of discrimination will exist for a long time, it cannot be employed without taking the extreme diversity of those factors and of societal circumstances into account. It does not mean that the factors of discrimination can never change or disappear, especially where they are related to customs or

faire l'objet de discrimination, ce n'est pas seulement se voir priver de quelque chose que d'autres personnes possèdent, mais d'en être privé de manière répréhensible ou injuste.

(S. Moreau, « The Promise of *Law v. Canada* » (2007), 57 *U.T.L.J.* 415, p. 426)

[181] En dernier lieu, je tiens à apporter une précision additionnelle au principe de « désavantage par la perpétuation d'un préjugé ». L'usage du terme « perpétuation » pourrait laisser entendre qu'il soit nécessaire qu'un préjugé ait une origine historique afin qu'une discrimination existe au sens du par. 15(1) : voir notamment Koshan et Hamilton, p. 51.

[182] Une telle conception est inexacte. Bien qu'il soit utile de démontrer l'existence de préjugés ayant historiquement affecté certains individus ou des catégories de personnes afin d'établir que la loi contestée impose actuellement un désavantage par la perpétuation d'un préjugé, une telle démonstration n'est pas obligatoire. Comme l'expliquait le juge Iacobucci aux par. 65-67 de *Law*, les facteurs contextuels historiques de vulnérabilité, d'exposition passée à des préjugés ou des stéréotypes et de désavantage préexistant sont utiles. Leur absence n'empêche cependant pas qu'une disposition législative soit actuellement empreinte de préjugés. D'autre part, pour évaluer adéquatement l'impact de la mesure désavantageuse sur l'égalité réelle, la preuve de discrimination doit, dans la plupart des cas, se concentrer sur les effets négatifs à la date de la demande, plutôt qu'à celle de l'entrée en vigueur de la mesure contestée : voir notamment Réaume, p. 687. De plus, les préjugés historiques peuvent changer; certains disparaissent, d'autres peuvent apparaître. La notion d'immutabilité sur laquelle s'appuient mes collègues les juges Deschamps et Abella, dans leurs opinions respectives, notamment à partir de l'arrêt *Corbiere*, n'est pas synonyme d'éternité. Bien que cette notion d'immutabilité puisse souligner la durabilité de certains facteurs de discrimination, son usage ne peut négliger l'extrême diversité de ces facteurs et des situations sociales. La notion d'immutabilité n'implique pas que les facteurs de discrimination

social behaviour that could change, as in the case of the attitudes of Quebec society with respect to *de facto* unions.

[183] Nor does recourse to these changeable contextual factors in analyzing a specific allegation of infringement of the right to equality mean that a ground of discrimination that is accepted or rejected in a specific case cannot be relied on in another situation. Context is critical, and it must be taken into account each time, since such factors are recognized "in the context of the place of the group in the entire social, political and legal fabric of our society": *R. v. Turpin*, [1989] 1 S.C.R. 1296, at p. 1332, *per* Wilson J., referring to her reasons in *Andrews*, at p. 152. The contextual nature of these factors means that they can change along with their social context, the one that has given rise to them.

[184] In *Corbiere*, the majority of the Court stressed the meaning and limits of the concept of immutability of the markers of discrimination. The presence of such a marker is not necessarily proof of discrimination. According to McLachlin and Bastarache JJ., the decision to categorize a characteristic as an analogous ground instead tells the court that it should consider the situation in light of s. 15. In this regard, McLachlin and Bastarache JJ. made the following observation in *Corbiere*: "To say that a ground of distinction is an analogous ground is merely to identify a type of decision making that is suspect because it often leads to discrimination and denial of substantive equality. Like distinctions made on enumerated grounds, distinctions made on analogous grounds may well not be discriminatory" (para. 8).

(3) Synthesis of the Analytical Framework

[185] In light of these reasons, and subject to my comments to the effect that prejudice or stereotyping is a crucial, although not the only, factor to be considered, a court analyzing the validity

ne sauraient jamais évoluer ou disparaître, surtout lorsqu'ils sont liés à des usages ou comportements sociaux susceptibles de se modifier, comme on le constate à l'examen des attitudes de la société québécoise à l'égard des unions de fait.

[183] De plus, le recours à ces facteurs contextuels évolutifs dans l'analyse d'une allégation particulière de violations du droit à l'égalité ne signifie pas que le motif de distinction admis ou rejeté dans ce cas précis ne puisse être invoqué dans une autre situation. Le contexte demeure critique et doit être pris en compte chaque fois puisque la reconnaissance de tels facteurs a lieu « en fonction de la place occupée par le groupe dans les contextes social, politique et juridique de notre société » : *R. c. Turpin*, [1989] 1 R.C.S. 1296, p. 1332, la juge Wilson, renvoyant alors à ses motifs dans *Andrews*, p. 152. Le caractère contextuel de ces facteurs signifie qu'ils sont susceptibles d'évoluer avec le contexte social où ils se situent et qui les fait apparaître.

[184] Dans l'arrêt *Corbiere*, l'opinion de la majorité de la Cour souligne le sens et les limites du concept d'immutabilité des indicateurs de discrimination. La présence d'un tel indicateur ne signifie pas qu'il y a nécessairement discrimination. Selon les juges McLachlin et Bastarache, la décision de catégoriser une caractéristique comme un motif analogue indique plutôt au tribunal qu'il doit examiner la situation au regard de l'art. 15. À ce propos, les juges McLachlin et Bastarache faisaient remarquer dans l'arrêt *Corbiere* : « Affirmer qu'un motif de distinction est un motif analogue ne fait qu'indiquer qu'un certain processus décisionnel est suspect parce qu'il aboutit souvent à la discrimination et au déni du droit à l'égalité réelle. Tout comme les distinctions fondées sur des motifs énumérés, celles qui reposent sur des motifs analogues peuvent fort bien ne pas être discriminatoires » (par. 8).

(3) Synthèse du cadre analytique

[185] À la lumière des présents motifs, et sous réserve de mes commentaires quant au rôle crucial mais non exclusif de l'existence d'un préjugé ou d'un stéréotype, une cour analysant la validité

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

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

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

s. 15(1) or on characteristics analogous to them. An adverse distinction can also be inconsistent with s. 15, even if there is no discriminatory intent whatsoever, if it has a discriminatory effect. Since equality is an expression of the values of a society in which all are secure in the knowledge that they are recognized at law as human beings equally entitled to respect, the perpetuation of such a negative view constitutes a denial of substantive equality.

[194] Thus, if the government either directly or indirectly disadvantages certain persons who share one of these personal characteristics that are immutable, or changeable only at unacceptable cost, it may be that a negative view is thereby being expressed either consciously or unconsciously. The government can treat individuals or groups differently, however. For example, it is accepted that it can confer advantages or impose disadvantages based on individual merit or capacity. Under s. 15(2), it can also implement specific programs to help disadvantaged groups. But the government is prohibited from showing certain individuals greater respect and consideration simply because they share an enumerated or analogous personal characteristic.

[195] Denise G. Réaume has described more precisely the meaning of the concept of prejudice and the nature of the harm that results from the expression or perpetuation of prejudice:

> A legislative distinction based on prejudice denies a class of persons a benefit out of *animus* or contempt. It directly connotes a belief in their inferiority, a denial of equal moral status. Legislated prejudice denies a benefit for the sake of causing harm to those denied. It thus treats members of a group as *loci* of intrinsic negative value, rather than intrinsic moral worth. Such treatment not only deprives them of the concrete benefit at issue, but also, through doing so, treats them as unworthy of basic human respect. . . .

personnelles énumérées au par. 15(1) ou analogues à celles-ci. Une distinction désavantageuse peut aussi être incompatible avec l'art. 15 lorsqu'elle a un effet discriminatoire, même en l'absence de toute volonté de discrimination. Puisque l'égalité exprime les valeurs d'une société où tous ont la certitude que la loi les reconnaît comme des êtres humains qui ont droit au même respect, la perpétuation d'une telle opinion défavorable porte atteinte à l'égalité réelle.

[194] Ainsi, lorsque l'État défavorise directement ou indirectement certaines personnes partageant une de ces caractéristiques personnelles immuables ou modifiables à un prix inacceptable, il est possible qu'une opinion défavorable soit exprimée consciemment ou inconsciemment par cette action. Cependant, l'État peut traiter des individus ou des groupes différemment. Il est aussi acquis qu'il peut, par exemple, accorder des avantages ou imposer des désavantages selon les mérites et capacités des individus. En vertu du par. 15(2), l'État peut aussi mettre en œuvre des programmes spécifiques destinés à aider des groupes défavorisés. Cependant, il lui est interdit d'accorder plus de respect et de considération à certains individus du simple fait qu'ils partagent une caractéristique personnelle énumérée ou analogue.

[195] Denise G. Réaume a décrit de manière plus précise le sens de la notion de préjugé, ainsi que la nature du préjudice découlant de son expression ou de sa perpétuation :

> [TRADUCTION] Une distinction établie par la loi et fondée sur des préjugés a pour effet de nier un avantage à un groupe, et ce, par animosité ou par mépris. Une telle distinction évoque directement l'idée que ces personnes sont inférieures et inégales sur le plan moral. Un préjugé exprimé législativement nie un avantage dans le but de causer du mal aux personnes visées. Il traite de ce fait les membres d'un groupe comme des individus dotés d'attributs intrinsèquement négatifs, plutôt que de qualités morales intrinsèques. Pareil traitement a non seulement pour effet de priver ces personnes de l'avantage concret en question, mais aussi, par le fait même, de les considérer indignes du respect fondamental auquel a droit tout individu. . .

Prejudice works through the attribution of negative worth to personal characteristics that are important aspects of identity; it thus constitutes an assault on the sense of self of its victims. Personal identity has both an individual and a social dimension. The kinds of characteristics that people regard as important to their sense of self tend to be, at the same time, characteristics by which they define themselves as individuals and through which they identify as members of a group. This group affiliation is as important to human identity as any purely individual understanding of the self. We develop a sense of self only through our interactions with others, and our most intimate and formative interactions are frequently with people who share a cultural or ethnic identity that distinguishes them from other such clusters of people in society. And we know from our social and political history that it has tended to be precisely this aspect of identity that has often been targeted for contempt — *individuals* have been denied respect through use of a characteristic identifying them as part of a *group* that is devalued. [Emphasis in original; pp. 679-80.]

[196] As I mentioned above, the devaluing of individuals need not be intentional to be considered an infringement of s. 15(1). Although an intention that reflects prejudice on the part of the government and its officials can sometimes be identified, such an intention does not exist in every situation involving discrimination — far from it.

[197] For instance, a government might make laws that unintentionally convey a negative social image of certain members of society. This situation could arise if the government favours certain individuals at the expense of others because the others share an enumerated or analogous characteristic. Such laws would express or perpetuate prejudice against certain individuals by establishing a hierarchy of worth based on prohibited grounds of discrimination, such as sex or sexual orientation. The identification of such prejudice will require a contextual inquiry, which might take account, among other things, of the disadvantages suffered by groups defined by a common personal characteristic.

Les préjugés ont pour effet d'attribuer une valeur négative à des caractéristiques personnelles qui constituent des aspects importants de l'identité; ils attaquent ainsi le sens du moi de leurs victimes. L'identité personnelle comporte à la fois un aspect individuel et un aspect social. Les caractéristiques que les gens considèrent importantes à l'égard de leur moi tendent également à être celles par lesquelles ils se définissent en tant qu'individus et s'identifient au groupe. Cette association à un groupe importe autant pour l'identité de la personne que toute conception strictement individuelle du moi. Ce n'est que par le truchement de nos interactions avec autrui que nous développons notre sens du moi, et nos interactions les plus intimes et les plus formatrices sont fréquemment celles que nous avons avec des personnes partageant une identité culturelle ou ethnique qui les distingue d'autres regroupements analogues dans la société. Notre histoire sociale et politique nous révèle d'ailleurs que c'est précisément cet aspect de l'identité qui tend souvent à être la cible du mépris; des *personnes* se sont vu refuser le respect en raison d'une caractéristique qui les identifie à un *groupe* déprécié. [En italique dans l'original; p. 679-680.]

[196] Comme je le souligne plus haut, il n'est pas nécessaire que l'imputation d'une valeur inférieure à des individus soit intentionnelle pour qu'elle soit considérée comme une violation du par. 15(1). Parfois, on arrive à découvrir une intention qui exprime des préjugés de la part de l'État et de ses agents. Cependant, une semblable intention n'existe pas dans toutes les situations de discrimination, loin de là.

[197] Ainsi, sans le vouloir, un gouvernement pourrait mettre en place des mesures qui véhiculent une image sociale négative de certains membres de la société. Cette situation pourrait se produire lorsque le gouvernement privilégie certains individus au détriment d'autres personnes parce que celles-ci partagent une caractéristique énumérée ou analogue. De telles mesures exprimeraient ou perpétueraient un préjugé négatif sur des personnes, parce qu'elles établissent entre elles une hiérarchie de valeur pour des motifs de discrimination interdits, tels que le sexe ou l'orientation sexuelle. La recherche de ces préjugés nécessitera un examen contextuel qui pourrait notamment tenir compte des désavantages qu'ont subis des groupes définis par une caractéristique personnelle commune.

[198] Moreover, rules that are seemingly neutral (because they do not draw obvious distinctions) may also treat certain individuals like second-class citizens whose aspirations are not equally deserving of consideration. As Réaume writes, "[p]ublic institutions and programs built, even unwittingly, in the image of a dominant group convey the message that others are not equally entitled to participate in society and its enterprises, and are not equally members of its institutions": p. 686. In such a case, a disadvantage resulting from exclusion constitutes an expression and perpetuation of prejudice against certain persons.

[199] For example, in *Eldridge*, this Court found that the lack of interpretation services for deaf persons in the public health care system meant that such persons were treated as less worthy even though the government had not intended to devalue them. The disadvantage in that case was not based on stereotyping. Rather, it conveyed a devalued image of deaf persons by failing to recognize them as human beings who deserved to participate fully in Canadian society. The government was therefore imposing a disadvantage on them that constituted an expression of prejudice. The following passage from *Eldridge* illustrates how a law that does not stereotype can nonetheless be discriminatory if it conveys prejudice by denying certain individuals full participation in a fundamental aspect of life in society because of a disability:

> The principal object of certain of the prohibited grounds is the elimination of discrimination by the attribution of untrue characteristics based on stereotypical attitudes relating to immutable conditions such as race or sex. In the case of disability, this is one of the objectives. The other equally important objective seeks to take into account the true characteristics of this group which act as headwinds to the enjoyment of society's benefits and to accommodate them. Exclusion from the mainstream of society results from the construction of a society based solely on "mainstream" attributes to which disabled persons will never be able to gain access. Whether it is the impossibility of success at a written test for a blind person, or the need for ramp access to a

[198] De plus, des règles en apparence neutres (parce que n'établissant pas de distinctions évidentes) peuvent aussi traiter certains individus comme des citoyens de seconde classe dont les aspirations ne méritent pas la même considération. Comme l'écrit Réaume, [TRADUCTION] « [d]es institutions et programmes publics façonnés, même inconsciemment, à l'image du groupe dominant communiquent le message que les personnes n'appartenant pas à ce groupe n'ont pas droit, elles aussi, de participer à la société et à ses entreprises, et qu'elles ne sont pas, elles aussi, membres de ses institutions » : p. 686. Le désavantage découlant de l'exclusion exprime et perpétue alors un préjugé défavorable à l'endroit de certaines personnes.

[199] Par exemple, notre Cour, dans l'arrêt *Eldridge*, a considéré que l'absence de services d'interprète pour les personnes atteintes de surdité dans le régime public de soins de santé les traitait comme des personnes de moindre valeur, et ce, sans que l'État ait eu l'intention de les dévaloriser. Dans cette affaire, le désavantage ne reposait pas sur l'application de stéréotypes. Il véhiculait plutôt une image dépréciée des personnes atteintes de surdité en ne les reconnaissant pas comme des êtres humains méritant de participer pleinement à la société canadienne. L'État leur imposait dès lors un désavantage exprimant un préjugé. L'extrait suivant d'*Eldridge* illustre comment une mesure qui n'applique pas de stéréotypes peut tout de même devenir discriminatoire lorsqu'elle exprime un préjugé en privant certaines personnes d'une pleine participation à un aspect fondamental de la vie en société, en raison de leur déficience :

> Certains des motifs illicites visent principalement à éliminer la discrimination par l'attribution de caractéristiques fausses fondées sur des attitudes stéréotypées se rapportant à des conditions immuables comme la race ou le sexe. Dans le cas d'une déficience, c'est l'un des objectifs. L'autre objectif, tout aussi important, vise à tenir compte des véritables caractéristiques de ce groupe qui l'empêchent de jouir des avantages de la société, et à les accommoder en conséquence. L'exclusion de l'ensemble de la société découle d'une interprétation de la société fondée seulement sur les attributs « de l'ensemble » auxquels les personnes handicapées ne pourront jamais avoir accès. Qu'il s'agisse de l'impossibilité pour une personne aveugle de réussir un examen

library, the discrimination does not lie in the attribution of untrue characteristics to the disabled individual. The blind person cannot see and the person in a wheelchair needs a ramp. Rather, it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them. The discrimination inquiry which uses "the attribution of stereotypical characteristics" reasoning as commonly understood is simply inappropriate here. It may be seen rather as a case of reverse stereotyping which, by not allowing for the condition of a disabled individual, ignores his or her disability and forces the individual to sink or swim within the mainstream environment. It is recognition of the actual characteristics, and reasonable accommodation of these characteristics which is the central purpose of s. 15(1) in relation to disability. [para. 65]

(Quoting *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241, at para. 67.)

[200] As I mentioned above, a court enquiring into the expression or perpetuation of prejudice can consider, among other things, the nature or scope of the benefit or interest which the claimant feels he or she has been denied. Does the distinction restrict access to a fundamental social institution or impede full membership in Canadian society? If the answer is yes, this could indicate that the government action expresses, or has the effect of perpetuating, prejudice against — i.e., a lower or demeaning opinion of — certain persons. *Eldridge* is one example of such a situation, as I have stated.

(c) *Stereotyping*

[201] In the analytical approach I am recommending here, the second way that substantive inequality — discrimination — 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

écrit ou du besoin d'une rampe pour avoir accès à une bibliothèque, la discrimination ne consiste pas dans l'attribution de caractéristiques fausses à la personne handicapée. La personne aveugle ne peut pas voir et la personne en fauteuil roulant a besoin d'une rampe d'accès. C'est plutôt l'omission de fournir des moyens raisonnables et d'apporter à la société les modifications qui feront en sorte que ses structures et les actions prises n'entraînent pas la relégation et la non-participation des personnes handicapées qui engendre une discrimination à leur égard. L'enquête sur la discrimination qui recourt au raisonnement fondé sur « l'attribution de caractéristiques stéréotypées », dans son acception courante, est tout simplement inappropriée dans le cas présent. Elle peut être considérée plutôt comme un cas d'inversion d'un stéréotype qui, en ne tenant pas compte de la condition d'une personne handicapée, fait abstraction de sa déficience et la force à se tirer d'affaire toute seule dans l'environnement de l'ensemble de la société. C'est la reconnaissance des caractéristiques réelles, et l'adaptation raisonnable à celles-ci, qui constitue l'objectif principal du par. 15(1) en ce qui a trait à la déficience. [par. 65]

(Citant *Eaton c. Conseil scolaire du comté de Brant*, [1997] 1 R.C.S. 241, par. 67.)

[200] Comme je le rappelle précédemment, l'examen de l'expression ou de la perpétuation de préjugés pourrait notamment tenir compte de la nature ou de l'étendue de l'avantage ou du droit dont le demandeur s'estime privé. Est-ce que la distinction restreint l'accès à une institution sociale fondamentale ou nuit à la pleine appartenance à la société canadienne? Une réponse affirmative pourrait révéler que la mesure gouvernementale véhicule un préjugé, c.-à-d. une opinion moindre ou dévalorisante à l'endroit de certaines personnes, ou a l'effet de perpétuer un préjugé. L'arrêt *Eldridge* constitue un exemple d'une situation de cette nature, comme je l'ai mentionné.

c) *Application d'un stéréotype*

[201] Dans la grille d'analyse que je recommande ici, la deuxième façon d'établir l'inégalité réelle — soit la discrimination — consiste à « démontrer que le désavantage imposé par une mesure législative repose sur un stéréotype qui ne reflète pas la situation et les caractéristiques véritables du

of the claimant or claimant group": *Withler*, at para. 36. Such a law will be discriminatory because it is premised upon personal traits or circumstances that do not relate to individual needs, capacities or merits: *Law*, at para. 53. Laws premised on an inaccurate characterization of an individual or group on grounds that are unacceptable under s. 15(1) thus become arbitrary themselves: see, *inter alia*, Moreau, "The Wrongs of Unequal Treatment", at p. 298.

[202] The following comments by Réaume contain an interesting description of the nature of negative stereotypes and their impact on the right to equality:

> Stereotypes are inaccurate generalizations about the characteristics or attributes of members of a group that can usually be traced back to a time when social relations were based more overtly on contempt for the moral worth of the group. . . . Negative characteristics, such as lack of intelligence, laziness, being fit for some pursuits rather than others, predisposition to criminality, avarice, vice, etc., which are in fact distributed throughout the human race, are falsely attributed predominantly to members of a particular group. It is then the negative characteristic that becomes the focus of contempt. Nevertheless, inaccurate assumptions and stereotypes about the capacities, needs, or desires of members of a particular group can carry forward ancient connotations of second class status, even if the legislators did not intend that meaning. The overt hostility may have come to be washed out of the picture with the passage of time or the "normalization" of such attitudes, but the implication that those to whom the stereotype applies are less worthy than others remains.
>
> Once this construction of a group has set in, others are likely to treat members of that group disadvantageously out of an honest belief that this merely reflects their just deserts or even simply because that is how everyone treats them, without ever thinking about the insult involved. They may even understand their conduct, as with certain traditional sexist practices, as a positive effort to accommodate the "natural weaknesses" of the stereotyped group. However, neither the absence

demandeur ou du groupe » : *Withler*, par. 36. Une mesure de cette nature sera discriminatoire parce qu'elle est fondée sur des caractéristiques ou situations personnelles étrangères aux besoins, capacités ou mérites de la personne : *Law*, par. 53. Ainsi, les mesures législatives qui reposent sur une caractérisation inexacte d'un individu ou d'un groupe sur la base de motifs inadmissibles selon le par. 15(1) deviennent elles-mêmes arbitraires : voir notamment Moreau, « The Wrongs of Unequal Treatment », p. 298.

[202] Quelques commentaires de Réaume contiennent une description intéressante de la nature des stéréotypes négatifs et de leurs conséquences sur le droit à l'égalité :

> [TRADUCTION] Un stéréotype constitue une généralisation inexacte à l'égard des caractéristiques ou attributs des membres d'un groupe, généralisation qui date habituellement d'une époque où les rapports sociaux reflétaient plus ouvertement le mépris pour la valeur morale d'un groupe. [. . .] Des caractéristiques négatives telles que l'absence d'intelligence, la paresse, l'aptitude à certaines activités plutôt qu'à d'autres, la prédisposition au crime, l'avarice et le vice — autant de caractéristiques que l'on retrouve en fait dans l'ensemble de la race humaine — sont injustement attribuées de façon prédominante aux membres d'un groupe particulier. C'est alors la caractéristique négative qui devient l'objet du mépris. Néanmoins, des présomptions et des stéréotypes inexacts à propos des capacités, des besoins ou des aspirations d'un groupe donné sont susceptibles de perpétuer de vieilles idées assimilant les membres de ce groupe à des citoyens de deuxième ordre, même si ce n'était pas là l'intention du législateur. Il se peut que les manifestations d'hostilité ouverte se soient estompées par suite du passage du temps ou de la « normalisation » de telles attitudes, mais le message implicite selon lequel les personnes à qui le stéréotype est appliqué valent moins que les autres demeure.
>
> Une fois que cette perception du groupe est bien ancrée, d'autres personnes risquent de traiter défavorablement les membres de ce groupe, sur la foi d'une conviction sincère que c'est tout ce qu'ils méritent, ou encore tout simplement parce que c'est ainsi que tout le monde les traite, sans jamais penser à l'insulte que cela suppose. Il est même possible que ces personnes considèrent leur conduite — comme c'est le cas pour certaines pratiques sexistes traditionnelles — comme un

of contempt as a subjective matter nor well-meaning paternalism prevents the use of stereotype from violating dignity. To be denied access to benefits or opportunities available to others on the basis of the false view that because of certain attributes members of one's group are less worthy of those benefits or less capable of taking up those opportunities can scarcely fail to be experienced as demeaning because it *is* demeaning. The message such legislation sends is that members of this group are inferior or less capable, and such a message is likely, in turn, to reinforce social attitudes attributing false inferiority to the group. [Emphasis in original; pp. 681-82.]

geste positif visant à tenir compte des « lacunes naturelles » du groupe visé par le stéréotype. Or, ni l'absence de mépris subjectif, ni un paternalisme bien intentionné n'empêchent l'application d'un stéréotype d'avoir pour effet de violer la dignité. Le fait pour une personne de se voir refuser des avantages ou des possibilités dont jouissent d'autres personnes, et ce, pour le motif — erroné — qu'en raison de certains attributs les membres de son groupe sont moins dignes de ces avantages que d'autres personnes ou encore sont moins aptes que celles-ci à profiter de ces possibilités peut difficilement ne pas être considéré comme une expérience abaissante, car un tel traitement *est* abaissant. Le message que transmet une mesure législative de cette nature est que les membres de ce groupe sont inférieurs ou moins capables que d'autres, et le message en question risque, à son tour, de renforcer des attitudes sociales attribuant une fausse infériorité au groupe en question. [En italique dans l'original; p. 681-682.]

[203] Continuing with a contextual approach, it may be helpful in determining whether stereotypes exist to consider the question of the correspondence, or lack thereof, between the grounds on which the claim is based and the actual need, capacity or circumstances of the claimant or the affected group. For example, in *M. v. H.*, the identification and rejection of certain stereotypes led the Court to declare a law under which support remedies were available only to opposite-sex spouses to be invalid. The law in question conveyed the negative stereotype that persons of the same sex were incapable of forming intimate relationships involving economic interdependence similar to those of opposite-sex couples, without regard to their actual circumstances. As a result, the impugned law violated s. 15(1).

[203] Toujours fidèle à une approche contextuelle, la recherche de l'existence de stéréotypes peut bénéficier d'un examen de la correspondance, ou de l'absence de correspondance, entre les motifs sur lesquels l'allégation est fondée et les besoins, les capacités ou la situation propre du demandeur ou du groupe touché. Ainsi, dans l'arrêt *M. c. H.*, l'identification et le rejet de certains stéréotypes avaient permis à la Cour de conclure à l'invalidité d'une loi qui n'ouvrait les recours alimentaires qu'aux conjoints de sexe différent. La loi en question exprimait le stéréotype négatif que les personnes de même sexe étaient incapables de former des unions intimes marquées par l'interdépendance financière semblables à celles formées par les couples de sexe différent, indépendamment de leur situation réelle. De ce fait, la loi contestée portait atteinte au par. 15(1).

(d) *Summary*

d) *Sommaire récapitulatif*

[204] In accordance with the general analytical framework for the application of s. 15(1) of the *Charter*, there are thus two ways for a claimant to show that a law that draws a distinction based on an enumerated or analogous ground is discriminatory. On the one hand, the claimant can show that the impugned disadvantageous law perpetuates prejudice against members of a group. On the other hand, the claimant can prove that the disadvantage

[204] Conformément au cadre général d'analyse établi pour l'application du par. 15(1) de la *Charte*, le demandeur dispose donc de deux méthodes pour démontrer qu'une mesure établissant une distinction sur la base d'un motif énuméré ou analogue est discriminatoire. D'une part, le demandeur peut établir que la mesure désavantageuse contestée perpétue un préjugé à l'égard des membres d'un groupe. D'autre part, il peut prouver que le désavantage imposé par

imposed by the law is based on a stereotype. Two comments are in order in this regard.

[205] First, because either one of these facts can on its own support a finding that the impugned law infringes s. 15(1), a distinction need not be based on a stereotype to be discriminatory: *Gosselin*, at para. 116, *per* L'Heureux-Dubé J.; *Lavoie*, at para. 52, *per* Bastarache J. A disadvantageous law can also be found to be discriminatory on the basis that it expresses or perpetuates prejudice. The Court has thus explicitly acknowledged the inadequacy of a *uniquely* stereotype-based approach that has been criticized by several authors: see, *inter alia*, M. Young, "Blissed Out: Section 15 at Twenty", in S. McIntyre and S. Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (2006), 45, at p. 59; G. Brodsky, "Case Comment: *Gosselin* v. *Quebec (Attorney General)*: Autonomy with a Vengeance" (2003), 15 *C.J.W.L.* 194, at p. 212; M. Young, "Unequal to the Task: 'Kapp'ing the Substantive Potential of Section 15", in S. Rodgers and S. McIntyre, eds., *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (2010), 183, at pp. 204-9.

[206] Second, the existence of these two approaches, which make it possible to prove that the impugned law infringes s. 15(1), also guides the use of the contextual factor of correspondence between the ground or grounds of discrimination on which the claim is based and the actual circumstances of the claimant or the affected group. It now seems clearer that this factor can be used to determine whether the distinction creates a disadvantage by stereotyping: *Kapp*, at para. 23. However, the Court also recognizes that the correspondence factor may not be sufficient to support a finding of expression or perpetuation of prejudice. Although it is true that prejudice and stereotyping are frequently linked, a claimant can also show that the impugned law expresses or perpetuates prejudice by emphasizing other contextual factors unrelated to that of correspondence. The Court thus acknowledges that the correspondence factor is only one of many factors that can be used to establish substantive inequality.

une telle mesure repose sur un stéréotype. Deux commentaires s'imposent à propos de ces méthodes.

[205] D'abord, le fait que l'une ou l'autre de ces démonstrations mènera à la conclusion que la mesure attaquée porte atteinte au par. 15(1) reconnaît que le constat d'une situation de discrimination ne dépend pas seulement de l'existence de stéréotypes : *Gosselin*, par. 116, la juge L'Heureux-Dubé; *Lavoie*, par. 52, le juge Bastarache. La discrimination peut également résulter de la présence de mesures désavantageuses exprimant ou perpétuant un préjugé. La Cour reconnaît ainsi explicitement l'insuffisance d'une démarche *uniquement* basée sur les stéréotypes qu'ont critiquée plusieurs auteurs : voir notamment M. Young, « Blissed Out : Section 15 at Twenty », dans S. McIntyre et S. Rodgers, dir., *Diminishing Returns : Inequality and the Canadian Charter of Rights and Freedoms* (2006), 45, p. 59; G. Brodsky, « Case Comment : *Gosselin* v. *Quebec (Attorney General)* : Autonomy with a Vengeance » (2003), 15 *R.F.D.* 194, p. 212; M. Young, « Unequal to the Task : "Kapp"ing the Substantive Potential of Section 15 », dans S. Rodgers et S. McIntyre, dir., *The Supreme Court of Canada and Social Justice : Commitment, Retrenchment or Retreat* (2010), 183, p. 204-209.

[206] Ensuite, l'existence de ces deux méthodes, qui permettent d'établir que la mesure attaquée porte atteinte au par. 15(1), oriente aussi l'usage du facteur contextuel de correspondance entre le ou les motifs de discrimination sur lesquels l'allégation est fondée et la situation propre au demandeur ou au groupe touché. Dorénavant, il apparaît plus clairement que ce facteur permet d'évaluer si la distinction crée un désavantage par l'application de stéréotypes : *Kapp*, par. 23. Toutefois, la Cour reconnaît aussi que ce facteur peut s'avérer inadéquat pour déceler l'expression ou la perpétuation de préjugés. En effet, malgré l'existence de liens fréquents entre préjugé et stéréotype, un demandeur pourra aussi démontrer que la mesure contestée exprime ou perpétue un préjugé en insistant sur d'autres éléments contextuels étrangers au facteur de correspondance. La Cour admet alors que le facteur de correspondance ne représente qu'un des multiples éléments capables de démontrer

Indeed, in the past, some authors deplored an approach that was overly dependent on the use of the correspondence factor at the expense of other contextual factors: see, *inter alia*, B. Ryder, C. C. Faria and E. Lawrence, "What's *Law* Good For? An Empirical Overview of Charter Equality Rights Decisions" (2004), 24 *S.C.L.R.* (2d) 103, at pp. 120-25.

G. *Walsh — Precedential Value of the Decision*

(1) Nature of the Case

[207] At this point, the evolution of the Court's case law on the right to equality raises the issue of the scope and application of an important case on the application of equality rights of *de facto* or common law spouses. In *Walsh*, which was decided several years before *Kapp* and *Withler*, this Court was dealing with an alleged violation of s. 15(1) by a Nova Scotia statute concerning the matrimonial rights of married spouses. The case involved a challenge to the validity of Nova Scotia's *Matrimonial Property Act*, R.S.N.S. 1989, c. 275 ("*MPA*"), under s. 15(1) of the *Charter*. The *MPA* established the consequences of marriage breakdown by creating a presumption that matrimonial property was to be divided equally between the former spouses. The *MPA* regulated the division of the property acquired by one of the spouses either before or during the marriage and established guidelines to assist in determining whether that property continued to be the separate property of each spouse or became common property of the parties. However, it did not provide for spousal support on the breakdown of a marriage. Section 2(g) of the *MPA* defined the term "spouse" by referring only to a man and a woman who were married to each other. It therefore had the effect of excluding unmarried opposite-sex couples who lived together.

[208] The claimant in *Walsh* argued that, by limiting the presumption of equal division to married couples, the *MPA* discriminated on the basis of an analogous ground, namely marital status. The

l'existence d'une inégalité réelle. D'ailleurs, certains auteurs avaient par le passé regretté une approche trop dépendante de l'emploi du facteur de correspondance au détriment d'autres facteurs contextuels : voir notamment B. Ryder, C. C. Faria et E. Lawrence, « What's *Law* Good For? An Empirical Overview of Charter Equality Rights Decisions » (2004), 24 *S.C.L.R.* (2d) 103, p. 120-125.

G. *Walsh — La portée précédentielle de l'arrêt*

(1) La nature de l'arrêt

[207] L'évolution de la jurisprudence de la Cour sur le droit à l'égalité soulève maintenant le problème de la portée et de l'application d'un arrêt important rendu au sujet de la mise en œuvre des droits à l'égalité des conjoints de fait. En effet, dans l'arrêt *Walsh*, décidé quelques années avant *Kapp* et *Withler*, notre Cour a dû se prononcer sur une allégation de violation du par. 15(1) à l'occasion de l'examen d'une loi de la Nouvelle-Écosse sur les droits matrimoniaux des époux. La Cour était alors saisie d'une contestation de la validité de la *Matrimonial Property Act* de la Nouvelle-Écosse, R.S.N.S. 1989, ch. 275 (« *MPA* »), au regard du par. 15(1) de la *Charte*. La *MPA* réglait les conséquences de la rupture du mariage en prévoyant une présomption de partage égal des biens matrimoniaux entre les ex-conjoints. La *MPA* régissait le partage des biens dont l'un des conjoints avait fait l'acquisition, avant ou pendant le mariage, et établissait les lignes directrices servant à déterminer si le bien restait toujours un bien propre à chacun des époux ou s'il devenait la propriété commune des parties. Cette loi ne visait toutefois pas l'obligation alimentaire entre les conjoints, en cas d'échec du mariage. À l'alinéa 2g), la *MPA* définissait le terme [TRADUCTION] « conjoint » en ne faisant référence qu'à un homme et une femme unis par les liens du mariage. Elle avait donc pour effet d'exclure les conjoints de sexe opposé qui cohabitaient sans être mariés.

[208] Selon la demanderesse, dans l'affaire *Walsh*, la *MPA*, en ne réservant l'application de la présomption de partage égal qu'aux seuls couples mariés, opérait une discrimination sur la base d'un

Court therefore had to decide whether the failure to include unmarried opposite-sex couples in the ambit of the *MPA* violated s. 15(1).

[209] Bastarache J., writing for a majority of the Court, found that the distinction between common law spouses and married spouses was not discriminatory and therefore did not violate s. 15(1). Gonthier J. added a few comments on the contractual nature of marriage and its fundamental place in society. L'Heureux-Dubé J., dissenting, found that married couples and unmarried couples were functionally identical. As a result, she concluded that the exclusion of unmarried couples from the ambit of the *MPA* was discriminatory and that the discrimination could not be justified under s. 1 of the *Charter*. Given the importance of that case, I will summarize the bases for the Court's decision. I will then discuss the relevance of Bastarache J.'s reasons to the appeals now before this Court.

(2) Bases for Bastarache J.'s Reasons

[210] Bastarache J. analyzed the claimant's position by applying the three-stage framework developed by Iacobucci J. a few years earlier in *Law*. He began by considering whether the *MPA* imposed differential treatment between the claimant and others. He then asked whether the differential treatment was based on an enumerated or analogous ground. Finally, he considered whether the law in question had a discriminatory purpose or effect for the purposes of the equality guarantee. That would be the case if the law imposed a burden upon or withheld a benefit from the claimant in a manner which reflected the stereotypical application of presumed group or personal characteristics, or if it otherwise had the effect of perpetuating or promoting the view that the claimant was less deserving of respect than other members of Canadian society. Thus, Bastarache J.'s analysis was based on the promotion of substantive equality that was also the basis for *Law* and for this Court's case law since *Andrews*. His approach represented a continuation of that case law.

motif analogue, soit l'état matrimonial. Dès lors, la Cour devait décider si l'omission des couples non mariés de sexe opposé du champ d'application de la *MPA* contrevenait au par. 15(1).

[209] Au nom d'une majorité de la Cour, le juge Bastarache conclut que la distinction entre conjoints de fait et conjoints mariés n'est pas discriminatoire et ne porte donc pas atteinte au par. 15(1). Le juge Gonthier ajoute quelques commentaires sur la nature contractuelle du mariage et sur sa place fondamentale au sein de la société. Dissidente, la juge L'Heureux-Dubé estime que les couples mariés et les couples non mariés sont fonctionnellement identiques. En conséquence, elle conclut que cette exclusion des couples non mariés du champ d'application de la *MPA* est discriminatoire et que cette discrimination ne peut être justifiée sous l'article premier de la *Charte*. En raison de l'importance de cet arrêt, j'en résumerai les fondements. Je discuterai ensuite de la pertinence de l'opinion du juge Bastarache à l'égard des pourvois dont notre Cour est saisie.

(2) Les bases de l'opinion du juge Bastarache

[210] Le juge Bastarache analyse la position de la demanderesse en appliquant le cadre en trois étapes élaboré quelques années plus tôt par le juge Iacobucci dans l'arrêt *Law*. Il se demande d'abord si la *MPA* établit une différence de traitement entre la demanderesse et d'autres personnes. Il recherche ensuite si la différence de traitement est fondée sur un motif énuméré ou analogue. Finalement, il examine si la loi en question a un objet ou un effet discriminatoire au sens de la garantie d'égalité. Elle mérite une telle qualification lorsqu'elle impose un fardeau à la demanderesse ou la prive d'un avantage d'une manière qui dénote une application stéréotypée de présumées caractéristiques personnelles ou de groupe. Il en va de même lorsque la loi, par ailleurs, a pour effet de perpétuer ou de favoriser l'opinion que la demanderesse ne mérite pas le même respect que les autres membres de la société canadienne. L'analyse du juge Bastarache se fonde alors sur la recherche de l'égalité réelle, qui inspirait l'arrêt *Law* et la jurisprudence de notre Cour depuis l'arrêt *Andrews*. Son approche s'inscrit dans la continuité de cette jurisprudence.

[211] Bastarache J. began by acknowledging that the *MPA* imposed differential treatment within the meaning of s. 15(1) because it applied only to persons who were legally married and excluded persons in a common law relationship. That differential treatment was based on the analogous ground of marital status, as the Attorney General of Nova Scotia had conceded. Bastarache J. therefore proceeded to the third stage of the analytical framework from *Law* and asked "whether a reasonable heterosexual unmarried cohabiting person, taking into account all of the relevant contextual factors, would find the *MPA*'s failure to include him or her in its ambit has the effect of demeaning his or her dignity": *Walsh*, at para. 38. At this point in the analysis, he undertook a contextual analysis of the claimant's argument.

[212] Bastarache J. acknowledged that unmarried spouses had experienced historical disadvantage, social prejudice, and stereotyping of various kinds. However, he found that the version of the *MPA* then in force properly accommodated the claimant's circumstances. It reflected the differences between common law relationships and marriage and respected the fundamental autonomy and dignity of common law spouses. In Bastarache J.'s view, despite the functional similarities between common law and married spouses, there was a fundamental difference between the two groups.

[213] On this point, Bastarache J. noted that the *MPA* deemed all marriages to be economic partnerships and thus imposed a significant alteration to the former *status quo* of married persons' proprietary rights and obligations. Those statutorily created restrictions, obligations and rights arose at the time of the marriage and continued throughout the duration of the marriage until separation or death. According to Bastarache J., "[t]he decision to marry, which necessarily requires the consent of each spouse, encapsulates within it the spouses' consent to be bound by the proprietary regime that the *MPA* creates": *Walsh*, at para. 48. This was a fundamental difference between married couples

[211] En premier lieu, le juge Bastarache reconnaît que la *MPA* crée une différence de traitement au sens du par. 15(1) parce qu'elle ne s'applique qu'aux personnes mariées légalement à l'exclusion des conjoints de fait. Cette différence de traitement, comme l'admettait en l'espèce le procureur général de la Nouvelle-Écosse, est basée sur le motif analogue qu'est l'état matrimonial. Le juge Bastarache passe donc à la troisième étape du cadre analytique de *Law*. Il se demande alors « si un conjoint hétérosexuel non marié raisonnable estimerait, compte tenu de tous les facteurs contextuels pertinents, que la *MPA* porte atteinte à sa dignité en ne l'incluant pas dans son champ d'application » : *Walsh*, par. 38. À cette étape de l'analyse, le juge Bastarache effectue une évaluation contextuelle de l'argument avancé par la demanderesse.

[212] Le juge Bastarache admet que les conjoints non mariés ont été désavantagés historiquement, ont été victimes de préjugés sociaux et ont été lésés par l'application de stéréotypes divers. Cependant, il considère que le texte de la *MPA* alors en vigueur tient adéquatement compte de la situation de la demanderesse. La *MPA* reflète les différences entre l'union de fait et le mariage. Elle respecte l'autonomie et la dignité fondamentale des conjoints de fait. Pour le juge Bastarache, malgré l'existence de similitudes fonctionnelles entre les conjoints de fait et les conjoints mariés, une différence fondamentale permet de distinguer les deux groupes.

[213] Sur ce point, le juge Bastarache rappelle que la *MPA* assimile tous les mariages à une association économique et modifie ainsi considérablement l'état antérieur des droits et obligations patrimoniaux des personnes mariées. Ces droits, obligations et restrictions légales naissent au moment du mariage et subsistent pendant toute sa durée jusqu'à la séparation ou au décès. Selon le juge Bastarache, « [l]a décision de se marier, qui requiert obligatoirement le consentement de chaque époux, implique leur consentement à être assujettis au régime de propriété établi par la *MPA* » : *Walsh*, par. 48. Il s'agit là d'une différence fondamentale entre les couples mariés et les couples non mariés;

and unmarried couples; the former had chosen to be bound by the *MPA*, while the latter had not given their consent to be so bound.

[214] Moreover, common law spouses who were unwilling to marry but wanted to modify their proprietary rights and obligations had various alternatives for clearly expressing their agreement. They could own property jointly or enter into domestic contracts that could be enforced pursuant to the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160 ("*MCA*"), s. 52(1), and the *Maintenance Enforcement Act*, S.N.S. 1994-95, c. 6 ("*MEA*"), s. 2(e). Bastarache J. also took note of the recent *Law Reform (2000) Act*, S.N.S. 2000, c. 29 ("*LRA*"), as a contextual consideration. Under the *LRA*, common law partners who decided to register their partnerships under the *Vital Statistics Act*, R.S.N.S. 1989, c. 494, thereby became subject to the *MPA*. There were therefore several options available to common law spouses who wished to avoid the application of the general principle that people who do not take consensual action maintain the right to deal with their property as they see fit. On this basis, Bastarache J. stated that the legislation corresponded to the free choice of the individuals involved and to their actual situation:

> The *MPA*, then, can be viewed as creating a shared property regime that is tailored to persons who have taken a mutual positive step to invoke it. Conversely, it excludes from its ambit those persons who have not taken such a step. This requirement of consensus, be it through marriage or registration of a domestic partnership, enhances rather than diminishes respect for the autonomy and self-determination of unmarried cohabitants and their ability to live in relationships of their own design. As Iacobucci J. phrased it in *Law*, at para. 102, "[t]he law functions not by the device of stereotype, but by distinctions corresponding to the actual situation of individuals it affects."

(*Walsh*, at para. 50)

les premiers ont choisi de se soumettre à la *MPA*, les seconds n'ont pas exprimé de volonté consensuelle à cet égard.

[214] D'autre part, les conjoints de fait ne voulant pas se marier, mais désireux de modifier leurs droits et obligations en matière de propriété, disposent d'alternatives diverses afin de manifester clairement leur accord. Ils peuvent devenir copropriétaires de certains biens ou conclure un contrat familial susceptible d'exécution en application de la *Maintenance and Custody Act*, R.S.N.S. 1989, ch. 160 (« *MCA* »), par. 52(1), et de la *Maintenance Enforcement Act*, S.N.S. 1994-1995, ch. 6 (« *MEA* »), al. 2(e). Le juge Bastarache prend également note de la récente *Law Reform (2000) Act*, S.N.S. 2000, ch. 29 (« *LRA* »), comme élément contextuel. Selon la *LRA*, les conjoints de fait qui décident d'enregistrer leur union sous la *Vital Statistics Act*, R.S.N.S. 1989, ch. 494, se soumettent ainsi à la *MPA*. Dès lors, les conjoints de fait désireux d'éviter l'application du principe général selon lequel les personnes qui ne prennent pas de mesure consensuelle conservent leur droit de disposer de leurs biens comme bon leur semble jouissent de plusieurs options pour ce faire. Sur cette base, le juge Bastarache affirme que les mesures législatives correspondent au libre choix des intéressés et à leur situation réelle :

> On peut donc dire que la *MPA* crée un régime de partage des biens conçu pour les personnes qui ont pris, mutuellement, une mesure concrète pour s'en prévaloir. À l'inverse, la loi exclut de son champ d'application les personnes qui n'ont pris aucune mesure en ce sens. En exigeant qu'il existe un consensus, exprimé par le mariage ou par l'enregistrement d'une union civile, on ne respecte pas moins, mais davantage l'autonomie et l'autodétermination des couples vivant en union libre, de même que leur faculté de vivre dans une forme d'union qu'ils ont eux-mêmes façonnée. Dans *Law*, par. 102, le juge Iacobucci a affirmé que « [l]a loi ne fonctionne pas au moyen de stéréotypes mais au moyen de distinctions qui correspondent à la situation véritable des personnes qu'elle vise. »

(*Walsh*, par. 50)

[215] Bastarache J. thus found that it was not stereotyping to believe that common law couples had chosen to avoid the institution of marriage: *Walsh*, at para. 43. Because this group was highly heterogeneous, there was no basis for arguing that even though common law spouses had not expressed a mutual intention to alter their proprietary regime, they had nevertheless implicitly chosen to be bound by the *MPA*. Accordingly, there was no constitutional requirement that the legislature extend the protections of the *MPA* to couples who had not expressed their consent to restrict their ability to deal with their own property during the relationship or to share their assets and liabilities should the relationship break down. The legislature's decision to respect the freedom of choice of common law spouses was not unconstitutional.

[216] Furthermore, in addition to not being based on negative stereotypes, the exclusion of unmarried couples from the *MPA* did not promote or perpetuate the idea that they were less capable, or less worthy of respect or value as members of Canadian society. Bastarache J. concluded that the *MPA* was not discriminatory in light of the values — such as dignity, liberty and autonomy — that underlie the *Charter*, including s. 15 thereof. Rather, it maintained the liberty of all spouses to make fundamental choices in their lives, thereby respecting the fundamental personal autonomy and dignity of common law spouses. According to Bastarache J., even if the freedom to marry can sometimes be illusory, s. 15(1) did not justify eliminating an individual's freedom of choice or imposing on common law spouses a regime designed for persons who had made an unequivocal commitment to form an equal partnership as provided for in the *MPA*: *Walsh*, at paras. 57, 62 and 63. Bastarache J. distinguished that case from the Court's decisions in *Miron* and *M. v. H.*, and concluded that the *MPA* was not discriminatory and therefore did not conflict with s. 15(1)'s purpose of ensuring substantive equality.

[215] Ainsi, le juge Bastarache estime que ce n'est pas un stéréotype que de considérer que les couples en union de fait ont choisi de se soustraire au régime du mariage : *Walsh*, par. 43. La grande hétérogénéité de ce groupe ne permet pas de soutenir une position selon laquelle, malgré l'absence d'expression d'une volonté commune d'altérer leur régime de propriété, les conjoints de fait aient tout de même choisi implicitement de se soumettre à la *MPA*. Dès lors, aucune règle constitutionnelle n'oblige le législateur à étendre la portée de la *MPA* pour régir les couples n'ayant pas exprimé de consentement à des restrictions à leur faculté de disposer de leurs propres biens pendant la durée de l'union ou à partager leurs actifs et passifs à la rupture de l'union. La décision du législateur de respecter la liberté de choix des conjoints de fait n'est pas inconstitutionnelle.

[216] Par ailleurs, l'exclusion des couples non mariés de l'application de la *MPA*, en plus de ne pas être fondée sur des stéréotypes négatifs, ne promeut ni ne perpétue l'idée que ces couples sont moins capables, ou moins dignes d'être respectés et valorisés en tant que membres de la société canadienne. Le juge Bastarache conclut qu'en regard des valeurs consacrées par la *Charte* et par son art. 15, notamment la dignité, la liberté et l'autonomie, la *MPA* n'est pas discriminatoire. Elle préserve plutôt la liberté de tous les conjoints de faire des choix fondamentaux dans leur vie, et en cela, respecte l'autonomie et la dignité fondamentale des conjoints de fait. Selon le juge Bastarache, même si la liberté de se marier peut, dans certains cas, s'avérer illusoire, le par. 15(1) n'impose pas l'élimination de la liberté de choix de l'individu et n'exige pas l'imposition aux conjoints de fait d'un régime destiné aux personnes qui se sont engagées de façon non équivoque à former une association à parts égales, comme la *MPA* la décrit : *Walsh*, par. 57, 62 et 63. Distinguant l'affaire *Walsh* des arrêts rendus par la Cour dans *Miron* et *M. c. H.*, le juge Bastarache conclut que la *MPA* n'est pas discriminatoire et ainsi n'entre pas en conflit avec l'objectif du par. 15(1) d'assurer l'égalité réelle des personnes.

(3) *Kapp* and *Withler* and Their Impact on *Walsh*

[217] In my opinion, Bastarache J. would have reached the same conclusion if his analysis had been based on the reworked analytical framework from *Kapp* and *Withler*. Although the *MPA* imposed differential treatment based on an analogous ground, that distinction did not create a disadvantage by perpetuating prejudice or stereotyping. Bastarache J.'s analysis of the *MPA* is therefore consistent with the decisions rendered after *Walsh* and with the principle of substantive equality, which "insists on going behind the facade of similarities and differences [and] asks not only what characteristics the different treatment is predicated upon, but also whether those characteristics are relevant considerations under the circumstances": *Withler*, at para. 39. As I mentioned above, this analysis was based on the wish to promote substantive equality that was also the basis for *Law*, despite the conceptual difficulties and problems of application that led to *Kapp* and *Withler*.

[218] In *Walsh*, the *MPA* did not have the effect of favouring marriage at the expense of cohabitation or of denying the worth of common law relationships. Nor did it draw distinctions that caused a disadvantage by perpetuating prejudice. According to Bastarache J., the Nova Scotia legislature was not favouring one form of relationship over another. It was merely defining the legal content of relationships and providing that any individuals in a conjugal relationship could, without changing their marital status, make a consensual choice to avail themselves of rights, obligations and restrictions analogous to the ones contained in the *MPA*. As a result, the law did not favour one form of relationship over another or express any prejudice against common law relationships.

[219] In Nova Scotia, as Bastarache J. demonstrated, the legislature had defined the content and consequences of various forms of relationship but had not favoured one form over another. Marriage and the registration of a common law

(3) Les arrêts *Kapp* et *Withler* et leur impact sur l'arrêt *Walsh*

[217] À mon avis, la conclusion du juge Bastarache 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 *MPA* ait créé une différence de traitement fondée sur un motif analogue, cette distinction n'entraînait pas de désavantage causé par la perpétuation d'un préjugé ou par l'application de stéréotypes. L'analyse que fait le juge Bastarache de la *MPA* demeure donc compatible avec la jurisprudence postérieure à l'arrêt *Walsh* ainsi qu'avec le principe d'égalité réelle qui « transcende les similitudes et distinctions apparentes [et] demande qu'on détermine non seulement sur quelles caractéristiques est fondé le traitement différent, mais également si ces caractéristiques sont pertinentes dans les circonstances » : *Withler*, par. 39. Comme je le mentionnais plus haut, cette analyse s'inscrit dans la volonté de recherche de l'égalité réelle qui inspirait l'arrêt *Law*, en dépit des problèmes conceptuels et des difficultés d'application qui ont conduit aux arrêts *Kapp* et *Withler*.

[218] Selon l'arrêt *Walsh*, la *MPA* n'a pas pour effet de favoriser le mariage au détriment de l'union libre ou de nier la valeur des unions de fait. La *MPA* n'opère pas de distinction causant un désavantage par la perpétuation d'un préjugé. Pour le juge Bastarache, le législateur néo-écossais dans *Walsh* ne privilégie pas une forme d'union par rapport à une autre. Le législateur ne fait que définir leur contenu juridique et prévoit que toutes personnes formant une union conjugale puissent choisir de façon consensuelle, sans changer d'état matrimonial, de se prévaloir de droits, obligations et restrictions analogues au contenu de la *MPA*. La loi, de ce fait, ne privilégie pas une forme d'union par rapport à une autre et n'exprime pas un préjugé défavorable à l'union de fait.

[219] En Nouvelle-Écosse, comme le démontre le juge Bastarache, le législateur définit le contenu de diverses formes d'union et leurs conséquences, mais n'en favorise pas l'une par rapport à l'autre. Le mariage ainsi que l'enregistrement de l'union de

partnership triggered the mutual rights, obligations and restrictions set out in the *MPA*, including the presumption of equal division of property should the relationship break down. Common law couples could also transform their relationships into economic partnerships as contemplated in the *MPA* by entering into domestic contracts that could be enforced under the *MCA* and the *MEA*. They could also purchase property jointly. The legislation did not establish an unacceptable hierarchy among the various forms of conjugal relationships. By expressing a consensual choice or intention, spouses could opt in to the regime of their choice to which the rights and obligations established by the legislature applied. *Walsh* was thus based on a principle of freedom to choose between different marital statuses that had different consequences for spouses, and that principle did not in this context infringe the constitutional equality guarantee. The principle in question continues to be valid in the circumstances of the case at bar despite the subsequent developments in the case law.

[220] In this regard, *Walsh* differed significantly from *Miron*. In the *Insurance Act*, R.S.O. 1980, c. 218, the Ontario legislature had not defined the content of relationships (that is, the relations between the members of a couple). Instead, it had favoured marriage over common law relationships by limiting benefits under an automobile insurance plan on the basis of marital status to those who were married.

[221] The common law spouses in *Miron* had therefore been excluded from certain provisions relating to automobile insurance because they were not married, a ground that was in all probability irrelevant to automobile insurance. As Bastarache J. pointed out in *Walsh*, "[t]he marital status of the couple should have had no bearing on the availability of the benefit": para. 53. In the legislation at issue in *Miron*, the Ontario legislature had not defined the legal content of the spouses' relationship with one another. Rather, it had given one class of couples a privilege that expressed or perpetuated prejudice in favour of marriage and against common law relationships.

fait emportent les droits, obligations et restrictions mutuels prévus par la *MPA*, dont la présomption de partage égal des biens à la rupture de la relation. Les couples en union de fait peuvent aussi transformer leur union en association économique tel que prévu par la *MPA* en concluant un contrat familial susceptible d'exécution en application de la *MCA* et de la *MEA*. Ils peuvent également acheter des biens en copropriété. Ces mesures législatives n'établissent pas de hiérarchie inadmissible entre les différentes formes d'union conjugale. Les conjoints, par l'expression d'une volonté ou d'un choix consensuel, peuvent se soumettre au régime de leur choix qui comporte les droits et obligations établis par la législature. L'arrêt *Walsh* repose ainsi 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. Ce principe conserve sa validité dans le cadre du présent litige, malgré l'évolution jurisprudentielle ultérieure.

[220] À cet égard, l'affaire *Walsh* diffère considérablement de l'arrêt *Miron*. En effet, le législateur ontarien dans la *Loi sur les assurances*, L.R.O. 1980, ch. 218, ne définissait pas le contenu des unions (c.-à-d. les rapports des membres du couple entre eux). Il privilégiait plutôt le mariage par rapport à l'union de fait en faisant dépendre la prestation de bénéfices prévus par un régime d'assurance automobile de l'état matrimonial qu'est le mariage.

[221] Dans *Miron*, le couple en union de fait se trouvait ainsi exclu de certaines dispositions concernant l'assurance automobile parce que les conjoints n'étaient pas mariés, un motif vraisemblablement sans pertinence relativement à l'assurance automobile. Comme le note le juge Bastarache dans *Walsh*, « [l]'état matrimonial du couple n'aurait dû avoir aucune incidence sur l'admissibilité aux prestations » : par. 53. Dans la loi attaquée au moment de l'affaire *Miron*, le législateur ontarien ne définissait pas le contenu juridique des rapports des conjoints entre eux. Il conférait plutôt à une catégorie de couples un privilège exprimant ou perpétuant un préjugé en faveur du mariage et au détriment de l'union de fait.

[222] Bastarache J. then observed that the *MPA* was not based on stereotypes about common law spouses. To support that conclusion, he considered the contextual factor of correspondence and found that it was not stereotyping to believe that common law couples had chosen to avoid the institution of marriage. The common law spouses in that case had not expressed a consensual intention to change their legal property relationship in any of the ways established by the government, one of which would have been to enter into a domestic contract as a common law couple. Thus, in distinguishing between married and unmarried spouses, the *MPA* was not based on a stereotype that did not correspond to the actual circumstances and characteristics of common law spouses.

[223] *Walsh* can be distinguished in a similar way from *M. v. H.*, in which the Ontario legislature had limited certain provisions of the *Family Law Act*, R.S.O. 1990, c. F.3 ("*FLA*"), to heterosexual common law couples. More specifically, the *FLA* had given opposite-sex common law spouses, but not same-sex common law spouses, the right to seek support if their relationship broke down. The possibility of obtaining support had thus been extended "beyond married persons to include individuals in conjugal opposite-sex relationships of some permanence": *M. v. H.*, at para. 2; see also para. 52. This differential treatment of same-sex and opposite-sex common law spouses was based on the analogous ground of sexual orientation.

[224] In the *FLA*, the legislature had defined a common law relationship as a conjugal relationship of some permanence. This form of relationship entitled the spouses to support if they ceased living together. Individuals who decided to live in a common law relationship were therefore covered by provisions of the *FLA* that entitled them to apply to a court for support. Although same-sex common law spouses could choose to enter into a relationship similar to the one defined in the *FLA*, they were denied the benefit of that support remedy. A majority of the Court held that the exclusion of

[222] Ensuite, le juge Bastarache fait remarquer que la *MPA* n'est pas basée sur des stéréotypes relatifs aux conjoints de fait. À l'appui de cette conclusion, il évalue le facteur contextuel de correspondance et estime que ce n'est pas un stéréotype que de considérer que les couples en union de fait ont choisi de se soustraire au régime du mariage. Les conjoints de fait en l'espèce n'avaient pas exprimé d'une des manières prévues par l'État, notamment par contrat familial en union de fait, une volonté consensuelle de modifier leurs rapports juridiques de propriété. Ainsi, la *MPA*, en distinguant entre les conjoints mariés et les conjoints non mariés, ne repose pas sur un stéréotype qui ne reflète pas la situation et les caractéristiques véritables des conjoints de fait.

[223] L'arrêt *Walsh* se distingue d'une manière analogue de l'arrêt *M. c. H.* Dans cette affaire, le législateur ontarien réservait aux conjoints de fait hétérosexuels l'accès à certaines dispositions de la *Loi sur le droit de la famille*, L.R.O. 1990, ch. F.3 (« *LDF* »). Plus précisément, la *LDF* accordait le droit de demander des aliments en cas de rupture de l'union aux conjoints de fait de sexe différent, mais non aux conjoints de fait de même sexe. Dès lors, l'accès potentiel au régime de l'obligation alimentaire était étendu « au-delà du cercle des personnes mariées de manière à inclure les personnes formant une union conjugale d'une certaine permanence avec une personne de sexe différent » : *M. c. H.*, par. 2; voir aussi par. 52. Cette différence de traitement entre conjoints de fait de même sexe et conjoints de fait de sexe différent était fondée sur le motif analogue qu'est l'orientation sexuelle.

[224] Dans la *LDF*, le législateur définissait l'union de fait comme une union conjugale d'une certaine permanence. Cette forme d'union accorde le droit à des aliments aux conjoints en cas de cessation de leur vie commune. Ainsi, dès lors que des personnes décidaient de former une union de fait, elles se soumettaient aux articles de la *LDF* qui leur donnait accès à une procédure de réclamation d'aliments devant un tribunal. Les conjoints de fait de même sexe, bien qu'ils pouvaient choisir de former une union similaire à celle que définissait la *LDF*, se voyaient priver du bénéfice représenté

same-sex common law spouses "implies that they are judged to be incapable of forming intimate relationships of economic interdependence, without regard to their actual circumstances": *M. v. H.*, at para. 3. Since "[b]eing in a same-sex relationship does not mean that it is an impermanent or a non-conjugal relationship" (*M. v. H.*, at para. 70), the legislature was imposing differential treatment that was found to be discriminatory because it created a disadvantage as a result of stereotyping. It was impossible for same-sex spouses to opt in to Ontario's legal regime. The exclusion of same-sex couples from the *FLA* was based on an inaccurate and stereotypical characterization of their actual circumstances and therefore violated their dignity.

par ce recours alimentaire. Une majorité de la Cour décide alors que cette exclusion des conjoints de fait de même sexe « laisse entendre qu'ils sont jugés incapables de former des unions intimes marquées par l'interdépendance financière, peu importe leur situation » : *M. c. H.*, par. 3. « L'union entre personnes de même sexe n'[étant] pas synonyme d'union non durable ou non conjugale » (*M. c. H.*, par. 70), le législateur établissait ainsi une différence de traitement jugée discriminatoire, parce qu'elle provoquait un désavantage découlant de l'application d'un stéréotype. Elle ne laissait aux conjoints de même sexe aucune possibilité d'opter pour le régime légal ontarien. L'exclusion de la *LDF* des couples de même sexe reposait sur une caractérisation inexacte et stéréotypée de leur situation réelle et violait donc leur dignité.

[225] The opposite was true in *Walsh*, in which the legislature had provided that the presumption of equal division of property was conditional on the expression of a consensual intention (through marriage, a domestic contract or, later, the registration of a common law partnership). Since common law spouses, unlike married spouses, had not expressed such an intention, their exclusion from the *MPA* was not based on an inaccurate and stereotypical characterization of their actual circumstances and did not violate their dignity.

[225] À l'opposé, dans *Walsh*, le législateur faisait dépendre la présomption de partage égal des biens de l'expression d'une volonté consensuelle (soit par mariage, soit par contrat familial, et plus tard par enregistrement d'union de fait). Les conjoints de fait, contrairement aux conjoints mariés, n'avaient pas manifesté une telle volonté consensuelle. Leur exclusion de la *MPA* ne reposait donc pas sur une caractérisation inexacte et stéréotypée de leur situation réelle et ne violait pas leur dignité.

[226] In short, it seems to me that Bastarache J. would have reached the same conclusion in *Walsh* even if the current analytical framework had applied. Although the *MPA* imposed differential treatment based on an analogous ground, that distinction did not create a disadvantage by expressing or perpetuating prejudice or by stereotyping. Accordingly, subject to the differences between the *MPA* and the Quebec scheme, Bastarache J.'s analysis can properly serve as a precedent for our assessment of the infringement of s. 15(1) alleged by A in the instant case. It is true that the Court's analysis concerned not the obligation of support, but the Nova Scotia legislation's presumption of equal division of family assets. However, Bastarache J.'s comments on the sources of the distinctions between the various forms of relationships and the consequences of those distinctions remain relevant.

[226] En somme, il m'apparaît que la conclusion du juge Bastarache dans *Walsh* aurait été la même si elle avait été adoptée dans le cadre juridique actuel. Ainsi, même si la *MPA* créait une différence de traitement fondée sur un motif analogue, cette distinction n'établissait pas de désavantage par l'expression ou la perpétuation d'un préjugé ou par l'application d'un stéréotype. C'est donc à bon droit que l'analyse effectuée par le juge Bastarache, sujette aux différences entre la *MPA* et le régime québécois, peut servir de point d'ancrage précédentiel à notre évaluation de l'atteinte au par. 15(1) qu'allègue A en l'espèce. Certes, l'analyse de la Cour ne portait pas sur l'obligation alimentaire, mais sur la présomption néo-écossaise de partage égal de biens familiaux. Cependant, les réflexions du juge Bastarache sur les sources des distinctions établies entre les différentes formes d'union et leurs

At any rate, even without *Walsh*, the same principles applied under the current analytical framework for s. 15(1) would lead to the conclusions I propose with respect to the Quebec legislation being challenged by A.

H. *Preliminary Comments on the Approach Proposed by the Court of Appeal*

[227] Before actually considering A's constitutional challenge, I believe a clarification is required with regard to the judgment of Dutil J.A. in the Court of Appeal. In her reasons, Dutil J.A. found that the main issues raised by A's appeal concerned [TRANSLATION] "the obligation of support" on the one hand and "the division of property" upon the breakdown of a relationship on the other. That distinction was central to her reasons and served as the framework for her reasoning. The same distinction is central to Deschamps J.'s reasons. Regarding the discrimination that allegedly results from the provisions on partition of property (family patrimony, protection of the family residence, partnership of acquests and compensatory allowance), Dutil J.A. considered herself bound by the reasoning in *Walsh* and concluded on that basis that those provisions are not discriminatory. Deschamps J. concludes that the exclusion of *de facto* spouses from the provisions in question is discriminatory, but that it is justified under s. 1 of the *Charter*.

[228] Dutil J.A. argued that, unlike in the case of the provisions on the partition of property, the obligation of support is not contractual in origin but [TRANSLATION] "exists to meet basic needs and represents an aspect of social solidarity": para. 68. As a result, she found that art. 585 *C.C.Q.*, which deals with the obligation of support, had to be assessed separately from the rest of the impugned provisions, that the reasoning in *Walsh* was not applicable to art. 585 and that s. 15(1) of the *Charter* had to be considered in relation to art. 585 alone. In my opinion, this is incorrect.

conséquences demeurent pertinentes. De toute manière, même en l'absence de l'arrêt *Walsh*, les mêmes principes appliqués dans le cadre actuel d'analyse du par. 15(1) conduiraient aux conclusions que je propose à propos de la législation québécoise attaquée par A.

H. *Commentaires préliminaires sur l'approche préconisée par la Cour d'appel*

[227] Avant de procéder à l'examen proprement dit de la contestation constitutionnelle engagée par A, j'estime qu'une précision s'impose à l'égard de l'opinion de la juge Dutil en Cour d'appel. Dans ses motifs, la juge Dutil considère que la question principale soulevée par le pourvoi de A touche, d'une part, « l'obligation alimentaire » et, d'autre part, « le partage des biens » lors d'une rupture. Cette distinction se situe au cœur de ses motifs et établit le cadre de son raisonnement. La même distinction se retrouve au cœur des motifs de la juge Deschamps. À l'égard de l'allégation de discrimination causée par les dispositions concernant le partage des biens (soit le patrimoine familial, la protection de la résidence familiale, la société d'acquêts et la prestation compensatoire), la juge Dutil s'estime liée par le raisonnement de l'arrêt *Walsh*. Elle conclut donc que ces dispositions ne sont pas discriminatoires. Pour sa part, la juge Deschamps conclut que l'exclusion des conjoints de fait du bénéfice de ces dispositions est discriminatoire, mais qu'elle est justifiée en vertu de l'article premier de la *Charte*.

[228] La juge Dutil soutient que, contrairement aux dispositions imposant un partage des biens, l'obligation alimentaire n'a pas d'origine contractuelle et « répond à des besoins de base et participe de la solidarité sociale » : par. 68. Dès lors, elle estime que l'art. 585 *C.c.Q.* concernant l'obligation alimentaire doit être apprécié séparément du reste des dispositions contestées, que le raisonnement de l'arrêt *Walsh* lui est inapplicable et qu'une évaluation sous le par. 15(1) de la *Charte* doit être entreprise isolément à son égard. J'estime que cette proposition est erronée.

[229] I find that the distinction drawn by Dutil J.A. between the "partition of property" and the "obligation of support" is inappropriate, as it 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.

[230] This distinction also overlooks the fact that each of the impugned provisions shapes the spouses' private patrimonial relationship and that a number of them rebalance the distribution of property between the spouses in some way, including through the payment of certain amounts or the granting of rights of use of or ownership in certain property. As well, by increasing the patrimony of the less wealthy spouse, each of these measures can enhance that spouse's autonomy and reduce the potential of his or her becoming dependent on government assistance.

[231] In Quebec law, the obligation of support is one of the mandatory effects of marriage (or of a civil union) that the spouses may not renounce in a marriage contract. As an expression of the duty of succour that each spouse owes the other where needed, the obligation of support, like the spouses' obligation to contribute towards household expenses in proportion to their respective means, is part of the primary regime that the spouses accept when they choose to marry. This obligation, in the form of the duty of succour, lasts as long as the spouses remain married or in a civil union.

[229] Selon moi, la distinction qu'établit la juge Dutil entre « partage des biens » et « obligation alimentaire » est inadéquate. Cette 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.

[230] D'autre part, cette distinction ne tient pas compte du fait que chacune des dispositions contestées module les rapports patrimoniaux privés des conjoints et rééquilibre dans un certain nombre de cas, d'une façon ou d'une autre, la répartition des biens entre eux, notamment par le paiement de certaines sommes ou l'attribution de droits d'usage ou de propriété sur certains biens. De plus, chacune de ces mesures, en bonifiant le patrimoine du conjoint moins nanti, peut rendre ce dernier plus autonome et potentiellement moins dépendant de l'aide de l'État, le cas échéant.

[231] En droit québécois, l'obligation alimentaire constitue l'un des effets impératifs du mariage (ou de l'union civile) auquel les conjoints ne peuvent déroger par contrat de mariage. Manifestation du devoir de secours auquel chaque conjoint est tenu envers l'autre en cas de besoin, l'obligation alimentaire, au même titre que l'obligation de contribuer aux charges du ménage en proportion de ses facultés respectives, fait partie du régime primaire auquel les conjoints adhèrent dès qu'ils choisissent de se marier. Cette obligation, sous la forme du devoir de secours, perdure tant que les conjoints demeurent liés par le mariage ou l'union civile.

[232] However, both the *Civil Code* and the *Divorce Act* provide that such an obligation may be imposed even after the bonds of civil union or marriage have been dissolved. Thus, in *Bracklow*, the Court considered the *Divorce Act* and enquired into the basis for the obligation of support after the marriage bond is dissolved. The Court noted first that support may be awarded to compensate a spouse who has been economically disadvantaged during the marriage: *Bracklow*, at paras. 36, 39 and 49. In this regard, support is similar to a compensatory allowance, since its objective will be to compensate one of the spouses for losses incurred as a result of the marriage and its breakdown.

[233] However, support can also be non-compensatory, and based on the "mere fact that a person who formerly enjoyed intra-spousal entitlement to support now finds herself or himself without it": *Bracklow*, at para. 41. This basis for the obligation of support "postulates each of the parties to the marriage agreeing, as independent individuals, to marriage and all that it entails — including the potential obligation of mutual support" and "recognizes the artificiality of assuming that all separating couples can move cleanly from the mutual support status of marriage to the absolute independence status of single life, indicating the potential necessity to continue support, even after the marital 'break'": *Bracklow*, at paras. 30-31.

[234] As the Court explained, this form of post-divorce support obligation is based on two important factors. First, it is based on the fact that an obligation of support, known as the duty of succour in the civil law, exists during marriage and may remain necessary after a marriage breaks down. Second, it can be seen as one of the many consequences to which individuals agree when they choose to marry. Thus, the choice to get married results in the application of certain mandatory effects codified in the *Civil Code of Québec*, such as the claim that arises for the value of the family patrimony, and of the effects set out in the *Divorce*

[232] Le *Code civil* et la *Loi sur le divorce* prévoient toutefois respectivement qu'une telle obligation peut être imposée même après la dissolution des liens d'union civile ou de mariage. Ainsi, dans l'arrêt *Bracklow*, la Cour étudie la *Loi sur le divorce* et s'interroge sur les fondements de l'obligation alimentaire après la dissolution du lien matrimonial. La Cour souligne d'abord que cette obligation alimentaire peut avoir un objectif compensatoire au profit d'un époux qui aurait été désavantagé économiquement durant le mariage : *Bracklow*, par. 36, 39 et 49. À ce titre, l'obligation alimentaire se rapproche de la prestation compensatoire en ce qu'elle aura pour objectif d'indemniser un des conjoints pour les pertes subies en raison du mariage et de son échec.

[233] Cependant, l'obligation alimentaire peut aussi être de nature non compensatoire et découler du « simple fait qu'une personne qui bénéficiait auparavant d'un droit aux aliments à titre d'époux au sein du mariage se trouve désormais privée de ce droit » : *Bracklow*, par. 41. Ce fondement de l'obligation alimentaire « pose comme principe que chaque partie au mariage souscrit, en tant que personne indépendante, au mariage et à tout ce qu'il entraîne, y compris la possibilité d'une obligation alimentaire mutuelle » et « reconnaît qu'il est irréaliste de supposer que tous les couples qui se séparent pourront facilement passer de l'obligation alimentaire mutuelle du mariage à l'indépendance absolue du célibat, d'où la nécessité éventuelle de poursuivre le versement d'aliments même après la "rupture" du mariage » : *Bracklow*, par. 30-31.

[234] Comme l'explique la Cour, cette forme d'obligation alimentaire après divorce repose sur deux constats importants. D'une part, elle découle du fait qu'une obligation alimentaire, appelée par ailleurs devoir de secours en droit civil, existe durant le mariage et peut demeurer nécessaire après la rupture. D'autre part, elle peut être vue comme une des nombreuses conséquences auxquelles les individus souscrivent lorsqu'ils choisissent de se marier. Dès lors, le choix de se marier emporte l'assujettissement à certains effets impératifs codifiés au *Code civil du Québec*, comme l'ouverture d'une créance pour la valeur

Act, which provides for an obligation of support following the breakdown of a marriage. In both cases, the obligation of support is therefore based on consent to the marriage or civil union.

[235] Accordingly, these appeals cannot be disposed of on the basis of the distinction made by Dutil J.A. between the partition of property and the obligation of support. Indeed, Beauregard J.A. seemed to acknowledge this in his concurring reasons in admitting that, were it not for *Walsh*, the Court of Appeal's reasoning on the discriminatory nature of the support obligation provision would apply equally to the other impugned provisions, such as those on the family patrimony: paras. 192 and 194. The main issue raised by 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*. For the reasons that follow, I find that it is not.

I. *A's Discrimination Claim*

[236] In these appeals, as I mentioned above, A is challenging the constitutional validity of the provisions of the *Civil Code of Québec* dealing with the family residence (arts. 401 *et seq.*), the family patrimony (arts. 414 *et seq.*), the compensatory allowance (arts. 427 *et seq.*), the partnership of acquests (arts. 432 *et seq.*) and the obligation of spousal support (art. 585) on the basis of the fact that they apply to private legal relationships of married and civil union spouses but not to those of *de facto* spouses. To prove that she has been discriminated against, A must show on a balance of probabilities that the provisions in question create an adverse distinction based on an enumerated or analogous ground and that the disadvantage is discriminatory because it perpetuates prejudice or stereotypes.

[237] Although the burden of proving that the impugned provisions discriminate in a substantive

du patrimoine familial, ainsi qu'aux effets prévus à la *Loi sur le divorce* qui reconnaît une obligation alimentaire post-rupture de l'union. De part et d'autre, l'obligation alimentaire repose alors sur le consentement au mariage ou à l'union civile.

[235] Dès lors, pour régler le sort de ces pourvois, on ne saurait retenir la distinction qu'effectue la juge Dutil entre partage des biens et obligation alimentaire. Le juge Beauregard, dans son opinion concurrente, semble d'ailleurs reconnaître cette réalité lorsqu'il admet que, n'eût été de l'arrêt *Walsh*, le raisonnement de la Cour d'appel selon lequel la disposition sur l'obligation alimentaire serait discriminatoire s'appliquerait tout autant aux autres dispositions contestées, tel le patrimoine familial : par. 192 et 194. La question principale soulevée par ces pourvois n'est pas de rechercher 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*. Pour les motifs qui suivent, j'estime qu'elle ne l'est pas.

I. *L'allégation de discrimination de A*

[236] En l'espèce, comme je l'ai exposé plus haut, A conteste la validité constitutionnelle des dispositions du *Code civil du Québec* portant sur la résidence familiale (art. 401 et suiv.), le patrimoine familial (art. 414 et suiv.), la prestation compensatoire (art. 427 et suiv.), la société d'acquêts (art. 432 et suiv.) et l'obligation alimentaire entre conjoints (art. 585), en ce qu'elles encadrent les rapports juridiques privés des conjoints mariés et des conjoints unis civilement, mais ignorent ceux des conjoints de fait. Afin d'établir l'existence d'une situation de discrimination, A doit démontrer, par prépondérance des probabilités, que ces dispositions 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.

[237] Bien que la charge de la preuve du caractère réellement discriminatoire des dispositions

sense lies on A, the Court can of course take judicial notice of certain facts. If it does so, it must follow the rules that permit, but define the limits of, judicial notice. As McLachlin J. explained in *R. v. Williams*, [1998] 1 S.C.R. 1128, "[j]udicial notice is the acceptance of a fact without proof": para. 54. In other words, it "dispenses with the need for proof of facts that are clearly uncontroversial or beyond reasonable dispute": *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863, at para. 48.

attaquées incombe à A, on sait que la Cour peut prendre connaissance d'office de certains faits. Elle applique alors les règles qui admettent la connaissance judiciaire, mais qui en délimitent la portée. Comme l'explique la juge McLachlin dans l'arrêt *R. c. Williams*, [1998] 1 R.C.S. 1128, « [l]a connaissance d'office est l'acceptation d'un fait sans preuve » : par. 54. Autrement dit, elle « dispense de la nécessité de prouver des faits qui ne prêtent clairement pas à controverse ou qui sont à l'abri de toute contestation de la part de personnes raisonnables » : *R. c. Find*, 2001 CSC 32, [2001] 1 R.C.S. 863, par. 48.

[238] According to the principles laid down in *Find*, judicial notice applies only where facts are either

(1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy: *R. v. Potts* (1982), 66 C.C.C. (2d) 219 (Ont. C.A.); J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 1055. [para. 48]

(See also *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458, at para. 53.)

[238] Selon les principes posés dans l'arrêt *Find*, la connaissance d'office ne s'applique qu'à deux types de faits :

(1) les faits qui sont notoires ou généralement admis au point de ne pas être l'objet de débats entre des personnes raisonnables; [et] (2) ceux dont l'existence peut être démontrée immédiatement et fidèlement en ayant recours à des sources facilement accessibles dont l'exactitude est incontestable : *R. c. Potts* (1982), 66 C.C.C. (2d) 219 (C.A. Ont.); J. Sopinka, S. N. Lederman et A. W. Bryant, *The Law of Evidence in Canada* (2e éd. 1999), p. 1055. [par. 48]

(Voir également *R. c. Spence*, 2005 CSC 71, [2005] 3 R.C.S. 458, par. 53.)

[239] These categories of facts are obviously limited. A court must therefore be cautious when asked to take judicial notice of particular facts. In particular, it must refrain from taking judicial notice of social phenomena unless they are not the subject of reasonable dispute for the particular purpose for which they are to be used: *Spence*, at para. 65. As Binnie J. explained in *Spence*, the closer a fact approaches the dispositive issue, or the closer it is to the centre of the controversy between the parties, the more stringently the court ought to verify it before taking judicial notice of it: paras. 60-61.

[239] Ces catégories de faits sont manifestement restreintes. Dès lors, les tribunaux doivent se montrer prudents lorsqu'on les invite à prendre connaissance d'office de certains faits. Ils doivent notamment se garder de constater d'office l'existence de phénomènes sociaux à moins que ceux-ci n'échappent à toute contestation raisonnable quant à la fin pour laquelle ils sont invoqués : *Spence*, par. 65. Comme l'explique le juge Binnie dans *Spence*, plus un fait a une incidence directe sur l'issue du procès ou plus il touche de près le cœur du litige, plus les tribunaux doivent le soumettre à des vérifications sévères avant d'en admettre d'office l'existence : par. 60-61.

[240] Aside from the facts of which the court may take judicial notice, the general rule of evidence remains the same: "We must decide [the] case on the evidence before us": *Gosselin*, at para. 66.

[240] En dehors des faits dont le tribunal peut prendre connaissance d'office, la règle de preuve générale demeure la même : « Nous devons trancher le [. . .] pourvoi en fonction de la preuve qui nous

This rule applies to cases involving allegations of infringements of the right to equality, including appeals to this Court.

(1) Adverse Distinction Based on an Enumerated or Analogous Ground

[241] In this appeal, the first matter to be proved by A presents no problem. The various articles of the *Civil Code* at issue here apply only to persons who are married or in a civil union. They govern the private legal relationships of such persons, but they do not apply to the relationships of *de facto* spouses. They therefore draw a distinction based on the analogous ground of marital status.

[242] 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, regardless of the origin of that patrimony, one of them will be in a worse position after the relationship ends than would a married spouse in a similar patrimonial situation. A married spouse whose marriage breaks down would be entitled to partition under the regimes of family patrimony and partnership of acquests and might also be awarded the ownership of certain movables, the use of the family residence, a compensatory allowance and support. The *de facto* spouse, on the other hand, will not have the rights recognized by the relevant provisions of the *Civil Code*. In reality, however, each form of conjugal relationship is likely to have its share of disadvantages for one or the other of the spouses, depending on their personal circumstances at the time of the breakdown. The nature of these disadvantages will vary with the position of each of the spouses and the nature of the legal regime applicable to them.

a été soumise » : *Gosselin*, par. 66. Cette règle s'applique aux affaires relatives aux allégations de violation du droit à l'égalité, y compris aux pourvois portés devant notre Cour.

(1) Distinction désavantageuse fondée sur un motif énuméré ou analogue

[241] En l'espèce, le premier élément dont A doit faire la preuve ne pose aucun problème. Les divers articles du *Code civil* faisant l'objet du présent litige ne s'appliquent qu'aux personnes mariées ou unies civilement. Ils régissent les rapports juridiques privés établis entre ces dernières, mais ne s'appliquent pas aux rapports entre conjoints de fait. Ces dispositions opèrent ainsi une distinction sur la base du motif analogue qu'est l'état matrimonial.

[242] 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 d'une capacité de gain et d'un patrimoine identiques, quelle que soit l'origine de ce dernier, un des conjoints se trouvera dans une situation moins favorable après la rupture que ne l'aurait été le conjoint marié, placé dans une situation patrimoniale similaire. Dans le cas de la rupture du mariage, ce conjoint bénéficierait d'un droit au partage des régimes de patrimoine familial et de société d'acquêts. Il pourrait aussi se voir octroyer la propriété de certains biens meubles, l'usage de la résidence familiale, une prestation compensatoire ainsi qu'une pension alimentaire. Le conjoint de fait, quant à lui, ne bénéficierait pas des droits reconnus par les dispositions pertinentes du *Code civil*. Toutefois, en réalité, chaque forme d'union conjugale est susceptible d'entraîner sa part de désavantages pour l'un ou l'autre des conjoints selon leur situation personnelle au moment de la rupture. La nature de ces désavantages variera avec la position de chacun des conjoints et la nature du régime juridique auquel il se trouvera assujetti.

[243] The provisions relating to the family patrimony, the family residence, the compensatory allowance, the partnership of acquests and the obligation of support therefore have the effect of creating a distinction based on an analogous ground, and that distinction can result in a disadvantage. What remains to be determined is whether the exclusion of *de facto* spouses from the framework applicable to marriage and civil unions discriminates in a substantive sense by violating the principle of substantive equality protected by s. 15(1) of the *Charter*. According to the general analytical framework in place since *Withler* and *Kapp*, there are two ways for A to prove this. First, she can show that the disadvantageous law perpetuates prejudice against *de facto* spouses. Second, she can show that the disadvantage imposed by the law is based on a stereotype. If either of these things is shown, the impugned provisions will be found to violate s. 15(1).

(2) Perpetuating Prejudice

[244] The first way that substantive inequality 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. Generally speaking, a law will perpetuate prejudice if it denotes a negative attitude or opinion concerning a person that is based on a personal characteristic enumerated in s. 15(1) or a characteristic analogous thereto. The same is true of provisions that attribute greater moral worth to certain persons at the expense of another group of persons on the basis of such a characteristic. Legislation that establishes a hierarchy among different individuals on the basis of their having or not having an enumerated or analogous characteristic would also perpetuate prejudice. As Professor Réaume explains, prejudice also works through the attribution of negative worth to personal characteristics that are important aspects of human identity: pp. 679-80.

[243] Les dispositions portant sur le patrimoine familial, la résidence familiale, la prestation compensatoire, la société d'acquêts et l'obligation alimentaire comportent donc, dans leur effet, une distinction fondée sur un motif analogue et cette distinction peut être la source d'un désavantage. Reste à déterminer si l'exclusion des conjoints de fait de l'encadrement du mariage et de l'union civile est réellement discriminatoire parce qu'elle porterait atteinte au principe d'égalité réelle protégé par le par. 15(1) de la *Charte*. Pour faire cette preuve, conformément au cadre général d'analyse établi depuis les arrêts *Withler* et *Kapp*, A dispose de deux méthodes. D'une part, elle peut démontrer que ces mesures désavantageuses perpétuent un préjugé à l'égard des conjoints de fait. D'autre part, elle peut établir que le désavantage imposé par de telles mesures repose sur un stéréotype. L'une ou l'autre de ces démonstrations mènera à la conclusion que les dispositions attaquées portent atteinte au par. 15(1).

(2) Perpétuation d'un préjugé

[244] La première façon de faire la preuve de l'inégalité réelle 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. Généralement, une mesure perpétue un préjugé lorsqu'elle révèle une attitude ou une opinion défavorable à l'égard d'une personne, sur la base d'une caractéristique personnelle énumérée au par. 15(1) ou qui lui est analogue. Un constat identique s'impose face à une disposition qui reconnaîtrait une plus grande valeur morale à certaines personnes au détriment d'un autre groupe de personnes sur la base d'une telle caractéristique. Par ailleurs, un préjugé est aussi présent lorsqu'une mesure législative établit une hiérarchie entre différentes personnes du fait de l'existence ou de l'absence d'une caractéristique énumérée ou analogue. Comme l'explique la professeure Réaume, le préjugé s'exprime en outre par l'attribution d'une valeur négative à des caractéristiques personnelles qui constituent des aspects importants de l'identité d'un être humain : p. 679-680.

[245] Prejudice can sometimes be seen on the very face of the legislation, especially if the legislation reflects contempt for or hostility toward the group concerned or if its purpose is to inflict prejudice on a group of persons. In such circumstances, discrimination through the expression or perpetuation of prejudice will likely be intentional.

[246] It is generally accepted that *de facto* spouses in Quebec historically experienced disadvantageous treatment based on intentional prejudice. As I explained above, until the 1980 family law reform, disapproval of "concubinage" was expressed in legislation. This disapproval could be seen in particular in the *Civil Code of Lower Canada*, which effectively prohibited any financial arrangements between *de facto* spouses and also maintained a strict distinction between legitimate children, those born in wedlock, and "natural, incestuous or adulterine" children, those born out of wedlock. These measures were an attempt to prevent individuals from choosing to live in such unions, which at the time were considered [TRANSLATION] "contrary to good morals": Cossette, at p. 53. Moreover, the only way for *de facto* spouses to legitimate their natural children was to get married, where such a marriage was legally possible.

[247] McLachlin J. described the historical situation of *de facto* spouses as follows in *Miron*:

> There is ample evidence that unmarried partners have often suffered social disadvantage and prejudice. Historically in our society, the unmarried partner has been regarded as less worthy than the married partner. The disadvantages inflicted on the unmarried partner have ranged from social ostracism through denial of status and benefits. [Emphasis added; para. 152.]

(See also *Walsh*, at para. 41.)

[248] Thus, there was a period of Quebec history during which *de facto* spouses were subjected

[245] Parfois, le préjugé apparaîtra à la face même de la législation, particulièrement lorsque cette dernière traduit un mépris ou une hostilité envers le groupe concerné, ou lorsque son objectif consiste à infliger un préjudice à un groupe de personne. Dans ces circonstances, la discrimination par l'expression ou la perpétuation d'un préjugé sera vraisemblablement intentionnelle.

[246] Il est généralement admis qu'historiquement, les conjoints de fait du Québec ont subi un traitement désavantageux empreint de préjugés intentionnels. Tel que je l'explique plus haut, jusqu'aux réformes du droit de la famille de 1980, le « concubinage » faisait l'objet d'une désapprobation législative. Celle-ci se manifestait notamment dans le *Code civil du Bas Canada* qui interdisait effectivement tout arrangement financier entre conjoints de fait. D'autre part, le *Code civil du Bas Canada* maintenait une distinction stricte entre les enfants légitimes, nés au sein du mariage, et les enfants « naturels, incestueux ou adultérins », nés hors mariage. Par ces mesures, l'on tentait d'éviter que les individus ne choisissent de vivre au sein de telles unions alors considérées comme « contraire[s] aux bonnes mœurs » : Cossette, p. 53. Par ailleurs, la seule méthode dont disposaient les parents vivant en union de fait pour que leur enfant naturel soit légitime était de se marier, lorsqu'un tel mariage était juridiquement possible.

[247] Décrivant la situation historique des conjoints de fait, la juge McLachlin tient, dans *Miron*, les propos suivants :

> De nombreux faits établissent que les partenaires non mariés ont souvent subi un désavantage et un préjudice au sein de la société. En effet, traditionnellement dans notre société, on a considéré que le partenaire non marié avait moins de valeur que le partenaire marié. Parmi les désavantages subis par les partenaires non mariés, mentionnons l'ostracisme social par négation de statut et de bénéfices. [Je souligne; par. 152.]

(Voir également *Walsh*, par. 41.)

[248] Il appert donc que durant une période de l'histoire du Québec, les conjoints de fait ont été

to both legislative hostility and social ostracism. In keeping with the principles stated in *Law*, this historical disadvantage means that particular care must be taken in reviewing any new legislation containing an adverse distinction with respect to certain members of the same group: paras. 63-68. However, the recognition of historical disadvantage does not automatically lead to the conclusion that a distinction remains discriminatory today on the basis that it creates a disadvantage by perpetuating prejudice. It is also necessary that the disadvantage continue to exist today and that the new legislation confirm or perpetuate the legislative and social stigmatization of such spouses.

[249] On this point, I would point out that the limits on freedom of contract imposed on *de facto* spouses, like the distinction between legitimate and natural children, were eliminated in 1980. Furthermore, nothing in the evidence suggests that *de facto* spouses are now subject to public opprobrium or that they are otherwise subject to social ostracism. 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. Statistics from the latest census in 2011 confirm that it exists and is developing in Quebec society. Several of the married spouses with whom certain experts met in conducting sociological studies for the purposes of this litigation even regularly use language specific to *de facto* unions when describing themselves to third parties. The fact that they do so does not support a view that society continues to be suspicious or intolerant of *de facto* unions.

[250] Moreover, the legislature's traditional hostility generally seems to have changed into acceptance of the *de facto* union. As I mentioned above, Quebec social legislation no longer draws distinctions between the various types of conjugality: see, *inter alia*, *An Act respecting financial assistance for education expenses*; *An Act respecting legal aid and the provision of certain other legal services*; *Automobile Insurance Act*. Rather,

victimes d'une hostilité législative accompagnée d'ostracisme social. Conformément aux enseignements de l'arrêt *Law*, ce désavantage historique appelle un examen résolument prudent de toute nouvelle mesure législative comportant une distinction désavantageuse pour certains membres de ce groupe : par. 63-68. Cependant, la reconnaissance d'un désavantage historique n'emporte pas automatiquement la conclusion qu'une distinction demeure aujourd'hui discriminatoire parce qu'elle causerait un désavantage par la perpétuation d'un préjugé. Encore faut-il que, dans le contexte actuel, le désavantage existe toujours et que la nouvelle mesure confirme ou perpétue cette stigmatisation législative et sociale.

[249] Sur ce point, je constate que les limites à la liberté contractuelle imposées aux conjoints de fait, tout comme la distinction entre enfants légitimes et naturels, ont été levées en 1980. De plus, rien dans la preuve ne permet de conclure que l'union de fait fasse aujourd'hui l'objet de l'opprobre populaire ou qu'elle soit autrement victime d'ostracisme social. 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. Les statistiques du dernier recensement de 2011 confirment sa présence et son développement dans la vie de la société québécoise. Plusieurs époux rencontrés dans le cadre des études sociologiques entreprises par certains experts aux fins du présent litige utilisent même régulièrement un vocabulaire propre à l'union de fait pour se décrire auprès des tiers. Un tel comportement serait difficilement conciliable avec l'existence d'une société méfiante ou intolérante vis-à-vis de l'union de fait.

[250] On peut aussi constater que l'hostilité législative traditionnelle semble s'être généralement muée en acceptation du phénomène de l'union de fait. À cet effet, rappelons que les lois sociales québécoises n'entretiennent plus de distinctions entre les divers modes de conjugalité : voir notamment *Loi sur l'aide financière aux études*; *Loi sur l'aide juridique et sur la prestation de certains autres services juridiques*; *Loi sur l'assurance*

it applies uniformly to *de facto*, married and civil union spouses both in granting benefits and in imposing obligations where their relations with government institutions are concerned. As we have seen, 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.

[251] However, the fact that the form of union chosen by *de facto* spouses now generally seems to have the social and legislative acceptance it formerly lacked does not on its own lead to the conclusion that the law at issue in this case does not express prejudice. Prejudice does not have to be intentional for s. 15(1) of the *Charter* to be violated. If a law has the effect of favouring certain individuals at the expense of others by treating the latter as less worthy, or if it creates a hierarchy between them, even inadvertently, it will be considered to discriminate by expressing prejudice.

[252] In the case at bar, the articles of the *Civil Code of Québec* whose validity is challenged by A have the purpose and effect of regulating the private relationships of married spouses. They do this in two ways, as I explained above.

[253] First, as a result of their marriage, the spouses are subject to a mandatory primary regime that radically alters each spouse's patrimonial rights. More specifically, the primary regime results in the formation of a partial economic union between the spouses. Second, 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 also 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. It expands the partial economic union already created by the primary regime. Upon separation or divorce, this matrimonial regime requires that the value of each spouse's acquests be partitioned. The monetary

automobile. Les conjoints de fait, comme les époux et les conjoints unis civilement, sont soumis à une application uniforme de ces lois tant sur le plan des bénéfices accordés que sur celui des obligations imposées lorsqu'il s'agit de leurs rapports avec les institutions publiques. Comme nous l'avons vu, 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.

[251] Cependant, le fait qu'à l'heure actuelle la forme d'union choisie par les conjoints de fait paraisse généralement bénéficier d'une acceptation sociale et législative autrefois inexistante, ne suffit pas pour conclure que les mesures contestées en l'espèce n'expriment pas de préjugés. Le préjugé n'a pas à être intentionnel pour porter atteinte au par. 15(1) de la *Charte*. Si une mesure a pour effet de privilégier certains individus au détriment d'autres individus en attribuant aux seconds une valeur inférieure, ou si elle crée, même par inadvertance, une hiérarchie entre eux, elle sera considérée discriminatoire par l'expression d'un préjugé.

[252] En l'espèce, l'objet et l'effet des articles du *Code civil du Québec* dont A conteste la validité sont d'encadrer les rapports privés des époux. Cet encadrement se réalise de deux manières, comme je l'ai exposé.

[253] Premièrement, le mariage emporte l'assujettissement des époux à un régime primaire impératif qui altère radicalement les droits patrimoniaux de chacun des époux. Spécifiquement, ce régime impose la formation d'une union économique partielle entre les époux. Deuxièmement, en l'absence de contrat de mariage prévoyant la séparation de biens ou des modifications au régime légal, le mariage emporte également 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. La société d'acquêts approfondit l'union économique partielle déjà créée par le régime primaire. À la séparation ou au divorce, ce régime matrimonial impose un partage de la valeur des acquêts que possède chaque

impact of this regime can be significant: each spouse's acquests include the proceeds of his or her work during the regime, and the fruits and income due or collected from all his or her private property or acquests during the regime.

[254] 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 legislature did not view cohabitation on its own as an expression of such consent. As a result, the regimes do not apply automatically to *de facto* unions.

[255] Has the legislature in this way established a hierarchy between the various forms of conjugality? Has it expressed a preference for marriage and civil unions at the expense of *de facto* unions? Do the articles of the *Civil Code of Québec* being challenged in this case have the effect of sending a message or conveying a negative image or belief concerning *de facto* spouses?

[256] In my opinion, the answer to these questions must be no. Like the Nova Scotia legislature in enacting the *MPA* at issue in *Walsh*, the Quebec National Assembly has not favoured one form of union over another. This conclusion can be inferred if the questions of freedom of choice and autonomy of the will of the parties are correctly considered. The legislature 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.

[257] This makes it easier to understand the real purpose of these appeals. It concerns the mutual rights and obligations of spouses in the various forms of conjugal relationships available to them in Quebec law. In Quebec family law, these rights and obligations are always available to everyone,

époux. L'impact pécuniaire de ce régime peut être important : les acquêts d'un époux comprennent notamment le produit de son travail au cours du régime ainsi que les fruits et revenus échus ou perçus au cours du régime, provenant de tous ses biens, propres ou acquêts.

[254] 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 législateur ne considère pas que la cohabitation, à elle seule, constitue une manifestation de ce consentement. Dès lors, ces régimes ne s'appliquent pas automatiquement à l'union de fait.

[255] Ce faisant, le législateur crée-t-il une hiérarchie entre les diverses formes de conjugalité? Manifeste-t-il une préférence pour le mariage et l'union civile au détriment de l'union de fait? Les articles du *Code civil du Québec* attaqués en l'espèce ont-ils pour effet de transmettre un message ou de projeter une image ou une croyance négative au sujet des conjoints de fait?

[256] Selon moi, ces questions doivent recevoir une réponse négative. À l'instar du législateur néo-écossais et de la *MPA* en litige dans l'arrêt *Walsh*, l'Assemblée nationale du Québec ne privilégie pas une forme d'union par rapport à une autre. Cette conclusion s'infère si l'on pose correctement les questions de la liberté de choix et de la marge d'autonomie laissée à la volonté des parties. Le législateur 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.

[257] Ceci permet de mieux comprendre l'objet réel de ces pourvois. Il met en cause les droits et obligations mutuels des conjoints en vertu des différentes formes d'union conjugale qui leur sont offertes par la loi au Québec. Dans tous les cas, selon le droit de la famille du Québec, ces droits

but imposed on no one. Their application depends on an express mutual will of the spouses to bind themselves. This express, and not deemed, consent is the source of the obligation of support and of that of partition of spouses' patrimonial interests. As we have seen, 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 without having to modify the form of conjugality they have chosen for their life together.

et obligations offerts à tous ne sont imposés à personne. Leur mise en œuvre dépend d'une volonté mutuelle explicite de se lier. Ce consentement explicite et non présumé constitue la source des obligations de soutien alimentaire et de partage des intérêts patrimoniaux entre conjoints. Comme on l'a vu, 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 des contrats de vie commune permet aux conjoints de fait de créer entre eux les rapports juridiques qu'ils estiment nécessaires sans devoir modifier la forme de conjugalité dans laquelle ils ont situé leur vie commune.

[258] *M. v. H.* does not preclude this conclusion. In that case, the same-sex spouses were excluded on the basis of their sexual orientation from a regime that required no form of express consent in order to apply. In the case of Quebec, consent is the ordinary rule. For *de facto* spouses, it can take legal forms that are well known and often straightforward, with which legal practitioners, if not the parties themselves, are familiar. If a spouse has concerns about the relative fragility of such agreements in the event of insolvency, agreements with respect to forms of co-ownership are possible.

[258] L'arrêt *M. c. H.* ne fait pas obstacle à cette conclusion. Dans cette affaire, les conjoints de même sexe étaient exclus en vertu de leur orientation sexuelle d'un régime qui n'exigeait aucune forme de consentement explicite pour son application. Dans le cas du Québec, le consentement est la règle commune. Dans le cas des conjoints de fait, il peut prendre des formes juridiques connues, souvent simples et familières aux praticiens du droit, sinon aux parties elles-mêmes. Si l'on entretient des inquiétudes sur la fragilité relative de ces ententes dans des situations d'insolvabilité, des accords relatifs à des formes de copropriété demeurent possibles.

[259] 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. In this regard, my colleague Abella J. is mistaken in saying that the choice of a form of conjugal relationship, especially that of marriage, is necessarily a mutual one. She criticizes what she describes as the "opt-in" system of Quebec law, arguing that it leaves each member of the couple at the mercy of the other should one of them refuse to marry: para. 375.

[259] 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 conjoints de fait. À cet égard, ma collègue la juge Abella se méprend sur la nature nécessairement mutuelle de la décision de choisir une forme d'union conjugale, en particulier celle du mariage. Son opinion critique ce qu'elle définit comme le système d'« *opting in* » (système fondé sur l'adhésion volontaire) du droit québécois parce qu'il laisserait chaque membre du couple à la merci de l'autre en cas de refus de conclure un mariage : par. 375.

[260] This represents an incomplete view of marriage and *de facto* unions in contemporary society. If we accept that an individual's freedom to decide and personal autonomy are not purely illusory, his or her decision to continue living with a spouse who refuses to marry has the same value as that of a spouse who gives in to insistent demands to marry.

[261] In Quebec family law, as I mentioned above, choosing a *de facto* union permits spouses to opt out of the primary regime that is mandatory in the case of marriage or a civil union. By making this choice, they avoid entering into that regime and consequently assuming such obligations as that of support or the partition of the family patrimony. My colleague Abella J. adopts a position that would require these spouses to perform positive acts to opt out of a regime they did not intend to adopt. She would thus require them to exercise a freedom of choice whose validity and relevance she nonetheless denies in the context of opting for a particular form of conjugality.

[262] Moreover, the entire history of societal and legal changes that have led to the *de facto* union becoming an accepted form of conjugality in Quebec, far from being irrelevant to the analysis of an allegation that the right to equality has been infringed, is essential if we are to understand the constitutional issue before us and consider it in its context. This context can be understood only in light of the very widespread acceptance of the *de facto* union in Quebec society since the recognition of marital status as an analogous ground of discrimination: *Turpin*, at p. 1332. 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: *Lavoie*, at paras. 47-48, *per* Bastarache J.

[263] That the legislature did not intend to favour marriage or the civil union is made even clearer by the fact that in Quebec law, *de facto* spouses may accept each of the effects of marriage set out in the

[260] Cette opinion présente une vision tronquée du mariage et des unions de fait dans la société contemporaine. Dans la mesure où nous acceptons que la liberté de décision et l'autonomie personnelle ne sont pas de pures illusions, la décision d'un individu de continuer sa vie conjugale avec un conjoint qui refuse de se marier possède la même valeur que celle d'un conjoint qui cède à une demande pressante de conclure un mariage.

[261] Dans le droit de la famille du Québec, comme nous l'avons vu, le choix de l'union de fait permet aux conjoints de se soustraire au régime primaire imposé par le mariage et l'union civile. Ce choix leur évite de s'engager dans ce régime et d'assumer en conséquence des obligations comme le soutien alimentaire ou le partage du patrimoine familial. La position adoptée par ma collègue la juge Abella contraindrait ces conjoints à poser des actes positifs pour choisir de se soustraire à un régime qu'ils n'entendaient pas adopter. Elle obligerait ainsi les conjoints à exercer une liberté de choix dont elle nie cependant la validité et la pertinence lorsqu'il s'agit d'opter pour une forme particulière de conjugalité.

[262] Par ailleurs, loin d'être sans pertinence pour l'analyse de l'allégation d'atteinte à la garantie d'égalité, toute l'histoire de l'évolution sociale et juridique de l'union de fait au Québec, qui en fait l'une des formes de conjugalité reconnues, est indispensable pour comprendre et contextualiser le débat constitutionnel porté devant nous. L'acceptation très généralisée de l'union de fait dans la société québécoise depuis la reconnaissance de l'état matrimonial comme motif analogue de distinction ne peut être négligée pour comprendre ce contexte : *Turpin*, p. 1332. 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 : *Lavoie*, par. 47-48, le juge Bastarache.

[263] L'absence de volonté de privilégier le mariage ou l'union civile est d'autant plus évidente que le droit québécois permet aux conjoints de fait de souscrire à chacun des effets du mariage prévus

impugned provisions. To do so, they must indicate their consent by expressing a clear intention.

[264] Thus, *de facto* spouses can enter into cohabitation agreements in which they can opt in to the rules on the partition of the family patrimony, provide for an obligation of support in the event that their relationship breaks down, grant a right of use of the family residence or reserve the right to claim a compensatory allowance. They can also establish the equivalent of a matrimonial regime and agree to have the rules of the regime of partnership of acquests apply to their relationship. Moreover, under statutory pension plans, *de facto* spouses can apply by mutual agreement for the partition of amounts accrued in one spouse's name. Also, spouses who do not want to proceed by way of an agreement can purchase property as co-owners, thus ensuring that they are entitled to partition the property when their union comes to an end. In the absence of such arrangements, a *de facto* spouse can always go to court to bring an action for unjust enrichment against his or her former spouse in circumstances in which such an action is available.

[265] To paraphrase Bastarache J. in *Walsh*, I believe that this requirement that a consensus between the spouses exist before any significant change is made to their rights of ownership "enhances rather than diminishes respect for the autonomy and self-determination of unmarried cohabitants and their ability to live in relationships of their own design": para. 50.

[266] In short, I do not consider it 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. Conversely, as we saw in *Miron*, differential treatment of spouses by the government in conferring financial benefits

par les dispositions contestées. Ceux-ci doivent alors manifester leur consentement par l'expression d'une volonté explicite

[264] Les conjoints de fait peuvent ainsi conclure des contrats de vie commune. Par ces contrats, ils sont capables de s'assujettir aux règles de partage du patrimoine familial, de prévoir une obligation alimentaire post-rupture, de s'accorder un droit d'usage de la résidence familiale, ou de se réserver l'octroi d'une prestation compensatoire. Ils peuvent en outre constituer l'équivalent d'un régime matrimonial et s'assujettir aux règles de la société d'acquêts. Les régimes statutaires de rentes et de pensions prévoient en outre que les conjoints de fait peuvent, d'un commun accord, demander le partage des sommes accumulées au nom d'un des conjoints. De plus, les conjoints qui ne désirent pas procéder par la voie contractuelle peuvent acheter des biens en copropriété, s'assurant ainsi d'un droit à leur partage lors de la fin de l'union. En l'absence de tels arrangements, un conjoint de fait peut toujours s'adresser aux tribunaux afin de présenter un recours en enrichissement injustifié contre son ex-conjoint, dans les situations où ce recours est possible.

[265] Paraphrasant les propos du juge Bastarache dans *Walsh*, j'estime qu'en exigeant qu'il existe un consensus entre les conjoints avant d'opérer une importante altération de leurs droits de propriété, « on ne respecte pas moins, mais davantage l'autonomie et l'autodétermination des couples vivant en union libre, de même que leur faculté de vivre dans une forme d'union qu'ils ont eux-mêmes façonnée » : par. 50.

[266] En somme, pour respecter l'objet du par. 15(1), je ne considère pas qu'il soit 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. *A contrario*, comme nous l'avons vu dans l'affaire *Miron*, un traitement différent des conjoints quant à l'attribution de bénéfices

may be a sign that prejudice is being expressed against certain forms of conjugality. On this fundamental distinction, I will repeat the comments of Professor Goubau, who discusses the importance of maintaining the diversity of forms of conjugality in private law and refraining from imposing a single form of conjugal relationship on spouses:

[TRANSLATION] Moreover, our reflection on the appropriateness of extending certain rights traditionally reserved for marriage (and now extended to civil unions) to *de facto* spouses must not confuse, as is done too often, the *recognition* of *de facto* spouses in social law with the idea that they should be *treated in the same way as other spouses* in private law, which, in my view, is the very negation of recognition. In public law and social law, the recognition of conjugality outside marriage, both heterosexual and homosexual, is now a fact. . . . To accept that unmarried couples can, for example, enjoy the benefits of a public pension plan just like married couples or have the same tax disadvantages is in fact to recognize that the private choices made by individuals have nothing to do with their status in society. Making the status of spouse available to all couples under social and public law regardless of the legal forms of their relationships is therefore a genuine way of recognizing the real diversity of conjugality in contemporary society.

On the other hand, to treat all couples in the same way when it comes, for example, to the obligation of support or the partition of the family patrimony, that is, to matters of private law, would amount to denying precisely what creates diversity among couples, namely the voluntary arrangement of the private effects of their conjugality. [Emphasis in original.]

(D. Goubau, "La conjugalité en droit privé: comment concilier 'autonomie' et 'protection'?", in Lafond and Lefebvre, 153, at p. 156)

[267] I conclude on completing this part of the analysis that the articles of the *Civil Code of Québec* whose constitutional validity is being challenged by A 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

financiers étatiques peut trahir l'expression d'un préjugé défavorable à l'égard de certaines formes de conjugalité. À propos de cette distinction fondamentale, je reprends les commentaires du professeur Goubau, d'après qui il importe de préserver la diversité des modes de conjugalité en droit privé et de se garder d'imposer une forme unique d'union conjugale aux conjoints :

Par ailleurs, dans le cadre de la réflexion sur l'opportunité d'étendre aux conjoints de fait certains droits traditionnellement réservés au mariage (et désormais élargis à l'union civile) il convient de ne pas confondre, comme trop souvent, la question de la *reconnaissance* des conjoints de fait en droit social avec celle de leur *assimilation* en droit privé qui est, à mon avis, la négation même de la reconnaissance. En droit public et social, la reconnaissance de la conjugalité hors mariage, hétérosexuelle et homosexuelle, est maintenant chose acquise. [. . .] Accepter qu'un couple non marié puisse, par exemple, bénéficier au même titre que les gens mariés des avantages d'un régime de rente publique ou qu'il puisse subir les mêmes inconvénients sur le plan fiscal, c'est en réalité reconnaître que les choix privés des individus n'ont rien à voir avec leur statut dans la cité. Ouvrir en droit social et public le statut de conjoints à tous les couples, quelle que soit la forme juridique de leur union, constitue donc une authentique façon de reconnaître la diversité réelle de la conjugalité dans la société contemporaine.

Par contre, assimiler tous les couples lorsqu'il s'agit, par exemple, d'obligation alimentaire ou de partage du patrimoine familial, c'est-à-dire de droit privé, revient à nier ce qui fait précisément la diversité des couples, soit l'organisation volontaire des effets privés de leur conjugalité. [En italique dans l'original.]

(D. Goubau, « La conjugalité en droit privé : comment concilier "autonomie" et "protection"? », dans Lafond et Lefebvre, 153, p. 156)

[267] Au terme de cette partie de l'analyse, je conclus que 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

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.

[268] At this point of my analysis, I must mention my reservations with respect to the position taken by my colleague Abella J. First of all, she does not recognize the role played by consent in the application of the rights and obligations that result from the various forms of conjugality. And it is odd that the opt-out solution she proposes for parties living in a *de facto* union would itself depend on this mutuality of consent and would not be available to parties who have chosen other forms of conjugal relationships. Next, she fails in practice to consider the social context of the *de facto* union in Quebec. Finally, her analysis would tend to reduce the review of alleged infringements of the right to equality to a requirement that adverse distinctions be found. There would no longer be an analytical framework to guide the courts in considering such matters, and this could affect the legitimacy of their decisions in this regard.

(3) Stereotyping

[269] There is a second way for A to prove substantive inequality, however. She can try to show that the disadvantage imposed by these legislative provisions is based on a stereotype that does not correspond to the actual circumstances or characteristics of *de facto* spouses: *Withler*, at para. 36.

[270] This argument essentially focuses on the issue of the validity of the basic premise of Quebec family law, namely the exercise of autonomy of the will. In Quebec, the legislature has provided that the application of the provisions on the family patrimony, the compensatory allowance, the obligation of support, the family residence

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.

[268] À ce point de mon analyse, je dois souligner mes réserves à l'égard de la position prise par ma collègue la juge Abella. D'abord, elle ne reconnaît pas la réalité du rôle du consentement dans la mise en œuvre des droits et obligations résultant des différentes formes de conjugalité. Curieusement, la solution d'« *opting out* » (régime assorti d'un droit de retrait) qu'elle propose aux parties vivant en une union de fait dépendrait elle-même de cette mutualité du consentement et ne serait pas ouverte aux parties qui ont choisi d'autres formes d'union conjugale. Puis, elle néglige en pratique de considérer le contexte social de l'union de fait au Québec. Enfin, son analyse tendrait à réduire l'étude des allégations de violation de la garantie d'égalité à un pur constat de différences désavantageuses. Il n'y aurait plus de cadre juridique pour gouverner l'intervention des tribunaux en ces matières, situation qui pourrait éventuellement affecter la légitimité de leurs interventions.

(3) Application d'un stéréotype

[269] Cependant, A dispose d'une deuxième possibilité de faire la preuve de l'inégalité réelle. Elle peut tenter de démontrer que le désavantage imposé par ces dispositions législatives repose sur un stéréotype qui ne reflète pas la situation ou les caractéristiques véritables des conjoints de fait : *Withler*, par. 36.

[270] Le cœur de cet argument repose essentiellement sur la question de la validité de la prémisse de base du droit de la famille québécois, soit l'exercice de l'autonomie de la volonté. Au Québec, le législateur fait dépendre l'application des dispositions sur le patrimoine familial, la prestation compensatoire, l'obligation alimentaire,

and partnership of acquests are conditional on the expression of a consensual intention (through marriage, a civil union or a cohabitation agreement). It thus refused to impose these measures on persons who have not expressed their consent to be bound by them and, in so doing, took the view that cohabitation alone does not amount to the expression of an intention to be so bound.

[271] If this premise is false and the decision to marry or not to marry does not imply consent to be bound by or excluded from the regimes in the *Civil Code*, the provisions challenged by A could well be based on an inaccurate characterization of the circumstances of Quebec couples. In other words, if autonomy of the will is merely wishful thinking and does not really exist in matrimonial matters, then the distinction made by the legislature does not correspond to the actual circumstances and characteristics of *de facto* spouses and therefore creates a disadvantage based on stereotyping.

[272] There is no evidence in the Court's record in this case that would justify accepting the validity of such an argument and 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.

[273] Nor can I take judicial notice 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: *Find*, at paras. 48 and 60-61.

[274] It is not unreasonable to believe that, in theory, individuals sometimes make uninformed

la résidence familiale et la société d'acquêts de l'expression d'une volonté consensuelle (soit par mariage, par union civile ou par contrat de cohabitation). Il refuse ainsi d'imposer ces mesures aux personnes n'ayant pas exprimé de volonté consensuelle de s'y soumettre et par le fait même, considère que la cohabitation seule ne constitue pas l'expression d'une telle volonté.

[271] Si cette prémisse est fausse et la décision de se marier ou de ne pas se marier n'implique pas le consentement à être assujetti ou soustrait aux régimes prévus par le *Code civil*, les dispositions contestées par A pourraient bien reposer sur une caractérisation inexacte de la situation des couples québécois. Autrement dit, si l'autonomie de la volonté demeure un vœu pieux qui, en matière matrimoniale, n'existe pas réellement, la distinction opérée par le législateur ne correspondrait pas à la situation et aux caractéristiques véritables des conjoints de fait. Elle créerait donc un désavantage reposant sur l'application d'un stéréotype.

[272] En l'espèce, aucune preuve au dossier de la Cour ne me permet d'accepter la validité d'une prétention semblable et 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.

[273] J'estime par ailleurs ne pas pouvoir 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 : *Find*, par. 48 et 60-61.

[274] Il n'est pas déraisonnable de considérer qu'en théorie des individus font parfois des choix

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 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.

[275] In the case at bar, 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.

[276] 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.

[277] In Quebec, the current legal framework for marriage and the other forms of conjugal relationships developed as a result of this type of intervention by the legislature, which intended to remedy problems caused by the evolution of marriage in Quebec and the longstanding preference of couples for the regime of separation of property over community matrimonial regimes.

[278] In the instant case, in the absence of an infringement of s. 15(1) of the *Charter*, the Court has no power to impose on the private relationships of *de facto* spouses a legal framework based on a social policy that differs from the policy adopted by the Quebec legislature. Only the legislature can intervene to change that legislative policy and

peu éclairés et que certaines personnes peuvent ne pas être conscientes des 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.

[275] 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.

[276] 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.

[277] Au Québec, le développement du cadre juridique actuel du mariage et des autres formes d'union conjugale s'explique d'ailleurs par ce type d'intervention législative qui entendait remédier aux problèmes causés par l'évolution du mariage au Québec et la faveur accordée pendant longtemps par les couples à la séparation des biens par rapport aux régimes matrimoniaux communautaires.

[278] Dans l'affaire dont notre Cour est saisie, en l'absence de violation du par. 15(1) de la *Charte*, la Cour n'a pas le pouvoir d'imposer aux rapports privés des conjoints de fait un encadrement juridique basé sur une politique sociale différente de celle qu'a choisie le législateur québécois. Seul le législateur peut intervenir pour modifier cette

remedy any problems encountered by *de facto* spouses.

[279] This type of legislative intervention has in fact occurred in certain provinces. Provincial legislatures have chosen to regulate the private relationships of common law spouses on the basis of their own provinces' legislative objectives. Today, each province defines the effects of *de facto* unions or common law relationships differently, which is a mark of Canadian legal pluralism.

[280] For example, in all provinces except Quebec, and in the territories, cohabitation for a certain number of years gives rise to an obligation of support between common law spouses: see, *inter alia*, *Family Law Act*, R.S.O. 1990, c. F.3; *Family Services Act*, S.N.B. 1980, c. F-2.2; *The Family Maintenance Act*, R.S.M. 1987, c. F20; *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160; *Family Relations Act*, R.S.B.C. 1996, c. 128; *Family Law Act*, R.S.N.L. 1990, c. F-2; *The Family Maintenance Act, 1997*, S.S. 1997, c. F-6.2; *Family Law Act*, R.S.P.E.I. 1988, c. F-2.1; *Family Law Act*, S.N.W.T. 1997, c. 18; *Domestic Relations Act*, R.S.A. 2000, c. D-14. Some provinces, such as Ontario, have imposed this policy to alleviate the burden on the public purse: see, *inter alia*, W. Holland, "Intimate Relationships in the New Millennium: The Assimilation of Marriage and Cohabitation?" (2000), 17 *Can. J. Fam. L.* 114, at p. 128. In British Columbia, in addition to the obligation of support, certain measures to protect the family residence apply to common law spouses: *Family Relations Act*. In Saskatchewan and Manitoba, common law relationships are, in addition to being subject to a support obligation and measures related to the family residence, subject to the division of family property: *The Miscellaneous Statutes (Domestic Relations) Amendment Act, 2001 (No. 2)*, S.S. 2001, c. 51; *Common Law Partners' Property and Related Amendments Act*, S.M. 2002, c. 48. As we saw above, Nova Scotia's legislation provides that common law partners can choose to register their partnerships and thus be governed by the legal framework applicable to marriage with respect

politique législative et remédier aux difficultés que rencontreraient les personnes vivant en union de fait.

[279] Ce type d'intervention législative a d'ailleurs eu lieu dans certaines provinces. Les législateurs provinciaux ont choisi d'encadrer les rapports privés des conjoints de fait au gré des objectifs législatifs propres à leur province. Signe du pluralisme juridique canadien, chaque province offre aujourd'hui une définition différente des effets de l'union de fait.

[280] Ainsi dans toutes les provinces, sauf le Québec, et les territoires, cohabiter pendant un certain nombre d'années fait naître une obligation alimentaire entre conjoints de fait : voir notamment *Loi sur le droit de la famille*, L.R.O. 1990, ch. F.3; *Loi sur les services à la famille*, L.N.-B. 1980, ch. F-2.2; *Loi sur l'obligation alimentaire*, L.R.M. 1987, ch. F20; *Maintenance and Custody Act*, R.S.N.S. 1989, ch. 160; *Family Relations Act*, R.S.B.C. 1996, ch. 128; *Family Law Act*, R.S.N.L. 1990, ch. F-2; *Loi de 1997 sur les prestations alimentaires familiales*, S.S. 1997, ch. F-6.2; *Family Law Act*, R.S.P.E.I. 1988, ch. F-2.1; *Loi sur le droit de la famille*, L.T.N.-O. 1997, ch. 18; *Domestic Relations Act*, R.S.A. 2000, ch. D-14. Certaines provinces, comme l'Ontario, ont imposé cette politique pour alléger le fardeau de l'État : voir notamment W. Holland, « Intimate Relationships in the New Millennium : The Assimilation of Marriage and Cohabitation? » (2000), 17 *Rev. can. d. fam.* 114, p. 128. En Colombie-Britannique, en plus de l'obligation alimentaire, les conjoints de fait sont assujettis à certaines mesures de protection de la résidence familiale (*Family Relations Act*), alors qu'en Saskatchewan et au Manitoba, l'union de fait entraîne, en sus de l'obligation alimentaire et des mesures concernant la résidence familiale, un partage des biens à caractère familial : *Loi corrective (relations domestiques) de 2001 (nº 2)*, S.S. 2001, ch. 51; *Loi sur les biens des conjoints de fait et modifications connexes*, L.M. 2002, ch. 48. Comme nous l'avons vu, la Nouvelle-Écosse prévoit quant à elle que les conjoints de fait peuvent choisir d'enregistrer leur union et ainsi s'assujettir

to matrimonial property: *Law Reform 2000 Act*, S.N.S. 2000, c. 29.

(4) Conclusion

[281] I therefore conclude that, although arts. 401 to 430, 432, 433, 448 to 484 and 585 *C.C.Q.* 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. The exclusion of *de facto* spouses from the scope of those provisions is not discriminatory within the meaning of s. 15(1) of the *Charter* and does not violate the constitutional right to equality. As a result, it is not necessary to proceed to the s. 1 stage of the *Charter* analysis.

V. Disposition

[282] I would allow the appeals of the Attorney General of Quebec and B and dismiss A's appeal, without costs in all cases. I would answer the constitutional questions 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*?

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*?

It is not necessary to answer this question.

The following are the reasons delivered by

[283] Abella J. (dissenting in result) — 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

à l'encadrement juridique propre au mariage en matière de biens matrimoniaux : *Law Reform (2000) Act*, S.N.S. 2000, ch. 29.

(4) Conclusion

[281] Je conclus donc que les art. 401 à 430, 432, 433, 448 à 484 et 585 *C.c.Q.*, 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. L'exclusion des conjoints de fait du champ d'application de ces dispositions 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 donc pas nécessaire de passer à l'étape de l'analyse sous l'article premier de la *Charte*.

V. Dispositif

[282] Je suis d'avis d'accueillir les appels du procureur général du Québec et de B, et de rejeter l'appel de A, sans dépens dans tous les cas. Je réponds aux questions constitutionnelles de la manière suivante :

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*?

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*?

Il n'est pas nécessaire de répondre à cette question.

Version française des motifs rendus par

[283] La juge Abella (dissidente quant au résultat) — 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

of the family property. During separation, their use of the family home and household effects is also protected. These legal protections are not contractual by nature; they are statutorily imposed either presumptively or mandatorily. The spousal support and family property provisions in Quebec are aimed at recognizing and compensating for the roles assumed within the relationship and any resulting dependence and vulnerability on its dissolution.

[284] Many *de facto* spouses — the term used in Quebec for those who are neither married nor in a civil union — share the characteristics that led to these protections. They form long-standing relationships; they divide household responsibilities and develop a high degree of interdependence; and, critically, the economically dependent — and therefore vulnerable — spouse is faced with the same disadvantages when the union is dissolved. Yet *de facto* dependent spouses in Quebec can claim none of the economic protections that are available to those in marriages or civil unions. They have no rights or obligations towards each other under the *Civil Code of Québec*, S.Q. 1991, c. 64 ("*C.C.Q.*"). They are entitled to enter into a cohabitation contract to govern their obligations, and can claim child support where appropriate, but they have no right to claim spousal support, no right to divide the family patrimony, and are not governed by any matrimonial regime.

[285] The question before us is whether dependent *de facto* spouses in Quebec should be denied access to fundamental legal protections simply because their spousal relationship lacks the formality of a civil union or marriage. In my respectful view, the total exclusion of *de facto* spouses from the legal protections for both support

droit de demander à l'autre de lui verser un soutien alimentaire, et de réclamer le partage égal des biens familiaux. Leur utilisation de la résidence familiale et des effets mobiliers durant la séparation est également protégée. Ces mesures de protection juridiques ne sont pas de nature contractuelle; elles sont établies par loi et leur application est présumée ou impérative. 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 dépendance et de vulnérabilité qui en résulte à la dissolution de la relation, et à les indemniser en conséquence.

[284] Bien des conjoints de fait, expression utilisée au Québec pour désigner les personnes qui vivent en couple mais ne sont ni mariées ni unies civilement, présentent les caractéristiques qui ont entraîné l'établissement de ces garanties. Ils forment des relations 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 l'union, les mêmes inconvénients que les conjoints mariés ou unis civilement. Pourtant, au Québec, ces conjoints de fait dépendants ne peuvent se prévaloir d'aucune des mesures de protection d'ordre économique ouvertes à ces personnes. Ils n'ont pas de droits ou d'obligations l'un envers l'autre en vertu du *Code civil du Québec*, L.Q. 1991, ch. 64 (« *C.c.Q.* »). Ils sont autorisés à conclure une convention de cohabitation régissant leurs obligations et ils peuvent, s'il y a lieu, réclamer une mesure de soutien alimentaire au profit d'un enfant, mais ils n'ont pas le droit de demander des aliments en faveur du conjoint, ils n'ont pas droit au partage du patrimoine familial et ils ne sont assujettis à aucun régime matrimonial.

[285] Nous avons à décider si l'accès aux mesures de protection juridiques fondamentales doit être refusé aux conjoints de fait dépendants du Québec du seul fait que leur relation conjugale ne présente pas le formalisme de l'union civile ou du mariage. Avec égards pour ceux qui sont d'avis contraire, l'exclusion totale des conjoints de fait du bénéfice

and property given to spouses in formal unions is a violation of s. 15(1) of the *Canadian Charter of Rights and Freedoms* and is not justified under s. 1. 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.

Facts

[286] Mr. B and Ms. A met in Ms. A's home country in 1992. At the time, she was 17 years old, while Mr. B was 32 and the owner of a lucrative business. The couple saw each other sporadically until 1995, travelling around the world together at times. In early 1995, Ms. A came to live in Canada. They broke up soon after, but saw each other over Christmas and in early 1996, when Ms. A became pregnant with their first child. She gave birth to two other children with Mr. B, in 1999 and 2001.

[287] The couple discussed marriage on at least two occasions. In 1996, Ms. A asked Mr. B to marry her, but he refused, on the basis 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. On January 1, 2000, the topic came up again, though the parties presented different accounts as to whether they agreed to marry. In any event, neither Ms. A nor Mr. B followed up on these plans.

[288] In 2001, the parties discussed separating. They agreed to live together for six months, in an attempt to reconcile, but in October 2001, Ms. A ended the relationship. By the time they stopped living under the same roof in 2002, they had cohabited for seven years. During the relationship, Ms. A had attempted to start a career as a model, but she largely did not work outside of the home and often accompanied Mr. B on his travels.

des mesures de protection juridiques reconnues par le *Code civil* 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* et n'est pas justifiée au regard de l'article premier. 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.

Faits

[286] Monsieur B et M^me^ A se sont rencontrés en 1992, dans le pays d'origine de cette dernière. À l'époque, celle-ci avait 17 ans tandis que M. B était âgé de 32 ans et propriétaire d'une entreprise prospère. Jusqu'en 1995, le couple se voit sporadiquement, voyageant parfois ensemble autour du monde. Au début de 1995, M^me^ A est venue vivre au Canada. Ils ont rompu peu de temps après, mais ils se sont revus à Noël et au début de 1996, lorsque M^me^ A est tombée enceinte de leur premier enfant. Elle a par la suite eu deux autres enfants avec M. B, en 1999 et en 2001.

[287] Madame A et M. B ont parlé de mariage à au moins deux occasions. En 1996, M^me^ A a demandé à M. B de l'épouser, mais ce dernier a refusé, affirmant qu'il ne croyait pas à l'institution du mariage. Il a dit qu'il pourrait envisager de se marier un jour, mais uniquement afin d'officialiser une longue relation. Le 1^er^ janvier 2000, la question du mariage est de nouveau revenue sur le tapis, bien que les parties aient présenté des versions différentes quant à la question de savoir s'ils avaient convenu de se marier. Quoi qu'il en soit, ni M^me^ A ni M. B n'ont donné suite à ces projets.

[288] Les parties ont discuté de séparation en 2001. Elles ont convenu de vivre ensemble pendant six mois, dans une tentative de réconciliation, mais M^me^ A a mis fin à la relation en octobre 2001. Lorsqu'ils ont cessé d'habiter sous le même toit en 2002, ils avaient cohabité pendant sept ans. Au cours de la relation, M^me^ A a tenté d'amorcer une carrière de mannequin, mais essentiellement elle n'a pas travaillé à l'extérieur du foyer et elle accompagnait souvent M. B lors de ses voyages.

[289] In February 2002, Ms. A began proceedings seeking custody of the children, spousal support, a lump sum support payment, and use of the family home. She challenged the constitutionality of certain provisions of the *Civil Code*, claiming access to the same protections as married spouses with respect to support, the family patrimony, the presumptive partnership of acquests regime, and the compensatory allowance. Her constitutional challenges were dismissed by the application judge in the Superior Court of Quebec. The Court of Appeal overturned the decision on support, concluding that the spousal support provision (art. 585 *C.C.Q.*) was unconstitutional. It considered itself bound, however, by this Court's decision in *Nova Scotia (Attorney General) v. Walsh*, [2002] 4 S.C.R. 325, and therefore did not interfere with the property aspect of the decision.

[289] En février 2002, M[me] A a intenté une procédure et sollicité la garde des enfants, une ordonnance alimentaire en faveur du conjoint, une somme forfaitaire au titre des aliments et l'usage de la résidence familiale. Elle a contesté la constitutionnalité de certaines dispositions du *Code civil*, soutenant avoir droit aux mêmes garanties que les conjoints mariés à l'égard des aliments, du patrimoine familial, du régime matrimonial présumé — à savoir la société d'acquêts — et de la prestation compensatoire. Ses arguments constitutionnels ont été rejetés par la juge saisie de la demande en Cour supérieure du Québec. La Cour d'appel, à la majorité, a infirmé la décision concernant le soutien alimentaire, concluant à l'inconstitutionnalité des dispositions relatives au soutien alimentaire (art. 585 *C.c.Q.*) en faveur du conjoint. Toutefois, elle a estimé être liée par l'arrêt de notre Cour *Nouvelle-Écosse (Procureur général) c. Walsh*, [2002] 4 R.C.S. 325, et n'est en conséquence pas intervenue à l'égard de l'aspect de la décision de première instance portant sur le partage des biens.

[290] Ms. A appealed the Court of Appeal's conclusion that the division of property provision was constitutional. Mr. B and the Attorney General of Quebec also appealed, on the conclusion that the spousal support provisions were unconstitutional.

[290] Madame A a interjeté appel de la conclusion de la Cour d'appel selon laquelle les dispositions sur le partage des biens sont constitutionnelles. Monsieur B et le procureur général du Québec ont eux aussi fait appel, dans leur cas à l'égard de la conclusion que les dispositions relatives au soutien alimentaire en faveur du conjoint sont inconstitutionnelles.

Analysis

[291] The current legislative scheme in Quebec leaves an economically vulnerable spouse excluded from mandatory support and property division regimes simply because he or she was not in a formally created union. The issue in this appeal is whether this exclusion violates s. 15 of the *Charter*.

Analyse

[291] Selon le cadre législatif actuellement en vigueur au Québec, en cas de séparation, les conjoints financièrement vulnérables sont exclus du bénéfice des régimes impératifs en matière de soutien alimentaire et de partage des biens, tout simplement parce qu'ils ne vivaient pas au sein d'une union créée officiellement. La question en litige dans le présent pourvoi consiste à décider si cette exclusion viole l'art. 15 de la *Charte*.

[292] It is helpful to review the reasons motivating the development of the modern approach to spousal support and family property regimes.

[292] Il est utile d'examiner les raisons ayant motivé le développement de l'approche moderne à l'égard des régimes relatifs à la pension alimentaire

While the ways in which these regimes have been implemented vary between provinces, the social rationale for the regimes is common across the country.

[293] In Quebec, spouses in marriages or civil unions have an obligation of support during the marriage (art. 585 *C.C.Q.*), which continues following separation, allowing a court to require one spouse to pay support payments to the other (arts. 507, 511 and 521.17 *C.C.Q.*). Following a divorce, the obligation of support under the *Code* ends, and s. 15.2 of the federal *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), governs support orders.

[294] Article 585 of the *Code* has a clearly protective purpose, since it extends the maintenance obligation not only to married or civil union spouses, but also to "relatives in the direct line in the first degree" such as children. The mechanism is adjustable, and support is determined based on "the needs and means of the parties, their circumstances and, as the case may be, the time needed by the creditor of support to acquire sufficient autonomy" (art. 587 *C.C.Q.*; see Jean Pineau and Marie Pratte, *La famille* (2006), at pp. 133 and 782). Moreover, the provisions in the *Code* make it clear that the obligation of support is fundamental. It is of public order and cannot be renounced, ceded or alienated by the dependent spouse, since it is indispensable to his or her survival (*Québec (Procureure générale) v. B.T.*, [2005] R.D.F. 709 (C.A.)).

[295] In other words, Quebec explicitly subordinated a contractual theory of support to a protective one based on mutual obligation, since its law does not allow a couple in a formally recognized union to contract out of the *Civil Code*'s mandatory support provision.

en faveur du conjoint et aux biens familiaux. Bien que la manière dont ces régimes sont mis en œuvre varie d'une province à l'autre, leur raison d'être sur le plan social est la même partout au pays.

[293] Au Québec, les conjoints mariés ou unis civilement ont, au cours du mariage ou de l'union, une obligation de soutien alimentaire (art. 585 *C.c.Q.*) qui survit à la séparation, ce qui permet au tribunal d'enjoindre à un conjoint de verser des aliments à l'autre (art. 507, 511 et 521.17 *C.c.Q.*). À la suite d'un divorce, l'obligation de soutien alimentaire prévue par le *Code* prend fin, et l'art. 15.2 de la *Loi sur le divorce*, L.R.C. 1985, ch. 3 (2e suppl.), régit les ordonnances alimentaires.

[294] L'article 585 du *Code* a clairement un objectif protecteur, puisqu'il étend le bénéfice de l'obligation de soutien alimentaire non seulement aux conjoints mariés ou unis civilement, mais aussi aux « parents en ligne directe au premier degré » comme les enfants. Cette règle est souple et le montant des aliments est fixé en fonction « des besoins et des facultés des parties, des circonstances dans lesquelles elles se trouvent et, s'il y a lieu, du temps nécessaire au créancier pour acquérir une autonomie suffisante » (art. 587 *C.c.Q.*; voir Jean Pineau et Marie Pratte, *La famille* (2006), p. 133 et 782). Qui plus est, le caractère fondamental de l'obligation de soutien alimentaire ressort clairement des dispositions du *Code*. Il s'agit d'une obligation d'ordre public, et le conjoint dépendant ne peut renoncer au droit qui en découle, ni le céder ou l'aliéner, car ce droit est indispensable à sa survie (*Québec (Procureure générale) c. B.T.*, [2005] R.D.F. 709 (C.A.)).

[295] Autrement dit, en matière alimentaire, le Québec a explicitement écarté les règles du contrat au profit d'un régime de protection fondé sur l'existence d'une obligation réciproque, étant donné que son droit ne permet pas aux couples vivant dans une forme d'union officiellement reconnue de se soustraire par contrat à l'application des dispositions impératives du *Code civil* sur l'obligation de soutien alimentaire.

[296] Throughout Canada, provincial and federal law reform commissions were predominantly concerned with the impact of separation and divorce on the economically vulnerable spouse, usually the wife (see British Columbia's Royal Commission on Family and Children's Law, *Family Maintenance* (1975), at p. 7; Ontario's Ministry of the Attorney General, *Family Law Reform* (1976), at p. 1; Manitoba Law Reform Commission, *Reports on Family Law*, Part I — *The Support Obligation*, Report #23 (1976), at p. 19). The Law Reform Commission of Canada concluded in its 1975 working paper 12, *Maintenance on Divorce*, that the right to support — and the obligation to pay it — did not rest on the legal status of either husband or wife, but on the reality of the dependence or vulnerability that the spousal relationship had created:

> Financial rights and obligations based upon marriage should be legal results that follow from the internal arrangements made by the spouses in line with their priorities, circumstances and interests rather than being imposed according to traditional legal preconceptions of the sexually determined roles of each spouse. [Emphasis deleted; p. 17.]

[297] In other words, the right to support was not created by marriage *per se*, but by the "reasonable needs" of a vulnerable spouse (*Maintenance on Divorce*, at p. 18). Its purpose was protective: ". . . to enable a former spouse who has incurred a financial disability as a result of marriage to become self-sufficient again in the shortest possible time" (p. 17).

[298] In elaborating on the rationale underlying spousal support in *Moge v. Moge*, [1992] 3 S.C.R. 813, this Court held that spousal maintenance "seeks to recognize and account for both the economic disadvantages incurred by the spouse who makes such sacrifices and the economic advantages conferred upon the other spouse" (p. 864). And in *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, McLachlin J. confirmed that the mutual obligation of support is protective: it stresses the interdependencies created by marriage, and "recognizes

[296] Dans l'ensemble du Canada, diverses commissions provinciales et fédérales de réforme du droit se sont attachées principalement aux répercussions de la séparation et du divorce sur le conjoint financièrement vulnérable, en général l'épouse (voir Royal Commission on Family and Children's Law de la Colombie-Britannique, *Family Maintenance* (1975), p. 7; ministère du Procureur général de l'Ontario, *Family Law Reform* (1976), p. 1; Commission de réforme du droit du Manitoba, *Reports on Family Law*, Part I — *The Support Obligation*, Report #23 (1976), p. 19). Dans son document de travail 12 de 1975, intitulé *Les divorcés et leur soutien*, la Commission de réforme du droit du Canada a conclu que le droit au soutien — et corollairement l'obligation de fournir ce soutien — ne reposait pas sur le statut juridique de l'époux ou de l'épouse, mais sur l'état concret de dépendance ou de vulnérabilité qu'avait créé la relation conjugale :

> Les droits et les obligations financières découlant du mariage devraient refléter en droit les accords personnels intervenus entre les conjoints selon leurs intérêts et leur situation, et non imposés conformément à des hypothèses juridiques traditionnelles fixant le rôle [de chacun des époux en fonction de leur sexe]. [Italiques omis; p. 19.]

[297] En d'autres termes, le droit au soutien alimentaire n'était pas créé par le mariage comme tel, mais par les « besoins raisonnables » du conjoint vulnérable (*Les divorcés et leur soutien*, p. 20). Ce droit avait un objectif protecteur : « . . . permettre au conjoint se trouvant dans l'incapacité de subvenir à ses besoins financiers à la suite du mariage de retrouver cette capacité dans les meilleurs délais » (p. 19).

[298] Lorsqu'elle a expliqué la raison d'être du soutien alimentaire en faveur du conjoint dans *Moge c. Moge*, [1992] 3 R.C.S. 813, notre Cour a jugé que ce soutien « cherche à reconnaître et à prendre en considération les inconvénients économiques subis par l'époux qui consent les sacrifices ainsi que les avantages économiques conférés à l'autre » (p. 864). Puis, dans *Bracklow c. Bracklow*, [1999] 1 R.C.S. 420, la juge McLachlin a confirmé que l'obligation mutuelle de soutien alimentaire a un caractère protecteur : cette obligation reflète les

the reality that when people cohabit over a period of time in a family relationship, their affairs may become intermingled and impossible to disentangle neatly" (para. 31). Need is central to this theory, which, as discussed later in these reasons, is conceptually applicable as much to *de facto* relationships as to marriages and civil unions.

[299] *Bracklow* echoes the Law Reform Commission of Canada in noting that the spousal support obligation does not stem from "the bare fact of marriage, so much as the relationship that is established and the expectations that may reasonably flow from it" (para. 44 (emphasis deleted)). Notably, it also rejects the paramountcy of the "clean-break" theory of support (para. 32), whereby each spouse is entitled at marriage breakdown to "what the individuals contracted for" (para. 29).

[300] A concern about the disproportionate number of women who experienced poverty when they separated was also at play in the development of the law. The goal of addressing this imbalance was clear in the work of the law reform commissions. It was also accepted by this Court in *Moge*, which noted that while support obligations were framed in gender-neutral terms, the reality is that "in many if not most marriages, the wife still remains the economically disadvantaged partner" (pp. 849-50). Justice L'Heureux-Dubé explained what spousal support was intended to remedy as follows:

Women have tended to suffer economic disadvantages and hardships from marriage or its breakdown because of the traditional division of labour within that institution. . . . [O]nce the marriage dissolves, the kinds of non-monetary contributions made by the wife may result in

interdépendances créées par le mariage et « reconnaît que, lorsque des gens cohabitent pendant un certain temps dans une relation familiale, leurs affaires peuvent devenir entremêlées et impossibles à démêler de manière ordonnée » (par. 31). La notion de besoin est au cœur de cette théorie, laquelle, comme il sera expliqué plus loin dans les présents motifs, s'applique conceptuellement tout autant aux relations de fait qu'aux mariages et aux unions civiles.

[299] Dans *Bracklow*, la Cour fait écho aux propos de la Commission de réforme du droit du Canada lorsqu'elle souligne que « [c]e n'est pas tant le seul fait du mariage que la relation qui s'établit et les attentes qui peuvent raisonnablement en découler » (par. 44 (soulignement omis)) qui donnent naissance à l'obligation de soutien alimentaire entre conjoints. Fait notable, la Cour rejette aussi la prépondérance de la théorie de la « rupture nette » en matière de soutien alimentaire (par. 32), théorie selon laquelle, au moment de la rupture du mariage, les conjoints ont chacun droit à « ce qu['ils] se sont engagés par contrat à faire » (par. 29).

[300] Les préoccupations que suscitait le nombre disproportionné de femmes connaissant la pauvreté après la séparation ont également influé sur l'évolution du droit en la matière. L'objectif consistant à corriger ce déséquilibre ressortait clairement des travaux des diverses commissions de réforme du droit. Notre Cour a elle aussi souscrit à cet objectif dans *Moge*, soulignant que, bien que les obligations de soutien alimentaire soient exprimées sans référence à un sexe ou à l'autre, la réalité demeure que, « dans bon nombre de mariages si ce n'est la majorité, c'est l'épouse qui est la partie désavantagée économiquement » (p. 849-850). La juge L'Heureux-Dubé a décrit ainsi ce que les mesures de soutien alimentaire en faveur du conjoint visaient à remédier :

Les femmes ont eu tendance à subir les inconvénients économiques qui découlent du mariage ou de son échec en raison de la répartition traditionnelle des tâches qu'on y retrouve. [. . .] [À] la dissolution du mariage, les contributions non monétaires de l'épouse peuvent donner

significant market disabilities. The sacrifices she has made at home catch up with her and the balance shifts in favour of the husband who has remained in the work force and focused his attention outside the home. In effect, she is left with a diminished earning capacity and may have conferred upon her husband an embellished one. [Emphasis added; pp. 861-62.]

[301] The law dealing with division of family property has also come to be conceptualized in recent years on a protective basis rather than a contractual one. Quebec has legislation making the division of family property between married and civil union spouses equitable. Its legislation dealing with property division for those spouses states that during a marriage or civil union, or during a period of separation, spouses are prohibited from alienating or leasing certain property, including the family residence, without the other's consent (arts. 401 and 404 *C.C.Q.*). The *Code* also establishes the family patrimony, a core of family property that must in principle be shared equally by the spouses on divorce. The provisions creating the family patrimony are of public order, so they cannot be contracted out of, except after separation, divorce or the death of the other spouse (arts. 414 to 416, 419 and 423 *C.C.Q.*).

[302] Except for the family patrimony, spouses in marriages or civil unions are able to choose the matrimonial regime governing their property. The default regime is the partnership of acquests, under which spouses each have control of their own property during the relationship, but most property acquired during the union is divided equally on its dissolution (art. 432 *C.C.Q.*). Alternatively, spouses can elect the separation as to property regime, under which spouses hold their property separately both before and after the union (art. 486 *C.C.Q.*), or a community regime, where property is controlled jointly during the union (art. 492 *C.C.Q.*).

lieu à d'importants désavantages sur le marché du travail. C'est alors que se font sentir les sacrifices consentis; la balance penche en faveur du mari qui est demeuré sur le marché du travail et s'est orienté vers l'extérieur du foyer. En fait, l'épouse se retrouve avec une capacité limitée de gagner sa vie alors qu'elle peut avoir contribué à améliorer celle de son conjoint. [Italiques ajoutés; p. 861-862.]

[301] Au cours des dernières années, le droit relatif au partage des biens familiaux en est lui aussi venu à être considéré, conceptuellement, comme un ensemble de règles possédant une vocation protectrice plutôt qu'un caractère contractuel. Le Québec a établi des dispositions législatives pourvoyant au partage équitable des biens familiaux entre ces conjoints. Ses dispositions sur le partage des biens entre les conjoints mariés ou unis civilement précisent que, pendant la durée du mariage, de l'union civile ou d'une séparation, un conjoint ne peut, sans le consentement de l'autre, aliéner ou louer certains biens, dont la résidence familiale (art. 401 et 404 *C.c.Q.*). Le *Code* prévoit également l'existence d'un patrimoine familial, constitué d'un ensemble de biens familiaux et qui doivent en principe être divisés à parts égales entre ceux-ci au moment du divorce. Comme les dispositions instaurant le patrimoine familial sont d'ordre public, il est interdit aux époux d'écarter par contrat leur application, sauf après la séparation, le divorce ou la mort de l'un des conjoints (art. 414 à 416, 419 et 423 *C.c.Q.*).

[302] Les conjoints mariés ou unis civilement peuvent choisir le régime matrimonial qui régira leurs biens, sauf ceux visés par le patrimoine familial. Le régime applicable par défaut est celui de la société d'acquêts, suivant lequel chacun des conjoints possède, durant la relation, la maîtrise des biens qui lui sont propres, mais la plupart des biens acquis durant celle-ci sont divisés également à sa dissolution (art. 432 *C.c.Q.*). Les conjoints peuvent aussi opter soit pour le régime de la séparation de biens — selon lequel chaque conjoint conserve la maîtrise de ses biens tant avant l'union qu'après (art. 486 *C.c.Q.*) —, soit pour un régime communautaire — en vertu duquel les biens sont administrés conjointement durant l'union (art. 492 *C.c.Q.*).

[303] Finally, on separation or divorce, spouses in marriages or civil unions can claim a compensatory allowance, a court-ordered payment that compensates one spouse for his or her contribution to the enrichment of the other (art. 427 *C.C.Q.*).

[304] The legislative progression in Quebec from the "community" matrimonial regime, to the partnership of acquests, to the compensatory allowance, and finally to the family patrimony, has been elegantly unfolded by my colleague LeBel J. Two important strands from this history merit particular attention.

[305] The first is that the goal of better protecting economically vulnerable spouses can be seen as motivating each successive stage of reform in Quebec. With many spouses opting for separation of property under the initial community regime, as Prof. Alain Roy explains, [TRANSLATION] "the breakdown of the conjugal relationship brought to light how very vulnerable wives were financially. . . . From this perspective, the legislature had to establish mechanisms to protect wives" ("Le régime législatif de l'union civile : entre symbolisme et anachronisme"), in Pierre-Claude Lafond and Brigitte Lefebvre, eds., *L'union civile: nouveaux modèles de conjugalité et de parentalité au 21e siècle* (2003), 165, at p. 170).

[306] In recommending the partnership of acquests as the new default matrimonial regime, the Civil Code Revision Office in 1968 noted that the "freedom and independence" provided to those spouses who chose separation of property "sometimes proves extremely burdensome for one of the consorts and, in certain cases, even results in real injustice" (*Report on Matrimonial Regimes* (1968), at p. 9). The subsequent compensatory allowance and family patrimony regimes targeted the same injustices, which had lingered in spite of the partnership of acquests (for judicial discussion of the respective goals of these regimes, see this

[303] Enfin, en cas de séparation ou de divorce, les conjoints mariés ou unis civilement peuvent demander une prestation compensatoire, à savoir une somme que le tribunal ordonne à un des conjoints de payer à l'autre en compensation de l'apport de ce dernier à l'enrichissement de son conjoint (art. 427 *C.c.Q.*).

[304] Mon collègue le juge LeBel a exposé de façon élégante le développement de la législation pertinente au Québec, en commençant par le régime matrimonial de la « communauté de biens », puis en poursuivant avec la société d'acquêts, la prestation compensatoire et, enfin, le patrimoine familial. Il se dégage de cet historique deux aspects importants qui méritent une attention particulière.

[305] Premièrement, il est possible de considérer que le désir de mieux protéger les conjoints financièrement vulnérables a motivé chacune des réformes successives au Québec. Comme l'explique le professeur Alain Roy, étant donné que bon nombre de conjoints optaient pour la séparation de biens, lorsque le régime par défaut était celui de la communauté de biens, on pouvait constater à « la rupture du lien conjugal la très grande vulnérabilité des femmes sur le plan financier. [. . .] Dans cette perspective, le législateur se devait d'établir des mécanismes de protection au bénéfice des femmes » (« Le régime juridique de l'union civile : entre symbolisme et anachronisme », dans Pierre-Claude Lafond et Brigitte Lefebvre, dir., *L'union civile : nouveaux modèles de conjugalité et de parentalité au 21e siècle* (2003), 165, p. 170).

[306] Quand l'Office de révision du Code civil a recommandé, en 1968, que le régime de la société d'acquêts devienne le nouveau régime matrimonial applicable par défaut, il a souligné que la « liberté et [. . .] [l]'indépendance » consenties aux conjoints ayant opté pour la séparation de biens « s'avère[nt] parfois extrêmement onéreuse[s] pour l'un des conjoints et même, en certains cas, abouti[ssent] à une véritable injustice » (*Rapport sur les régimes matrimoniaux* (1968), p. 8). Les régimes de prestation compensatoire et de patrimoine familial instaurés par la suite visaient eux aussi à remédier aux mêmes injustices, lesquelles avaient persisté

Court's *M. (M.E.) v. L. (P.)*, [1992] 1 S.C.R. 183, and *Droit de la famille — 977*, [1991] R.J.Q. 904 (C.A.), at p. 908).

[307] The second strand is that, far from being designed to reflect the actual choices made by married spouses, these measures subordinated those choices to the agenda of protection. In crafting the partnership of acquests regime, which became the presumptive matrimonial regime for all married couples in 1970, the National Assembly abandoned wording that would have presumed that the equal sharing of property it created was an implicit choice by the couple. The Law Reform Commission of Canada applauded this decision, noting that "we cannot assume, in all cases, that the spouses have not made a marriage contract because they consider the legal regime to be the one which suits them best" (*Studies on Family Property Law*, Research Paper: Matrimonial Regimes in Québec (1975), at p. 61). Significantly too, the subsequent provision on compensatory allowance was made part of public order, applying mandatorily to all married couples regardless of matrimonial regime. As a result, couples who had chosen the separation of property regime were largely denied their freedom to contract with respect to contributions made during the marriage.

[308] The same was true under the family patrimony regime, which was also made part of public order. In introducing the new legislation, Monique Gagnon-Tremblay, the Minister responsible for the Status of Women, while noting that a mandatory division of the family patrimony negates freedom of choice, nonetheless said that choice would have to defer to the more important social goal of remedying a legal and social barrier to equality:

malgré l'établissement du régime de la société d'acquêts (pour une analyse judiciaire des objectifs respectifs de ces régimes, voir l'arrêt de notre Cour, *M. (M.E.) c. L. (P.)*, [1992] 1 R.C.S. 183, ainsi que l'arrêt *Droit de la famille — 977*, [1991] R.J.Q. 904 (C.A.), p. 908).

[307] Deuxièmement, loin de tendre à refléter les choix faits que faisaient concrètement les conjoints mariés, ces mesures subordonnaient ces choix à l'objectif de protection. Quand l'Assemblée nationale a conçu le régime de la société d'acquêts, qui est devenu en 1970 le régime matrimonial applicable par défaut à tous les couples mariés, elle n'a pas retenu une formulation qui aurait présumé que le partage égal des biens instauré par ce régime constituait le choix implicite des couples. Cette décision a été applaudie par la Commission de réforme du droit du Canada, qui a souligné qu'« on ne peut pas prétendre, dans tous les cas, que les époux n'ont pas fait de contrat de mariage parce qu'ils considèrent le régime légal comme étant celui qui leur convient le mieux » (*Études sur le droit des biens de la famille*, Recherches préliminaires : Les régimes matrimoniaux au Québec (1975), p. 63). Autre fait notable, la disposition subséquente ayant créé le mécanisme de la prestation compensatoire a été désignée mesure d'ordre public, applicable impérativement à tous les couples mariés, quel que soit leur régime matrimonial. Par conséquent, les couples qui avaient opté pour le régime de la séparation de biens ont essentiellement été privés de la liberté de contracter à l'égard de leurs apports durant le mariage.

[308] Le régime du patrimoine familial, auquel on a aussi conféré le caractère d'ordre public, produisait également le même effet. Lors du dépôt de cette nouvelle mesure législative, tout en soulignant que le partage obligatoire du patrimoine familial niait la liberté de choix, M^me^ Monique Gagnon-Tremblay, la ministre responsable de la Condition féminine, a néanmoins déclaré que cette faculté devait s'effacer devant un objectif social plus important, à savoir écarter un obstacle de nature juridique et sociale à l'égalité :

[TRANSLATION] It was necessary to rethink a legal and social mechanism that tends to reproduce inequality.

. . .

In a word, it seemed to us *that to refuse to introduce a family patrimony on the basis that this new institution is incompatible with certain matrimonial regimes spouses might want to choose would amount to giving greater importance to legal models than to the imperatives of social change*. Were it to do so, the legislature would deprive itself of an essential lever for social change. [Emphasis added.]

(National Assembly, *Journal des débats*, vol. 30, No. 125, 2nd Sess., 33rd Leg., June 8, 1989, at p. 6489)

The opposition critic at the time, Louise Harel, provided crucial support to the measure, noting specifically that it represented a move from formal to substantive equality within marriage:

[TRANSLATION] In our society, for an entire generation, the institution of marriage represented something that was contrary to the principle of equality. Then a legal equality was introduced. And, Mr. President, I cannot place too much emphasis on the fact that, *if we are going to work together to pass this bill, it is precisely because that formal legal equality is not enough. It is precisely to open a new legal path to the full economic and social equality of women*. [Emphasis added.]

(National Assembly, *Journal des débats*, vol. 30, No. 125, 2nd Sess., 33rd Leg., June 8, 1989, p. 6497)

[309] Thus the mandatory nature of both the compensatory allowance and family patrimony regimes highlights the preeminent significance Quebec has accorded to concerns for the protection of vulnerable spouses over other values such as contractual freedom or choice.

[310] These concerns were harmoniously echoed across Canada. The case of *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436, contains useful insight into

Il s'agissait, en effet, de repenser une mécanique juridique et sociale qui tend à reproduire l'inégalité.

. . .

Il nous semblait, enfin, *que refuser l'instauration d'un patrimoine familial, au motif que cette nouvelle institution ne cadre pas avec certains régimes matrimoniaux que peuvent vouloir choisir les époux, équivaudrait à donner plus d'importance à des modèles juridiques qu'aux impératifs de mouvement social.* Ce faisant, le législateur se priverait d'un levier nécessaire au changement social. [Italiques ajoutés.]

(Assemblée nationale, *Journal des débats*, vol. 30, nº 125, 2e sess., 33e lég., 8 juin 1989, p. 6489)

Mme Louise Harel, la critique de l'opposition à l'époque, a fourni un appui crucial à l'édiction de la mesure, précisant que celle-ci permettait de passer de l'égalité formelle à l'égalité réelle des époux au sein du mariage :

L'institution du mariage, dans notre société, pour toute une génération, a représenté quelque chose de contraire au principe d'égalité. Par la suite, on a introduit une égalité juridique. Et, Monsieur le président, je ne peux pas assez insister sur le fait que, *si nous allons concourir à l'adoption de ce projet de loi, c'est justement parce que cette égalité juridique formelle est insuffisante. C'est justement pour ouvrir une nouvelle voie juridique à la pleine égalité économique et sociale des femmes*. [Italiques ajoutés.]

(Assemblée nationale, *Journal des débats*, vol. 30, nº 125, 2e sess., 33e lég., 8 juin 1989, p. 6497)

[309] Par conséquent, 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.

[310] Il existait une harmonie des préoccupations à cet égard d'un bout à l'autre du Canada. L'arrêt *Rathwell c. Rathwell*, [1978] 2 R.C.S. 436, nous

the shift to a protective understanding of the division of family property. Dickson J. noted that matrimonial property disputes were "bedevilled by conflicting doctrine and a continuing struggle between the 'justice and equity' school . . . and the 'intent' school" (p. 442). Intent had ruled the day in the prior case of *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423, which confirmed the century-old approach to matrimonial property: the wife had been denied any share in the property held in her husband's name because of her inability to prove common intent to vest in her a beneficial interest in the property.

éclaire utilement sur les raisons de l'évolution en faveur d'une perspective protectrice des régimes de partage des biens familiaux. Le juge Dickson a souligné que le règlement des litiges portant sur des biens matrimoniaux était « entravé par des théories contradictoires et un conflit continuel entre l'école "de justice et d'équité" [. . .] et l'école de l'"intention" » (p. 442). La seconde avait prévalu précédemment dans l'arrêt *Murdoch c. Murdoch*, [1975] 1 R.C.S. 423, où la Cour avait confirmé la règle séculaire applicable aux biens matrimoniaux : l'épouse s'était vu nier toute part des biens au nom de son mari, au motif qu'elle n'avait pas été en mesure de prouver l'existence d'une intention commune de lui conférer un intérêt bénéficiaire dans ces biens.

[311] In *Rathwell*, Dickson J. relied instead on the doctrine of constructive trust, which requires no common intent, to award Helen Rathwell a share of the matrimonial property. Common intent, Dickson J. explained, could rarely be found, and to look for it was to misapprehend the way most couples approach their relationship:

[311] Dans *Rathwell*, le juge Dickson s'est plutôt fondé sur la théorie de la fiducie par interprétation, laquelle n'exige aucune intention commune, pour accorder à M^me^ Helen Rathwell une part des biens matrimoniaux. Comme l'a expliqué le juge Dickson, il est rare de constater l'existence d'une intention commune, et c'est se méprendre sur la manière dont la plupart des couples abordent leur relation que de chercher cette intention :

> . . . the plain fact is that there rarely is agreement [on the disposition of matrimonial property in the event of divorce] because the parties do not turn their minds to the eventuality of separation and divorce.
>
> . . .
>
> . . . There is rarely implied agreement or common intention, apart from the general intention of building a life together. It is not in the nature of things for young married people to contemplate the break-up of their marriage and the division, in that event, of assets acquired by common effort during wedlock. [pp. 444 and 447-48]

> . . . manifestement il y a rarement un accord [de disposition des biens matrimoniaux en cas de divorce] puisque les parties ne pensent pas à l'éventualité d'une séparation et d'un divorce.
>
> . . .
>
> . . . Il y a rarement une entente expresse préalable ou une entente ou une intention commune implicite, sauf l'intention générale de vivre ensemble. Il n'est pas normal pour de jeunes mariés d'envisager la rupture de leur union et le partage, dans cette éventualité, des avoirs acquis par leur effort commun pendant le mariage. [p. 444 et 447-448]

The emergence of a constructive trust to resolve matrimonial property disputes, Dickson J. explained,

> reflects a diminishing preoccupation with the formalities of real property law and individual property rights and the substitution of an attitude more in keeping with the realities of contemporary family life. . . . The state of

Le juge Dickson a précisé que l'émergence du recours à la fiducie par interprétation pour régler les litiges relatifs aux biens matrimoniaux

> reflète la diminution de l'importance de l'aspect procédural du droit immobilier et des droits individuels de propriété et son remplacement par une attitude plus conforme aux réalités de la vie familiale contemporaine.

legal title may merely reflect conformity with regulatory requirements . . .; it may, on the other hand, be a matter *of utmost indifference to the spouses as to which name appears on the title, so long as happy marriage subsists* . . . . The state of title may be entirely fortuitous . . . . [Emphasis added; p. 456.]

[312] This brings us to the status of unmarried spouses in Canada. Historically, they were stigmatized. The children of unmarried relationships, for example, were deemed "illegitimate" and unable to inherit on intestacy. But as social attitudes changed, so did the approaches of legislatures and courts, which came to accept conjugal relationships outside a formal marital framework.

[313] This change reflected an enhanced understanding of what constitutes a "family". In a 1993 report in which it recommended the extension of both spousal support and division of property regimes to unmarried spouses, the Ontario Law Reform Commission noted that

throughout much of the [*Family Law Act*, R.S.O. 1990, c. F.3], "family" is equated with "marriage". . . . [T]he Act . . . provides little room for other forms of relationship that embody the fundamental elements of intimacy, mutual economic interdependence, and living together in a "close personal relationship that is of primary importance in both persons' lives", which we see as the essence of the concept of "family".

(*Report on the Rights and Responsibilities of Cohabitants under the Family Law Act* (1993), at p. 1)

The Report found that in

common-law relationships, which embody virtually all the characteristics of marriage . . . the need to protect the interests of both parties and to ensure equality and

[. . .] Les énonciations d'un titre de propriété peuvent simplement refléter les exigences de la réglementation [. . .]; il se peut, en revanche, qu'il soit *totalement indifférent aux conjoints que le titre de propriété soit enregistré au nom de l'un ou de l'autre, tant que dure la félicité conjugale* [. . .] Les énonciations du titre de propriété peuvent être entièrement fortuites . . . [Italiques ajoutés; p. 456.]

[312] Ce qui nous amène à la situation des conjoints non mariés au Canada. Ces personnes ont longtemps été stigmatisées. Par exemple, les enfants issus de personnes qui n'étaient pas mariées étaient considérés « illégitimes » et incapables de succéder en l'absence de testament. 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.

[313] Ce changement reflétait une conception plus large de la notion de « famille ». Dans un rapport publié en 1993, dans lequel elle recommandait d'élargir aux conjoints non mariés tant le régime relatif au soutien alimentaire en faveur du conjoint que celui régissant le partage des biens, la Commission de réforme du droit de l'Ontario a formulé l'observation suivante :

[TRADUCTION] . . . dans la majeure partie de la [*Loi sur le droit de la famille*, L.R.O. 1990, ch. F.3], « famille » est synonyme de « mariage ». [. . .] [L]a Loi [. . .] laisse peu de place aux autres types de relation qui incarnent les caractéristiques fondamentales d'intimité, d'interdépendance financière et de cohabitation dans le cadre d'une « relation personnelle revêtant une importance primordiale dans la vie des conjoints », une relation qui, selon nous, constitue l'essence de la notion de « famille ».

(*Report on the Rights and Responsibilities of Cohabitants under the Family Law Act* (1993), p. 1)

Le Rapport faisait également état des conclusions suivantes :

[TRADUCTION] . . . dans les unions de fait, lesquelles présentent virtuellement toutes les caractéristiques du mariage [. . .] le besoin de protéger les intérêts des deux

fairness in the event of the breakdown of the relationship is the same as in marriages.

. . .

Common-law spouses pool their resources and make joint economic plans, they provide each other financial and emotional support, and they raise children. [pp. 2 and 27]

[314] This Court launched the possibility of an equitable division of property for unmarried spouses in *Pettkus v. Becker*, [1980] 2 S.C.R. 834, where it extended the availability of a constructive trust to the division of property between separated common law spouses. Significantly, Dickson J. found that there were no grounds for a distinction in property division between a marriage and a less formally recognized long-term relationship, and that being unmarried was no barrier to the claimant obtaining the fruits of her contribution to a common law partnership.

[315] Subsequently, in *M. v. H.*, [1999] 2 S.C.R. 3, this Court found that the exclusion of same-sex couples from statutory support benefits violated s. 15(1) of the *Charter*. In developing its analysis, the Court noted that the various features that characterize a conjugal relationship could be found in same-sex relationships. Those features could be "present in varying degrees and not all are necessary for the relationship to be found to be conjugal" (para. 59). A conjugal relationship, in other words, is not a binary question: married or unmarried, opposite-sex or same-sex, economically dependent or economically independent. This decision highlighted an increasing willingness to look past the relationship's formal wrapping and into its content. It is the *nature* of the relationship that is paramount, not what it is called.

[316] 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.*

parties et d'assurer l'égalité et la justice entre elles en cas d'échec de la relation est le même que dans un mariage.

. . .

Les conjoints de fait mettent leurs ressources en commun et échafaudent ensemble des projets économiques, ils se soutiennent mutuellement sur les plans financier et psychologique, et ils élèvent des enfants. [p. 2 et 27]

[314] Notre Cour a ouvert la possibilité d'un partage des biens entre conjoints non mariés dans l'arrêt *Pettkus c. Becker*, [1980] 2 R.C.S. 834, où elle a étendu le recours à la notion de fiducie par interprétation au partage des biens entre conjoints de fait séparés. Fait important, le juge Dickson a conclu que rien ne justifiait d'établir des distinctions entre le mariage et les relations de longue durée moins formellement reconnues en ce qui concerne le partage des biens, et que le fait de ne pas être mariée n'empêchait pas la demanderesse de récolter les fruits de son apport à la relation de fait.

[315] Subséquemment, dans *M. c. H.*, [1999] 2 R.C.S. 3, la Cour a jugé que le refus de conférer aux couples de même sexe les avantages prévus par la loi en matière de soutien alimentaire violait le par. 15(1) de la *Charte*. En élaborant son analyse, la Cour a souligné que les différentes caractéristiques d'une relation conjugale pouvaient se trouver dans les unions formées par des conjoints de même sexe. Ces caractéristiques peuvent être « présent[e]s à des degrés divers et [. . .] tou[te]s ne sont pas nécessaires pour que l'union soit tenue pour conjugale » (par. 59). En d'autres termes, l'existence ou non d'une relation conjugale n'est pas déterminée au moyen de propositions alternatives : mariés ou non mariés, sexe opposé ou même sexe, financièrement dépendants ou financièrement autonomes. Cet arrêt a bien fait ressortir la volonté accrue du droit de regarder au-delà des apparences formelles de la relation et d'en examiner le contenu. C'est la *nature* de la relation qui est primordiale, et pas le nom qu'on lui donne.

[316] 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

Trudel, [1995] 2 S.C.R. 418, the Court found that marital status was an analogous ground under s. 15(1) of the *Charter*, because while in theory an individual is free to choose whether to marry, there are, in reality, a number of factors that may place the decision out of his or her control. McLachlin J. described the impediments to choice as including:

> The law; the reluctance of one's partner to marry; financial, religious or social constraints — these factors and others commonly function to prevent partners who otherwise operate as a family unit from formally marrying. In short, marital status often lies beyond the individual's effective control. [para. 153]

[317] The recognition of marital status as an analogous ground 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 not in fact be a choice at all.

[318] I would make one further observation about the narrative of the treatment of *de facto* or common law unions in Canada. As part of the acceptance of marital status as an analogous ground in *Miron*, McLachlin J. recognized that unmarried spouses have faced historical disadvantage stemming from societal prejudice. She acknowledged that this disadvantage has faded as attitudes have changed, but nonetheless concluded that "the historical disadvantage associated with this group cannot be denied" (para. 152), a significant reminder that there has rarely been, in our lifetime, a bright line demarcating the successful evolution of an historically disadvantaged group into a barrier-free reality. The fact that society appears to have attenuated overtly discriminatory attitudes it once held towards a group does not mean that there is no continuing discriminatory conduct, however benignly or unconsciously motivated.

mesures de protection aux conjoints non mariés. Dans *Miron c. Trudel*, [1995] 2 R.C.S. 418, la Cour a conclu que l'état matrimonial était un motif analogue pour l'application du par. 15(1) de la *Charte*, car 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. La juge McLachlin a énuméré certains obstacles susceptibles d'entraver ce choix :

> La loi, l'hésitation à se marier de l'un des partenaires, les contraintes financières, religieuses ou sociales sont autant de facteurs qui empêchent habituellement des partenaires, qui par ailleurs fonctionnent comme une unité familiale, de se marier officiellement. Bref, l'état matrimonial échappe souvent au contrôle de la personne. [par. 153]

[317] En reconnaissant à l'état matrimonial le caractère de motif analogue, la Cour a pris acte de la nature complexe et réciproque de la décision de se marier, ainsi que de la myriade de facteurs qui influent sur cette décision. Elle a également reconnu que la décision de vivre ensemble en tant que conjoints non mariés ne constitue peut-être pas du tout un choix dans les faits.

[318] Je tiens à faire une autre observation au sujet de l'historique du traitement réservé aux unions de fait au Canada. Lorsqu'elle a accepté, dans *Miron*, que l'état matrimonial constitue un motif analogue, la juge McLachlin a notamment reconnu le désavantage historique subi par les conjoints non mariés en raison des préjugés de la société à leur endroit. Bien qu'elle ait admis que ce désavantage s'est estompé à mesure que les attitudes ont changé, elle a néanmoins conclu qu'« on ne saurait nier le désavantage historique subi par ce groupe » (par. 152), conclusion qui rappelle de façon importante qu'il est rarement arrivé, à notre époque, qu'une ligne de démarcation nette témoigne clairement du passage fructueux d'un groupe historiquement désavantagé à une réalité dénuée d'obstacles. Le fait que la société semble avoir atténué les attitudes ouvertement discriminatoires qu'elle adoptait à l'égard d'un groupe ne signifie pas que sa conduite soit dépourvue de toute discrimination, même bénigne ou inconsciente.

[319] This is the history that animates our s. 15 inquiry. In *R. v. Kapp*, [2008] 2 S.C.R. 483, 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. Building on the human rights decisions in *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, at p. 551, and *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114 ("*Action Travail*"), McIntyre J., in *Andrews*, noted that

> 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. [Emphasis added; p. 165.]

He identified the purpose of the equality provision and anti-discrimination law in general, as being to eliminate the exclusionary barriers faced by individuals in the enumerated or analogous groups in gaining meaningful access to what is generally available.

[320] *Andrews* involved a British citizen who challenged the citizenship requirement for admission to the British Columbia bar under the *Barristers and Solicitors Act*, R.S.B.C. 1979, c. 26. He succeeded because the requirement was found to have drawn a distinction based on an enumerated ground — national origin — and because that distinction resulted in an additional burden on non-citizens, namely a delay of several years before they could become entitled to practise law. The government's justification was evaluated under s. 1 of the *Charter*.

[321] McIntyre J.'s approach in *Andrews* had several important features. First, it stipulated that

[319] Voilà l'historique qui guide notre analyse fondée sur l'art. 15. Dans *R. c. Kapp*, [2008] 2 R.C.S. 483, 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. S'appuyant sur les arrêts relatifs aux droits de la personne *Commission ontarienne des droits de la personne c. Simpsons-Sears Ltd.*, [1985] 2 R.C.S. 536, p. 551, et *Compagnie des chemins de fer nationaux du Canada c. Canada (Commission canadienne des droits de la personne)*, [1987] 1 R.C.S. 1114 (« *Action Travail* »), le juge McIntyre a fait les remarques suivantes dans *Andrews* :

> . . . 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. [Italiques ajoutés; p. 165.]

Il a précisé que la disposition sur l'égalité ainsi que les lois luttant contre la discrimination en général ont 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.

[320] Dans l'arrêt *Andrews*, un citoyen britannique contestait la condition relative à la citoyenneté à laquelle il devait satisfaire pour être admis au barreau de la Colombie-Britannique en vertu de la *Barristers and Solicitors Act*, R.S.B.C. 1979, ch. 26. Il a eu gain de cause, car la Cour a conclu que cette exigence établissait une distinction fondée sur un motif énuméré — en l'occurrence l'origine nationale — et que cette distinction imposait un fardeau additionnel aux non-citoyens, c'est-à-dire une attente de plusieurs années avant d'être autorisés à pratiquer le droit. La justification invoquée par le gouvernement a été évaluée au regard de l'article premier de la *Charte*.

[321] La démarche suivie par le juge McIntyre dans *Andrews* comportait plusieurs éléments

"[t]he analysis of discrimination . . . must take place within the context of the enumerated grounds and those analogous to them" (p. 180).

[322] Second, the words "without discrimination" require more than a mere distinction in the treatment given to different groups or individuals. Instead, McIntyre J. found that those words were a form of qualifier built into s. 15 which limits the distinctions forbidden by the section to "those which involve *prejudice or disadvantage*" (p. 181 (emphasis added)). McIntyre J.'s definition of discrimination contains the following statement about what constitutes "disadvantage":

> . . . 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*. [Emphasis added; p. 174.]

[323] In sum, 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. As McIntyre J. explained, "any justification, any consideration of the reasonableness of the enactment; indeed, any consideration of factors which could justify the discrimination and support the constitutionality of the impugned enactment would take place under s. 1" (p. 182).

[324] *Kapp*, and later *Withler v. Canada (Attorney General)*, [2011] 1 S.C.R. 396, restated these principles as follows: (1) Does the law create a distinction based on an enumerated

importants. Premièrement, comme l'a mentionné le juge, « l'analyse de la discrimination doit se faire en fonction des motifs énumérés et de ceux qui leur sont analogues » (p. 180).

[322] Deuxièmement, l'expression « indépendamment de toute discrimination » requiert davantage qu'une simple distinction dans le traitement réservé à un groupe ou à des individus. Le juge McIntyre a conclu que cette expression se veut plutôt une forme de réserve, intégrée à l'art. 15, qui a pour effet de limiter les distinctions prohibées par cette disposition à « celles qui entraînent *un préjudice ou un désavantage* » (p. 181 (italiques ajoutés)). Dans la définition qu'il a donnée de la discrimination, le juge McIntyre a dit ceci à propos la notion de « désavantage » :

> . . . 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 [. . .], 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*. [Italiques ajoutés; p. 174.]

[323] Bref, 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. Comme l'a expliqué le juge McIntyre, « toute justification, tout examen du caractère raisonnable de la mesure législative et, en fait, tout examen des facteurs qui pourraient justifier la discrimination et appuyer la constitutionnalité de la mesure législative attaquée devraient se faire en vertu de l'article premier » (p. 182).

[324] Ces principes ont été reformulés ainsi dans l'arrêt *Kapp* et, plus tard, dans *Withler c. Canada (Procureur général)*, [2011] 1 R.C.S. 396 : (1) La loi crée-t-elle une distinction fondée sur un motif

or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? (*Kapp*, at para. 17; *Withler*, at para. 30). As the Court stated in *Withler*:

> 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. [para. 39]

[325] 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. *Withler* is clear that "[a]t the end of the day there is *only one question*: Does the challenged law violate the norm of substantive equality in s. 15(1) of the *Charter*?" (para. 2 (emphasis added)). Prejudice and stereotyping are two of the indicia that may help answer that question; they are not discrete elements of the test which the claimant is obliged to demonstrate, as Professor Sophia Moreau explains:

> Such a narrow interpretation will likely have the unfortunate effect of blinding us to other ways in which individuals and groups, that have suffered serious and long-standing disadvantage, can be discriminated against. This would include cases, for instance, that do not involve either overt prejudice or false stereotyping, but do involve oppression or unfair dominance of one group by another, or involve a denial to one group of goods that seem basic or necessary for full participation in Canadian society.

("*R. v. Kapp*: New Directions for Section 15" (2008-2009), 40 *Ottawa L. Rev.* 283, at p. 292)

[326] 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

énuméré ou analogue? (2) Cette distinction crée-t-elle un désavantage par la perpétuation d'un préjugé ou l'application de stéréotypes? (*Kapp*, par. 17; *Withler*, par. 30). Comme l'a précisé la Cour dans *Withler* :

> 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. [par. 39]

[325] 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. L'arrêt *Withler* indique clairement que, « [e]n définitive, *une seule question* se pose : La mesure contestée transgresse-t-elle la norme d'égalité réelle consacrée par le par. 15(1) de la *Charte*? » (par. 2 (italiques ajoutés)). Les préjugés et l'application de stéréotypes sont deux des indices susceptibles d'être utiles pour répondre à cette question; il ne s'agit pas, comme l'explique la professeure Sophia Moreau, d'éléments distincts du critère auquel doit satisfaire le demandeur :

> [TRADUCTION] Une interprétation aussi étroite aura vraisemblablement le malheureux effet d'occulter d'autres formes de discrimination à l'endroit de personnes et de groupes qui sont depuis longtemps gravement désavantagés. Il pourrait s'agir par exemple de situations où — sans qu'il y ait manifestation ouverte de préjugés ou application injuste de stéréotypes — il y a oppression ou domination injuste d'un groupe par un autre, ou encore négation à un groupe de biens qui paraissent fondamentaux ou nécessaires à une pleine participation à la société canadienne.

(« *R. v. Kapp* : New Directions for Section 15 » (2008-2009), 40 *R.D. Ottawa* 283, p. 292)

[326] 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

discriminatory conduct, and discriminatory conduct in turn can reinforce these negative attitudes, since "the very exclusion of the disadvantaged group . . . fosters the belief, both within and outside the group, that the exclusion is the result of 'natural' forces, for example, that women 'just can't do the job'" (*Action Travail*, at p. 1139). As Walter Tarnopolsky observed:

> . . . it is the overt act and not the thought which is prohibited and, as a natural consequence thereof, in many cases action could be contrary to human rights legislation even in the absence of a discriminatory intent, if its *effect* is discriminatory. [Emphasis in original.]

(*Discrimination and The Law in Canada* (1982), at p. 86)

[327] We must be careful not to treat *Kapp* and *Withler* as establishing an additional requirement on s. 15 claimants to prove that a distinction will perpetuate prejudicial or stereotypical 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*. In explaining prejudice in *Withler*, the Court said: "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" (para. 38).

[328] It is the discriminatory *conduct* that s. 15 seeks to prevent, not the underlying attitude or motive, as Dickson C.J. explained in *Action Travail*:

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 renforcer cette attitude négative, car « l'exclusion même du groupe désavantagé [. . .] favorise la conviction, tant à l'intérieur qu'à l'extérieur du groupe, qu'elle résulte de forces "naturelles", par exemple que les femmes "ne peuvent tout simplement pas faire le travail" » (*Action Travail*, p. 1139). Comme l'a fait remarquer Walter Tarnopolsky :

> [TRADUCTION] . . . c'est le fait d'agir ouvertement, et non la façon de penser elle-même, qui est prohibé, de telle sorte que, naturellement, dans bien des cas un acte pourrait contrevenir aux lois sur les droits de la personne même en l'absence d'intention discriminatoire, si *l'effet* de cet acte est discriminatoire. [En italique dans l'original.]

(*Discrimination and The Law in Canada* (1982), p. 86)

[327] Il faut se garder de considérer que les arrêts *Kapp* et *Withler* ont 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*. Expliquant la notion de préjugé dans *Withler*, la Cour a indiqué ce qui suit : « 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 » (par. 38).

[328] 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, comme l'a expliqué le juge en chef Dickson dans l'arrêt *Action Travail* :

It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory. [p. 1139, citing the *Report of the Commission on Equality in Employment* (1984).]

This was reiterated in *Withler*, where the Court said: "Whether the s. 15 analysis focuses on perpetuating disadvantage or stereotyping, the analysis involves looking at the circumstances of members of the group and the *negative impact* of the law on them" (para. 37 (emphasis added)).

[329] That was the lesson learned from the former "dignity" test from *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, which required claimants to establish that the impugned law had "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" (para. 51 (emphasis added)). In *Kapp*, this Court recognized that "dignity" was an underlying objective of the whole *Charter*, not a discrete and additional component of the equality test that the claimant had the burden of proving:

. . . human dignity is an abstract and subjective notion that . . . cannot only become confusing and difficult to apply; it has also proven to be an *additional* burden on equality claimants . . . . [Emphasis in original; para. 22.]

Similarly, prejudice and stereotyping are neither separate elements of the *Andrews* test, nor categories into which a claim of discrimination must fit. A claimant need not prove that a law promotes negative *attitudes*, a largely unquantifiable burden.

La question n'est pas de savoir si la discrimination est intentionnelle ou si elle est simplement involontaire, c'est-à-dire découlant du système lui-même. Si des pratiques occasionnent des répercussions néfastes pour certains groupes, c'est une indication qu'elles sont peut-être discriminatoires. [p. 1139, citant le *Rapport de la Commission sur l'égalité en matière d'emploi* (1984).]

Ce principe a été réitéré en ces termes par notre Cour dans l'arrêt *Withler* : « 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 » (par. 37 (italiques ajoutés)).

[329] C'est la leçon qui a été tirée de l'ancien critère fondé sur la « dignité », qui avait été établi dans *Law c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1999] 1 R.C.S. 497, et qui obligeait le demandeur à établir que la mesure contestée « perpétu[ait] ou favoris[ait] *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 » (par. 51 (italiques ajoutés)). Dans l'arrêt *Kapp*, notre Cour a reconnu que la protection de la « dignité » constitue un objectif fondamental de l'ensemble de la *Charte*, et non un élément additionnel distinct devant être prouvé par le demandeur dans le cadre de l'analyse relative à l'égalité :

. . . la dignité humaine est une notion abstraite et subjective qui non seulement peut être déroutante et difficile à appliquer [. . .], mais encore s'est avérée un fardeau *additionnel* pour les parties qui revendiquent le droit à l'égalité . . . [En italique dans l'original; par. 22.]

De même, les préjugés et l'application de stéréotypes ne représentent ni des éléments particuliers du critère établi dans l'arrêt *Andrews*, ni des catégories auxquelles doit se rattacher la plainte de discrimination. Le demandeur n'a pas besoin de prouver que la loi qu'il conteste répand des *attitudes* négatives, un aspect essentiellement impossible à mesurer.

[330] Requiring claimants, therefore, to prove that a distinction perpetuates negative attitudes about them imposes a largely irrelevant, not to mention ineffable burden.

[331] *Kapp* and *Withler* guide us, as a result, to a flexible and contextual inquiry into 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. As *Withler* makes clear, the contextual factors will vary from case to case — there is no "rigid template":

> *The particular contextual factors relevant to the substantive equality inquiry at the second step [of the Andrews test] will vary with the nature of the case. A rigid template risks consideration of irrelevant matters on the one hand, or overlooking relevant considerations on the other*: *Kapp*. Factors such as those developed in *Law* — pre-existing disadvantage, correspondence with actual characteristics, impact on other groups and the nature of the interest affected — may be helpful. However, they need not be expressly canvassed in every case in order to fully and properly determine whether a particular distinction is discriminatory . . . . [Emphasis added; para. 66.]

[332] 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. 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. As the U.S. Supreme Court warned in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971):

> . . . practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices. [p. 430]

[333] An emphasis at this stage on whether the claimant group's exclusion was well motivated

[330] 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.

[331] Les arrêts *Kapp* et *Withler* nous fournissent une analyse souple et contextuelle visant à 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. Comme l'indique clairement l'arrêt *Withler*, les facteurs contextuels varient dans chaque cas — il n'existe pas de « modèle rigide » :

> *Les facteurs contextuels particuliers pertinents dans l'analyse de l'égalité réelle à la deuxième étape [du critère de l'arrêt Andrews] varieront selon la nature de l'affaire. Un modèle rigide pourrait mener à un examen qui inclut des questions non pertinentes ou, à l'opposé, qui exclut des facteurs pertinents* : *Kapp.* Des facteurs comme ceux établis dans l'arrêt *Law* — un désavantage préexistant, la correspondance avec les caractéristiques réelles, l'effet sur d'autres groupes et la nature du droit touché — peuvent être utiles. Toutefois, il n'est pas nécessaire de les examiner expressément dans tous les cas pour répondre complètement et correctement à la question de savoir si une distinction particulière est discriminatoire . . . [Italiques ajoutés; par. 66.]

[332] 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. 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. Voici, à ce sujet, la mise en garde faite par la Cour suprême des États-Unis dans l'affaire *Griggs c. Duke Power Co.*, 401 U.S. 424 (1971) :

> [TRADUCTION] . . . les pratiques, procédures ou tests en apparence neutres, et même neutres du point de vue de l'intention, ne peuvent être maintenus s'ils ont pour effet de « préserver » le statu quo, à savoir les pratiques d'embauche discriminatoires antérieures. [p. 430]

[333] Le fait de s'attacher, à ce stade, à la question de savoir si l'exclusion du groupe demandeur

or reasonable is inconsistent with this substantive equality approach to s. 15(1) since it redirects the analysis from the *impact* of the distinction on the affected individual or group to the legislature's *intent* or *purpose*. As McIntyre J. warned in *Andrews*, an approach to s. 15(1) based on assessing the "reasonableness" of the legislative distinction would be a "radical departure from the analytical approach to the *Charter*", under which "virtually no role would be left for s. 1" (pp. 181-82). It would also effectively turn the s. 15(1) analysis into a review of whether the legislature had a "rational basis" for excluding a group from a statutory benefit. This reduces the test for discrimination to "a prohibition on intentional discrimination based on irrational stereotyping" (Sheila McIntyre, "Deference and Dominance: Equality Without Substance", in Sheila McIntyre and Sanda Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (2006), 95, at p. 104). 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.

[334] This crucial distinction between the s. 15 analysis and the s. 1 justificatory step of the equality test brings us to another legal issue of particular importance in this case: the proper stage in the analysis to address the effect of the *choice* not to marry. In *Miron*, the fact that marital status is not a real choice was the basis for designating marital status as an analogous ground under s. 15(1). McLachlin J. accepted that the choice to marry is constrained by a number of factors. Her reasons, already briefly referred to, bear more fulsome repetition:

est raisonnable ou motivée par de bonnes intentions serait incompatible avec l'approche axée sur l'égalité réelle à l'étape du par. 15(1), car l'analyse porterait alors non plus sur *l'effet* de la distinction sur l'individu ou le groupe touché mais sur *l'intention* ou *l'objectif* du législateur. Conformément à la mise en garde formulée par le juge McIntyre dans *Andrews*, le recours à une approche axée sur l'appréciation du caractère « déraisonnable » de la distinction établie par la loi s'éloignerait « radicalement de la façon analytique d'aborder la *Charte* » et « aurait pour effet de dépouiller pratiquement de tout rôle l'article premier » (p. 182). Elle aurait en outre concrètement pour effet de transformer l'analyse fondée sur le par. 15(1) en un examen visant à déterminer si la décision du législateur de nier à un groupe le bénéfice de la loi avait un « fondement rationnel ». Tout cela réduirait l'analyse relative à la discrimination au rôle de [TRADUCTION] « prohibition des mesures discriminatoires intentionnelles basées sur des stéréotypes irrationnels » (Sheila McIntyre, « Deference and Dominance : Equality Without Substance », dans Sheila McIntyre et Sanda Rodgers, dir., *Diminishing Returns : Inequality and the Canadian Charter of Rights and Freedoms* (2006), 95, p. 104). 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.

[334] Cette distinction cruciale entre les deux étapes de l'analyse relative à l'égalité, soit l'examen fondé sur l'art. 15 et l'étape de la justification suivant l'article premier, nous amène à une autre question juridique qui revêt une importance particulière en l'espèce : la détermination de l'étape de l'analyse à laquelle il convient d'examiner l'effet du *choix* de ne pas se marier. Dans *Miron*, l'état matrimonial a été reconnu comme un motif analogue de discrimination pour l'application du par. 15(1), en raison du fait que la décision de se marier ou non ne constitue pas véritablement un choix. La juge McLachlin a admis que la décision de se marier est limitée par certains facteurs. Ses motifs, que j'ai cités brièvement plus tôt, valent d'être répétés, cette fois plus longuement :

In theory, the individual is free to choose whether to marry or not to marry. In practice, however, the reality may be otherwise. The sanction of the union by the state through civil marriage cannot always be obtained. The law; the reluctance of one's partner to marry; financial, religious or social constraints — these factors and others commonly function to prevent partners who otherwise operate as a family unit from formally marrying. In short, marital status often lies beyond the individual's effective control. In this respect, marital status is not unlike citizenship, recognized as an analogous ground in *Andrews*: the individual exercises limited but not exclusive control over the designation. [para. 153]

[335] Any discussion of the reasonableness of distinctions based on this ground, or justifications for such distinctions, must take place under s. 1. To focus on the "choice" to marry at the s. 15(1) stage is not only contrary to the approach in *Andrews*, it is completely inconsistent with *Miron* and undermines the recognition of marital status as an analogous ground. By definition, analogous grounds are "personal characteristic[s] that [are] immutable or changeable only at unacceptable cost to personal identity" (*Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 13). This Court has firmly rejected the context-dependency of analogous grounds: they are not deemed immutable in some legislative contexts and a matter of choice in others. Rather, they stand as "constant marker[s] of potential legislative discrimination" (*Corbiere*, at para. 10). Having accepted marital status as an analogous ground, it is contradictory to find not only that *de facto* spouses *do* 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.

En théorie, la personne est libre de choisir de se marier ou non. Cependant, en pratique, la réalité pourrait bien être tout autre. Il n'est pas toujours possible d'obtenir la sanction de l'union par l'État par un mariage civil. La loi, l'hésitation à se marier de l'un des partenaires, les contraintes financières, religieuses ou sociales sont autant de facteurs qui empêchent habituellement des partenaires, qui par ailleurs fonctionnent comme une unité familiale, de se marier officiellement. Bref, l'état matrimonial échappe souvent au contrôle de la personne. À ce point de vue, l'état matrimonial n'est pas différent de la citoyenneté, qui a été reconnue comme un motif analogue dans l'arrêt *Andrews*; la personne exerce un contrôle limité, mais non exclusif sur son état matrimonial. [par. 153]

[335] Toute appréciation du caractère raisonnable des distinctions fondées sur ce motif ou de leur justification doit être effectuée à l'étape de l'article premier. Le fait de se pencher sur le « choix » de se marier 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 tout à fait incompatible avec l'arrêt *Miron* et compromettrait la qualité de motif analogue reconnue à l'état matrimonial. Les motifs analogues ont été définis comme étant des « caractéristique[s] personnelle[s] qui [sont] soit immuable[s], soit modifiable[s] uniquement à un prix inacceptable du point de vue de l'identité personnelle » (*Corbiere c. Canada (Ministre des Affaires indiennes et du Nord canadien)*, [1999] 2 R.C.S. 203, par. 13). Notre Cour a fermement refusé de faire dépendre du contexte l'existence des motifs analogues : un motif ne saurait être réputé immuable dans certains contextes législatifs et constituer une question de choix dans d'autres. Au contraire, un tel motif représente « un indicateur permanent de discrimination législative potentielle » (*Corbiere*, par. 10). La Cour ayant reconnu l'état matrimonial comme motif analogue, il est contradictoire de conclure non seulement que les conjoints de fait ont *effectivement* 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*.

[336] Moreover, this Court has repeatedly rejected arguments that choice protects a distinction from a finding of discrimination. In *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, the employer argued that a different amount of compensation for women who took time off from work while pregnant was not discriminatory because "pregnancy is a voluntary state and, like other forms of voluntary leave, it should not be compensated" (p. 1236). Dickson C.J. refused to accept that pregnancy was a choice, noting that an emphasis on choice would be "against one of the purposes of anti-discrimination legislation . . . the removal of unfair disadvantages which have been imposed on individuals or groups in society" (p. 1238). In other words, not only was pregnancy not a "true choice", but choice was *irrelevant* to the question of discrimination.

[336] 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. Dans *Brooks c. Canada Safeway Ltd.*, [1989] 1 R.C.S. 1219, l'employeur prétendait que la rémunération différente versée aux femmes qui s'absentaient du travail pendant leur grossesse ne constituait pas de la discrimination, parce que « la grossesse est un état voulu et [. . .], comme les autres formes d'absence volontaire, elle ne saurait faire l'objet de prestations » (p. 1236). Le juge en chef Dickson a refusé de souscrire à l'argument selon lequel la grossesse résulte d'un choix, indiquant que le fait de s'attacher à la notion de choix irait « à l'encontre de l'un des objets des lois anti-discrimination [. . .] la suppression des désavantages injustes imposés à des personnes ou à des groupes dans la société » (p. 1238). Autrement dit, non seulement la grossesse ne résulte pas d'un « choix véritable », mais l'existence d'un choix n'est *pas pertinente* pour statuer sur la discrimination.

[337] In *Lavoie v. Canada*, [2002] 1 S.C.R. 769, the Court was faced with a question of discrimination on the grounds of citizenship. The claimants challenged a provision of the *Public Service Employment Act*, R.S.C. 1985, c. P-33, that gave the Public Service Commission the discretion to prefer Canadian citizens in open competitions for employment. Bastarache J., for the majority, expressly rejected the argument, relied on by Arbour J. in her separate reasons, that the claimants could have chosen to obtain Canadian citizenship. In their own reasons, which agreed with Bastarache J. on this point, McLachlin C.J. and L'Heureux-Dubé J. were even clearer in rejecting choice as justifying discriminatory treatment:

[337] Dans l'affaire *Lavoie c. Canada*, [2002] 1 R.C.S. 769, la Cour était saisie de la question de la discrimination fondée sur la citoyenneté. Les demanderesses contestaient une disposition de la *Loi sur l'emploi dans la fonction publique*, L.R.C. 1985, ch. P-33, qui conférait à la Commission de la fonction publique le pouvoir discrétionnaire de privilégier les candidats détenant la citoyenneté canadienne à l'occasion de concours publics en vue de doter un poste. Au nom des juges majoritaires, le juge Bastarache a expressément rejeté l'argument sur lequel s'est appuyée la juge Arbour dans son opinion distincte et suivant lequel les demanderesses auraient pu choisir d'obtenir la citoyenneté canadienne. Dans leurs propres motifs, qui concordaient avec ceux du juge Bastarache sur ce point, la juge en chef McLachlin et la juge L'Heureux-Dubé ont rejeté plus clairement encore l'argument voulant que l'existence d'un choix justifierait un traitement discriminatoire :

. . . the fact that a person could avoid discrimination by modifying his or her behaviour does not negate the discriminatory effect. If it were otherwise, an employer who denied women employment in his factory on the ground that he did not wish to establish female changing facilities could contend that the real cause of

. . . le fait qu'une personne puisse éviter la discrimination en modifiant son comportement n'en supprime pas l'effet discriminatoire. S'il en était autrement, l'employeur qui refuserait d'embaucher des femmes dans son usine parce qu'il ne veut pas mettre un vestiaire à leur disposition pourrait prétendre que la cause réelle de l'effet

the discriminatory effect is the woman's "choice" not to use men's changing facilities. The very act of forcing some people to make such a choice violates human dignity, and is therefore inherently discriminatory. The law of discrimination thus far has not required applicants to demonstrate that they could not have avoided the discriminatory effect in order to establish a denial of equality under s. 15(1). [para. 5]

[338] Having reviewed the distinct analytical approaches to the s. 15(1) analysis and s. 1 justificatory step and the significance of this Court's finding that marital status is an analogous ground, I turn to the final legal issue that commands the Court's attention: the applicability of this Court's decision in *Walsh*. Because the equality analysis under s. 15(1) of the *Charter* has evolved substantially in the decade since *Walsh* was decided, I would, with respect, decline to follow *Walsh*. Two aspects of the majority's decision in *Walsh* are, in fact, manifestly contrary to the substantive equality analysis developed in *Kapp* and *Withler*, namely its approach to the issue of choice and its reliance on the heterogeneity of common law relationships.

[339] *Walsh*, similarly to the case before us, considered the role of freedom of choice in a s. 15 application dealing with the exclusion of common law spouses from a family property regime. The majority judgment in *Walsh* found that "people who marry can be said to freely accept mutual rights and obligations" while common law spouses cannot. In turn, it found that common law spouses "are free to take steps to deal with their personal property" privately (para. 55). *Walsh* was determinatively applied by the trial judge in the case before us, and in part by the Court of Appeal.

[340] As noted, in *Walsh* freedom of choice was key to the s. 15(1) analysis. Although the *Walsh* majority accepted that some common law spouses

discriminatoire est le « choix » des femmes de ne pas utiliser le vestiaire des hommes. Le seul fait de contraindre certaines personnes à faire ce type de choix viole la dignité humaine et est discriminatoire en soi. Jusqu'à maintenant, le droit en matière de discrimination n'a pas exigé que le demandeur prouve qu'il n'aurait pu éviter l'effet discriminatoire pour que soit reconnue l'atteinte à l'égalité garantie au par. 15(1). [par. 5]

[338] Après avoir passé en revue les différentes approches établies pour les besoins de l'analyse fondée sur le par. 15(1) et l'étape de justification au regard de l'article premier, et avoir rappelé l'importance de la conclusion de notre Cour selon laquelle l'état matrimonial constitue un motif analogue, je vais maintenant examiner la dernière question juridique qui requiert notre attention : l'applicabilité de l'arrêt *Walsh* de notre Cour. 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*, avec égards, je m'abstiendrai de le suivre. Deux aspects de la décision des juges majoritaires dans *Walsh* vont, en fait, manifestement à l'encontre de l'analyse relative à l'égalité réelle élaborée dans les arrêts *Kapp* et *Withler*, c'est-à-dire l'approche suivie dans cette décision à l'égard de la question de l'existence d'un choix et le fait qu'on y ait invoqué l'hétérogénéité des unions de fait.

[339] Tout comme dans l'affaire dont nous sommes saisis, dans *Walsh*, la Cour a été appelée à considérer le rôle de la liberté de choisir dans une demande fondée sur l'art. 15 concernant l'exclusion des conjoints de fait d'un régime de partage des biens matrimoniaux. Selon les juges majoritaires, « on peut dire des personnes qui se marient qu'elles ont librement accepté des droits et obligations réciproques », ce qu'on ne peut dire des conjoints de fait. Ensuite, les juges ont conclu que ces conjoints « peuvent en toute liberté prendre des mesures à l'égard de leurs biens personnels » de gré à gré (par. 55). En l'espèce, la juge de première instance s'est appuyée de façon déterminante sur l'arrêt *Walsh*, et la Cour d'appel l'a appliqué en partie.

[340] Comme je l'ai mentionné précédemment, dans l'affaire *Walsh*, la question de la liberté de choisir a constitué un aspect clé de l'analyse fondée

would suffer disadvantage under the *Matrimonial Property Act*, R.S.N.S. 1989, c. 275, it held that because they could *choose* to marry, their exclusion from the legislative scheme was not an issue that fell within the protection of s. 15(1):

> While there is no denying that inequities may exist in certain unmarried cohabiting relationships and that those inequities may result in unfairness between the parties on relationship breakdown, there is no constitutional requirement that the state extend the protections of the *MPA* to those persons. *The issue here is whether making a meaningful choice matters, and whether unmarried persons are prevented from taking advantage of the benefits of the MPA in an unconstitutional way.* [Emphasis added; para. 57.]

The majority in *Walsh* accepted that marital status is an analogous ground, but justified distinctions within this ground by pointing to an individual's "choice" to marry. This contradicts the approach to substantive equality under s. 15(1), where any argument concerning the reasonableness of the legislation is considered under s. 1. Contrary to this approach, the majority of the Court in *Walsh* collapsed the justification into the s. 15 analysis, leaving the claimants to justify what should analytically have been part of the government's burden.

[341] The majority in *Walsh* went on to find that despite the adverse impact suffered by some unmarried spouses under the *Matrimonial Property Act*, the claimant had failed to satisfy the dignity test. Again, the majority emphasized the importance of the claimant's choice, concluding that a legislative regime that respected the personal autonomy and freedom of choice of an individual *enhanced* rather than detracted from their dignity. This reliance on dignity is the analytic approach this Court eschewed in *Kapp* when it dropped "dignity" as a required component in the s. 15(1) analysis

sur le par. 15(1). Tout en admettant que certains conjoints de fait seraient désavantagés par l'application de la *Matrimonial Property Act*, R.S.N.S. 1989, ch. 275, les juges majoritaires ont néanmoins conclu que, comme les conjoints de fait pouvaient *choisir* de se marier ou non, leur exclusion du bénéfice du régime établi par la loi ne faisait pas intervenir la protection du par. 15(1) :

> Personne ne nie qu'il puisse exister des iniquités chez certains couples non mariés et qu'une injustice entre les parties puisse en résulter à la rupture de leur union, mais aucune règle constitutionnelle n'oblige l'État à étendre la portée de la *MPA* pour les protéger. *Il faut en l'occurrence déterminer si la faculté de faire un choix utile mérite d'être maintenue et si les personnes non mariées sont privées inconstitutionnellement de l'accès aux bénéfices de la MPA*. [Italiques ajoutés; par. 57.]

Dans *Walsh*, les juges majoritaires ont reconnu que l'état matrimonial constitue un motif analogue, mais ils ont justifié les distinctions qu'ils faisaient au sein du groupe visé par ce motif en invoquant le « choix » qu'ont les gens de se marier ou non. Un tel raisonnement va à l'encontre de l'approche relative à l'égalité réelle dans l'analyse fondée sur le par. 15(1), approche suivant laquelle tout argument concernant le caractère raisonnable du texte de loi en cause est considéré à l'étape de l'article premier. Dérogeant à cette approche, les juges de la majorité dans *Walsh* ont amalgamé l'étape de la justification à celle de l'analyse fondée sur l'art. 15, obligeant ainsi les demandeurs à apporter une justification qui, sur le plan analytique, aurait dû incomber à l'État.

[341] Dans *Walsh*, les juges majoritaires ont ensuite conclu que, malgré l'effet préjudiciable de la *Matrimonial Property Act* sur certains conjoints de fait, la demanderesse n'avait pas satisfait au critère de l'atteinte à la dignité. Une foi de plus, les juges majoritaires ont souligné l'importance du choix dont disposait la demanderesse et conclu qu'un régime législatif respectant l'autonomie et la liberté de choisir d'une personne a pour effet de *favoriser* la dignité de cette dernière et non de la compromettre. Cette prise en compte de la dignité est l'approche analytique qu'a écartée la Cour dans

because it had become an undue evidentiary burden for claimants.

[342] In *Walsh*, the majority's focus on choice rather than on the impact of the distinction on members of the group also paid insufficient attention to the requirement for a true substantive equality analysis, affirmed in *Kapp* and *Withler*. In contrast to formal equality, which assumes an "autonomous, self-interested and self-determined" individual, substantive equality looks not only at the choices that are available to individuals, but at "the social and economic environments in which [they] pla[y] out" (Margot Young, "Unequal to the Task: 'Kapp'ing the Substantive Potential of Section 15", in Sanda Rodgers and Sheila McIntyre, eds., *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (2010), 183, at pp. 190-91 and 196).

[343] This is not to suggest that the issue of choice is entirely irrelevant to a claim under s. 15(1). It may be an important factor in determining whether a ground of discrimination qualifies as an analogous ground. In addition, it may factor into the s. 1 analysis. Examining choice at the s. 1 stage instead of integrating it into the discrimination analysis as the majority did in *Walsh* properly places the onus on the government to justify the exclusion based on freedom of choice, rather than compromising the s. 15(1) analysis. It is not the claimant's burden to disprove the legislative purpose for the exclusion, but the government's to demonstrate it under s. 1.

[344] *Walsh* is also at odds with the substantive equality analysis of *Kapp* and *Withler* in its

l'arrêt *Kapp*, lorsqu'elle a cessé de considérer la « dignité » comme un élément essentiel de l'analyse fondée sur le par. 15(1), au motif que ce critère était devenu un fardeau de preuve indu pour les demandeurs.

[342] De plus, en s'attachant à la liberté de choisir plutôt qu'à l'effet de la distinction sur les membres du groupe, les juges majoritaires dans *Walsh* n'ont pas accordé suffisamment d'attention à la nécessité de procéder à une véritable analyse de l'égalité réelle, exigence confirmée dans les arrêts *Kapp* et *Withler*. Contrairement à l'égalité formelle, qui suppose une personne [TRADUCTION] « autonome, agissant dans son propre intérêt et décidant par elle-même », l'égalité réelle tient compte non seulement des choix qui s'offrent à la personne, mais également du « contexte socioéconomique dans lequel il[s] s'inscrive[nt] » (Margot Young, « Unequal to the Task : "Kapp"ing the Substantive Potential of Section 15 », dans Sanda Rodgers et Sheila McIntyre, dir., *The Supreme Court of Canada and Social Justice : Commitment, Retrenchment or Retreat* (2010), 183, p. 190-191 et 196).

[343] Cela ne signifie pas que la question de l'existence d'un choix est entièrement dénuée de pertinence dans l'examen d'une demande présentée en vertu du par. 15(1). Cette question pourrait constituer un facteur important afin de déterminer si un motif de discrimination constitue un motif analogue. En outre, elle pourrait jouer un rôle dans l'analyse fondée sur l'article premier. Le fait de considérer la question du choix à cette étape — au lieu de l'intégrer à l'analyse relative à la discrimination, comme l'ont fait les juges majoritaires dans *Walsh* — a pour effet d'imposer à juste titre à l'État le fardeau de tenter de justifier l'exclusion par l'existence d'une liberté de choisir, et évite de compromettre l'analyse fondée sur le par. 15(1). En effet, il n'incombe pas au demandeur de prouver que l'objectif visé par le législateur en édictant l'exclusion est mal fondé, mais plutôt à l'État de justifier cet objectif au regard de l'article premier.

[344] L'arrêt *Walsh* s'écarte également de l'analyse relative à l'égalité réelle prévue par

emphasis on the heterogeneity of common law relationships. The *Walsh* majority found this heterogeneity to be a pertinent distinction between married spouses and unmarried spouses. The majority accepted that some common law spouses suffered adverse impact, but emphasized that "many persons in circumstances similar to those of the parties, that is, opposite sex individuals in conjugal relationships of some permanence, have chosen to avoid the institution of marriage and the legal consequences that flow from it" (para. 43). The majority relied on the fact that not *all* common law spouses suffered discrimination as a basis for rejecting the s. 15(1) claim.

[345] The importance the *Walsh* majority placed on the heterogeneity of unmarried relationships resulted from its use of the then operative comparator group analysis. The majority assessed the discrimination claim by comparing two groups: married heterosexual cohabitants and unmarried heterosexual cohabitants. Although the majority in *Walsh* found that the "functional similarities" between married and common law spouses may be substantial, it held that "it would be wrong to ignore the significant heterogeneity that exists within the claimant's comparator group [i.e. unmarried heterosexual cohabitants]" (para. 39).

[346] The majority's reasoning in *Walsh* illustrates the problems with comparator groups that the subsequent decision in *Withler* sought to address, namely that "a mirror comparator group analysis may fail to capture substantive inequality, may become a search for sameness, may shortcut the second stage of the substantive equality analysis, and may be difficult to apply" (para. 60). In *Walsh*, the fact that the comparator group of married spouses was not perfectly mirrored by the group of unmarried spouses, based on the heterogeneity

les arrêts *Kapp* et *Withler* en insistant sur l'hétérogénéité des unions de fait. Dans *Walsh*, les juges majoritaires ont conclu que cette hétérogénéité représente un motif de distinction pertinent entre les conjoints mariés et les conjoints non mariés. Tout en reconnaissant que certains conjoints de fait subissent des effets préjudiciables du fait de leur statut, les juges majoritaires ont souligné que « de nombreuses personnes se trouvant dans une situation semblable à celle des parties, c'est-à-dire des personnes de sexe opposé vivant dans une union conjugale d'une certaine permanence, ont choisi de se soustraire à l'institution du mariage et aux conséquences juridiques qui en découlent » (par. 43). Un des motifs invoqués par les juges de la majorité pour rejeter la plainte fondée sur le par. 15(1) est le fait que les conjoints de fait ne sont pas *tous* victimes de discrimination.

[345] L'importance qu'ont accordée les juges de la majorité dans *Walsh* au caractère hétérogène des relations unissant des personnes non mariées résulte du fait qu'ils ont appliqué l'analyse basée sur des groupes de comparaison qui avait cours à l'époque. Les juges majoritaires ont examiné la plainte de discrimination en comparant deux groupes : les conjoints hétérosexuels mariés et les conjoints hétérosexuels non mariés. Bien que les juges majoritaires aient conclu que les « similitudes fonctionnelles » entre les unions formelles et les unions de fait pouvaient être importantes, ils ont décidé que « ce serait une erreur [. . .] que de faire abstraction de la grande hétérogénéité du groupe de comparaison auquel appartient l'auteur de l'allégation [c'est-à-dire les conjoints hétérosexuels non mariés] » (par. 39).

[346] Le raisonnement de la majorité dans *Walsh* illustre les difficultés que pose le recours à des groupes de comparaison, difficultés que l'arrêt subséquent *Withler* a cherché à régler, à savoir qu'« une analyse fondée sur la comparaison avec un groupe aux caractéristiques identiques ne permet pas toujours de détecter l'inégalité réelle et risque de se muer en recherche de la similitude, de court-circuiter le deuxième volet de l'analyse de l'égalité réelle et de se révéler difficile à appliquer » (par. 60). Dans l'affaire *Walsh*, le fait que le groupe

of the latter, short-circuited the analysis of the actual adverse impact experienced by a significant proportion of unmarried spouses.

[347] For all these reasons, and with great respect, I think, unlike the Court of Appeal, we can appropriately proceed to the application of the s. 15(1) test in this case untethered from *Walsh*.

Application

[348] The first step in s. 15(1) is to identify the distinction at issue and determine whether it is based on an enumerated or analogous ground. This is easily demonstrated in this case. The exclusion of *de facto* spouses from the economic protections for formal spousal unions is a distinction based on marital status, an analogous ground.

[349] We must then consider whether the distinction is discriminatory. That it imposes a disadvantage is clear, in my view: the law excludes economically vulnerable and 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 the couple's freedom of contract or choice. The disadvantage this exclusion perpetuates is an historic one: it continues to deny *de facto* spouses access to economic remedies they have always been deprived of, remedies the National Assembly considered indispensable for the protection of married and civil union spouses.

[350] There is little doubt that some *de facto* couples are in relationships that are functionally similar to formally recognized spousal relationships. When introducing family law reforms in 1976, the Ontario Ministry of the Attorney General

de comparaison, en l'occurrence les conjoints mariés, n'était pas le reflet exact de groupe des conjoints non mariés, vu l'hétérogénéité du second, a court-circuité l'analyse des effets préjudiciables réels subis par une proportion appréciable de conjoints non mariés.

[347] Pour toutes ces raisons et, avec égards, contrairement à la Cour d'appel, j'estime que l'on peut à juste titre appliquer à la présente espèce l'analyse fondée sur le par. 15(1) sans être tenu de suivre l'arrêt *Walsh*.

Application

[348] La première étape de l'analyse fondée sur le par. 15(1) consiste à bien circonscrire la distinction invoquée et à déterminer si elle repose sur un motif énuméré ou sur un motif analogue, ce qui est facile à démontrer en l'espèce. L'exclusion des conjoints de fait du bénéfice des protections de nature économique dont jouissent les unions formelles constitue une distinction basée sur l'état matrimonial, un motif analogue.

[349] Il faut ensuite se demander si la distinction est discriminatoire. Le fait qu'elle impose un désavantage est clair à mon avis : la loi exclut les conjoints de fait financièrement vulnérables et 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 l'Assemblée nationale a jugé indispensables pour protéger les conjoints mariés ou unis civilement.

[350] Il fait peu de doute que certaines unions de fait sont fonctionnellement similaires aux unions formellement reconnues. En 1976, lors du dépôt de sa réforme du droit de la famille, le ministère du Procureur général de l'Ontario a reconnu que

acknowledged that the functional characteristics of unmarried relationships justified some protection:

> When a man and woman have been living together in a relationship of some permanence, their lives take on the same financial characteristics as a legally recognized marriage. Often the couple both contribute to household expenses. One may be just as dependent on the other for certain tasks as married persons are.

(*Family Law Reform*, at p. 18)

[351] On the same note, the British Columbia Law Institute commented that people in "relationship[s] that resembl[e] marriage may suffer economic prejudice when the relationship ends" and "are also in need of protection" (*Report on Recognition of Spousal and Family Status* (1998), at p. 7). The Law Reform Commission of Nova Scotia noted that, due to the functional similarities, unmarried relationships "deserve to be treated similarly by the law" as marriages (*Final Report: Reform of the Law Dealing with Matrimonial Property in Nova Scotia* (1997), at p. 21). And the Law Reform Commission of Saskatchewan tied these functional similarities to the goals of matrimonial property legislation, commenting that

> [t]he realities of marriage, not the legal status it creates, justified [matrimonial property] legislation. If long-term common law relationships are functionally similar, the mechanism by which the status is created is less important than the fact that the status entails social expectations that are usually associated with marriage.

(Discussion Paper, "Common Law Relationships Under the Matrimonial Property Act", July 1997 (online), at p. 12)

[352] This understanding of the functional similarity of *de facto* unions to marriages, it should be stressed, is shared in Quebec, where the Civil

les caractéristiques fonctionnelles des relations unissant des personnes non mariées justifiaient de leur accorder une certaine protection :

> [TRADUCTION] Lorsqu'un homme et une femme vivent ensemble dans le cadre d'une relation d'une certaine permanence, leur union acquiert les mêmes caractéristiques financières qu'un mariage légalement reconnu. Souvent, les deux conjoints contribuent aux charges du ménage. Il se peut que, pour certaines tâches, un des conjoints dépende de l'autre tout autant que cela se produit chez les personnes mariées.

(*Family Law Reform*, p. 18)

[351] Dans le même ordre d'idées, le British Columbia Law Institute a fait remarquer que les personnes vivant au sein d'une [TRADUCTION] « relation qui ressemble au mariage risquent de subir un préjudice économique en cas de rupture » et « elles ont elles aussi besoin de protection » (*Report on Recognition of Spousal and Family Status* (1998), p. 7). Selon la Commission de réforme du droit de la Nouvelle-Écosse, en raison de similitudes fonctionnelles, les relations unissant des personnes non mariées [TRADUCTION] « méritent un traitement similaire en droit » à celui réservé aux mariages (*Final Report : Reform of the Law Dealing with Matrimonial Property in Nova Scotia* (1997), p. 21). Pour sa part, la Commission de réforme du droit de la Saskatchewan a rattaché ces similitudes fonctionnelles aux objectifs de la loi régissant le partage des biens matrimoniaux, formulant les commentaires suivants :

> [TRADUCTION] Les réalités du mariage, et non la situation juridique qui en découle, justifiaient de légiférer [en matière de patrimoine familial]. Si les unions de fait de longue durée présentent des similitudes fonctionnelles, le mécanisme créant le statut est moins important que le fait que ce statut emporte, sur le plan social, des attentes généralement associées au mariage.

(Document de travail, « Common Law Relationships Under the Matrimonial Property Act », juillet 1997 (en ligne), p. 12)

[352] Cette conception des similitudes fonctionnelles entre les unions de fait et les mariages est, il convient de le souligner, également partagée

Code Revision Office, in proposing changes to the regime governing *de facto* spouses in 1978, accepted these functional similarities, commenting that "*[d]e facto* unions, though perhaps more tenuous, are often as stable as marriages" (*Report on the Québec Civil Code* (1978), vol. II — *Commentaries*, t. 1, at p. 113).

[353] This Court has also readily recognized that some *de facto* spouses share the functional characteristics of those in formal marriages. In the context of spousal support obligations, Cory and Iacobucci JJ. held in *M. v. H.* that unmarried same-sex couples, unmarried opposite-sex couples, and married couples, can all fulfill the "generally accepted characteristics of a conjugal relationship [which] include shared shelter, sexual and personal behaviour, services, social activities, economic support and children, as well as the societal perception of the couple" (para. 59). And in *Pettkus v. Becker*, Dickson J. acknowledged that there was "no basis for any distinction, in dividing property and assets, between marital relationships and those more informal relationships which subsist for a lengthy period" and that the unmarried parties "lived as man and wife" (p. 850).

[354] Even if there is a range of need or vulnerability among *de facto* spouses, as there must inevitably be, this Court has held that heterogeneity within a claimant group does not defeat a claim of discrimination. In *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, Dickson C.J., as he had in *Brooks*, squarely rejected the idea that for a claim of discrimination to succeed, all members of a group had to receive uniform treatment from the impugned law:

While the concept of discrimination is rooted in the notion of treating an individual as part of a group rather than on the basis of the individual's personal characteristics, *discrimination does not require uniform treatment of all members of a particular group. It is sufficient that*

au Québec. En effet, en 1978, lorsque l'Office de révision du Code civil a proposé des modifications au régime régissant les unions de fait, il a reconnu l'existence de ces similitudes, faisant remarquer que « [l]'union de fait, pour être plus fragile, n'en est pas moins, souvent, aussi stable que le mariage » (*Rapport sur le Code civil du Québec* (1978), vol. II — *Commentaires*, t. 1, p. 115).

[353] Notre Cour a elle aussi volontiers admis que certaines unions de fait présentent les caractéristiques fonctionnelles des mariages. Quant aux obligations alimentaires entre conjoints, les juges Cory et Iacobucci ont conclu, dans l'arrêt *M. c. H.*, que tant les couples de même sexe non mariés, que les couples de sexe opposé non mariés et les couples mariés peuvent posséder les « caractéristiques généralement acceptées de l'union conjugale, soit le partage d'un toit, les rapports personnels et sexuels, les services, les activités sociales, le soutien financier, les enfants et aussi l'image sociétale du couple » (par. 59). Qui plus est, dans l'arrêt *Pettkus c. Becker*, le juge Dickson a reconnu que « [r]ien ne justifie que l'on fasse une distinction, lors du partage des biens et de l'actif, entre les personnes mariées et les personnes liées par une relation moins formelle qui dure depuis longtemps »; il a également reconnu que, sans être mariées, les parties « [avaient] vécu comme mari et femme » (p. 850).

[354] Même s'il existe un éventail de besoins ou de situations de vulnérabilité à l'intérieur du groupe des conjoints de fait, comme cela est d'ailleurs inévitable, notre Cour a conclu que l'hétérogénéité d'un groupe de demandeurs n'est pas fatale à une plainte de discrimination. Dans *Janzen c. Platy Enterprises Ltd.*, [1989] 1 R.C.S. 1252, le juge en chef Dickson a carrément rejeté, tout comme il l'avait fait dans *Brooks*, l'idée voulant que, pour qu'une plainte de discrimination soit accueillie, tous les membres du groupe en question doivent être traités de la même manière par la mesure législative contestée :

Bien que le concept de discrimination trouve sa source dans le traitement accordé à un particulier en raison de son appartenance à un groupe plutôt qu'en raison de ses caractéristiques personnelles, *il n'est pas nécessaire, pour qu'il y ait discrimination, que tous les membres du*

ascribing to an individual a group characteristic is one factor in the treatment of that individual. If a finding of discrimination required that every individual in the affected group be treated identically, legislative protection against discrimination would be of little or no value. It is rare that a discriminatory action is so bluntly expressed as to treat all members of the relevant group identically. In nearly every instance of discrimination the discriminatory action is composed of various ingredients with the result that some members of the pertinent group are not adversely affected, at least in a direct sense, by the discriminatory action. *To deny a finding of discrimination in the circumstances of this appeal is to deny the existence of discrimination in any situation where discriminatory practices are less than perfectly inclusive*. It is to argue, for example, that an employer who will only hire a woman if she has twice the qualifications required of a man is not guilty of sex discrimination if, despite this policy, the employer nevertheless manages to hire some women. [Emphasis added; pp. 1288-89.]

groupe concerné soient traités de la même façon. Il suffit que l'attribution d'une caractéristique du groupe visé à un de ses membres en particulier constitue un facteur du traitement dont il fait l'objet. S'il fallait, pour conclure à la discrimination, que tous les membres du groupe visé soient traités de façon identique, la protection législative contre la discrimination aurait peu ou pas de valeur. En effet, il arrive rarement qu'une mesure discriminatoire soit si nettement exprimée qu'elle s'applique de façon identique à tous les membres du groupe-cible. Dans presque tous les cas de discrimination, la mesure discriminatoire comporte divers éléments de sorte que certains membres du groupe concerné ne sont pas atteints, tout au moins de façon directe, par la mesure discriminatoire. *Refuser de conclure à la discrimination dans les circonstances de ce pourvoi équivaut à nier l'existence de la discrimination chaque fois que les pratiques discriminatoires ne touchent pas l'ensemble du groupe-cible*. C'est affirmer, par exemple, que l'employeur qui n'engage une femme que si elle a deux fois plus de diplômes qu'un homme n'est pas coupable de discrimination sexuelle si, en dépit de cette politique, il engage tout de même quelques femmes. [Italiques ajoutés; p. 1288-1289.]

[355] Although *Janzen* and *Brooks* were decided in the human rights context, they were applied in the *Charter* context in *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, where Gonthier J. held that "[t]his Court has long recognized that differential treatment can occur . . . despite the fact that not all persons belonging to the relevant group are equally mistreated" (para. 76). In other words, even if only some members of an enumerated or analogous group suffer discrimination by virtue of their membership in that group, the distinction and adverse impact can still constitute discrimination.

[355] Bien que les arrêts *Janzen* et *Brooks* aient été décidés dans le contexte des droits de la personne, ils ont par la suite été appliqués dans l'affaire touchant la *Charte*, *Nouvelle-Écosse (Workers' Compensation Board) c. Martin*, [2003] 2 R.C.S. 504, où le juge Gonthier a conclu que « [n]otre Cour reconnaît depuis longtemps qu'une différence de traitement peut [exister] même lorsque les membres du groupe pertinent ne sont pas tous également maltraités » (par. 76). Autrement dit, même si quelques membres seulement d'un groupe énuméré ou analogue sont victimes de discrimination du fait de leur appartenance à ce groupe, la distinction qui est faite et son effet préjudiciable peuvent tout de même constituer de la discrimination.

[356] The National Assembly enacted economic safeguards for spouses in formal unions based on the need to protect them from the economic consequences of their assumed roles. Since many spouses in *de facto* couples exhibit the same functional characteristics as those 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

[356] L'Assemblée nationale a édicté des garanties économiques en faveur des conjoints vivant dans des unions formelles, au motif qu'il était nécessaire de les protéger des conséquences financières des rôles qu'ils jouent au sein de la relation. Comme bon nombre de conjoints vivant au sein d'unions de fait présentent les mêmes caractéristiques fonctionnelles que ceux vivant dans des unions formelles, y compris le même risque qu'un des conjoints se

protections perpetuates historic disadvantage against them based on their marital status.

[357] 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. Nor need we consider whether the exclusions promote the view that the individual is less capable or worthy of recognition as a human being or citizen — which, as discussed in *Kapp*, would be difficult to prove. 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*.

[358] This brings us to the s. 1 analysis. The application judge found that the purpose of the exclusion of *de facto* spouses from the presumptive statutory protections was to preserve their freedom to choose to be outside the legal regimes governing marriage and civil unions. The Court of Appeal questioned whether, in the context of spousal support, freedom of choice can qualify as a pressing and substantial objective. Quebec has implemented *mandatory* provisions relating to support, they noted, thereby denying spouses in marriages or civil unions any freedom of choice in the interests of protecting and compensating economically vulnerable spouses. *De facto* spouses, on the other hand, have been excluded from similar protection based on the very freedom of choice Quebec has decided is irrelevant for formally recognized spousal relationships. However, since the objective of preserving freedom of choice was not vigorously challenged by the parties before this Court, I would accept it for the purposes of the s. 1 analysis.

retrouve financièrement vulnérable ou 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.

[357] 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. Il n'est pas non plus nécessaire de se demander si l'exclusion répand l'opinion que l'individu concerné est moins capable ou moins digne d'être reconnu en tant qu'être humain ou que citoyen — élément qui, comme il est expliqué dans *Kapp*, serait difficile à prouver. 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.

[358] Ce qui nous amène à l'analyse fondée sur l'article premier. La juge saisie de la demande a conclu que l'exclusion des conjoints de fait du bénéfice des mesures de protection prévues par la loi et dont l'application est présumée avait pour objectif de préserver la liberté de ces personnes de choisir de ne pas être visées par les régimes légaux régissant les mariages et les unions civiles. Les juges majoritaires de la Cour d'appel ont pour leur part émis des doutes quant à savoir si, dans le contexte du soutien alimentaire en faveur du conjoint, le maintien de la liberté de choisir peut être considéré comme un objectif urgent et réel. Ils ont souligné que le Québec a adopté des dispositions *impératives* en matière de soutien alimentaire et a, de ce fait, retiré aux conjoints mariés ou unis civilement leur liberté de choisir, dans un souci de protection et d'indemnisation des conjoints financièrement vulnérables. Par contre, les conjoints de fait se sont vu refuser ce genre de protection, en raison de cette même liberté de choisir que le Québec a estimé non pertinente dans le cas des relations conjugales reconnues formellement. Toutefois, comme l'objectif consistant à préserver la liberté de choisir n'a pas été débattu vigoureusement devant notre Cour par les parties, je l'accepte pour les besoins de l'analyse fondée sur l'article premier.

[359] At the rational connection stage, the government does not face a heavy burden. It must show "that it is reasonable to suppose that the limit may further the goal, not that it will do so" (*Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567, at para. 48). While I find the connection tenuous, I cannot say that excluding *de facto* spouses from the support and division of property protections is wholly unconnected to the goal of allowing couples the freedom to be outside the legal regimes governing marriage and civil union.

[359] À l'étape de l'examen du lien rationnel, l'État ne supporte pas un lourd fardeau. Il doit démontrer « qu'il est raisonnable de supposer que la restriction peut contribuer à la réalisation de l'objectif, et non qu'elle y contribuera effectivement » (*Alberta c. Hutterian Brethren of Wilson Colony*, [2009] 2 R.C.S. 567, par. 48). Bien que le lien invoqué en l'espèce soit ténu à mes yeux, je ne peux affirmer que le fait d'exclure les conjoints de fait du bénéfice des mesures de protection relatives au soutien alimentaire et au partage des biens n'a absolument aucun rapport avec l'objectif qui consiste à accorder à ces couples la liberté de choisir de ne pas être visés par les régimes légaux régissant le mariage et l'union civile.

[360] The critical stage in this case, in my view, is minimal impairment, under which "the government must show that the measures at issue impair the right . . . as little as reasonably possible in order to achieve the legislative objective" (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160). In my view, an outright exclusion of *de facto* spouses cannot be said to be minimally impairing of their equality rights. A presumptively protective scheme, on the other hand, with a right on the part of *de facto* spouses to opt *out*, is an example of an alternative 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.

[360] Dans le présent pourvoi, l'étape cruciale de l'analyse est à mon avis celle de l'atteinte minimale, étape à laquelle « le gouvernement doit établir que les mesures en cause restreignent le droit [. . .] aussi peu que cela est raisonnablement possible aux fins de la réalisation de l'objectif législatif » (*RJR-MacDonald Inc. c. Canada (Procureur général)*, [1995] 3 R.C.S. 199, par. 160). À mon avis, il est impossible d'affirmer que l'exclusion totale des conjoints de fait porte atteinte de façon minimale à leur droit à l'égalité. En revanche, un régime dont la protection s'appliquerait de manière présumée et qui serait assorti d'un droit de retrait en faveur des conjoints de fait constitue un exemple de solution de rechange propre 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.

[361] This Court has generally been reluctant to defer to the legislature in the context of total exclusions from a legislative scheme. In *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, the Court described the lack of funding for sign language interpretation as an approach that did not "reasonably balanc[e] the competing social demands which our society must address" (para. 93, citing *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at p. 314). Similarly, in *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22, the Court held

[361] 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. Dans l'arrêt *Eldridge c. Colombie-Britannique (Procureur général)*, [1997] 3 R.C.S. 624, la Cour a dit, au sujet du financement de services d'interprétation gestuelle, qu'une telle approche n'établissait pas « un équilibre raisonnable entre les revendications sociales concurrentes auxquelles doit s'attaquer notre société » (par. 93, citant *McKinney c. Université de Guelph*, [1990] 3 R.C.S. 229, p. 314). De même,

that, even allowing for "a healthy measure of flexibility . . ., the complete denial of unemployment benefits [was] not an acceptable method of achieving any of the government objectives" (p. 47). And in *Vriend v. Alberta*, [1998] 1 S.C.R. 493, in the context of the total exclusion of sexual orientation from human rights protections, the Court found that "the call for judicial deference [was] inappropriate" (para. 127).

dans *Tétreault-Gadoury c. Canada (Commission de l'emploi et de l'immigration)*, [1991] 2 R.C.S. 22, la Cour a conclu que, même en reconnaissant au législateur « la possibilité de jouir d'une large souplesse [. . .] [le fait d']interdire complètement l'accès aux prestations d'assurance-chômage ne constitu[ait] pas une méthode acceptable pour atteindre l'un quelconque des objectifs énoncés précédemment » (p. 47). Et, dans l'affaire *Vriend c. Alberta*, [1998] 1 R.C.S. 493, relativement à la décision d'exclure totalement l'orientation sexuelle des motifs de distinction interdits en matière de protection des droits de la personne, la Cour a jugé qu'« il ne conv[enait] pas d'invoquer le principe de la retenue judiciaire » (par. 127).

[362] The antipathy towards complete exclusions is hardly surprising, since the government is required under s. 1 to "explain why a significantly less intrusive and equally effective measure was not chosen" (*RJR-MacDonald*, at para. 160). 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.

[362] Cette aversion pour les exclusions complètes n'est guère 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 » (*RJR-MacDonald*, par. 160). 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.

[363] I concede that the exclusion of *de facto* spouses from spousal support and property regimes in Quebec was a carefully considered policy choice. As my colleague LeBel J. points out, 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.

[363] Je concède que 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. Comme le souligne mon collègue le juge LeBel, 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.

[364] This Court concluded in *M. v. H.* that there should be deference to the policy choices that the legislature is "in a better position than the court to make, as in the case of difficult policy judgments

[364] Dans *M. c. H.*, notre Cour a conclu qu'il y a lieu de faire montre de déférence à l'égard des décisions de politique générale que le législateur est « mieux en mesure de faire que le tribunal, comme

regarding the claims of competing groups or the evaluation of complex and conflicting social science research" (para. 79). But it went on to find that the question of spousal support entitlement was *not* a question on which the legislature should be given deference:

> [Since] no group will be disadvantaged by granting members of same-sex couples access to the spousal support scheme under the [*Family Law Act*, R.S.O. 1990, c. F.3], the notion of deference to legislative choices in the sense of balancing claims of competing groups has no application . . . . [para. 126]

[365] The argument was made that *de facto* spouses have other mechanisms available to them that compensate for their exclusion from the support and division of property regimes, specifically the ability to sign a cohabitation agreement and the possibility of claiming for unjust enrichment. However, these contractual and statutory protections available to *de facto* spouses in Quebec fall far short of what married and civil union spouses obtain presumptively, both in their content and in their realistic availability to the most vulnerable *de facto* spouses. The Court in *M. v. H.* has already rejected the view that the availability of either of these options meant that there was no discrimination against same-sex couples who were excluded from spousal support. It held that "neither the common law equitable remedies nor the law of contract are adequate substitutes for the *FLA*'s spousal support regime" and that "if these remedies were considered satisfactory there would have been no need for the spousal support regime" (para. 124). As shall be seen, these alternatives are, in my respectful view, equally inadequate as substitutes for division of property.

par exemple des jugements de principe difficiles concernant les demandes de groupe concurrents ou l'évaluation de recherches complexes et contradictoires en sciences humaines » (par. 79). Toutefois, elle a poursuivi en statuant que la question du droit des conjoints au soutien alimentaire *n'*était *pas* une question qui commandait la déférence envers le législateur :

> Étant donné qu'aucun groupe ne sera défavorisé par l'octroi aux membres des couples de même sexe de l'accès au régime de l'obligation alimentaire entre conjoints prévu par la [*Loi sur le droit de la famille*, L.R.O. 1990, ch. F.3], la notion de retenue à l'égard des choix du législateur appelé à trouver un point d'équilibre entre des groupes concurrents n'a aucune application en l'espèce. [par. 126]

[365] On a plaidé que les conjoints de fait disposent d'autres mécanismes compensant leur exclusion du bénéfice des régimes relatifs au soutien alimentaire et au partage des biens, à savoir la faculté de signer des contrats de cohabitation ou d'exercer une action pour enrichissement injustifié. Or, ces mesures de protection de nature contractuelle et législative dont disposent les conjoints de fait au Québec sont de beaucoup inférieures à celles qu'obtiennent par voie de présomption les conjoints mariés ou unis civilement, autant du point de vue de leur teneur que de la possibilité réaliste que les conjoints de fait les plus vulnérables puissent s'en prévaloir. La Cour a déjà rejeté, dans *M. c. H.*, la thèse selon laquelle la possibilité de recourir à l'une ou l'autre de ces solutions signifiait qu'il n'y avait aucune discrimination à l'endroit des conjoints de même sexe exclus du bénéfice des dispositions relatives au soutien alimentaire. La Cour a jugé que « ni les recours en *equity* prévus par la common law ni le droit des contrats ne peuvent être adéquatement substitués au régime de l'obligation alimentaire entre conjoints prévu par la *LDF* » et que « si ces recours étaient jugés satisfaisants, le régime de l'obligation alimentaire entre conjoints serait inutile » (par. 124). Comme nous le verrons, ces solutions de rechange sont à mon humble avis tout aussi inadéquates pour remplacer le régime de partage des biens.

[366] With respect to cohabitation agreements, Iacobucci J. in *M. v. H.* found that they did not provide an adequate justification for the exclusion of same-sex couples from the statute (see para. 124). A contract requires positive action on the part of the spouses. That means that "[t]hose who want to resolve support issues before the relationship breaks down are forced either to expend resources to devise a suitable contractual arrangement or risk being left without a remedy in law" (para. 122). *De facto* spouses face the same alternative with respect to division of property: since they are excluded from presumptive statutory regimes, they must either expend resources to create contractual protections or accept the risk of being unprotected. Iacobucci J. noted further that contracts provided inferior protection than a statute, such as against bankruptcy (para. 123).

[366] Relativement aux contrats de cohabitation, le juge Iacobucci a conclu, dans *M. c. H.*, qu'ils ne constituaient pas une solution adéquate pour justifier l'exclusion des conjoints de même sexe du bénéfice de la loi (voir le par. 124). Un contrat nécessite des gestes concrets de la part des conjoints. En d'autres mots, « [c]eux qui veulent régler la question [du soutien alimentaire] avant la rupture de l'union sont obligés soit de faire préparer à leur frais une convention adéquate, soit de prendre le risque de se retrouver sans recours juridique » (par. 122). Les conjoints de fait sont placés devant le même dilemme en ce qui concerne le partage des biens : comme ils sont exclus du bénéfice des régimes légaux dont l'application est présumée, ils doivent soit faire dresser à leurs frais une convention de partage soit accepter les risques découlant du fait de n'être pas protégés. Le juge Iacobucci a en outre mentionné que les contrats offrent une protection inférieure à celle accordée par la loi, par exemple en cas de faillite (par. 123).

[367] As to the ability of *de facto* spouses to claim unjust enrichment, *M. v. H.* also firmly rejected this as a viable alternative for spousal support. The Court found that unjust enrichment addressed different interests than a support order and that such a claim was "more onerous [to] claimants [and] available under far narrower circumstances" (para. 120). These comments are a full answer to the notion that the availability of a claim for unjust enrichment is an equitable substitute for spousal support.

[367] Pour ce qui est de la faculté qu'ont les conjoints de fait d'intenter un recours pour enrichissement injustifié, la Cour a également conclu de manière non équivoque dans *M. c. H.* qu'un tel recours ne constituait pas une solution de rechange valable à une ordonnance alimentaire en faveur du conjoint. Elle a jugé qu'une action pour enrichissement injustifié porte sur des intérêts différents de ceux visés par une ordonnance alimentaire et qu'une telle action « impos[e] des exigences plus grandes aux demandeurs et ne peu[t] être exercé[e] qu'en des circonstances bien plus restreintes » (par. 120). Ces remarques réfutent entièrement l'argument voulant que la possibilité d'intenter une action pour enrichissement injustifiée remplace équitablement les mesures de soutien alimentaires en faveur du conjoint.

[368] A claim for unjust enrichment is equally inadequate as a substitute for a statutorily presumptive division of property. The greatest difference between unjust enrichment and the presumptive or mandatory division of property in the *Code* is the burden placed on the claimant. While the partnership of acquests and the family patrimony presume equal sharing, unjust enrichment requires

[368] L'action pour enrichissement injustifié constitue une solution de rechange tout aussi inadéquate au partage des biens présumé par la loi. La principale différence entre cette action et les dispositions du *Code* qui s'appliquent de manière impérative ou présumée au partage des biens est le fardeau de preuve qui est imposé au demandeur par la première. Tandis que le régime de la société

the claimant to establish his or her contribution before the court will order any corresponding compensation.

[369] Critical on this point, in my view, is the legislative history of the family property provisions. As discussed above, the family patrimony was adopted in response to the perceived weaknesses of the compensatory allowance, which allows a spouse to claim compensation for their *demonstrated* contributions to the enrichment of the patrimony of the other spouse (art. 427 *C.C.Q.*). In other words, the compensatory allowance fulfills a very similar role to unjust enrichment. However, the National Assembly specifically decided that the compensatory allowance was an insufficient remedy, because it imposed too high a burden on the claimant. As a result, it established the family patrimony, which was mandatory, did not require proof of contribution, and presumed equal sharing. In light of the fact that the legislature itself did not consider an unjust enrichment-type remedy to be sufficient protection in marital spousal relationships, unjust enrichment is an inadequate alternative remedy for *de facto* spouses under s. 1.

[370] As this Court noted in *Martin*, we can look to the measures taken by the rest of Canada in considering whether there are alternative, less infringing options available (para. 112). Every other province has extended spousal support to unmarried spouses. They have drawn different borders by setting minimum periods of cohabitation before couples are subject to their regimes, and have preserved freedom of choice by allowing couples to opt out. Saskatchewan, Manitoba, British Columbia, Nunavut and the Northwest Territories have also extended statutory division of property to unmarried spouses (with British Columbia's law to that effect

d'acquêts et celui régissant le patrimoine familial ont pour effet de présumer le partage égal du patrimoine, le demandeur à une action pour enrichissement injustifié doit faire la preuve de son apport avant que le tribunal puisse ordonner le paiement d'une indemnité correspondant à cet apport.

[369] À mon avis, l'historique législatif des dispositions concernant les biens familiaux est crucial à cet égard. Comme nous l'avons vu, les règles relatives au patrimoine familial ont été édictées pour remédier à ce qu'on percevait comme des lacunes du mécanisme de la prestation compensatoire, lequel permet aux conjoints mariés ou unis civilement de réclamer une indemnité en compensation de leurs apports *prouvés* à l'enrichissement du patrimoine de l'autre conjoint (art. 427 *C.c.Q.*). Autrement dit, la prestation compensatoire joue un rôle très semblable à celui de l'action pour enrichissement injustifié. Toutefois, l'Assemblée nationale a clairement décidé que la prestation compensatoire constituait une mesure de réparation insuffisante, parce qu'elle impose un fardeau trop lourd au demandeur. Par conséquent, elle a établi le régime du patrimoine familial, qui s'applique impérativement, ne nécessite pas la preuve d'un apport et crée une présomption de partage égal des biens. Compte tenu du fait que le législateur lui-même a considéré qu'un recours analogue à l'action pour enrichissement injustifié ne protégeait pas suffisamment les conjoints mariés ou unis civilement, une telle action constitue, dans le cas des conjoints de fait, une solution de rechange inadéquate au regard de l'article premier.

[370] Comme notre Cour l'a indiqué dans l'arrêt *Martin*, il est possible d'examiner les mesures adoptées dans le reste du Canada pour déterminer s'il existe des solutions de rechange moins attentatoires que les mesures contestées (par. 112). Toutes les autres provinces ont élargi aux conjoints non mariés le bénéfice du soutien alimentaire en faveur du conjoint. Chaque législateur a tracé les contours propres à son régime en fixant 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. La Saskatchewan,

not yet in force). In spite of the lack of a uniform position on division of property, however, and regardless of the various thresholds that the rest of Canada has drawn for unmarried spouses, the existence of these alternatives to total exclusion is instructive.

[371] Quebec is, of course, in no way obliged to mimic any other province's treatment of *de facto* spouses. Quebec not only has a separate system of private law from the rest of Canada, it also has unique historical and societal values which it has a right to express through its legislation. The fact of these other regimes, however, can be helpful in determining that there *is* a less impairing way to fulfill the objective of preserving freedom of choice.

[372] The current opt *in* protections may well be adequate for some *de facto* spouses who enter their relationships with sufficient financial security, legal information, and the deliberate intent to avoid the consequences of a more formal union. But their ability to exercise freedom of choice can be equally protected under a protective regime with an opt *out* mechanism. The needs of the economically vulnerable, however, require presumptive protection no less in *de facto* unions than in more formal ones.

[373] Professor Hélène Belleau's expert report notes that the *de facto* spouses in her sample most likely to be aware that they did not benefit from the same legal protections as married or civil union spouses were those familiar with law through their profession, their spouse's profession, or a prior separation with a previous spouse. Professor Belleau explains that beyond this group who have had some personal or professional experience with law, most

le Manitoba, la Colombie-Britannique, le Nunavut et les Territoires du Nord-Ouest ont étendu l'application des dispositions législatives sur le partage des biens aux conjoints non mariés (la loi de la Colombie-Britannique n'étant toutefois pas encore en vigueur). Toutefois, malgré l'absence d'uniformité sur la question du partage des biens, et en dépit des seuils différents établis dans le reste du Canada pour l'application de ces régimes aux conjoints non mariés, l'existence de ces solutions de rechange à l'exclusion totale est instructive.

[371] Il va de soi que le Québec n'est pas tenu de reproduire le traitement réservé aux conjoints de fait par une autre province. Non seulement le Québec dispose-t-il d'un système de droit privé différent de celui du reste du Canada, mais il possède également des valeurs historiques et sociales uniques, qu'il a le droit d'exprimer par ses lois. Cependant, 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.

[372] Le système actuel d'*adhésion volontaire* aux mesures de protection peut fort bien convenir à certains conjoints de fait qui, au début de leur relation, jouissent d'une sécurité financière suffisante, sont adéquatement renseignés sur le plan juridique et entendent délibérément 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 de protection 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.

[373] Dans son rapport d'expertise, la professeure Hélène Belleau signale que, parmi les conjoints de fait ayant participé à son enquête, les personnes les plus susceptibles de savoir qu'elles ne bénéficiaient pas des mêmes protections légales que les conjoints mariés ou unis civilement étaient celles qui étaient familières avec le droit en raison de leur profession ou de celle de leur conjoint, ou qui avaient déjà vécu une séparation. La professeure Belleau explique

spouses rarely consider, or are ignorant of, the law surrounding *de facto* unions:

[TRANSLATION] On the whole, it was clear that the respondents were mistaken about the rights and obligations applicable to marriage, which they associated more generally with conjugal life, and therefore also with couples living in *de facto* unions. . . .

The majority of *de facto* spouses and of married spouses think that couples who have been living together in *de facto* unions for several years, or where they have children, have the same rights and obligations in the case of a breakdown. . . .

Aside from this misunderstanding, it was also observed that couples rarely discuss legal questions, in particular because such questions are incompatible with the notion of being in love. To discuss the legal questions that circumscribe the conjugal relationship inevitably leads one to foresee the possibility of an eventual breakup. In the context of a proposed marriage or a *de facto* relationship, these questions are not really compatible with the notion of being in love. . . .

For the majority of *de facto* spouses and of married spouses, legal questions are not included in the reflection that takes place when deciding whether to get married. At any rate, they believe that they have the same rights and obligations as married spouses. [Joint Record, vol. 8, at pp. 70-71]

Similarly, in "Controversy Over Couples in Canada: The Evolution of Marriage and Other Adult Interdependent Relationships" (2003), 29 *Queen's L.J.* 41, at p. 53, Nicholas Bala points out that,

while it is doubtless true that "some" cohabitants live together because they have consciously chosen not to assume the obligations of marriage, many cohabitants give little thought to their rights and obligations, or are ill-informed or understandably confused about exactly what rights common-law partners have.

[374] This echoes Dickson J.'s observations in *Rathwell* that for many spouses, issues of economic or legal rights arising from their relationship are

que, à part ce groupe de personnes ayant acquis une certaine expérience personnelle ou professionnelle du droit, la plupart des conjoints réfléchissent rarement aux règles juridiques applicables aux unions de fait ou bien ne les connaissent pas :

Dans l'ensemble, il ressort clairement que les répondants méconnaissent les droits et obligations encadrant le mariage qu'ils associent plus généralement à la vie conjugale et donc aussi, aux couples vivant en union de fait. . .

La majorité des conjoints de fait et des conjoints mariés pensent que les couples vivant en union de fait depuis quelques années, ou lorsqu'ils ont un enfant, ont les mêmes droits et obligations advenant une rupture. . .

Au-delà de cette méconnaissance, on constate également que les questions légales sont peu abordées par les couples, notamment parce qu'elles vont à contre-courant de l'idéologie amoureuse. Aborder les questions juridiques qui balisent la relation conjugale conduit inévitablement à entrevoir la possibilité d'une rupture éventuelle. Ces questions dans le cadre d'un projet de mariage ou encore d'une relation de conjoint de fait cadrent difficilement avec l'idéologie amoureuse. . .

Pour la majorité des conjoints de fait et des conjoints mariés, les questions légales ne font pas partie de la réflexion autour de l'idée de se marier ou non. Ils croient, de toute manière, avoir les mêmes droits et obligations que les gens mariés. [Dossier conjoint, vol. 8, p. 70-71]

De même, dans « Controversy Over Couples in Canada : The Evolution of Marriage and Other Adult Interdependent Relationships » (2003), 29 *Queen's L.J.* 41, p. 53, le professeur Nicholas Bala fait la remarque suivante :

[TRADUCTION] . . . s'il ne fait aucun doute que « certains » conjoints vivent en union de fait parce qu'ils ont sciemment choisi de ne pas assumer les obligations qui découlent du mariage, de nombreux autres réfléchissent peu à leurs droits et à leurs obligations ou sont soit mal informés soit à juste titre incertains en ce qui concerne la nature exacte des droits des conjoints de fait.

[374] Ces observations font écho à celles qu'a faites le juge Dickson dans l'arrêt *Rathwell* et selon lesquelles, pour de nombreux conjoints, les droits

not a preoccupation when the relationship is a happy one. Many couples — married or *de facto* — simply "do not turn their minds to the eventuality of separation and divorce" (p. 444). This lack of awareness of a great number of *de facto* spouses, confirmed by the evidence, 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.

[375] A further weakness of the current opt-in system is its failure to recognize that the choice to formally marry is a mutual decision. One member of a couple can decide to refuse to marry or enter a civil union and thereby deprive the other of the benefit of needed spousal support when the relationship ends. In her dissenting reasons in *Walsh*, L'Heureux-Dubé J. observed that "[t]his results in a situation where one of the parties to the cohabitation relationship preserves his or her autonomy at the expense of the other: 'The flip side of one person's autonomy is often another's exploitation'" (para. 152, citing W. H. Holland, "Marriage and Cohabitation — Has the Time Come to Bridge the Gap?", in *Special Lectures of the Law Society of Upper Canada 1993 — Family Law: Roles, Fairness and Equality* (1994), 369, at p. 380). The case before us resonates with this observation: Ms. A consistently wanted to marry, but Mr. B refused, depriving Ms. A of access to the possibility of spousal support at the end of the relationship.

[376] At the end of the day, the methodology for remedying the s. 15 breach lies with the Quebec legislature. The Quebec scheme currently gives *de facto* spouses the choice of entering into a contract to enshrine certain protections, or marrying and receiving all the protections provided by law, or remaining unbound by any mutual rights or obligations. None of these choices is compromised by a

économiques et juridiques découlant de leur union ne les préoccupent pas tant que le bonheur règne au sein du couple. Bon nombre de couples — mariés ou vivant en union de fait — « ne pensent pas à l'éventualité d'une séparation et d'un divorce », tout simplement (p. 444). Cette méconnaissance qui existe chez un grand nombre de conjoints de fait, et que confirme d'ailleurs la preuve à cet effet, 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.

[375] 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. Un des membres du couple peut décider de refuser de se marier ou de s'unir civilement et ainsi priver l'autre du bénéfice d'un soutien alimentaire nécessaire lorsque la relation prend fin. Dans les motifs dissidents qu'elle a exposés dans *Walsh*, la juge L'Heureux-Dubé a souligné qu'« [i]l en résulte une situation où l'une des parties à l'union de fait conserve son autonomie au détriment de l'autre : [TRADUCTION] "Le revers de l'autonomie de l'un, c'est souvent l'exploitation de l'autre"» (par. 152, citant W. H. Holland, « Marriage and Cohabitation — Has the Time Come to Bridge the Gap? », dans *Special Lectures of the Law Society of Upper Canada 1993 — Family Law : Roles, Fairness and Equality* (1994), 369, p. 380). L'affaire dont nous sommes saisis correspond tout à fait à la situation évoquée dans cette observation : M^me^ A réitérait constamment son souhait de se marier, mais M. B s'y refusait, privant ainsi M^me^ A de la possibilité d'obtenir un soutien alimentaire en cas de rupture de la relation.

[376] Ultimement, c'est au législateur québécois qu'il appartient de choisir la façon de remédier à la violation de l'art. 15. Selon le régime québécois actuel, 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 rester libres de quelque droit ou

presumptively protective scheme of some sort. It is entirely possible for Quebec to design a regime that retains all of these choices. 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 dissolution of their relationship.

obligation réciproque que ce soit. Aucune de ces solutions ne serait compromise par un régime dont la protection s'appliquerait de manière présumée. Il est tout à fait possible pour le Québec de concevoir un régime qui offrirait toutes ces possibilités. 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 également 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 financièrement vulnérables en cas d'échec de la relation.

[377] In view of the conclusion that the provisions are not minimally impairing since other mechanisms for preserving choice are available, it is unnecessary, strictly speaking, to consider the final step of *Oakes*. Nonetheless, there seems to me to be some value in clarifying why the deleterious impact of the exclusion is more pronounced than its salutary effects. The harm of excluding all *de facto* spouses from the protection of the spousal support and family property regimes is clearly profound. Hallée J. at the Superior Court found, based on census figures and expert reports, that the number of *de facto* unions in Quebec continues to rise, representing 34.6% of all Quebec unions in 2006. These exclusions thus impact over a third of Quebec couples.

[377] Compte tenu de la conclusion selon laquelle les dispositions en cause ne sont pas minimalement attentatoires étant donné qu'il existe d'autres mécanismes qui permettraient de préserver la liberté de choisir, il n'est pas nécessaire, à proprement parler, de procéder à la dernière étape de l'analyse établie dans *Oakes*. Néanmoins, j'estime que le fait de préciser les raisons pour lesquelles les effets préjudiciables de l'exclusion du bénéfice des mesures de protection sont plus prononcés que ses effets bénéfiques pourrait avoir une certaine utilité. Le préjudice causé par l'exclusion de tous les conjoints de fait du bénéfice de la protection des régimes applicables en matière de soutien alimentaire en faveur du conjoint et de biens familiaux est évidemment profond. La juge Hallée de la Cour supérieure a conclu, à la lumière des données du recensement et de rapports d'expertise, que le nombre d'unions de fait au Québec ne cesse de croître. En 2006, elles représentaient 34,6 % de toutes les unions dans cette province. L'exclusion du bénéfice des régimes susmentionnés a donc une incidence sur plus du tiers des couples québécois.

[378] 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

[378] 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

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.

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. Or, 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.

[379] 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. Leaving aside the trenchant observation of McLachlin J. in *Miron* about whether such choices are realistically genuine, this freedom would be equally protected under a presumptive scheme. Those for whom a *de facto* union is truly a chosen means to preserve economic independence can still achieve this result by opting out. Since this salutary effect can be achieved without in any way impairing 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 spousal support and family property regimes.

[379] 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. Abstraction faite de la remarque incisive de la juge McLachlin dans *Miron* quant au caractère véritablement authentique d'un tel choix, cette liberté serait tout aussi bien protégée dans le cadre d'un régime qui s'appliquerait de manière présumée. 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.

[380] Because the distinction in excluding *de facto* spouses from the protective support regime in art. 585 and the division of property provisions in arts. 401 to 430, 432, 433 and 448 to 484 of the *Civil Code* cannot be justified, these articles are unconstitutional.

[380] Étant donné que la distinction découlant de l'exclusion des conjoints de fait de la protection du régime de soutien alimentaire établi à l'art. 585 et des mesures de partage des biens prévues aux art. 401 à 430, 432, 433 et 448 à 484 du *Code civil* ne peut être justifiée, ces dispositions sont inconstitutionnelles.

[381] I would therefore allow Ms. A's appeal in part and dismiss the appeals of the Attorney General of Quebec and Mr. B.

English version of the reasons of Deschamps, Cromwell and Karakatsanis JJ. delivered by

[382] DESCHAMPS J. (dissenting in part in result) — I agree with Abella J. that 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. Unlike my colleague, however, I do not view all these measures as a package. Nor can I endorse the position of my colleague LeBel J. that the majority of the protective measures constitute a mandatory primary regime with a single dominant objective. 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. My analysis leads me to conclude that only the exclusion from support is not justified under s. 1 of the *Canadian Charter of Rights and Freedoms* ("*Charter*").

[383] Aside from support, the measures in question are the matrimonial regime, the compensatory allowance, the family residence and the family patrimony. The effect of these various measures, which are the result of successive actions by the Quebec legislature, has been to gradually increase the protection provided to married and civil union spouses. However, art. 585 of the *Civil Code of Québec*, S.Q. 1991, c. 64 ("*C.C.Q.*"), establishes that the right to support granted to persons in need who are part of the family unit is distinct in that it does not have a compensatory function and does not depend on the consent of the debtor of support. This provision is different from the provisions on partition of property, which address a greater

[381] En conséquence, j'accueillerais l'appel de M^me^ A en partie et je rejetterais les appels interjetés par le procureur général du Québec et M. B.

Les motifs des juges Deschamps, Cromwell et Karakatsanis ont été rendus par

[382] LA JUGE DESCHAMPS (dissidente en partie quant au résultat) — Je suis d'accord avec la juge Abella pour conclure que 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. Je ne peux cependant, comme le fait ma collègue, considérer ces différentes mesures sur un même pied. Par ailleurs, je ne peux non plus adhérer à la thèse de mon collègue le juge LeBel selon laquelle la majorité des mesures de protection constituent un régime primaire impératif visant un seul et même objectif dominant. 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. Suivant l'analyse que j'en fais, seule l'exclusion de la pension alimentaire n'est pas justifiée en vertu de l'article premier de la *Charte canadienne des droits et libertés* (« *Charte* »).

[383] Outre la pension alimentaire, les mesures en cause sont le régime matrimonial, la prestation compensatoire, la résidence familiale et le patrimoine familial. Ces différentes mesures, qui résultent d'interventions successives du législateur québécois, ont eu pour effet d'augmenter progressivement la protection accordée aux personnes mariées ou unies civilement. Par contre, l'art. 585 du *Code civil du Québec*, L.Q. 1991, ch. 64 (« *C.c.Q.* »), consacre le caractère distinct du droit à une pension alimentaire reconnu aux personnes nécessiteuses faisant partie de la cellule familiale, et ce, indépendamment de toute fonction compensatoire ou du consentement du débiteur alimentaire. Cette disposition se distingue de celles régissant le partage des biens,

variety of needs, including the needs to protect vulnerable spouses, to compensate for contributions made by the parties while living together and to recognize the economic union formed by married and civil union spouses. I agree with the Court of Appeal's conclusion that the exclusion of *de facto* spouses from the protection of support cannot be treated the same way as their exclusion from that of the other measures (2010 QCCA 1978, [2010] R.J.Q. 2259). For the reasons that follow, I would dismiss the appeals.

[384] In my analysis on the right of *de facto* spouses to equality, I will not be relying directly on *Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83, [2002] 4 S.C.R. 325. I find that certain aspects of that decision have not survived the recent decisions of this Court 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, particularly the fact that, according to it, the possibility for the parties of marrying to benefit from the measures relating to patrimonial property was one of the factors to be applied in determining whether the right to equality was infringed rather than in determining whether the infringement was justified under s. 1 of the *Charter*. In my opinion, the fact that the parties' freedom of choice was invoked at the infringement stage of the analysis can only be attributed to the application of the test established in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497. The autonomy of the will of the parties becomes relevant only at the justification stage, since this is the objective being pursued by the Quebec legislature.

[385] My colleagues LeBel and Abella JJ. do not take issue with the recognition of marital status as an analogous ground for the purposes of the analysis under s. 15 of the *Charter*. LeBel J. finds that the distinction at issue is not discriminatory. With respect, I agree instead with Abella J.'s analysis of s. 15 of the *Charter*. The exclusion of *de facto* spouses from the protections provided for in the *C.C.Q.* perpetuates a historical disadvantage (*Withler*, at paras. 3, 35, 37 and 54). The Court has recognized the fact of being unmarried as an

lesquelles répondent à des besoins plus variés, dont celui de protéger le conjoint vulnérable, de compenser l'apport des parties durant la vie commune et de reconnaître le fait de l'union économique formée par les couples mariés ou unis civilement. Je souscris à la conclusion de la Cour d'appel selon laquelle l'exclusion des conjoints de fait de toute protection alimentaire ne peut être traitée de la même manière que l'exclusion des conjoints de fait de la protection des autres mesures (2010 QCCA 1978, [2010] R.J.Q. 2259). Pour les motifs qui suivent, je rejetterais les appels.

[384] Dans mon analyse du droit des conjoints de fait à l'égalité, je ne m'appuie pas directement sur l'arrêt *Nouvelle-Écosse (Procureur général) c. Walsh*, 2002 CSC 83, [2002] 4 R.C.S. 325. En effet, j'estime que certains aspects de cette décision n'ont pas survécu aux récents arrêts de notre Cour *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, particulièrement le fait que la faculté qu'ont les parties de se marier pour bénéficier des mesures relatives aux biens patrimoniaux ait été considérée comme un des facteurs dans l'analyse de l'atteinte au droit à l'égalité plutôt que dans celle de la justification au regard de l'article premier de la *Charte*. Le fait que la liberté de choisir des parties ait été invoquée à l'étape de l'étude de l'atteinte au droit ne peut, à mon avis, s'expliquer que par l'application de la grille d'analyse établie dans *Law c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1999] 1 R.C.S. 497. L'autonomie de la volonté des parties n'intervient, selon moi, qu'à l'étape de la justification, puisqu'il s'agit de l'objectif avancé par le législateur québécois.

[385] Mes collègues les juges LeBel et Abella ne remettent pas en question la reconnaissance de l'état matrimonial comme motif analogue pour les besoins de l'analyse fondée sur l'art. 15 de la *Charte*. Le juge LeBel conclut que la distinction en litige n'est pas discriminatoire. Avec égards pour l'opinion qu'exprime mon collègue, je souscris à l'analyse que fait la juge Abella de l'art. 15 de la *Charte*. L'exclusion des conjoints de fait du bénéfice des protections prévues par le *C.c.Q.* perpétue un désavantage historique (*Withler*, par. 3,

analogous ground because, historically, unmarried persons were 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 (*Miron v. Trudel*, [1995] 2 S.C.R. 418, at para. 152). The Attorney General of Quebec therefore had to justify this distinction.

I. Justification

[386] From a functional perspective, all the impugned measures have the effect of protecting married and civil union spouses who are in need following a separation. However, since support and the other protections do not have all the same bases, I find that the Court of Appeal was correct to distinguish support.

[387] In *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, at para. 15, McLachlin J. (as she then was), writing for the Court, recognized that there are three possible bases for support: the first is compensatory, the second contractual and the third non-compensatory. Although the "autonomist" trend that has predominated for the last 50 years or so has emphasized the compensatory and contractual aspects, the non-compensatory basis nevertheless continues to be relevant. McLachlin J.'s comments on the noncompensatory basis for support in the context of marriage are general enough to extend to *de facto* spouses (para. 31):

The mutual obligation view of marriage also serves certain policy ends and social values. First, it recognizes

35, 37 et 54). La Cour a reconnu que le statut de personne non mariée constitue un motif analogue, parce que, historiquement, 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 (*Miron c. Trudel*, [1995] 2 R.C.S. 418, par. 152). Il était donc nécessaire pour le procureur général du Québec de justifier cette distinction.

I. Justification

[386] Fonctionnellement, toutes les mesures en cause ont pour effet de protéger les personnes mariées ou unies civilement qui se retrouvent dans le besoin à la suite d'une séparation. Cependant, comme les fondements sur lesquels reposent l'aide alimentaire et les autres mesures de protection ne sont pas tous les mêmes, j'estime que la Cour d'appel a eu raison d'établir une distinction pour la pension alimentaire.

[387] Dans *Bracklow c. Bracklow*, [1999] 1 R.C.S. 420, par. 15, la juge McLachlin (maintenant Juge en chef), qui s'exprimait alors pour la Cour, a reconnu que la pension alimentaire peut reposer sur trois fondements, un premier de nature compensatoire, un deuxième de nature contractuelle et un troisième de nature non compensatoire. Si le courant autonomiste qui prédomine depuis une cinquantaine d'années a mis au premier plan les aspects compensatoire et contractuel, le fondement non compensatoire demeure néanmoins toujours présent. Le caractère général des propos de la juge McLachlin au sujet du fondement non compensatoire de la pension alimentaire dans le contexte du mariage permet de les étendre aux conjoints de fait (par. 31) :

La conception du mariage fondée sur l'obligation mutuelle satisfait également à certains objectifs de politique

the reality that when people cohabit over a period of time in a family relationship, their affairs may become intermingled and impossible to disentangle neatly. When this happens, it is not unfair to ask the partners to continue to support each other (although perhaps not indefinitely). Second, it recognizes the artificiality of assuming that all separating couples can move cleanly from the mutual support status of marriage to the absolute independence status of single life, indicating the potential necessity to continue support, even after the marital "break". Finally, it places the primary burden of support for a needy partner who cannot attain post-marital self-sufficiency on the partners to the relationship, rather than on the state, recognizing the potential injustice of foisting a helpless former partner onto the public assistance rolls. [Emphasis added.]

générale et à certaines valeurs sociales. Premièrement, elle reconnaît que, lorsque des gens cohabitent pendant un certain temps dans une relation familiale, leurs affaires peuvent devenir entremêlées et impossibles à démêler de manière ordonnée. Quand cela se produit, il n'est pas injuste de demander aux partenaires de continuer à subvenir mutuellement à leurs besoins (quoique peut-être pas indéfiniment). Deuxièmement, elle reconnaît qu'il est irréaliste de supposer que tous les couples qui se séparent pourront facilement passer de l'obligation alimentaire mutuelle du mariage à l'indépendance absolue du célibat, d'où la nécessité éventuelle de poursuivre le versement d'aliments même après la « rupture » du mariage. Enfin, elle impose aux partenaires de la relation, plutôt qu'à l'État, l'obligation principale de verser des aliments au partenaire dans le besoin qui est incapable de parvenir à l'indépendance économique après le mariage, reconnaissant qu'il pourrait être injuste d'obliger un ex-partenaire sans ressources à joindre les rangs des assistés sociaux. [Je souligne.]

[388] These comments, together with others she had made in *Miron*, make it clear that the non-compensatory basis is just as valid for *de facto* spouses as for married and civil union spouses, since *de facto* spouses may find themselves in a position of vulnerability without having had the choice of getting married or not getting married (*Miron*, at para. 153):

In theory, the individual is free to choose whether to marry or not to marry. In practice, however, the reality may be otherwise. The sanction of the union by the state through civil marriage cannot always be obtained. The law; the reluctance of one's partner to marry; financial, religious or social constraints — these factors and others commonly function to prevent partners who otherwise operate as a family unit from formally marrying. In short, marital status often lies beyond the individual's effective control. [Emphasis added.]

[388] Conjugués à ceux qu'elle a formulés dans *Miron*, ces commentaires font clairement ressortir que le fondement non compensatoire est tout aussi valable pour les conjoints de fait que pour les personnes mariées ou unies civilement, car ils peuvent se retrouver dans une situation de vulnérabilité sans avoir eu le choix de se marier ou non (*Miron*, par. 153) :

En théorie, la personne est libre de choisir de se marier ou non. Cependant, en pratique, la réalité pourrait bien être tout autre. Il n'est pas toujours possible d'obtenir la sanction de l'union par l'État par un mariage civil. La loi, l'hésitation à se marier de l'un des partenaires, les contraintes financières, religieuses ou sociales sont autant de facteurs qui empêchent habituellement des partenaires, qui par ailleurs fonctionnent comme une unité familiale, de se marier officiellement. Bref, l'état matrimonial échappe souvent au contrôle de la personne. [Je souligne.]

[389] The changes that have been made to the rules governing support in Quebec confirm that this measure is distinct. In the codification of 1866, the Quebec legislature provided that married persons had an obligation of succour to one another (art. 173 of the *Civil Code of Lower Canada*, obligation reiterated in art. 392 of the *Civil Code of Québec*). At the time of the major reform of family law in 1980, the legislature considered it appropriate to

[389] L'évolution des règles régissant la pension alimentaire au Québec confirme le caractère distinct de cette mesure. Dès la codification en 1866, le législateur québécois a prévu l'obligation de secours entre personnes mariées (art. 173 du *Code civil du Bas Canada*, obligation reprise à l'art. 392 du *Code civil du Québec*). Lors de la grande réforme du droit de la famille en 1980, le législateur a jugé pertinent de faire de l'obligation alimentaire résultant

make the obligation of support resulting from the creation of a family unit a separate requirement. That obligation was incorporated into the *Civil Code of Québec* (1980), in art. 633. When the *Civil Code of Québec* was enacted in 1991, the obligation was set out in art. 585, which is in Book Two on the family, under Title Three, "Obligation of Support". That title is separate from the one dealing with the rules of marriage, namely Title One, "Marriage". In 2002, the obligation in question was extended to civil union spouses.

[390] It can be seen from the legislative history as set out by LeBel J. that the autonomist trend had a strong influence on the reform of the rules governing cohabitation. However, that trend was not what led to the recognition of the obligation of support itself or to the decision to make it a separate obligation. Rather, art. 585 reflects the non-compensatory basis, which is closely tied to the creation of the "family unit" referred to in *Miron*. This interpretation is reinforced by the observation that art. 585 includes not only married and civil union spouses but also children and relatives. In short, the family unit benefits from the right to support.

[391] The bases for the other disputed measures vary. Several of them can easily be linked to the autonomist movement, while others are motivated by a desire to protect the disadvantaged spouse and establish rules of fairness between spouses. The oldest of the measures, the legal regime of partnership of acquests (art. 432), was adopted in 1970. As LeBel J. explains, it was introduced to counter a tendency among spouses to choose the regime of separation of property, which often left wives with nothing if the marriage broke down. The regime of partnership of acquests gives spouses control over the property they acquire during the marriage and provides a basis for recognizing, if the marriage breaks down and property is to be partitioned, that the marriage gave rise to an "economic union" that results in a presumptive claim to equal standards of living: *Moge v. Moge*, [1992] 3 S.C.R. 813, at p. 870. Two of the other measures were part of the major reform of family law that took place in 1980: the compensatory

de la création d'une unité familiale une prescription autonome. Cette obligation est intégrée au *Code civil du Québec* (1980) à l'art. 633. À l'occasion de l'adoption du *Code civil du Québec* en 1991, elle est inscrite à l'art. 585, qui fait partie du Livre deuxième, traitant de la famille, sous le Titre troisième « De l'obligation alimentaire », un titre distinct de celui touchant les règles régissant le mariage, à savoir le Titre premier « Du mariage ». En 2002, l'obligation en question a été étendue aux conjoints unis civilement.

[390] Il ressort de l'historique législatif fait par le juge LeBel que la réforme des règles régissant la vie commune a été fortement influencée par le courant autonomiste. Ce courant n'est cependant à l'origine ni de la reconnaissance de l'obligation alimentaire elle-même ni de la décision d'en faire une obligation autonome. L'article 585 reprend plutôt le fondement non compensatoire intimement lié à la création de l'« unité familiale » évoquée dans l'arrêt *Miron*. Cette interprétation est renforcée par la constatation que cette disposition inclut non seulement les époux et les conjoints unis civilement mais aussi les enfants et les parents. En somme, l'unité familiale bénéficie du droit aux aliments.

[391] Le fondement des autres mesures contestées varie. Plusieurs peuvent facilement être rattachées au mouvement autonomiste, alors que d'autres découlent de la volonté de protéger le conjoint défavorisé et établissent des règles d'équité conjugale. La plus ancienne des mesures, le régime légal de la société d'acquêts (art. 432), a été adoptée en 1970. Comme le précise le juge LeBel, l'instauration de ce régime visait à contrer la tendance des époux à choisir le régime de la séparation de biens, lequel laissait souvent les épouses démunies lors de la rupture. Le régime de la société d'acquêts confère aux époux la maîtrise des biens qu'ils acquièrent pendant le mariage et permet, lors de la rupture et du partage, de reconnaître que le mariage fait naître une « union économique » donnant lieu à une présomption d'égalité de niveau de vie : *Moge c. Moge*, [1992] 3 R.C.S. 813, p. 870. Deux des autres mesures font partie de la grande réforme du droit de la famille de 1980, à savoir la prestation compensatoire (art. 427 à 430)

allowance (arts. 427 to 430) and the family residence (arts. 401 to 413). As can be seen from the wording of art. 427, the former has a compensatory basis and is intended to recognize the contribution one spouse may have made to the other spouse's patrimony. The purpose of this measure is to protect the spouse who made the contribution, thereby ensuring that the spouses' economic autonomy is recognized — one spouse does not work for the other as a volunteer. As for the provisions protecting the family residence, their fundamental purpose is to protect the family unit. The final measure, the family patrimony (arts. 414 to 426), dates back to 1989. I agree with LeBel J. that the legislature's objectives were to "remedy the problems encountered by women who had married under the regime of separation of property, make up for the ineffectiveness of the compensatory allowance and redefine marriage" (para. 74). Thus, the purpose of these provisions is, first and foremost, to protect the contributions made by the spouses and establish a legislative framework for the economic partnership of the parties in relation to family property.

[392] Because of the diversity of legislative sources and the variety of objectives being pursued and means that have been adopted by the Quebec legislature, it is impossible to place the majority of the measures at issue under a single umbrella, that of the "protection of vulnerable persons", or to conclude that these measures should form an inflexible unit described as a "primary" regime, which, I should add, is a concept to which the legislature did not refer. Moreover, 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.

[393] There is another reason, a pragmatic one, why a distinction must be drawn between the measures related to property and those related to support. 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 such as the family residence or pension plans can be acquired

et la résidence familiale (art. 401 à 413). Comme le libellé de l'art. 427 l'indique, la première a un fondement compensatoire et vise à faire reconnaître la contribution qu'un époux peut avoir apportée au patrimoine de son conjoint. Cette mesure vise à protéger le conjoint ayant été à la source de l'apport, permettant de reconnaître par le fait même l'autonomie économique des époux — l'un n'est pas au service bénévole de l'autre. Les dispositions relatives à la protection de la résidence familiale visent fondamentalement à protéger la cellule familiale. La dernière mesure, le patrimoine familial (art. 414 à 426), date de 1989. À l'instar du juge LeBel, je suis d'avis que les objectifs poursuivis par le législateur sont les suivants : « . . . remédier aux difficultés subies par les femmes mariées en séparation de biens, pallier l'inefficacité de la prestation compensatoire et redéfinir le mariage » (par. 74). Ces dispositions ont donc d'abord et avant tout pour but de protéger la contribution des conjoints et de consacrer l'union économique des parties pour ce qui est des biens familiaux.

[392] La diversité des sources législatives de même que la variété des objectifs poursuivis et des moyens utilisés par le législateur québécois ne permettent ni de regrouper la majorité des mesures en cause sous un chapeau unique, à savoir la « protection des personnes vulnérables », ni de conclure que ces mesures devraient former un bloc rigide dit « primaire », notion que le législateur n'utilise d'ailleurs pas. De plus, 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.

[393] Un autre facteur, pragmatique celui-là, commande de distinguer les mesures qui ont trait à la propriété de celles qui concernent la pension alimentaire. 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 comme la résidence familiale ou des

only as a result of a conscious act. 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. In short, I find that the Court of Appeal was correct to distinguish the right to support from the patrimonial rights.

II. Support

[394] I agree with Abella J. that, since the parties do not really dispute that the objective of promoting the autonomy of the parties is pressing and substantial, the Court need not discuss this stage of the justification analysis in detail. I also agree with her that there is a rational connection, given that even a tenuous connection will satisfy the constitutional requirement in this regard. Since the obligation of support is mandatory for married and civil union spouses, the exclusion of *de facto* spouses means that those who do not wish to be bound by such an obligation are able to avoid it. This is the confirmation of a situation that, although undesirable in cases in which interdependence is the cause of the vulnerability of the spouse in need, constitutes a form of autonomy nonetheless.

[395] However, I cannot agree that this measure meets the minimal impairment test. The affected interest is vital to persons who have been in a relationship of interdependence. I will take the liberty of adapting the following comment of Cory and Iacobucci JJ. in *M. v. H.*, [1999] 2 S.C.R. 3, at para. 72, to the context of the case at bar:

. . . the interest protected by [support] is fundamental, namely the ability to meet basic financial needs following the breakdown of a relationship characterized by intimacy and economic dependence. Members of [unmarried] couples are entirely ignored by the statute, notwithstanding the undeniable importance to them of the benefits accorded by the statute.

régimes de rente ne peut résulter que d'un geste conscient. 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. En somme, j'estime que la Cour d'appel a eu raison de distinguer le droit à la pension alimentaire des droits patrimoniaux.

II. Pension alimentaire

[394] À l'instar de la juge Abella, j'estime qu'en l'absence de contestation réelle par les parties du caractère urgent et réel de l'objectif de promotion de l'autonomie des parties, la Cour ne devrait pas s'attarder sur cet élément de l'analyse de la justification. Comme elle, je reconnais aussi l'existence d'un lien rationnel, compte tenu du fait qu'un tel lien, même ténu, satisfait à l'exigence constitutionnelle. Puisque l'obligation alimentaire s'impose impérativement aux conjoints mariés ou unis civilement, le fait de ne pas assujettir à celle-ci les conjoints de fait permet à la partie ou aux parties qui ne veulent pas être liées par cette obligation d'y échapper. C'est la consécration d'un état qui, bien que peu souhaitable dans les cas où l'interdépendance est la cause de la vulnérabilité du conjoint dans le besoin, demeure tout de même une forme d'autonomie.

[395] Je ne peux cependant me rallier à la thèse voulant que cette mesure satisfasse au critère de l'atteinte minimale. L'intérêt touché est vital pour les personnes ayant vécu une relation d'interdépendance. Je me permets d'adapter au contexte de la présente affaire les propos tenus par les juges Cory et Iacobucci, dans *M. c. H.*, [1999] 2 R.C.S. 3, par. 72 :

. . . le droit protégé par [la pension alimentaire] est fondamental, savoir la capacité de satisfaire à des besoins financiers de base après la rupture d'une union caractérisée par l'intimité et la dépendance financière. La loi passe complètement sous silence les membres des couples [non mariés], malgré l'importance indéniable que revêtent pour ces derniers les avantages qu'elle confère.

[396] 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, 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. As the majority of the Court recognized in *Miron*, it is possible for a couple to remain unmarried contrary to the ardent wish of one of its members, the vulnerable one. As McLachlin J. said, freedom of choice is, or may be, theoretical.

[396] 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 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. Comme le reconnaît la majorité de la Cour dans l'arrêt *Miron*, il est possible qu'un couple ne soit pas marié en dépit du désir profond de l'un des membres du couple, la partie vulnérable. Comme l'a dit la juge McLachlin, la liberté de choix est, ou peut être, théorique.

[397] The Quebec government's decision to take care of persons in need by providing them with social assistance benefits is not likely to make up for the exclusion of *de facto* spouses from the protection of support. Minimalist assistance such as this is not an adequate response. Social assistance is intended to be a measure of last resort and is not a reasonable substitute for support from a spouse who can afford to pay it.

[397] La décision de l'État québécois de prendre en charge les personnes démunies en leur fournissant des prestations d'aide sociale ne constitue pas une mesure propre à compenser l'exclusion des conjoints de fait de la protection de la pension alimentaire. Cette assistance minimaliste n'est pas une réponse adéquate. L'aide sociale se veut une mesure de dernier recours et ne constitue pas un substitut raisonnable au soutien alimentaire que peut payer le conjoint qui en a les moyens.

[398] In *Walsh*, since the Court was not dealing with the issue of exclusion from support, it did not enquire into either the bases for the obligation of support or the fact that a relationship of interdependence may develop and be imposed on one of the parties without his or her having made a personal choice in this regard. That case is therefore of no assistance on this aspect of the instant case.

[398] Dans l'arrêt *Walsh*, comme la Cour n'était pas saisie de la question de l'exclusion du bénéfice de la protection alimentaire, elle ne s'est interrogée ni sur les fondements de l'obligation alimentaire ni sur le fait qu'une relation d'interdépendance peut se créer et s'imposer à une des parties sans que cette situation ne résulte de son choix personnel. Cette décision n'est donc d'aucun secours sur cet aspect de la présente affaire.

[399] The concept of "mutual obligation" as the non-compensatory basis for the obligation of support must guide legislators in seeking ways to

[399] La notion d'« obligation mutuelle » comme fondement non compensatoire de l'obligation alimentaire doit inspirer les législateurs dans la

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. The legislature could, for example, have imposed on the parties an obligation to resolve their separation fairly and imposed on the dissatisfied party the burden of proving that the conditions of separation are unfair. Such a requirement would respect the autonomy of the parties while preventing abuse. This is only one of a number of possible solutions, and I mention it only to illustrate the fact that the legislature has less intrusive means at its disposal. The finding that there is a total exclusion from support without any mitigation of the effects of that exclusion is sufficient for me to conclude, like the Court of Appeal, that this measure is not justified under s. 1 of the *Charter*.

III. Measures Related to Rights of Ownership

[400] In my opinion, I must accept, as in the case of support, that the objective of promoting the autonomy of the parties is pressing and substantial and that a rational connection has been established.

[401] Regarding the compensatory allowance, I find that the exclusion of *de facto* spouses from this measure represents a minimal impairment. On the one hand, the right is in effect patrimonial in nature. In this regard, I take into account my conclusion that a spouse who can afford to do so must pay support to a spouse who needs it. The negation of this protective measure therefore does not compromise the basic ability of the former spouse to survive the breakdown of the relationship of interdependence with as much dignity as possible. On the other hand, although the legislature did not eliminate this measure, the debate that preceded the enactment of the provisions on the family patrimony shows that it was dissatisfied with decisions in which courts had failed to give sufficient recognition to the spouses' respective contributions. That debate should provide the courts with a sound basis for interpreting the

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. Le législateur aurait pu, par exemple, imposer aux parties l'obligation de régler leur séparation de façon équitable et imposer à la personne insatisfaite le fardeau de prouver l'iniquité des conditions de séparation. Une telle exigence respecterait l'autonomie des parties tout en prévenant les abus. Il ne s'agit là que d'une solution parmi d'autres, que je présente uniquement pour illustrer que le législateur dispose de moyens moins attentatoires. La constatation qu'il y a exclusion totale du bénéfice de la pension alimentaire, sans aucune mitigation des effets de cette situation, me suffit pour conclure, comme la Cour d'appel, que cette mesure n'est pas justifiée au sens de l'article premier de la *Charte*.

III. Mesures touchant les droits de propriété

[400] Comme pour l'analyse touchant à la pension alimentaire, je dois à mon avis accepter que l'objectif de recherche d'autonomie des parties est urgent et réel et que le lien rationnel a été établi.

[401] En ce qui a trait à la prestation compensatoire, je reconnais que l'exclusion des conjoints de fait du bénéfice de cette mesure constitue une atteinte minimale. D'une part, il s'agit en effet d'un droit de nature patrimoniale. Je tiens compte de ma conclusion que le conjoint qui en a les moyens doit payer une pension alimentaire à celui qui en a besoin. La négation de cette mesure de protection ne compromet donc pas la capacité fondamentale de l'ex-conjoint de survivre à la rupture de la relation d'interdépendance le plus dignement possible. D'autre part, bien que cette mesure n'ait pas été éliminée par le législateur, les débats législatifs qui ont précédé l'adoption des dispositions sur le patrimoine familial révèlent l'insatisfaction du législateur à l'endroit de la jurisprudence ne reconnaissant pas suffisamment l'apport respectif des conjoints. Ces débats devraient offrir aux tribunaux

Civil Code's provisions on unjust enrichment in a manner consistent with the concept of equality entrenched in the *Charter*. Although total exclusion was certainly not the only possible solution for the legislature, the means that are still available to the vulnerable party are sufficient to meet the minimal impairment and balance of convenience tests.

[402] As for the partnership of acquests — the legal matrimonial regime — I find that this measure is also justified. First, this right too is patrimonial in nature. Unlike support, this measure does not relate to the ability of vulnerable persons to meet their basic needs. Next, participation in the legal regime requires a positive action by the parties. It is not a state resulting solely from the passage of time like the state of dependency that can gradually take hold in the parties' relationship. Although it is not a contract, the formalization of a union through a marriage or civil union ceremony nevertheless constitutes consent that is given at a specific time, most often before a relationship of interdependence develops. In seeking ways to promote the autonomy of the parties, it was difficult for the legislature to avoid providing for, in parallel with the conventional regimes and the legal regime, a "no regime" option. In addition, like married and civil union spouses who opt for the legal regime, *de facto* spouses, while living together, remain completely autonomous and retain full ownership of the property they acquire. Of course, some *de facto* spouses will not be concerned about maintaining a fair division of the property acquired during the time they live together. If one spouse has been unjustly enriched at the other's expense, however, this could be rectified by an action for unjust enrichment, interpreted, as I mentioned above, generously and in a manner consistent with the *Charter*.

[403] My reasons for concluding that the exclusion of *de facto* spouses from the protection of the family patrimony is justified are similar to those

une base solide leur permettant d'interpréter les dispositions du *Code civil* concernant l'enrichissement injustifié d'une manière conforme au concept d'égalité consacré par la *Charte*. Certes, l'exclusion totale n'était pas la seule solution à la disposition du législateur, mais les moyens dont peut toujours se prévaloir la partie vulnérable sont suffisants pour satisfaire au critère de l'atteinte minimale et à celui de la balance des inconvénients.

[402] Pour ce qui est de la société d'acquêts — le régime matrimonial légal —, j'estime que cette mesure est elle aussi justifiée. D'abord, ici encore, il s'agit d'un droit de nature patrimoniale. À l'inverse de la pension alimentaire, cette mesure n'influe pas sur la capacité de la personne vulnérable de subvenir à ses besoins de base. Ensuite, le régime légal est un régime auquel les parties adhèrent en faisant un geste positif. Il ne constitue pas un état qui résulte du seul écoulement du temps, comme l'état de dépendance qui peut s'installer graduellement entre les parties. Quoiqu'il ne s'agisse pas d'un contrat, la formalisation de l'union par la cérémonie du mariage ou de l'union civile constitue toutefois un consentement donné à un moment précis, lequel précède habituellement la relation d'interdépendance. Dans la recherche des moyens propres à favoriser l'autonomie des parties, le législateur pouvait difficilement éviter de prévoir, parallèlement aux régimes conventionnels et au régime légal, une option « sans régime ». De plus, tout comme les époux ou les conjoints unis civilement qui optent pour le régime légal, les conjoints de fait conservent pendant la vie commune toute leur autonomie ainsi que la pleine propriété des biens dont ils se portent acquéreurs. Évidemment, il arrivera que certains conjoints de fait ne se soucieront pas de maintenir une répartition équitable des biens acquis pendant leur vie commune. Toutefois, si un conjoint s'est enrichi injustement aux dépens de l'autre, le recours en enrichissement injustifié — interprété comme je l'ai décrit ci-dessus de façon généreuse et conforme à la *Charte* — pourra corriger cette situation.

[403] Les motifs m'amenant à conclure que l'exclusion des conjoints de fait du bénéfice de la protection du patrimoine familial est justifiée

set out above. First, the affected interest is once again patrimonial in nature. Next, property becomes part of the family patrimony because the parties have deliberately decided to acquire it. Neither a residence nor movable property becomes part of a party's patrimony over time without concrete action being taken. Unlike the interdependence that sometimes steals into conjugal life, over which the parties have no real control, the acquisition of patrimonial property results from decisions regarding which the government is justified in respecting the autonomy of the parties. The rules on the family patrimony were not established without causing a stir in Quebec society. At the time when they were adopted, there were transitional measures allowing married spouses to opt out of the protection so that they could not complain that their property had been "expropriated". In the future, individuals would be able to opt out of these rules by not marrying.

[404] I recognize that support and the division of assets are both measures that make it possible to ease the burden created by the breakdown of a relationship of economic interdependence. However, the division of patrimonial property on the basis of an economic union in which each party is entitled to an equal share is based first and foremost on a laudable objective pursued by the legislature. The government had the power to impose measures of patrimonial protection on a given group, and it was not obliged to impose them on everyone. Those who are excluded from the application of these measures nevertheless do not lack ways to form an economic union analogous to the one imposed on persons who are married or in a civil union; they can, for example, purchase their residence jointly. There are protections that apply to spouses even if they have not formalized their relationship by choosing a protected form of union. As I mentioned above, a vulnerable spouse who is in need could be awarded support. Thus, in assessing what the debtor of support can afford to pay, the court must take all the debtor's resources, including patrimonial property, into account. To

se rapprochent de ceux que j'ai exposés précédemment. D'abord, l'intérêt visé a, lui aussi, un caractère patrimonial. Ensuite, les biens composant le patrimoine familial en font partie parce que les parties ont pris la décision délibérée de les acquérir. Ni une résidence, ni des meubles ne s'introduisent au fil du temps dans le patrimoine d'une partie sans un geste concret à cet effet. À la différence de l'interdépendance qui s'insinue parfois dans la vie conjugale sans que les parties ne puissent vraiment influer sur cette situation, l'acquisition de biens patrimoniaux procède de décisions pour lesquelles l'État est justifié de respecter l'autonomie des parties. L'instauration des règles régissant le patrimoine familial ne s'est pas faite sans créer de remous au sein de la société québécoise. Lors de l'adoption du régime, des mesures transitoires permettaient aux conjoints mariés de s'exclure de sa protection, afin qu'ils ne puissent se plaindre d'avoir d'une certaine manière fait l'objet d'une « expropriation ». Pour le futur, la façon de s'exclure du champ d'application de ce régime consistait à ne pas se marier.

[404] Je reconnais que l'attribution d'une pension alimentaire et la répartition d'éléments d'actif sont toutes deux des mesures permettant d'atténuer les difficultés créées par la rupture d'une relation d'interdépendance économique. Cependant, la répartition des biens patrimoniaux sur la base d'une union économique dans laquelle chaque partie a droit à une part égale repose d'abord et avant tout sur un objectif louable poursuivi par le législateur. L'État avait le pouvoir d'imposer des mesures de protection patrimoniale à un groupe donné, et il n'était pas obligé de les imposer à tous. Ceux qui sont exclus de l'application de ces mesures ne sont pas pour autant démunis de tout moyen de former une union économique analogue à celle imposée aux personnes mariées ou unies civilement, par exemple ils peuvent acheter leur résidence en commun. Les conjoints qui ne formalisent pas leur relation en choisissant un mode d'union protégé disposent tout de même de moyens de protection. Comme je l'ai précisé, le conjoint vulnérable peut se voir attribuer une pension alimentaire s'il est dans le besoin. Ainsi, dans l'évaluation des moyens du débiteur alimentaire, le tribunal doit tenir compte

ensure that the needs of the spouse in need are met, the court does not necessarily have to make an award of patrimonial property.

[405] In light of the objective of promoting the autonomy of the parties, the positive actions the parties must take to acquire family property and the flexibility the courts have in assessing the resources available for the payment of support, I find that the exclusion of *de facto* spouses from the protection of the family patrimony satisfies the minimal impairment requirement.

[406] The disadvantages of this measure do not outweigh its advantages, since, although the parties do not have an automatic right, there are nevertheless other ways for them to obtain sufficient protection.

[407] One issue remains: that of the family residence. Although this protection was originally adopted as a separate measure from the protection of the family patrimony, there are now a number of ways in which these two measures overlap, so I do not intend to engage in a separate analysis. However, I would note that the courts have taken a flexible approach, exercising their incidental powers with regard to the family residence. Indeed, an order to that effect was made in the instant case.

[408] In summary, I conclude that the exclusion of *de facto* spouses from support is not justified, but that their exclusion from the patrimonial measures is justified.

[409] For these reasons, I would dismiss the appeals and affirm the decision of the Court of Appeal to suspend the declaration of constitutional invalidity of art. 585 *C.C.Q.* for a period of 12 months, without costs.

de l'ensemble des ressources de ce dernier, y compris des biens patrimoniaux. La solution que retient le tribunal pour s'assurer que les besoins du conjoint nécessiteux sont satisfaits ne passe pas nécessairement par l'attribution de la propriété de biens patrimoniaux.

[405] Compte tenu de l'objectif consistant à favoriser l'autonomie des parties, des gestes positifs que les parties doivent poser pour acquérir des biens familiaux et de la flexibilité dont disposent les tribunaux dans l'évaluation des ressources disponibles pour le paiement de la pension alimentaire, j'estime que l'exclusion des conjoints de fait du bénéfice de la protection du patrimoine familial satisfait à l'exigence d'atteinte minimale.

[406] Les désavantages de cette mesure n'excèdent pas ses avantages, car si les parties ne bénéficient pas d'un droit automatique, d'autres moyens leur sont néanmoins ouverts pour obtenir une protection suffisante.

[407] Reste la question de la résidence familiale. Quoique, à l'origine, cette protection ait été adoptée en tant que mesure distincte de la protection du patrimoine familial, plusieurs aspects de ces mesures se confondent maintenant. Je n'entends donc pas procéder à une analyse distincte. Je signalerai cependant que les tribunaux ont utilisé une approche flexible, usant de leurs pouvoirs accessoires concernant la résidence familiale. C'est d'ailleurs une ordonnance de ce genre qui a été prononcée dans la présente instance.

[408] En résumé, je conclus que l'exclusion des conjoints de fait du bénéfice de la pension alimentaire n'est pas justifiée mais que celle visant les mesures patrimoniales l'est.

[409] Pour ces motifs, je rejetterais les appels et je confirmerais la décision de la Cour d'appel de suspendre la déclaration d'invalidité constitutionnelle de l'art. 585 *C.c.Q.* pour une période de 12 mois, le tout sans frais.

The following are the reasons delivered by

[410] THE CHIEF JUSTICE — One of the responsibilities of provincial legislatures across Canada is to provide laws to deal with disputes concerning support and property of couples in conjugal relationships. In the old days, the problem was seen as simple; most couples were married, and it sufficed — or was thought to suffice — to pass laws regulating what happened when married couples separated.

[411] No longer are matters so simple. Increasingly, in all parts of Canada, couples are choosing to live together without being married. The stigma that once attached to these relationships has faded. The law has recognized that married couples and unmarried couples are entitled to equal treatment, for example with respect to insurance regime benefits, and that treating married couples differently from unmarried couples may be discriminatory and violate the equality guarantee of s. 15 of the *Canadian Charter of Rights and Freedoms*: *Miron v. Trudel*, [1985] 2 S.C.R. 418.

[412] The legislatures of different provinces have responded to this challenge in different ways. In many parts of Canada, the choice has been to apply to *de facto* spouses an attenuated version of the mandatory regime that applies to married couples, unless the *de facto* couple formally chooses to opt out. For example, some provinces apply to *de facto* spouses the spousal support aspects of the mandatory regime applicable to married spouses. The Province of Quebec has chosen a different approach. Its law contemplates two completely different and distinct legal regimes — one for married couples and couples in civil unions, and one for *de facto* spouses. Couples who choose to marry or to enter into a civil union are subject to a mandatory regime governing both property and support (the "mandatory regime"). Upon separation, the family patrimony is divided between the spouses, and one spouse may be ordered to make support payments

Version française des motifs rendus par

[410] LA JUGE EN CHEF — Au Canada, les législatures provinciales sont notamment responsables de légiférer quant au règlement des litiges qui peuvent survenir relativement aux droits alimentaires et patrimoniaux des personnes qui entretiennent une relation conjugale. Autrefois, le problème pouvait être facilement résolu : la plupart des couples étaient mariés et il suffisait — ou on jugeait qu'il suffisait — d'adopter des lois régissant la séparation des couples mariés.

[411] Les choses ne sont plus aussi simples. Dans toutes les régions du pays, les couples choisissent de plus en plus de faire vie commune sans être mariés. Les stigmates jadis rattachés à ce type de relations se sont estompés. Le droit a reconnu que tant les couples mariés que les couples non mariés ont droit à un traitement égal, par exemple quant aux bénéfices qu'ils peuvent tirer d'un régime d'assurance, et que le fait de traiter les couples mariés différemment de ceux qui ne le sont pas peut être discriminatoire et enfreindre le droit à l'égalité garanti par l'art. 15 de la *Charte canadienne des droits et libertés* : *Miron c. Trudel*, [1985] 2 R.C.S. 418.

[412] Les législatures provinciales ont relevé ce défi de diverses manières. Dans de nombreuses régions du pays, le législateur a choisi d'assujettir les conjoints de fait — à moins qu'ils ne s'y soustraient formellement — à une version atténuée du régime qui s'applique obligatoirement aux couples mariés. Par exemple, certaines provinces appliquent aux conjoints de fait les obligations alimentaires du régime applicable aux époux. Le Québec a choisi une approche différente. Ses dispositions législatives prévoient deux régimes législatifs totalement différents et distincts — un pour les couples mariés ou unis civilement, l'autre pour les couples vivant en union de fait. Ceux qui choisissent de se marier ou de contracter une union civile sont assujettis à un régime obligatoire qui encadre les droits et obligations patrimoniaux et alimentaires des conjoints (le « régime obligatoire »). Advenant une rupture, les biens du couple sont partagés entre

to the other. Couples who choose not to marry or to enter into a civil union — and this category is much larger in Quebec than in other provinces — are not subject to the mandatory regime that applies to married and civil union couples, and are free to craft whatever arrangements suit them. Unless they provide otherwise, each partner holds his or her property as an individual, and cannot be ordered to divide it with the other partner on separation. Nor, subject to exceptions related to children, can one partner be ordered to pay support to the other partner.

les conjoints et l'un d'entre eux peut être tenu de verser une pension alimentaire à l'autre. Les couples qui choisissent de ne pas se marier et de ne pas s'unir civilement — une catégorie de couples nettement plus importante au Québec que dans les autres provinces — ne sont pas assujettis au régime obligatoire que je viens d'évoquer. Ils sont libres de concevoir les arrangements qui leur conviennent. Ainsi, advenant une séparation, chaque conjoint conserve les biens qui lui appartiennent sans risquer d'être tenu de les partager avec l'autre, à moins que les partenaires n'en aient décidé autrement. De même, sous réserve de l'obligation alimentaire qui leur incombe à l'égard des enfants, ils ne peuvent non plus être tenus de se verser des aliments l'un à l'autre.

[413] Underlying the Quebec policy is the desire to enhance the right of Quebec couples to choose the regime they prefer, the one that best suits their particular needs. The policy is aimed at enhancing their choice and autonomy. Instead of a single norm based on the mandatory regime, there is a distinct choice between two different regimes: the mandatory regime, providing for a division of property and spousal support upon the dissolution of marriage or civil union, and a regime of full autonomy, allowing *de facto* spouses complete freedom to provide for the consequences of a break-up. The evidence is clear that this dual regime approach enjoys wide popularity in Quebec; many couples deliberately choose not to marry or to enter into a civil union in order to avoid the mandatory regime. If a couple does not marry or enter into a civil union, they will not be required to share their property or pay spousal support if the relationship ends. No special opt-out agreement is required, unlike in other provinces. The Quebec approach is grounded in Quebec's unique history and social situation, as my colleague LeBel J. explains.

[413] C'est le désir d'accroître le droit des couples québécois de choisir le régime qu'ils préfèrent, soit celui qui convient le mieux à leurs besoins, qui sous-tend la politique du Québec. Cette politique vise à accroître leur libre choix ainsi que leur autonomie. Plutôt que de fixer une seule norme fondée sur le régime obligatoire, la loi donne un choix clair entre deux régimes distincts : le régime obligatoire, qui prévoit le partage des biens et le soutien alimentaire entre conjoints lors de la dissolution du mariage ou de l'union civile, et un régime de pleine autonomie, qui laisse les conjoints de fait totalement libres de convenir des conséquences d'une rupture. Selon la preuve, ce modèle à deux régimes distincts est manifestement très populaire au Québec; de nombreux couples choisissent délibérément de ne pas se marier et de ne pas s'unir civilement pour éviter d'être assujettis au régime obligatoire. Advenant leur séparation, les conjoints qui ne sont ni mariés ni unis civilement n'auront pas à partager leurs biens ou à payer une pension alimentaire pour conjoint. Aucune entente n'est nécessaire pour que ces conjoints ne soient soumis à aucune obligation, ce qui diffère des régimes en vigueur dans les autres provinces. Comme l'explique mon collègue le juge LeBel, l'approche du Québec est ancrée dans son histoire et dans son contexte social uniques.

[414] The issue in this case is whether the Province of Quebec can maintain the dual regime

[414] En l'espèce, nous sommes appelés à déterminer si le Québec peut maintenir les deux régimes

approach that its legislature has adopted. A argues that this approach is unconstitutional because it unjustifiably discriminates against *de facto* spouses by denying them access to the more protective mandatory regime that applies to married and civil union couples. Accordingly, she argues that the Quebec law must be struck down and replaced by a regime that treats married, civil union and *de facto* spouses the same with respect to property division and spousal support upon separation.

[415] I agree with LeBel J. that the Quebec dual regime approach is constitutional. Unlike LeBel J., I conclude — as do my colleagues Deschamps J. and Abella J. — that the law violates the equality guarantee in s. 15 of the *Charter*. However, I find that the limit on the equality right of *de facto* spouses imposed by the law is reasonable and justifiable in a free and democratic society. Quebec's goal is to enhance the choice and autonomy of couples in conjugal relationships. This policy goal is important to Quebec. Treating *de facto* spouses differently from married and civil union spouses enhances this goal, and does so in a proportionate way. The fact that Quebec has chosen a different policy than other provinces in keeping with its own history and social values does not make the law unconstitutional.

I. Section 15: Does the Quebec Law Discriminate Against *De Facto* Spouses?

A. *The Section 15 Analysis*

[416] I agree with the s. 15 analysis set out in Abella J.'s reasons, which flows from the refinements to the s. 15 analysis that the Court made 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. I disagree, however, as to whether the legislative scheme is justified under s. 1 of the *Charter*.

distincts créés par le législateur. A fait valoir que ce modèle est inconstitutionnel parce qu'il discrimine sans justification les conjoints de fait en leur niant l'accès aux mesures plus protectrices du régime obligatoire qui s'applique aux couples mariés ou unis civilement. En conséquence, elle soutient que le régime législatif du Québec doit être invalidé et remplacé par un régime qui traite les couples mariés ou unis civilement et ceux qui ne le sont pas de la même façon en ce qui a trait aux droits alimentaires et patrimoniaux advenant une séparation.

[415] Je suis d'accord avec le juge LeBel pour conclure que le modèle québécois est constitutionnel. Contrairement à lui, je conclus toutefois — comme le font mes collègues les juges Deschamps et Abella — que les dispositions législatives en cause violent le droit à l'égalité garanti par l'art. 15 de la *Charte*. Cependant, j'estime que cette atteinte au droit à l'égalité que la loi impose aux conjoints de fait constitue une limite raisonnable qui se justifie dans une société libre et démocratique. Le Québec vise à accroître le libre choix des personnes en couple ainsi que leur autonomie. C'est un objectif important pour la province. Traiter les conjoints de fait différemment des couples mariés ou unis civilement favorise cet objectif et le fait de manière proportionnée. Le fait que le Québec ait choisi une politique différente de celles adoptées par les autres provinces, et ce, en conformité avec son histoire et ses valeurs sociales propres, n'invalide pas pour autant son régime législatif.

I. Article 15 : le régime législatif du Québec est-il discriminatoire à l'endroit des conjoints de fait?

A. *L'analyse relative à l'art. 15*

[416] Je suis d'accord avec l'analyse de la juge Abella relative à l'art. 15 de la *Charte*. Cette analyse découle de l'approche peaufinée par la Cour dans *R. c. Kapp*, 2008 CSC 41, [2008] 2 R.C.S. 483, et dans *Withler c. Canada (Procureur général)*, 2011 CSC 12, [2011] 1 R.C.S. 396. Je ne suis toutefois pas d'accord quant à la question de savoir si le régime législatif est justifié au sens où il faut l'entendre pour l'application de l'article premier.

[417] Section 15 of the *Charter* protects against discrimination on the basis of personal characteristics, the enumerated or analogous grounds. Marital status is such a ground. To constitute discrimination, the impugned law must have the purpose or effect "of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration": *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at para. 88(3)(C); see also *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 171.

[418] Most recently, this Court has articulated the approach in terms of two steps: (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 false stereotyping?: *Kapp*, at para. 17; *Withler*, at para. 30. 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: *Withler*, at para. 38; *Kapp*, at para. 19.

[419] A few further points that touch on differences between my reasons and those of LeBel J. bear noting. First, 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": *Law*, at para. 60.

[417] L'article 15 de la *Charte* protège contre la discrimination fondée sur des caractéristiques personnelles, à savoir les motifs énumérés ou analogues. Le statut matrimonial est un de ces motifs. Pour qu'il soit discriminatoire, le régime législatif contesté doit avoir pour objet ou 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 » : *Law c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1999] 1 R.C.S. 497, par. 88(3)(C); voir aussi *Andrews c. Law Society of British Columbia*, [1989] 1 R.C.S. 143, p. 171.

[418] Plus récemment, la Cour a formulé le cadre d'analyse applicable à une demande fondée sur l'art. 15 en la décrivant comme une approche en deux étapes : (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 de préjugés ou l'application de stéréotypes erronés? : *Kapp*, par. 17; *Withler*, par. 30. 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 : *Withler*, par. 38; *Kapp*, par. 19.

[419] Il vaut la peine de mentionner quelques autres points relatifs à des divergences entre mes motifs et ceux du juge LeBel. Premièrement, 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 » : *Law*, par. 60.

[420] Second, a legal distinction can be discriminatory *either* in purpose or in effect. As a practical matter, legislatures seldom set out to discriminate on purpose; discrimination when it occurs is usually a matter of unintended effect.

[421] Finally, and related to this, it is important to maintain the analytical distinction between s. 15 and s. 1. While the public policy basis for legislation has a limited relevance to the s. 15 analysis, it is central to the s. 1 inquiry: see *Andrews*, at pp. 177-78. This flows from the two-stage model of constitutional review inherent in the *Charter*. As Aharon Barak, former President of the Supreme Court of Israel, puts it:

> . . . what is the case when the legal system has adopted a two-stage model [of constitutional review], such as in Germany, Canada, South Africa, and Israel? . . . Should public interest considerations be included in the first stage or the second or in both stages? Should public interest considerations affect the determination of the right's scope, or should consideration of these interests be postponed to the stage of . . . the discussion regarding proportionality?
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> . . .
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> The proper location for public interest considerations is in the second stage of the constitutional review, as part of the discussion of the justification of the limitation on the constitutional right.

(*Proportionality: Constitutional Rights and their Limitations* (2012), at pp. 75-76)

B. *Application of the Section 15 Framework to A's Claim of Discrimination*

[422] The first question is whether this Court's decision in *Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83, [2002] 4 S.C.R. 325, resolves

[420] Deuxièmement, une distinction dans la loi peut être discriminatoire *soit* par son objet, *soit* par son effet. D'un point de vue pratique, il est rare que le législateur ait l'intention d'adopter une loi discriminatoire; lorsqu'il y a discrimination, c'est habituellement le fruit d'un effet inattendu.

[421] Finalement, et cela est lié à ce qui précède, il importe de garder distinctes les analyses que commandent respectivement l'art. 15 et l'article premier. Tandis que les politiques publiques qui sous-tendent une loi ont peu de pertinence au stade de l'analyse fondée sur l'art. 15, elles ont une importance capitale pour l'analyse fondée sur l'article premier : voir *Andrews*, p. 177-178. Cette approche découle du modèle d'examen de la constitutionnalité d'une loi en deux étapes, qui est intrinsèque à la *Charte*. Comme l'a affirmé Aharon Barak, ancien président de la Cour suprême d'Israël :

> [TRADUCTION] . . . qu'en est-il des systèmes juridiques dotés d'un modèle [de contrôle de la constitutionnalité] en deux étapes, à l'instar de ceux qui existent en Allemagne, au Canada, en Afrique du Sud et en Israël? [. . .] Les considérations d'intérêt public devraient-elles être prises en compte à la première étape ou à la deuxième ou aux deux? Devraient-elles avoir une incidence sur la détermination de la portée du droit ou leur examen devrait-il être plutôt reporté à l'étape [. . .] de l'analyse de la proportionnalité?
>
> . . .
>
> C'est à la deuxième étape du contrôle de la constitutionnalité qu'il convient de tenir compte des considérations d'intérêt public, soit lors de l'analyse de la justification de l'atteinte au droit protégé par la Constitution.

(*Proportionality : Constitutional Rights and their Limitations* (2012), p. 75-76)

B. *L'application du cadre d'analyse relatif à l'art. 15 à l'allégation de discrimination de A*

[422] La première question à trancher est celle de savoir si la décision de la Cour dans *Nouvelle-Écosse (Procureur général) c. Walsh*, 2002 CSC 83,

this appeal. Like my colleague Abella J., I am of the view that *Walsh* does not bind this Court in the present case. *Walsh* involved different issues (division of property only) and was decided at an earlier point in our evolving appreciation of s. 15. More fundamentally, however, I agree with Abella J. that 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. Freedom of choice and autonomy are public interest considerations. They are relied on by Quebec to justify the obvious fact that its law may disadvantage some *de facto* spouses by denying claims to property division and support in circumstances where they may not have truly chosen to forego the protections of the mandatory regime, but rather have been unable to access them due to their partner's refusal to marry. As discussed above, under s. 15 of the *Charter*, public policy considerations should be considered at the second stage of the constitutional analysis.

[423] In my view, the Quebec dual regime approach makes discriminatory distinctions that limit the s. 15 equality right of *de facto* spouses. All the elements of a s. 15 violation are present. The law denies *de facto* spouses protections available to married and civil union spouses. These distinctions are made on the basis of the analogous ground of marital status: *Miron*. The distinctions create a disadvantage: *de facto* spouses do not automatically benefit from a series of provisions that ensure an equitable division of property and continued financial support at the end of a relationship characterized by financial interdependence (*Civil Code of Québec*, S.Q. 1991, c. 64, arts. 401 *et seq.*, 414 *et seq.*, 427 *et seq.*, 432 and 585). Finally, the disadvantage is discriminatory from the point of view of a reasonable person placed in circumstances similar to those of A. The law in fact shows less concern for people in A's position than for married and civil union spouses on break-up of the

[2002] 4 R.C.S. 325, résout le présent pourvoi. À l'instar de ma collègue la juge Abella, je suis d'avis que cet arrêt ne lie pas la Cour dans la présente affaire. Des questions différentes devaient y être tranchées (soit des questions relatives uniquement au partage des biens) et l'appréciation de l'art. 15 a évolué depuis cet arrêt. Plus fondamentalement toutefois, je souscris à l'opinion de la juge Abella selon laquelle 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. Le libre choix et l'autonomie sont des considérations d'intérêt public; le Québec se fonde sur elles pour justifier le fait manifeste que sa loi peut désavantager certains conjoints de fait en leur niant tout droit à un partage des biens et à une pension alimentaire dans des circonstances où ils n'ont peut-être pas réellement choisi de renoncer aux mesures protectrices du régime obligatoire, mais plutôt n'y ont pas eu accès en raison du refus de leur partenaire de se marier. Comme je l'ai évoqué précédemment, dans le contexte d'une demande fondée sur l'art. 15 de la *Charte*, les considérations d'intérêt public sont prises en compte à la deuxième étape de l'analyse constitutionnelle.

[423] À mon avis, le recours par le législateur québécois à deux régimes distincts crée une distinction discriminatoire qui porte atteinte au droit à l'égalité des conjoints de fait garanti par l'art. 15. Tous les éléments nécessaires pour conclure à une violation de l'art. 15 sont présents. La loi nie aux conjoints de fait les mesures de protection dont jouissent les conjoints mariés ou unis civilement. Les distinctions sont fondées sur un motif analogue, soit l'état matrimonial : *Miron*. Elles créent un désavantage : les conjoints de fait ne bénéficient pas automatiquement d'une série de dispositions qui assurent le partage équitable des biens du couple et le soutien financier continu au terme d'une relation caractérisée par une interdépendance économique (*Code civil du Québec*, L.Q. 1991, ch. 64, art. 401 et suiv., 414 et suiv., 427 et suiv., 432 et 585). Finalement, le désavantage est discriminatoire du point de vue d'une personne raisonnable placée dans une situation similaire à celle de A. En effet, à

relationship. As it applies to people in A's situation, it perpetuates the effects of historical disadvantage rooted in prejudice *and* rests on a false stereotype of choice rather than on the reality of the claimant's situation.

[424] LeBel J.'s review of the relevant legislative history demonstrates that the purpose and intent animating the impugned provisions are not discriminatory. The Quebec legislature did not view *de facto* spouses as inferior or second-class spouses.

[425] However, this does not end the inquiry. It is necessary to go on to ask whether the adverse distinctions made by the law against *de facto* spouses discriminate against them in effect, on the approach to s. 15 set out above.

[426] In its effect, the Quebec scheme denies separated *de facto* partners important protections that it accords to separated married and civil union partners, despite the fact that they may not have meaningfully exercised a choice of regime. It is reasonable to infer from this, subject to a full analysis of the relevant contextual factors, that the law that denies them these protections treats them as less deserving of concern, respect and consideration.

[427] A reasonable person in A's situation would conclude that the law perpetuates pre-existing disadvantage. *De facto* spouses in Quebec suffer from significant pre-existing disadvantage. Until the enactment of the family law reform in 1980, the legislation actively discouraged and marginalized *de facto* spousal relationships, by prohibiting *de facto* spouses from contractually agreeing to obligations stemming from their relationships and by de-legitimizing their offspring. While the

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 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.

[424] L'examen de l'historique législatif pertinent auquel a procédé le juge LeBel démontre que l'objectif et l'intention qui ont présidé à l'adoption des dispositions contestées ne sont pas discriminatoires. Le législateur québécois ne considérait pas les conjoints de fait comme des conjoints inférieurs ou de seconde classe.

[425] Cette constatation ne met toutefois pas fin à l'examen auquel nous devons procéder. En effet, il est nécessaire de poursuivre l'analyse en nous demandant si les distinctions désavantageuses créées par la loi au détriment des conjoints de fait sont discriminatoires par leurs effets, selon le cadre d'analyse de l'art. 15 énoncé précédemment.

[426] Le modèle québécois a pour effet de priver les ex-conjoints de fait des importantes mesures de protection qu'il consent aux ex-conjoints mariés ou unis civilement, et ce même si, dans les faits, ils pourraient ne pas avoir réellement exercé un choix de régime. Il est raisonnable d'en déduire, sous réserve d'une analyse complète des facteurs contextuels pertinents, que la loi qui les prive de ces mesures de protection les traite comme s'ils étaient moins dignes d'intérêt, de respect ou de considération.

[427] Une personne raisonnable placée dans la situation de A pourrait en conclure que la loi perpétue un désavantage préexistant. Les conjoints de fait au Québec souffrent en effet de désavantages préexistants considérables. Jusqu'à l'adoption de la réforme du droit de la famille en 1980, la loi décourageait activement les unions de fait et les marginalisait. Elle le faisait en interdisant aux conjoints de fait de convenir contractuellement des obligations découlant de leur relation et en privant

legislative animus that underlay those measures has disappeared, the present law continues to exclude *de facto* spouses from the protective schemes of Quebec family law.

[428] Equally, a reasonable person in A's position would conclude that in denying her recourse to spousal support and equitable property division, the law relies on false stereotypes. The law assumes that *de facto* partners choose to forego the protections it offers to married and civil union partners. Yet people in A's situation have not in fact chosen to forego the protections of the mandatory regime. A's real choice was of a different nature: she could either remain in a *de facto* relationship with B, or walk away from it after having become accustomed to the lifestyle she shared with him. More broadly, the law rests on the assumption that *de facto* partners will provide for their needs by making their own agreements or arrangements for property and support. Again, for claimants in A's situation, this assumption fails to accord with the reality of their situation.

[429] What then of context? Quebec's argument is that when the denial of protection to *de facto* partners is considered in the context of the absence of prejudice against *de facto* partners in Quebec and the desire to enhance the choice and autonomy of Quebec couples, the denial does not promote the view that *de facto* partners are less worthy of concern and protection than married and civil union partners, and hence is not discriminatory.

[430] The first difficulty with this argument is that it does not consider the distinction from the perspective of a reasonable person *in the claimant's position*, as the equality jurisprudence requires. It may be that some *de facto* spouses are not prejudiced by the law because they choose to be unmarried and make alternate agreements or arrangements that

de légitimité les enfants nés de telles unions. Même si l'opprobre de la loi qui sous-tendait ces mesures a disparu, la loi actuelle continue d'exclure les conjoints de fait des régimes protecteurs offerts par le droit de la famille québécois.

[428] De même, une personne raisonnable placée dans la situation de A pourrait conclure qu'en lui niant le droit au soutien alimentaire ainsi qu'au partage des biens, la loi se fonde sur des stéréotypes erronés. 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. Or, dans les faits, les personnes placées dans la situation de A n'ont pas renoncé à ces mesures qui découlent du régime obligatoire. Le choix qu'A avait à faire était d'une tout autre nature : elle pouvait soit rester en union de fait avec B, soit quitter ce dernier après s'être habituée au train de vie qu'elle partageait avec lui. Plus largement, la loi se fonde sur la prémisse que les conjoints de fait subviennent à leurs propres besoins en convenant de leurs propres ententes et arrangements patrimoniaux et alimentaires. Je le répète, pour les demandeurs placés dans la situation de A, cette hypothèse ne concorde pas avec leur situation réelle.

[429] Qu'en est-il alors du contexte? Selon le Québec, l'absence de mesures protectrices pour les conjoints de fait devrait être examinée en fonction du contexte actuel : il n'existe pas de préjugés à l'encontre des conjoints de fait et l'objectif du législateur est l'accroissement du libre choix des personnes en couple ainsi que de leur autonomie. Prise dans ce contexte, la privation qui vise les conjoints de fait ne favorise donc pas l'opinion selon laquelle ils sont moins dignes d'intérêt et de protection que les conjoints mariés ou unis civilement et n'est donc pas discriminatoire.

[430] La première faille dans ce raisonnement réside dans le fait qu'il ne tient pas compte de la distinction du point de vue d'une personne raisonnable *placée dans la situation de la demanderesse*, comme l'exige la jurisprudence sur le droit à l'égalité. Il se peut que la loi ne cause aucun préjudice à certains conjoints de fait qui choisissent

suit them. But from the perspective of a person in the claimant's position, who has as a matter of fact been denied the right to choose, it is reasonable to view the law as treating her as less deserving of concern and consideration than married and civil union spouses.

[431] The second and related difficulty with Quebec's argument is that it imports public interest considerations — the goal of maximizing choice and autonomy for conjugal partners as a whole — into the s. 15 analysis. Such interests, as I discussed above, should not be considered at the first stage of determining whether a right has been limited, but at the second stage of determining whether the limitation on the right is justified.

II. Is the Breach of Section 15 Justified Under Section 1 of the *Charter*?

[432] The equality analysis under the *Charter* is a two-stage process. The first stage asks whether the law limits the right at issue. The second stage asks whether that limit is reasonable and justified in a free and democratic society (s. 1).

[433] For the reasons just discussed, I conclude that the dual regime approach — which denies *de facto* spouses the protections of the mandatory regime accorded to married and civil union spouses — treats *de facto* spouses unequally and discriminates against them contrary to s. 15 of the *Charter*. The remaining question is whether this limit on the equality right of *de facto* spouses is justified under s. 1 of the *Charter*.

de ne pas se marier ou s'unir civilement et qui concluent d'autres ententes ou arrangements qui leur conviennent. Cependant, du point de vue d'une personne placée dans la situation de la demanderesse qui, dans les faits, n'a pas pu exercer le droit de choisir, il est raisonnable de croire que la loi la traite comme une personne moins digne d'intérêt et de considération que les conjoints mariés ou unis civilement.

[431] Le point de vue défendu par le Québec contient une deuxième faille liée à la première : il déplace les considérations d'intérêt public — soit l'objectif de maximiser le libre choix des personnes qui entretiennent une relation conjugale ainsi que leur autonomie — à l'étape de l'analyse portant sur l'art. 15. Comme je l'ai mentionné précédemment, de tels intérêts ne doivent pas être examinés à la première étape de l'analyse, soit celle où l'on doit déterminer s'il a été porté atteinte à un droit, mais plutôt à la deuxième étape, soit celle qui consiste à décider si l'atteinte est justifiée.

II. La violation de l'art. 15 est-elle justifiée au sens où il faut l'entendre pour l'application de l'article premier de la *Charte*?

[432] L'analyse d'une demande fondée sur une atteinte au droit à l'égalité protégé par la *Charte* consiste en un processus en deux étapes. Dans le cadre de la première, le tribunal doit se demander si le texte législatif porte atteinte au droit en cause. Dans le cadre de la seconde, il doit déterminer si l'atteinte est raisonnable et justifiée dans le cadre d'une société libre et démocratique (article premier).

[433] Pour les motifs que je viens d'exposer, je conclus que le modèle québécois à deux régimes distincts, qui nie aux conjoints de fait les mesures de protection du régime obligatoire accordées aux conjoints mariés ou unis civilement, traite les conjoints de fait différemment et établit à leur égard une discrimination contraire à l'art. 15 de la *Charte*. Il reste donc à décider si cette 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*.

[434] The state bears the burden of establishing justification on a balance of probabilities. The state must demonstrate (1) a sufficiently important objective to justify an infringement of a *Charter* right, (2) a rational connection between that objective and the means chosen by the state, (3) that the means are minimally impairing of the right at issue, and (4) that the measure's effects on the *Charter*-protected right are proportionate to the state objective: *R. v. Oakes*, [1986] 1 S.C.R. 103.

A. *An Important Objective*

[435] The objective of the distinction between *de facto* spouses and married or civil union couples made by the Quebec dual regime approach is to promote choice and autonomy for all Quebec spouses with respect to property division and support. Those who choose to marry choose the protections — but also the responsibilities — associated with that status. Those who choose not to marry avoid these state-imposed responsibilities and protections, and gain the opportunity to structure their relationship outside the confines of the mandatory regime applicable to married and civil union spouses.

[436] The legislature pursued this objective in response to rapidly changing attitudes in Quebec with respect to marriage, namely a rejection of the gender inequalities associated with the tradition of marriage, a shift away from the influence of the Church and the assertion of values linked to individualism: B. Moore, "Culture et droit de la famille: de l'institution à l'autonomie individuelle" (2009), 54 *McGill L.J.* 257, at p. 268. The legislator sought to accommodate the social rejection of the traditional control by the state and the Church over intimate relationships. When the family patrimony provisions were adopted in Quebec, the responsible Minister stated that a harmonization of the legislative treatment of marriage and of *de facto* spousal relationships [TRANSLATION] "would not be without consequences, for what then would

[434] C'est à l'État qu'il incombe de faire la preuve de la justification suivant la prépondérance des probabilités. Il doit démontrer (1) que l'objectif poursuivi est suffisamment important pour justifier une atteinte à un des droits garantis par la *Charte*, (2) qu'il existe un lien rationnel entre cet objectif et les moyens choisis par l'État, (3) que les moyens choisis portent minimalement atteinte au droit en cause et (4) que les effets de la mesure sur les droits protégés par la *Charte* sont proportionnés à l'objectif poursuivi par l'État : *R. c. Oakes*, [1986] 1 R.C.S. 103.

A. *Un objectif important*

[435] La distinction entre les couples mariés ou unis civilement et les conjoints de fait créée par le modèle québécois à deux régimes distincts vise la promotion du libre choix et de l'autonomie de tous les conjoints au Québec en ce qui a trait au partage des biens et au soutien alimentaire. Ceux qui choisissent de se marier ou de s'unir civilement choisissent les mesures protectrices — mais aussi les obligations — qui découlent de leur statut. Ceux qui font plutôt le choix de l'union de fait se soustraient aux mesures de protection ainsi qu'aux obligations prescrites par l'État et sont libres de structurer leur relation de couple sans être confinés aux règles du régime obligatoire applicable aux conjoints mariés ou unis civilement.

[436] Le législateur a poursuivi cet objectif en réponse aux changements rapides survenus dans les attitudes au Québec à l'égard du mariage, soit en réponse au rejet du modèle d'inégalité des sexes associée à l'institution du mariage, à la perte d'influence de l'Église et à l'affirmation de valeurs associées à l'individualisme : B. Moore, « Culture et droit de la famille : de l'institution à l'autonomie individuelle » (2009), 54 *R.D. McGill* 257, p. 268. Le législateur a voulu respecter le rejet exprimé par la société à l'égard du contrôle traditionnellement exercé par l'État et l'Église sur les relations intimes. Lors de l'adoption des dispositions sur le patrimoine familial au Québec, le ministre responsable a affirmé que l'uniformisation des dispositions législatives applicables au mariage et à l'union de fait « ne serait pas sans conséquence,

be the meaning of marriage or the value in the civil context of religious marriage, and what would be the form of union developed by those who do not want to be regulated?": National Assembly, *Journal des débats*, vol. 30, No. 125, 2nd Sess., 33rd Leg., June 8, 1989, p. 6487 (emphasis added).

car quel serait alors le sens du mariage ou la valeur civile du mariage religieux et quelle serait la forme d'union développée par ceux qui ne veulent pas être réglementés? » : Assemblée nationale, *Journal des débats*, vol. 30, nº 125, 2e sess., 33e lég., 8 juin 1989, p. 6487 (je souligne).

[437] The objective of the law is sufficiently important to justify an infringement of the right to equality.

[437] L'objectif de la loi est suffisamment important pour justifier une atteinte au droit à l'égalité.

B. *Rational Connection*

[438] The distinction made by the law between married, civil union and *de facto* spouses is rationally connected to the state objective of preserving the autonomy and freedom of choice of Quebec spouses. Without this distinction, the clear choice between a regime of division of property and support on the one hand, and a regime of full autonomy on the other hand, would be absent. The Quebec approach only imposes state-mandated obligations on spouses who have made a conscious and active choice to accept those obligations. The requirement of an active choice to undertake obligations is consistent with the objective of enhancing autonomy.

B. *Lien rationnel*

[438] La distinction que la loi établit entre les conjoints mariés ou unis civilement et les conjoints de fait a un lien rationnel avec l'objectif de l'État qui consiste à préserver le libre choix et l'autonomie des conjoints au Québec. Sans cette distinction, le choix clair entre le régime qui prévoit le partage du patrimoine et le soutien alimentaire, d'une part, et celui de l'autonomie complète, d'autre part, n'existerait pas. 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. L'exigence d'un choix qui soit exercé activement de se conformer à ces obligations est par ailleurs conforme à l'objectif d'accroître l'autonomie des couples.

C. *Minimum Impairment*

[439] The *Oakes* test requires that impugned provisions impair the infringed right "as little as is reasonably possible": *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 772. This Court has recognized that the state must have a margin of appreciation in selecting the means to achieve its objective: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 999; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at paras. 35 and 53; *Edwards Books and Art*. The question is whether the impugned provisions fall within a range of reasonable alternatives: *Lavoie v. Canada*, 2002 SCC 23, [2002] 1 S.C.R. 769, at para. 61; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160; *McKinney v.*

C. *Atteinte minimale*

[439] Selon le test formulé dans l'arrêt *Oakes*, les dispositions contestées doivent porter atteinte au droit « aussi peu qu'il est raisonnablement possible de le faire » : *R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713, p. 772. La Cour a accordé à l'État une certaine latitude dans le choix du moyen pour réaliser son objectif : *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927, p. 999; *Alberta c. Hutterian Brethren of Wilson Colony*, 2009 CSC 37, [2009] 2 R.C.S. 567, par. 35 et 53; *Edwards Books and Art.* La question qu'il faut trancher est celle de savoir si les dispositions contestées font partie d'une gamme de mesures raisonnables (*Lavoie c. Canada*, 2002 CSC 23, [2002] 1 R.C.S. 769, par. 61; *RJR-MacDonald Inc. c. Canada (Procureur général)*, [1995] 3

University of Guelph, [1990] 3 S.C.R. 229, at pp. 285-86; *Hutterian Brethren*, at para. 37. This is particularly the case where the impugned measures "attempt to strike a balance between the claims of legitimate but competing social values": *McKinney*, at p. 285; *Hutterian Brethren*, at para. 53.

[440] In addition, the minimum impairment test is informed by the values of federalism. "The uniformity of provincial laws that would be entailed by a stringent requirement of least drastic means is in conflict with the federal values of distinctiveness, diversity and experimentation": P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp. (loose-leaf)), vol. 2, p. 38-39; see also *R. v. Advance Cutting & Coring Ltd.*, 2001 SCC 70, [2001] 3 S.C.R. 209, at para. 275. The test must not be applied in a manner that amounts to identifying the Canadian province that has adopted the "preferable" approach to a social issue and requiring that all other provinces follow suit.

[441] A argues that the Quebec dual regime approach does not minimally impair the equality right of *de facto* spouses. She argues that choice and autonomy can be respected without excluding *de facto* spouses entirely from the mandatory regime applicable to married and civil union spouses. She points to other provinces, where aspects of the mandatory regime apply to *de facto* spouses, unless they have formally opted out of that regime. Under such schemes, *de facto* spouses are denied protection only if they have agreed to that result. Unlike A, they are not effectively left unprotected because their partner did not consent to marriage. She also argues that a scheme that allowed for judicial intervention where property division and/or support are warranted would be less impairing of her equality right than the current scheme.

[442] There is no doubt that schemes can be conceived — and indeed have been adopted in

R.C.S. 199, par. 160; *McKinney c. Université de Guelph*, [1990] 3 R.C.S. 229, p. 285-286; *Hutterian Brethren*, par. 37), particulièrement lorsque les mesures en question « tentent d'établir un équilibre entre des valeurs sociales légitimes mais opposées » : *McKinney*, p. 285; *Hutterian Brethren*, par. 53.

[440] En outre, le critère relatif à l'atteinte minimale doit respecter les valeurs du fédéralisme. [TRADUCTION] « L'uniformité des lois provinciales qui découlerait de l'obligation stricte d'opter pour les moyens les moins attentatoires irait à l'encontre des valeurs du fédéralisme que sont le caractère distinct, la diversité et l'expérimentation » : P. W. Hogg, *Constitutional Law of Canada* (5e éd. suppl. (feuilles mobiles)), vol. 2, p. 38-39; voir également *R. c. Advance Cutting & Coring Ltd.*, 2001 CSC 70, [2001] 3 R.C.S. 209, par. 275. L'application de ce volet du test ne consiste pas à désigner la province ayant adopté la démarche « préférable » à l'égard d'une question sociale pour ensuite exiger des autres provinces qu'elles lui emboîtent le pas.

[441] A fait valoir que le modèle québécois à deux régimes distincts ne porte pas une atteinte minimale au droit à l'égalité des conjoints de fait. Selon elle, il est possible de respecter leur choix et leur autonomie sans pour autant les soustraire totalement au régime obligatoire applicable aux couples mariés ou unis civilement. Elle fait référence à d'autres provinces où des aspects du régime obligatoire s'appliquent aux conjoints de fait, à moins que ceux-ci ne s'y soient soustraient expressément. Selon ces régimes, les conjoints de fait ne sont privés de protection advenant une rupture que s'ils ont convenu qu'il en serait ainsi. Contrairement à A, ils ne sont pas laissés dans les faits sans protection parce que leur partenaire n'a pas voulu se marier. A prétend également qu'un modèle qui habiliterait le tribunal à intervenir dans les cas où il serait équitable de partager les biens et de fixer une pension alimentaire attenterait moins à son droit à l'égalité que la situation actuelle.

[442] Il ne fait aucun doute qu'il serait possible de concevoir des modèles qui portent moins

other provinces — that impair the equality right of *de facto* spouses to a lesser degree than the Quebec scheme. However — and this is the important point — such approaches would be less effective in promoting the goals of the Quebec scheme of maximizing choice and autonomy for couples in Quebec. The question at the minimum impairment stage is whether the limit imposed by the law goes too far *in relation to the goal the legislature seeks to achieve.* "Less drastic means which do not actually achieve the government's objective are not considered at this stage": *Hutterian Brethren*, at para. 54.

[443] A presumptive scheme that applied the mandatory regime to all spouses, subject to the right to opt out, would automatically sweep in all couples. Even if *de facto* spouses were given the opportunity to opt out, this scheme would offer a narrower conception of choice than does Quebec's current approach. Indeed, opting out would require agreement and positive action on the part of *de facto* spouses. The Quebec scheme, by contrast, allows couples to avoid state-imposed obligations simply by not marrying. The state-free zone created by the Quebec scheme is thus broader than under a presumptive regime.

[444] The Quebec scheme has the benefit of giving spouses the opportunity to perform a cost-benefit analysis of staying in a *de facto* relationship that does not confer any rights upon them, but that *correlatively does not impose any legal obligations on them*: R. Leckey, "Chosen Discrimination" (2002), 18 *S.C.L.R.* (2d) 445, at p. 458. The legislature has chosen to avoid mandatory protective provisions that important segments of the population may view as paternalistic, by instead allowing spouses to weigh the consequences of their choices and to make decisions accordingly.

[445] What then of the absence of judicial recourse? Quebec is the only province that provides

atteinte au droit à l'égalité des conjoints de fait que ne le fait le modèle québécois — c'est d'ailleurs ce qu'ont fait d'autres provinces. Toutefois, et c'est là un élément important, de telles solutions serviraient moins efficacement les objectifs que vise le régime 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'atteinte qui découle de la loi va trop loin *par rapport à l'objectif du législateur* : « Les moyens moins attentatoires qui ne lui permettraient pas de réaliser son objectif ne sont pas examinés à ce stade » (*Hutterian Brethren*, par. 54).

[443] Un régime protecteur qui s'appliquerait par défaut, à moins d'une volonté expresse contraire, aurait pour effet d'englober tous les couples. Même si les conjoints de fait pouvaient choisir de s'y soustraire, ce modèle donnerait aux couples un choix plus restreint que ne le fait le modèle québécois actuel. En effet, les conjoints de fait qui voudraient se prévaloir du droit de se soustraire au régime seraient tenus de s'entendre à ce sujet et de poser des gestes concrets pour arriver à leurs fins. Au contraire, le modèle québécois actuel permet aux couples de ne pas être assujettis aux obligations prescrites par l'État tout simplement en ne se mariant pas. La zone exempte de l'intervention de l'État créée par le modèle québécois est donc plus étendue qu'elle ne le serait dans le contexte d'un régime d'application par défaut.

[444] Le régime québécois a l'avantage de donner aux conjoints l'occasion de faire un calcul coût-bénéfice du statut de conjoints de fait qui ne leur confère aucun droit, mais *qui, en contrepartie, ne leur impose aucune obligation* : R. Leckey, « Chosen Discrimination » (2002), 18 *S.C.L.R.* (2d) 445, p. 458. Le législateur a choisi de ne pas adopter de dispositions protectrices obligatoires que d'importants segments de la population pourraient juger paternalistes et a plutôt permis aux conjoints de soupeser les conséquences de leurs choix et de prendre des décisions en conséquence.

[445] Qu'en est-il alors de l'absence de recours judiciaire? Le Québec est la seule province où

for no court intervention whatsoever to ensure that *de facto* spouses exercised a meaningful choice to forego legal protection of their interests in the event of a breakdown of the relationship. Permitting judges to intervene and make orders for property and support for *de facto* spouses would obviously be less impairing of their equality right than the Quebec regime. However, again there would be a trade-off in diminished choice and autonomy. The Quebec scheme leaves it up to partners to choose whether to opt into the mandatory regime and leaves them the discretion to manage their independence if they do not opt in. Allowing judges to make orders would limit those choices, and result in individuals who thought they were free to structure their affairs finding themselves bound by judicially imposed obligations.

aucune intervention judiciaire n'est prévue pour garantir que les conjoints de fait ont exercé un choix éclairé en renonçant à la protection légale de leurs droits advenant une rupture. Permettre aux juges d'intervenir ou de rendre des ordonnances quant aux patrimoines des conjoints de fait ou quant à une quelconque obligation alimentaire restreindrait forcément moins leur droit à l'égalité que ne le fait le régime québécois. Cela dit, il faudrait alors encore renoncer à une part de libre choix et d'autonomie. Le régime québécois laisse aux partenaires le soin de choisir de s'astreindre ou non au régime obligatoire et leur accorde le pouvoir discrétionnaire de gérer leur indépendance s'ils choisissent de ne pas le faire. Si les juges étaient autorisés à rendre des ordonnances à leur égard, cela limiterait ce libre choix et des individus qui avaient cru pouvoir gérer leurs affaires à l'écart de l'intervention de l'État se retrouveraient liés par des obligations qui leur seraient imposées par la cour.

[446] Finally, it is suggested that the law does not meet the minimal impairment requirement because it affects support as well as property. For the reasons just discussed, allowing judges to award support would undermine the legislative goal of maximizing choice and autonomy. A judge, not the parties, would decide. The question at this stage of the analysis is whether the legislative goal could be achieved in a way that impacts the right less, not whether the legislative goal should be altered. Moreover, the protective effects of support and property division are intertwined and cannot be readily separated.

[446] Finalement, d'aucuns soutiennent que la loi ne satisfait pas à l'exigence de l'atteinte minimale parce qu'elle a une incidence tant sur les droits alimentaires que sur les droits patrimoniaux. Pour les motifs que je viens d'exposer, autoriser les juges à octroyer des aliments minerait l'objectif de la loi, soit de maximiser le libre choix et l'autonomie. Ce serait alors un juge, et non les conjoints, qui déciderait. À cette étape de l'analyse, la question à trancher 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. En outre, les mesures protectrices que constituent l'octroi d'aliments et le partage des biens sont interreliées et ne peuvent être facilement traitées distinctement.

[447] For these reasons, I conclude that the Quebec law falls within a range of reasonable alternatives for maximizing choice and autonomy in the matter of family assets and support.

[447] Pour ces motifs, je conclus que 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.

D. *Proportionality*

D. *Proportionnalité*

[448] Ultimately, the infringement of a protected right must be proportionate to the benefits of

[448] Finalement, l'atteinte à un droit garanti doit être proportionnelle aux avantages que procure

pursuing the state objective, having regard to the impact of the law on the exercise of the right and the broader public benefits it seeks to achieve.

[449] The impact of the Quebec scheme on the exercise and enjoyment of the equality right is significant. However, the discriminatory effects of the exclusion of *de facto* spouses from the mandatory regime are attenuated in the modern era, as compared to earlier points in Quebec's history. The impugned provisions do not appear to perpetuate animus against *de facto* spouses. All parties to this appeal agreed that the *de facto* spousal relationship is a popular form of relationship in Quebec. There is no longer any stigma attached to *de facto* spousal relationships. Many spouses in Quebec appreciate and take advantage of the ability to structure their relationship outside the traditional strictures of marriage. The impugned provisions enhance the freedom of choice and autonomy of many spouses as well as their ability to give personal meaning to their relationship. Against this must be weighed the cost of infringing the equality right of people like A, who have not been able to make a meaningful choice. Critics can say and have said that the situation of women like A suggests that the legislation achieves only a formalistic autonomy and an illusory freedom. However, the question for this Court is whether the unfortunate dilemma faced by women such as A is disproportionate to the overall benefits of the legislation, so as to make it unconstitutional. 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 each province to legislate for its population, the answer to this question is no.

la recherche des objectifs de l'État, compte tenu de l'incidence du texte législatif sur l'exercice du droit en cause et des avantages d'intérêt public plus larges qu'il vise à atteindre.

[449] L'incidence du régime québécois sur l'exercice et la jouissance du droit à l'égalité est considérable. Cependant, les effets discriminatoires de l'exclusion des conjoints de fait du régime obligatoire sont atténués à l'ère moderne par rapport à ce qu'ils étaient à divers moments antérieurs de l'histoire du Québec. Les dispositions contestées ne semblent pas perpétuer d'animosité à l'endroit des conjoints de fait. Toutes les parties au présent litige ont convenu que l'union de fait est populaire au Québec et qu'il n'y est plus rattaché quelque stigmate que ce soit. De nombreuses personnes vivant en couple au Québec comprennent la possibilité qui est la leur de structurer leur relation autrement que par le seul mariage traditionnel et s'en prévalent. Les dispositions contestées accroissent le libre choix et l'autonomie de nombreux conjoints de même que leur capacité à donner un sens personnel à leur relation. C'est à la lumière de ces réalités qu'il faut mesurer le coût de l'atteinte au droit à l'égalité pour les personnes comme A qui n'ont pas réellement pu faire un choix. Il est possible de prétendre, à tort ou à raison, que la situation de femmes comme A peut mener à la conclusion que le modèle québécois n'offre qu'une autonomie formelle et une liberté illusoire. Cependant, la question que doit trancher la Cour est celle de savoir si le malheureux dilemme auquel sont confrontées les femmes comme A est disproportionné par rapport à l'ensemble des avantages que procure le texte législatif, au point de le rendre inconstitutionnel. 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, c'est par la négative qu'il faut répondre à la question.

III. Conclusion

[450] I would allow the appeals of B and the Attorney General of Quebec and find the Quebec scheme to be constitutional. I would dismiss A's appeal and would not award costs.

Appeals of the Attorney General of Quebec and B allowed, appeal of A dismissed, DESCHAMPS, CROMWELL *and* KARAKATSANIS JJ. *dissenting in part in the result,* ABELLA J. *dissenting in the result.*

Solicitors for the appellant/respondent the Attorney General of Quebec: Bernard, Roy & Associés, Montréal.

Solicitors for the appellant/respondent A: Borden Ladner Gervais, Montréal.

Solicitors for the appellant/respondent B: Norton Rose Canada, Montréal; Suzanne H. Pringle, Montréal.

Solicitor for the intervener the Attorney General of New Brunswick: Attorney General of New Brunswick, Fredericton.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Solicitors for the intervener Fédération des associations de familles monoparentales et recomposées du Québec: Garneau, Verdon, Michaud, Samson, Québec.

Solicitors for the intervener the Women's Legal Education and Action Fund: Martha McCarthy & Company, Toronto; O'Hanlon, Sanders, Teixeira, Montréal.

III. Conclusion

[450] Je suis d'avis d'accueillir les appels de B et du procureur général du Québec et de conclure à la constitutionnalité du modèle québécois. Je suis en outre d'avis de rejeter l'appel de A et de ne pas accorder de dépens.

Pourvois du procureur général du Québec et de B accueillis, pourvoi de A rejeté, les juges DESCHAMPS, CROMWELL *et* KARAKATSANIS *sont dissidents en partie quant au résultat et la juge* ABELLA *est dissidente quant au résultat.*

Procureurs de l'appelant/intimé le procureur général du Québec : Bernard, Roy & Associés, Montréal.

Procureurs de l'appelante/intimée A : Borden Ladner Gervais, Montréal.

Procureurs de l'appelant/intimé B : Norton Rose Canada, Montréal; Suzanne H. Pringle, Montréal.

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