In the matter of the Public Inquiries Act, 2009, S.O. 2009, c 33, Sch 6

And in the matter of the Resolution of the Council of the City of Hamilton dated April 24, 2019, establishing the Red Hill Valley Parkway Inquiry pursuant to section 274 of the Municipal Act, 2001, S.O. 2001, c 25

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City of Toronto (Appellant) and Attorney General of Ontario (Respondent) and Attorney General of Canada, Attorney General of British Columbia, Toronto District School Board, Cityplace Residents' Association, Canadian Constitution Foundation, International Commission of Jurists (Canada), Federation of Canadian Municipalities, Durham Community Legal Clinic, Centre for Free Expression at Ryerson University, Canadian Civil Liberties Association, Art Eggleton, Barbara Hall, David Miller, John Sewell, David Asper Centre for Constitutional Rights, Progress Toronto, Métis Nation of Ontario, Métis Nation of Alberta and Fair Voting British Columbia (Interveners)

Wagner C.J.C., Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer JJ.

Heard: March 16, 2021
Judgment: October 1, 2021
Docket: 38921

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Babcock v. Canada (Attorney General) (2002), 2002 SCC 57, 2002 CarswellBC 1576, 2002 CarswellBC 1577, 3 B.C.L.R. (4th) 1, [2002] 8 W.W.R. 585, 214 D.L.R. (4th) 193, 3 C.R. (6th) 1, 289 N.R. 341, 168 B.C.A.C. 50, 275 W.A.C. 50, [2002] 3 S.C.R. 3, 2002 CSC 57 (S.C.C.) — refered to in a minority or dissenting opinion

Baier v. Alberta (2007), 2007 SCC 31, 2007 CarswellAlta 853, 2007 CarswellAlta 854, 76 Alta. L.R. (4th) 1, [2007] 9 W.W.R. 389, 365 N.R. 1, 283 D.L.R. (4th) 1, 156 C.R.R. (2d) 279, 412 A.R. 300, 404 W.A.C. 300, [2007] 2 S.C.R. 673 (S.C.C.) — considered in a minority or dissenting opinion

Beckman v. Little Salmon/Carmacks First Nation (2010), 2010 SCC 53, 2010 CarswellYukon 140, 2010 CarswellYukon 141, 97 R.P.R. (4th) 1, 10 Admin. L.R. (5th) 163, 55 C.E.L.R. (3d) 1, (sub nom. *Little Salmon/Carmacks First Nation v. Beckman)* 408 N.R. 281, 326 D.L.R. (4th) 385, (sub nom. *Little Salmon/Carmacks First Nation v. Beckman)* 295 B.C.A.C. 1, (sub nom. *Little Salmon/Carmacks First Nation v. Beckman)* 501 W.A.C. 1, [2011] 1 C.N.L.R. 12, [2010] 3 S.C.R. 103 (S.C.C.) — refered to in a minority or dissenting opinion

British Columbia v. Imperial Tobacco Canada Ltd. (2005), 2005 SCC 49, 2005 CarswellBC 2207, 2005 CarswellBC 2208, 45 B.C.L.R. (4th) 1, 257 D.L.R. (4th) 193, [2006] 1 W.W.R. 201, 339 N.R. 129, [2005] 2 S.C.R. 473, 134 C.R.R. (2d) 46, 218 B.C.A.C. 1, 359 W.A.C. 1, 27 C.P.C. (6th) 13 (S.C.C.) — considered in a minority or dissenting opinion

Canada (Attorney General) v. Ontario (Attorney General) (1937), [1937] 1 W.W.R. 299, [1937] A.C. 326, [1937] 1 D.L.R. 673, [1937] W.N. 53, 1937 CarswellNat 2 (Jud. Com. of Privy Coun.) — refered to in a minority or dissenting opinion

Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc. (1984), [1984] 2 S.C.R. 145, (sub nom. *Hunter v. Southam Inc.)* 11 D.L.R. (4th) 641, (sub nom. *Hunter v. Southam Inc.)* 55 N.R. 241, 33 Alta. L.R. (2d) 193, (sub nom. *Hunter v. Southam Inc.)* 55 A.R. 291, 27 B.L.R. 297, (sub nom. *Hunter v. Southam Inc.)* 2 C.P.R. (3d) 1, 41 C.R. (3d) 97, (sub nom. *Hunter v. Southam Inc.)* 9 C.R.R. 355, 84 D.T.C. 6467, (sub nom. *Hunter v. Southam Inc.)* 14 C.C.C. (3d) 97, (sub nom. *Director of Investigations & Research Combines Investigation Branch v. Southam Inc.)* [1984] 6 W.W.R. 577, 1984 CarswellAlta 121, 1984 CarswellAlta 415 (S.C.C.) — refered to in a minority or dissenting opinion

Canada (Minister of Citizenship and Immigration) v. Vavilov (2019), 2019 SCC 65, 2019 CSC 65, 2019 CarswellNat 7883, 2019 CarswellNat 7884, 59 Admin. L.R. (6th) 1, 441 D.L.R. (4th) 1, 69 Imm. L.R. (4th) 1 (S.C.C.) — refered to in a minority or dissenting opinion

Canadian Broadcasting Corp. v. New Brunswick (Attorney General) (1996), 2 C.R. (5th) 1, 110 C.C.C. (3d) 193, [1996] 3 S.C.R. 480, 139 D.L.R. (4th) 385, 182 N.B.R. (2d) 81, 463 A.P.R. 81, 39 C.R.R. (2d) 189, 203 N.R. 169, 1996 CarswellNB 462, 1996 CarswellNB 463, 2 B.H.R.C. 210 (S.C.C.) — refered to in a minority or dissenting opinion

Canadian Federation of Students v. Greater Vancouver Transportation Authority (2009), 2009 SCC 31, 2009 CarswellBC 1767, 2009 CarswellBC 1768, 93 B.C.L.R. (4th) 1, [2009] 8 W.W.R. 385, 389 N.R. 98, 309 D.L.R. (4th) 277, 272 B.C.A.C. 29, 459 W.A.C. 29, (sub nom. *Greater Vancouver Transportation Authority v. Canadian Federation of Students - British Columbia Component)* 192 C.R.R. (2d) 336, (sub nom. *Greater Vancouver Transportation Authority v. Canadian Federation of Students - British Columbia Component)* [2009] 2 S.C.R. 295 (S.C.C.) — considered in a minority or dissenting opinion

Carter v. Canada (Attorney General) (2015), 2015 SCC 5, 2015 CSC 5, 2015 CarswellBC 227, 2015 CarswellBC 228, 66 B.C.L.R. (5th) 215, [2015] 3 W.W.R. 425, 17 C.R. (7th) 1, 320 C.C.C. (3d) 1, 468 N.R. 1, 384 D.L.R. (4th) 14, 366 B.C.A.C. 1, 629 W.A.C. 1, [2015] 1 S.C.R. 331, 327 C.R.R. (2d) 334 (S.C.C.) — refered to in a minority or dissenting opinion

Catalyst Paper Corp. v. North Cowichan (District) (2012), 2012 SCC 2, 2012 CarswellBC 17, 2012 CarswellBC 18, 11 R.P.R. (5th) 1, [2012] 2 W.W.R. 415, 26 B.C.L.R. (5th) 1, 340 D.L.R. (4th) 385, 93 M.P.L.R. (4th) 1, 425 N.R. 22, 316 B.C.A.C. 1, 537 W.A.C. 1, 34 Admin. L.R. (5th) 175, [2012] 1 S.C.R. 5 (S.C.C.) — considered in a minority or dissenting opinion

Committee for the Commonwealth of Canada v. Canada (1991), 1991 CarswellNat 827, 1991 CarswellNat 1094, 4 C.R.R. (2d) 60, 77 D.L.R. (4th) 385, 40 F.T.R. 240 (note), 120 N.R. 241, [1991] 1 S.C.R. 139 (S.C.C.) — refered to in a minority or dissenting opinion

Criminal Lawyers' Assn. v. Ontario (Ministry of Public Safety & Security) (2010), 2010 SCC 23, 2010 CarswellOnt 3964, 2010 CarswellOnt 3965, 1 Admin. L.R. (5th) 235, 84 C.P.R. (4th) 81, 319 D.L.R. (4th) 385, 255 C.C.C. (3d) 545, 402 N.R. 350, (sub nom. *Criminal Lawyers' Assn. (Ont.) v. Ontario (Ministry of Public Safety & Security))* 262 O.A.C. 258, 76 C.R. (6th) 283, (sub nom. *Ontario (Public Safety & Security) v. Criminal Lawyers' Association)* [2010] 1 S.C.R. 815, (sub nom. *Ontario (Minister of Public Safety) v. Criminal Lawyers' Association)* 212 C.R.R. (2d) 300, 2010 CSC 23 (S.C.C.) — refered to in a minority or dissenting opinion

Dagenais v. Canadian Broadcasting Corp. (1994), 34 C.R. (4th) 269, 20 O.R. (3d) 816 (note), [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12, 175 N.R. 1, 94 C.C.C. (3d) 289, 76 O.A.C. 81, 25 C.R.R. (2d) 1, 1994 CarswellOnt 112, 1994 CarswellOnt 1168 (S.C.C.) — refered to in a minority or dissenting opinion

Delisle c. Canada (Sous-procureur général) (1999), 1999 CarswellQue 2840, 1999 CarswellQue 2841, (sub nom. *Delisle v. Attorney General of Canada)* 99 C.L.L.C. 220-066, (sub nom. *Delisle v. Canada (Attorney General))* 244 N.R. 33, (sub nom. *Delisle v. Canada (Deputy Attorney General))* 176 D.L.R. (4th) 513, (sub nom. *Delisle v. Canada (Attorney General))* 66 C.R.R. (2d) 14, [1999] 2 S.C.R. 989 (S.C.C.) — refered to in a minority or dissenting opinion

Devine c. Québec (Procureur général) (1988), 90 N.R. 48, [1988] 2 S.C.R. 790, 55 D.L.R. (4th) 641, 19 Q.A.C. 33, 36 C.R.R. 64, 10 C.H.R.R. D/5610, 1988 CarswellQue 156, 1988 CarswellQue 156F (S.C.C.) — refered to in a minority or dissenting opinion

Di Ciano v. Toronto (City) (2017), 2017 CarswellOnt 20297 (O.M.B.) — considered in a minority or dissenting opinion

Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580 (1986), 38 C.C.L.T. 184, 71 N.R. 83, (sub nom. *R.W.D.S.U. v. Dolphin Delivery Ltd.)* [1986] 2 S.C.R. 573, (sub nom. *R.W.D.S.U. v. Dolphin Delivery Ltd.)* 9 B.C.L.R. (2d) 273, (sub nom. *R.W.D.S.U., Local 580 v. Dolphin Delivery Ltd.)* 87 C.L.L.C. 14,002, (sub nom. *R.W.D.S.U., Local 580 v. Dolphin Delivery Ltd.)* [1987] 1 W.W.R. 577, (sub nom. *R.W.D.S.U., Local 580 v. Dolphin Delivery Ltd.)* 33 D.L.R. (4th) 174, (sub nom. *R.W.D.S.U., Local 580 v. Dolphin Delivery Ltd.)* 25 C.R.R. 321, [1987] D.L.Q. 69 (note), 1986 CarswellBC 411, 1986 CarswellBC 764 (S.C.C.) — referred to

Dunmore v. Ontario (Attorney General) (2001), 2001 SCC 94, 2001 CarswellOnt 4434, 2001 CarswellOnt 4435, 13 C.C.E.L. (3d) 1, 2002 C.L.L.C. 220-004, 207 D.L.R. (4th) 193, 279 N.R. 201, 154 O.A.C. 201, 89 C.R.R. (2d) 189, [2001] 3 S.C.R. 1016, 2001 CSC 94 (S.C.C.) — considered in a minority or dissenting opinion

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

Edwards v. Canada (Attorney General) (1929), [1930] A.C. 124, [1930] 1 D.L.R. 98, (sub nom. *Reference re s. 24 of the Constitution Act, 1867)* [1929] 3 W.W.R. 479, 1929 CarswellNat 2, [1929] UKPC 86 (Jud. Com. of Privy Coun.) — refered to in a minority or dissenting opinion

Eldridge v. British Columbia (Attorney General) (1997), 1997 CarswellBC 1939, 1997 CarswellBC 1940, 151 D.L.R. (4th) 577, 218 N.R. 161, 96 B.C.A.C. 81, 155 W.A.C. 81, [1998] 1 W.W.R. 50, 46 C.R.R. (2d) 189, 38 B.C.L.R. (3d) 1, [1997] 3 S.C.R. 624, 3 B.H.R.C. 137 (S.C.C.) — refered to in a minority or dissenting opinion

Fedsure Life Assurance Ltd. v. Greater Johannesburg Transitional Metropolitan Council (1998), [1998] ZACC 17 (South Africa H.C.) — refered to in a minority or dissenting opinion

Ford c. Québec (Procureur général) (1988), 90 N.R. 84, 54 D.L.R. (4th) 577, 19 Q.A.C. 69, 36 C.R.R. 1, 10 C.H.R.R. D/5559, 1988 CarswellQue 155, 1988 CarswellQue 155F, (sub nom. *Ford v. Quebec (Attorney General))* [1988] 2 S.C.R. 712 (S.C.C.) — refered to in a minority or dissenting opinion

Fraser v. Canada (Attorney General) (2020), 2020 SCC 28, 2020 CSC 28, 2020 CarswellNat 4333, 2020 CarswellNat 4334, 57 C.C.P.B. (2nd) 1, 450 D.L.R. (4th) 1, 2021 C.L.L.C. 230-001, 2020 C.E.B. & P.G.R. 8392 (headnote only), 467 C.R.R. (2d) 38 (S.C.C.) — refered to in a minority or dissenting opinion
Fraser v. Ontario (Attorney General) (2011), 2011 SCC 20, 2011 CarswellOnt 2695, 2011 CarswellOnt 2696, D.T.E. 2011T-294, (sub nom. *A.G. (Ontario) v. Fraser)* 2011 C.L.L.C. 220-029, 331 D.L.R. (4th) 64, 415 N.R. 200, 275 O.A.C. 205, 91 C.C.E.L. (3d) 1, (sub nom. *Ontario (Attorney General) v. Fraser)* [2011] 2 S.C.R. 3, 233 C.R.R. (2d) 237, 108 O.R. (3d) 78 (note) (S.C.C.) — refered to in a minority or dissenting opinion
Godbout c. Longueuil (Ville) (1997), 219 N.R. 1, (sub nom. *Godbout v. Longueuil (City))* 152 D.L.R. (4th) 577, 1997 CarswellQue 883, 1997 CarswellQue 884, (sub nom. *Godbout v. Longueuil (City))* 47 C.R.R. (2d) 1, 43 M.P.L.R. (2d) 1, (sub nom. *Longueuil (City) v. Godbout)* 97 C.L.L.C. 210-031, [1997] 3 S.C.R. 844 (S.C.C.) — considered in a minority or dissenting opinion
Haida Nation v. British Columbia (Minister of Forests) (2004), 2004 SCC 73, 2004 CarswellBC 2656, 2004 CarswellBC 2657, 245 D.L.R. (4th) 33, 19 Admin. L.R. (4th) 195, 11 C.E.L.R. (3d) 1, [2005] 1 C.N.L.R. 72, 26 R.P.R. (4th) 1, [2005] 3 W.W.R. 419, [2004] 3 S.C.R. 511, 36 B.C.L.R. (4th) 282, 327 N.R. 53, 206 B.C.A.C. 52, 338 W.A.C. 52, 2004 CSC 73 (S.C.C.) — refered to in a minority or dissenting opinion
Haig v. R. (1993), 156 N.R. 81, (sub nom. *Haig v. Canada)* 105 D.L.R. (4th) 577, (sub nom. *Haig v. Canada)* 16 C.R.R. (2d) 193, (sub nom. *Haig v. Canada)* 66 F.T.R. 80 (note), 1993 CarswellNat 1384, (sub nom. *Haig v. Canada)* [1993] 2 S.C.R. 995, 1993 CarswellNat 2353 (S.C.C.) — refered to in a minority or dissenting opinion
Harper v. Canada (Attorney General) (2004), 2004 SCC 33, 2004 CarswellAlta 646, 2004 CarswellAlta 647, 320 N.R. 49, 239 D.L.R. (4th) 193, 27 Alta. L.R. (4th) 1, [2004] 8 W.W.R. 1, 348 A.R. 201, 321 W.A.C. 201, [2004] 1 S.C.R. 827, 119 C.R.R. (2d) 84, 2004 CSC 33 (S.C.C.) — refered to in a minority or dissenting opinion
Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia (2007), 2007 SCC 27, 2007 CarswellBC 1289, 2007 CarswellBC 1290, 2007 C.L.L.C. 220-035, 65 B.C.L.R. (4th) 201, [2007] 7 W.W.R. 191, D.T.E. 2007T-507, 363 N.R. 226, 137 C.L.R.B.R. (2d) 166, 283 D.L.R. (4th) 40, 164 L.A.C. (4th) 1, 242 B.C.A.C. 1, 400 W.A.C. 1, [2007] 2 S.C.R. 391, 157 C.R.R. (2d) 21 (S.C.C.) — refered to in a minority or dissenting opinion
Irwin Toy Ltd. c. Québec (Procureur général) (1989), 94 N.R. 167, (sub nom. *Irwin Toy Ltd. v. Quebec (Attorney General))* [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577, 24 Q.A.C. 2, 25 C.P.R. (3d) 417, 39 C.R.R. 193, 1989 CarswellQue 115F, 1989 CarswellQue 115 (S.C.C.) — considered in a minority or dissenting opinion
J.T.I. MacDonald Corp. c. Canada (Procureure générale) (2007), 2007 SCC 30, 2007 CarswellQue 5573, 2007 CarswellQue 5574, 364 N.R. 89, 281 D.L.R. (4th) 589, (sub nom. *Canada (Attorney General) v. JTI-MacDonald Corp.)* 158 C.R.R. (2d) 127, [2007] 2 S.C.R. 610 (S.C.C.) — refered to in a minority or dissenting opinion
Kable v. Director of Public Prosecutions (NSW) (1996), 189 C.L.R. 51 (Australia H.C.) — refered to in a minority or dissenting opinion
Kesavananda v. State of Kerala (1973), 1973 S.C. 1461 (India P.C.) — refered to in a minority or dissenting opinion
Lange v. Australian Broadcasting Corp. (1997), 189 C.L.R. 520, 71 A.L.J.R. 818, 145 A.L.R. 96 (Australia H.C.) — refered to in a minority or dissenting opinion
Libman c. Québec (Procureur général) (1997), 151 D.L.R. (4th) 385, 1997 CarswellQue 851, 1997 CarswellQue 852, (sub nom. *Libman v. Quebec (Attorney General))* 46 C.R.R. (2d) 234, [1997] 3 S.C.R. 569, 3 B.H.R.C. 269, 218 N.R. 241 (S.C.C.) — considered in a minority or dissenting opinion
Little Sisters Book & Art Emporium v. Canada (Minister of Justice) (2000), 2000 SCC 69, 2000 CarswellBC 2442, 2000 CarswellBC 2452, 83 B.C.L.R. (3d) 1, [2001] 2 W.W.R. 1, 38 C.R. (5th) 209, 150 C.C.C. (3d) 1, 193 D.L.R. (4th) 193, 263 N.R. 203, [2000] 2 S.C.R. 1120, 145 B.C.A.C. 1, 237 W.A.C. 1, 28 Admin. L.R. (3d) 1, 79 C.R.R. (2d) 189, 5 T.T.R. 161, 2000 CSC 69, 263 A.R. 203 (S.C.C.) — refered to in a minority or dissenting opinion
MacMillan Bloedel Ltd. v. Simpson (1995), [1995] 4 S.C.R. 725, [1996] 2 W.W.R. 1, 14 B.C.L.R. (3d) 122, 44 C.R. (4th) 277, 130 D.L.R. (4th) 385, 103 C.C.C. (3d) 225, 191 N.R. 260, 33 C.R.R. (2d) 123, 68 B.C.A.C. 161, 112 W.A.C. 161, 1995 CarswellBC 974, 1995 CarswellBC 1153 (S.C.C.) — considered in a minority or dissenting opinion
Montreal (Ville) v. 2952-1366 Québec inc. (2005), 2005 SCC 62, 2005 CarswellQue 9633, 2005 CarswellQue 9634, 201 C.C.C. (3d) 161, 32 Admin. L.R. (4th) 159, 15 M.P.L.R. (4th) 1, 33 C.R. (6th) 78, (sub nom. *Montreal (City) v. 2952-1366*

Québec Inc.) 340 N.R. 305, 258 D.L.R. (4th) 595, 18 C.E.L.R. (3d) 1, *(*sub nom. *Montréal (City) v. 2952-1366 Québec Inc.)* 134 C.R.R. (2d) 196, [2005] 3 S.C.R. 141 (S.C.C.) — refered to in a minority or dissenting opinion

Mounted Police Association of Ontario v. Canada (Attorney General) (2015), 2015 SCC 1, 2015 CSC 1, 2015 CarswellOnt 210, 2015 CarswellOnt 211, 380 D.L.R. (4th) 1, 249 L.A.C. (4th) 1, 2015 C.L.L.C. 220-010, 466 N.R. 199, 328 O.A.C. 1, *(*sub nom. *Mounted Police Association of Ontario v. Canada (Attorney General))* [2015] 1 S.C.R. 3, 325 C.R.R. (2d) 300, 129 O.R. (3d) 559 (note) (S.C.C.) — refered to in a minority or dissenting opinion

Nanaimo (City) v. Rascal Trucking Ltd. (2000), 2000 SCC 13, 2000 CarswellBC 392, 2000 CarswellBC 393, 183 D.L.R. (4th) 1, 251 N.R. 42, 132 B.C.A.C. 298, 215 W.A.C. 298, 9 M.P.L.R. (3d) 1, [2000] 1 S.C.R. 342, [2000] 6 W.W.R. 403, 76 B.C.L.R. (3d) 201, 20 Admin. L.R. (3d) 1, 2000 CSC 13 (S.C.C.) — referred to

Natale v. City of Toronto (2018), 2018 ONSC 1475, 2018 CarswellOnt 3319, 71 M.P.L.R. (5th) 265, 1 O.M.T.R. 349 (Ont. Div. Ct.) — considered in a minority or dissenting opinion

Native Women's Assn. of Canada v. Canada (1994), 1994 CarswellNat 1499, 1994 CarswellNat 1773, [1995] 1 C.N.L.R. 47, 24 C.R.R. (2d) 233, 119 D.L.R. (4th) 224, 84 F.T.R. 240 (note), 173 N.R. 241, [1994] 3 S.C.R. 627 (S.C.C.) — refered to in a minority or dissenting opinion

New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly) (1993), 146 N.R. 161, 13 C.R.R. (2d) 1, 100 D.L.R. (4th) 212, 118 N.S.R. (2d) 181, 327 A.P.R. 181, [1993] 1 S.C.R. 319, 1993 CarswellNS 417, 1993 CarswellNS 417F (S.C.C.) — refered to in a minority or dissenting opinion

O.P.S.E.U. v. Ontario (Attorney General) (1987), [1987] 2 S.C.R. 2, 41 D.L.R. (4th) 1, 77 N.R. 321, 23 O.A.C. 161, 28 Admin. L.R. 141, 87 C.L.L.C. 14,037, 1987 CarswellOnt 945, 59 O.R. (2d) 671 (note), 1987 CarswellOnt 968, 59 O.R. (2d) 671 (S.C.C.) — refered to in a minority or dissenting opinion

Ontario (Attorney General) v. G (2020), 2020 SCC 38, 2020 CSC 38, 2020 CarswellOnt 17020, 2020 CarswellOnt 17021, 451 D.L.R. (4th) 541, 67 C.R. (7th) 340, 395 C.C.C. (3d) 277, 469 C.R.R. (2d) 272 (S.C.C.) — refered to in a minority or dissenting opinion

PHS Community Services Society v. Canada (Attorney General) (2011), 2011 SCC 44, 2011 CarswellBC 2443, 2011 CarswellBC 2444, 336 D.L.R. (4th) 385, 272 C.C.C. (3d) 428, 86 C.R. (6th) 223, 22 B.C.L.R. (5th) 213, [2011] 12 W.W.R. 43, 421 N.R. 1, *(*sub nom. *Canada (Attorney General) v. PHS Community Services Society)* [2011] 3 S.C.R. 134, 310 B.C.A.C. 1, 526 W.A.C. 1, *(*sub nom. *Canada (Attorney General) v. PHS Community Services Society)* 244 C.R.R. (2d) 209 (S.C.C.) — refered to in a minority or dissenting opinion

R. (on the application of Jackson) v. Attorney General (2005), [2006] 1 A.C. 262, [2005] UKHL 56 (Eng. H.L.) — refered to in a minority or dissenting opinion

R. (on the application of Miller) v. Prime Minister (2019), [2019] UKSC 41 (U.K. S.C.) — refered to in a minority or dissenting opinion

R. (on the application of Privacy International) v. Investigatory Powers Tribunal (2019), [2020] A.C. 491, [2019] 4 All E.R. 1, [2019] 2 W.L.R. 1219, [2019] UKSC 22 (U.K. S.C.) — refered to in a minority or dissenting opinion

R. v. Bryan (2007), 2007 SCC 12, 2007 CarswellBC 533, 2007 CarswellBC 534, [2007] 5 W.W.R. 1, 217 C.C.C. (3d) 97, 276 D.L.R. (4th) 513, 359 N.R. 1, 45 C.R. (6th) 102, 237 B.C.A.C. 33, 392 W.A.C. 33, 153 C.R.R. (2d) 316, [2007] 1 S.C.R. 527, 72 B.C.L.R. (4th) 199 (S.C.C.) — refered to in a minority or dissenting opinion

R. v. Butler (1992), [1992] 2 W.W.R. 577, [1992] 1 S.C.R. 452, 11 C.R. (4th) 137, 70 C.C.C. (3d) 129, 134 N.R. 81, 8 C.R.R. (2d) 1, 89 D.L.R. (4th) 449, 78 Man. R. (2d) 1, 16 W.A.C. 1, 1992 CarswellMan 100, 1992 CarswellMan 220 (S.C.C.) — refered to in a minority or dissenting opinion

R. v. Campbell (1997), 11 C.P.C. (4th) 1, *(*sub nom. *Reference re Public Sector Pay Reduction Act (P.E.I.), s. 10)* 150 D.L.R. (4th) 577, 118 C.C.C. (3d) 193, *(*sub nom. *Provincial Court Judges Assn. (Manitoba) v. Manitoba (Minister of Justice))* 46 C.R.R. (2d) 1, *(*sub nom. *Reference re Remuneration of Judges of the Provincial Court (P.E.I.))* 206 A.R. 1, *(*sub nom. *Reference re Remuneration of Judges of the Provincial Court (P.E.I.))* 156 W.A.C. 1, *(*sub nom. *Reference re Remuneration of Judges of the Provincial Court (P.E.I.))* 156 Nfld. & P.E.I.R. 1, *(*sub nom. *Reference re Remuneration of Judges of the Provincial Court (P.E.I.))* 483 A.P.R. 1, 217 N.R. 1, *(*sub nom. *Reference re Remuneration of Judges of the Provincial Court (P.E.I.))* 121 Man. R. (2d) 1, 49 Admin. L.R. (2d) 1, *(*sub nom. *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island)* [1997] 3 S.C.R. 3, [1997] 10 W.W.R. 417, 1997 CarswellNat 3038, 1997 CarswellNat 3039 (S.C.C.) — refered to in a minority or dissenting opinion

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R. v. Morgentaler (1988), [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385, 26 O.A.C. 1, 37 C.C.C. (3d) 449, 62 C.R. (3d) 1, 31 C.R.R. 1, 82 N.R. 1, 63 O.R. (2d) 281 (note), 1988 CarswellOnt 954, 1988 CarswellOnt 45 (S.C.C.) — refered to in a minority or dissenting opinion

R. v. Sharpe (2001), 2001 SCC 2, 2001 CarswellBC 82, 2001 CarswellBC 83, 194 D.L.R. (4th) 1, 150 C.C.C. (3d) 321, 39 C.R. (5th) 72, 264 N.R. 201, 146 B.C.A.C. 161, 239 W.A.C. 161, 88 B.C.L.R. (3d) 1, [2001] 6 W.W.R. 1, [2001] 1 S.C.R. 45, 86 C.R.R. (2d) 1 (S.C.C.) — refered to in a minority or dissenting opinion

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Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authorit (1997), 190 C.L.R. 410 (Australia H.C.) — refered to in a minority or dissenting opinion

Reference re Alberta Legislation (1938), [1938] S.C.R. 100, [1938] 2 D.L.R. 81, 1938 CarswellAlta 88 (S.C.C.) — refered to in a minority or dissenting opinion

Reference re Amendment to the Constitution of Canada (1981), 125 D.L.R. (3d) 1, *(*sub nom. *Constitutional Amendment References 1981, Re)* 39 N.R. 1, *(*sub nom. *Constitutional Amendment References 1981, Re)* 11 Man. R. (2d) 1, *(*sub nom. *Constitutional Amendment References 1981, Re)* 34 Nfld. & P.E.I.R. 1, *(*sub nom. *Manitoba (Attorney General) v. Canada (Attorney General))* [1981] 6 W.W.R. 1, *(*sub nom. *Resolution to amend the Constitution, Re)* [1981] 1 S.C.R. 753, *(*sub nom. *Constitutional Amendment References 1981, Re)* 95 A.P.R. 1, 1981 CarswellMan 110, 1981 CarswellMan 360, *(*sub nom. *Resolution to Amend the Constitution of Canada, Re)* 1 C.R.R. 59 (S.C.C.) — refered to in a minority or dissenting opinion

Reference re Constitutional Validity of Bill No. 136 (Nova Scotia) (1950), [1951] S.C.R. 31, *(*sub nom. *Nova Scotia (Attorney General) v. Canada (Attorney General))* [1950] 4 D.L.R. 369, *(*sub nom. *Nova Scotia (Attorney General) v. Canada (Attorney General))* 50 D.T.C. 838, 1950 CarswellNS 20 (S.C.C.) — refered to in a minority or dissenting opinion

Reference re Legislative Authority of Parliament of Canada (1979), [1980] 1 S.C.R. 54, 102 D.L.R. (3d) 1, 30 N.R. 271, 1979 CarswellNat 643F, 1979 CarswellNat 643 (S.C.C.) — refered to in a minority or dissenting opinion

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Roach v. Electoral Commissioner (2007), 233 C.L.R. 162, [2007] HCA 43 (Australia H.C.) — refered to in a minority or dissenting opinion

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Shell Canada Products Ltd. v. Vancouver (City) (1994), [1994] 3 W.W.R. 609, 20 M.P.L.R. (2d) 1, 20 Admin. L.R. (2d) 202, 110 D.L.R. (4th) 1, 88 B.C.L.R. (2d) 145, [1994] 1 S.C.R. 231, 163 N.R. 81, 41 B.C.A.C. 81, 66 W.A.C. 81, 1994 CarswellBC 115, 1994 CarswellBC 1234 (S.C.C.) — considered in a minority or dissenting opinion

Slaight Communications Inc. v. Davidson (1989), 26 C.C.E.L. 85, [1989] 1 S.C.R. 1038, 59 D.L.R. (4th) 416, *(*sub nom. *Davidson v. Slaight Communications Inc.)* 93 N.R. 183, 89 C.L.L.C. 14,031, 40 C.R.R. 100, 1989 CarswellNat 695, 1989 CarswellNat 193 (S.C.C.) — refered to in a minority or dissenting opinion

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Switzman v. Elbling (1956), 7 D.L.R. (2d) 337, [1957] S.C.R. 285, 117 C.C.C. 129, 1957 CarswellQue 39 (S.C.C.) — refered to in a minority or dissenting opinion

Thomson Newspapers Co. v. Canada (Attorney General) (1998), 1998 CarswellOnt 1981, 1998 CarswellOnt 1982, 159 D.L.R. (4th) 385, 226 N.R. 1, 51 C.R.R. (2d) 189, 109 O.A.C. 201, [1998] 1 S.C.R. 877, 5 B.H.R.C. 567, 38 O.R. (3d) 735 (S.C.C.) — refered to in a minority or dissenting opinion

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Trial Lawyers Assn. of British Columbia v. British Columbia (Attorney General) (2014), 2014 SCC 59, 2014 CSC 59, 2014 CarswellBC 2873, 2014 CarswellBC 2874, 375 D.L.R. (4th) 599, [2014] 11 W.W.R. 213, 59 C.P.C. (7th) 1, 62 B.C.L.R. (5th) 1, 74 Admin. L.R. (5th) 181, 51 R.F.L. (7th) 1, 463 N.R. 336, 361 B.C.A.C. 1, 619 W.A.C. 1, *(*sub nom. *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General))* [2014] 3 S.C.R. 31, *(*sub nom. *Trial Lawyers Assn. of British Columbia v. British Columbia (Attorney General))* 320 C.R.R. (2d) 239 (S.C.C.) — considered in a minority or dissenting opinion

United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City) (2004), 2004 SCC 19, 2004 CarswellAlta 355, 2004 CarswellAlta 356, 46 M.P.L.R. (3d) 1, 236 D.L.R. (4th) 385, 318 N.R. 170, 18 R.P.R. (4th) 1, 50 M.V.R. (4th) 1, 26 Alta. L.R. (4th) 1, 12 Admin. L.R. (4th) 1, [2004] 7 W.W.R. 603, 346 A.R. 4, 320 W.A.C. 4, [2004] 1 S.C.R. 485, 2004 CSC 19 (S.C.C.) — considered in a minority or dissenting opinion

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114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town) (2001), 2001 SCC 40, 2001 CarswellQue 1268, 2001 CarswellQue 1269, 19 M.P.L.R. (3d) 1, 271 N.R. 201, 40 C.E.L.R. (N.S.) 1, 2001 CSC 40, 200 D.L.R. (4th) 419, [2001] 2 S.C.R. 241 (S.C.C.) — considered in a minority or dissenting opinion

Statutes considered by *Wagner C.J.C., Brown J.*:

Better Local Government Act, 2018, S.O. 2018, c. 11

Generally — considered

Canada Evidence Act, R.S.C. 1985, c. C-5

Generally — referred to

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

Generally — considered

s. 1 — considered

s. 2(b) — considered

s. 2(d) — considered

s. 3 — considered

s. 11(d) — considered

s. 33 — referred to
City of Toronto Act, 2006, S.O. 2006, c. 11, Sched. A
Generally — referred to
Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5
Generally — referred to

Preamble — referred to

s. 91 — referred to

s. 92 — referred to

s. 92 ¶ 8 — considered

s. 92 ¶ 14 — considered

s. 96 — considered

ss. 96-100 — referred to

ss. 96-101 — referred to

s. 100 — referred to

s. 129 — referred to
Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44
Generally — referred to

Preamble — referred to

s. 52 — referred to

s. 52(1) — considered
Human Rights Act, 1998, c. 42
s. 4 — referred to
Magna Carta, 1215 (17 John)
Generally — referred to
Statutes considered by *Abella J.* (dissenting):
Better Local Government Act, 2018, S.O. 2018, c. 11
Generally — referred to
Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
Generally — referred to

s. 1 — referred to

s. 2(b) — considered

s. 2(d) — considered

s. 7 — referred to

s. 11(d) — considered

s. 15 — referred to

s. 33 — referred to

City of Toronto Act, 2006, S.O. 2006, c. 11, Sched. A

s. 128(1) — referred to

Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

Generally — considered

Preamble — referred to

s. 92 ¶ 8 — considered

ss. 96-100 — referred to

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44

s. 52 — considered

s. 52(1) — considered

Municipal Elections Act, 1996, S.O. 1996, c. 32, Sched.

s. 10.1(8) [en. 2018, c. 11, Sched. 3, s. 1] — referred to

Young Offenders Act, R.S.C. 1985, c. Y-1

s. 47(2) — referred to

Treaties considered by *Wagner C.J.C., Brown J.*:

European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222; E.T.S. No. 5

Generally — referred to

***Wagner C.J.C., Brown J.* (Moldaver, Côté and Rowe JJ. concurring):**

I. Introduction

1 While cast as a claim of right under s. 2(b) of the Canadian Charter of Rights and Freedoms, this appeal, fundamentally, concerns the exercise of provincial legislative authority over municipalities. The issue, simply put, is whether and how the Constitution of Canada restrains a provincial legislature from changing the conditions by and under which campaigns for elected municipal councils are conducted.

2 Section 92(8) of the Constitution Act, 1867 assigns to provinces exclusive legislative authority regarding "Municipal Institutions in the Province". Municipalities incorporated under this authority therefore hold delegated provincial powers; like school boards or other creatures of provincial statute, they do not have independent constitutional status (Public School Boards' Assn. of Alberta v. Alberta (Attorney General), 2000 SCC 45, [2000] 2 S.C.R. 409, at paras. 33-34). The province has "absolute and unfettered legal power to do with them as it wills" (Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General), 2001 SCC 15, [2001] 1 S.C.R. 470, at para. 58, quoting with approval Campbell J. in Ontario Public School Boards' Assn. v. Ontario (Attorney General)(1997), 151 D.L.R. (4th) 346 (Ont. C.J. (Gen. Div.)), at p. 361). No constitutional norms or conventions prevent a province from making changes to municipal institutions without municipal consent (*East York (Borough) v. Ontario*, (1997), 36 O.R. (3d) 733 (C.A.), at pp. 737-38, per Abella J.A.). And "it is not for this Court to create constitutional rights in respect of a third order of government where the words of the Constitution read in context do not do so" (Baier v. Alberta, 2007 SCC 31, [2007] 2 S.C.R. 673, at para. 39).

3 Aside from one reference to s. 92(8) — and an acknowledgement that the Province of Ontario had constitutional authority to act as it did in this case — our colleague Abella J. all but ignores this decisive constitutional context (para. 112). And yet,

these considerations loom large here. After the closing of a nomination period for elections to the Toronto City Council, the Province legislated a new, reduced ward structure for the City of Toronto and a correspondingly reduced Council. The City says that doing so was unconstitutional, because it limited the s. 2(b) Charter rights of electoral participants and violated the unwritten constitutional principle of democracy. It also, says the City, ran afoul of the constitutional requirements of effective representation, which it says flow from s. 2(b) of the Charter and s. 92(8) of the Constitution Act, 1867 by virtue of that same unwritten constitutional principle of democracy.

4 None of these arguments have merit, and we would dismiss the City's appeal. In our view, the Province acted constitutionally. As to the s. 2(b) claim, the City seeks access to a statutory platform which must be considered under the framework stated in *Baier*. The change to the ward structure did not prevent electoral participants from engaging in further political expression on election issues under the new ward structure in the 69 days between the Act coming into force and the election day. There was no substantial interference with the claimants' freedom of expression and thus no limitation of s. 2(b).

5 Nor did the Act otherwise violate the Constitution. Unwritten constitutional principles cannot in themselves ground a declaration of invalidity under s. 52(1) of the Constitution Act, 1982, and there is no freestanding right to effective representation outside s. 3 of the Charter. Further, the unwritten constitutional principle of democracy cannot be used to narrow provincial authority under s. 92(8), or to read municipalities into s. 3.

II. Background

6 In 2013, the City of Toronto engaged consultants to conduct the Toronto Ward Boundary Review of Toronto's then 44-ward structure. They recommended an expanded 47-ward structure, which the City adopted in 2016.

7 On May 1, 2018, the City of Toronto campaign commenced and nominations opened in preparation for an election day on October 22, 2018. By the close of nominations on July 27, 2018, just over 500 candidates had registered to run in the 47 wards. That same day, the Government of Ontario announced its intention to introduce legislation reducing the size of Toronto City Council to 25 wards. On August 14, 2018, the Better Local Government Act, 2018, S.O. 2018, c. 11 ("Act"), came into force, reducing the number of wards from 47 to 25 (based on the boundaries of the federal electoral districts), and extending the nomination period to September 14.

8 The City and two groups of private individuals applied on an urgent basis to the Ontario Superior Court of Justice challenging the constitutionality of these measures and seeking orders restoring the 47-ward structure. They argued that the Act breached *Charter* guarantees of freedom of expression, freedom of association, and equality, and that it violated the unwritten constitutional principles of democracy and the rule of law.

9 The application judge agreed, finding two limits on s. 2(b) of the *Charter* (2018 ONSC 5151, 142 O.R. (3d) 336). First, he found that the Act limited the municipal candidates' s. 2(b) right to freedom of expression, a conclusion largely tied to the timing of the Act, enacted as it was during the election campaign. Secondly, he found that the Act limited municipal voters' s. 2(b) right to effective representation — despite the fact that effective representation is a principle of s. 3 (and not s. 2(b)) of the Charter — due to his conclusion that the ward population sizes brought about by the Act were too large to allow councillors to effectively represent their constituents. Neither of these limits could, he further held, be justified under s. 1 and he set aside the impugned provisions of the Act. As a result, the election was to proceed on the basis of the 47-ward system.

10 The Province appealed and moved to stay the judgment pending appeal. The Court of Appeal for Ontario granted the stay on September 19, 2018, concluding that there was a strong likelihood that the Province's appeal would be successful and, on October 22, 2018, the Toronto municipal election proceeded on the basis of the 25-ward structure created by the Act (2018 ONCA 761, 142 O.R. (3d) 481). No issue is taken with the integrity of the election or the results thereof.

11 When the Court of Appeal decided the Province's appeal on its merits, it divided. While the dissenters would have invalidated the Act as unjustifiably limiting freedom of expression, the majority allowed the appeal, finding no such limit (2019 ONCA 732, 146 O.R. (3d) 705). The City had advanced a positive rights claim — that is, a claim for a particular platform and not protection from state interference with the conveyance of a message. Consistent with the *Baier* framework governing such

claims, the majority applied the factors stated in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016, to conclude that the claim was not properly grounded in s. 2(b) of the Charter, and that the application judge had erred in finding that the Act substantially interfered with the candidates' freedom of expression. Further, he had erred in finding that the right to effective representation — guaranteed by s. 3 — applies to municipal elections and bears any influence over the s. 2(b) analysis. Finally, the majority held that unwritten constitutional principles do not confer upon the judiciary power to invalidate legislation that does not otherwise infringe the Charter; nor do they limit provincial legislative authority over municipal institutions. Though unwritten constitutional principles are sometimes used to fill gaps in the Constitution, no such gap exists here.

12 The Court of Appeal appears to have granted the City public interest standing to argue the appeal (para. 28). The City's standing was not challenged before this Court.

III. Issues

13 Two issues arise from the foregoing. First, did the Act limit (unjustifiably or at all) the freedom of expression of candidates and/or voters participating in the 2018 Toronto municipal election? And secondly, can the unwritten constitutional principle of democracy be applied, either to narrow provincial legislative authority over municipal institutions or to require effective representation in those institutions, so as to invalidate the Act?

IV. Analysis

A. Freedom of Expression

(1) Principles of Charter Interpretation in the Context of Section 2(b)

14 This appeal hinges on the scope of s. 2(b) of the Charter, which provides that everyone has the fundamental freedoms "of thought, belief, opinion and expression, including freedom of the press and other media of communication". A purposive interpretation of *Charter* rights must begin with, and be rooted in, the text (*Quebec (Attorney General) v.* 9147-0732 Québec inc., 2020 SCC 32, at paras. 8-10) and not overshoot the purpose of the right but place it in its appropriate linguistic, philosophic and historical contexts (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344). Yet, it is undeniable that s. 2(b) has traditionally been interpreted expansively (*Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 976; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at pp. 765-67). Indeed, s. 2(b) has been interpreted so broadly that the framework has been criticized for setting too low a bar for establishing a s. 2(b) limitation, such that any consideration of its substantive reach and bounds is generally consigned to the limitations analysis under s. 1 (K. Chan, "Constitutionalizing the Registered Charity Regime: Reflections on *Canada Without Poverty*" (2020), 6 *C.J.C.C.L.* 151, at p. 174, citing M. Plaxton and C. Mathen, "Developments in Constitutional Law: The 2009-2010 Term" (2010), 52 *S.C.L.R.* (2d) 65). Following *Irwin Toy* , then, if an activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of "expression" (p. 969). Further, if the purpose or effect of the impugned governmental action is to control attempts to convey meaning through that activity, a limit on expressive freedom will be shown (p. 972).

15 Freedom of expression is not, however, presently recognized as being without internal limits. Activities may fall outside the scope of s. 2(b) where the method of the activity itself — such as violence — or the location of that activity is not consonant with *Charter* protection (Montréal (City) v. 2952-1366 Québec Inc., 2005 SCC 62, [2005] 3 S.C.R. 141, at paras. 60 and 62).

16 Further, and of particular significance to this appeal, s. 2(b) has been interpreted as "generally impos[ing] a *negative* obligation ... rather than a positive obligation of protection or assistance" (*Baier* , at para. 20 (emphasis added), citing *Haig v. Canada*, [1993] 2 S.C.R. 995, at p. 1035). A claim is properly characterized as negative where the claimant seeks "freedom *from* government legislation or action suppressing an expressive activity in which people would otherwise be free to engage" (*Baier* , at para. 35 (emphasis added)). Such claims of right under s. 2(b) are considered under this Court's *Irwin Toy* framework.

17 In *Baier* , however, this Court explained that s. 2(b) may, in certain circumstances, impose positive obligations on the government to facilitate expression. Put differently, while s. 2(b) typically "prohibits gags", it can also, in rare and narrowly circumscribed cases, "compel the distribution of megaphones" (para. 21, quoting *Haig*, at p. 1035). Hence the Court of Appeal's

statement in this case that "[f]reedom of expression is respected, in the main, if governments simply *refrain* from actions that would be an unjustified interference with it", and that positive claims under s. 2(b) may be recognized in only "exceptional and narrow" circumstances (paras. 42 and 48 (emphasis in original)).

18 Central to whether s. 2(b) was limited by the Province here is, therefore, the appropriate characterization of the claim as between a negative and positive claim of right. In *Baier* , this Court shielded positive claims from the *Irwin Toy* framework and subjected them to an elevated threshold. This is necessary, given the ease with which claimants can typically show a limit to free expression under the *Irwin Toy* test. An elevated threshold for positive claims narrows the circumstances in which a government or legislature must legislate or otherwise act to support freedom of expression. To consider positive claims under *Irwin Toy* would be to force the government to justify, under s. 1, any decisions *not* to provide particular statutory platforms for expression.

19 The *Baier* framework is therefore not confined, as our colleague suggests, "to address[ing] underinclusive statutory regimes" (para. 148). This Court could not have been clearer in *Baier* that it applies "where a government defending a *Charter* challenge alleges, or the Charter claimant concedes, that a positive rights claim is being made under s. 2(b)" (para. 30). Were it otherwise — that is, were *Baier* 's application limited to cases of underinclusion — claims seeking the creation or extension of a statutory platform for expression would be considered under *Baier* while claims seeking the preservation of that same platform would be considered under *Irwin Toy* . This is illogical. *Baier* 's reach extends beyond cases of underinclusion or exclusion, and categorically limits the "obligation[s] on government to provide individuals with a particular platform for expression" (Greater Vancouver Transportation Authority v. Canadian Federation of Students-British Columbia Component, 2009 SCC 31, [2009] 2 S.C.R. 295, at para. 35). This reflects the separation of powers; choices about whether and how to design a statutory or regulatory platform are best left to the elected orders of the state.

20 We should not be taken as suggesting that s. 2(b) is to be understood as conferring a right that is wholly positive or wholly negative. Many constitutional rights have both positive and negative dimensions and the *Baier* framework explicitly recognizes that this is so for s. 2(b). But the distinction between those positive and negative dimensions remains important when considering the nature of *the obligation* that the claim seeks to impose upon the state: a "right's positive dimensions require government to act in certain ways, whereas its negative dimensions require government to refrain from acting in other ways" (P. Macklem, "Aboriginal Rights and State Obligations" (1997), 36 Alta. L. Rev. 97, at p. 101; see also A. Sen, *The Idea of Justice* (2009), at p. 282). For instance, would the claim, if accepted, require government action, or is the claim concerned with restrictions on the content or meaning of expression? And, were the claim rejected, would it deny the claimant access to a particular platform for expression on a subject, or would it preclude altogether the possibility of conveying expression on that subject? While in *Haig*, L'Heureux-Dubé J. correctly noted that the distinction between positive and negative entitlements is "not always clearly made, nor ... always helpful", she nevertheless distinguished typical negative claims from those that might require "positive governmental action" (p. 1039). This is the distinction with which we concern ourselves here.

21 This appeal therefore presents an opportunity to affirm and clarify the application of *Baier* to positive claims under s. 2(b). *Baier* remains good law in the context of s. 2(b). It adopts a framework for analysis first set forth in *Dunmore* , which itself decided a claim under s. 2(d) (freedom of association). We need not decide here whether *Dunmore* remains applicable to s. 2(d) claims (an open question, given the decisions of this Court in *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, and *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3). It suffices here for us to affirm *Baier* as a useful and necessary framework in the context of positive s. 2(b) claims (although, as we will explain, we would simplify the framework).

(2) The Baier Framework

22 The *Baier* framework applies if a claimant seeks to impose an obligation on the government (or legislature) to provide access to a particular statutory or regulatory platform for expression (para. 30; *Greater Vancouver Transportation Authority* , at para. 35). Here, therefore, if the City's claim would require the government or legislature to enact legislation or promulgate regulations, or otherwise act to provide a particular statutory or regulatory platform, it is advancing a positive claim (*Baier* , at para. 35).

23 In *Baier* , this Court held that, to succeed, a positive claim must satisfy the three *Dunmore* factors: (1) Is the claim grounded in freedom of expression, rather than in access to a particular statutory regime? (2) Has the claimant demonstrated that lack of access to a statutory regime has the effect of a substantial interference with freedom of expression, or has the purpose of infringing freedom of expression? (3) Is the government responsible for the inability to exercise the fundamental freedom?

24 These factors set an elevated threshold for positive claims. The first factor asks what the claimant is really seeking — in other words, whether the claim is grounded in freedom of expression or whether it merely seeks access to a statutory regime. Likewise, the second factor — which requires that the claimant establish a *substantial* interference with freedom of expression — sets a higher threshold than that stated in *Irwin Toy* , which asks only whether "the purpose or effect of the government action in question was to restrict freedom of expression" (p. 971; see also *Baier* , at paras. 27-28 and 45).

25 So understood, these factors can usefully be distilled to a single core question: is the claim grounded in the fundamental *Charter* freedom of expression, such that, by denying access to a statutory platform or by otherwise failing to act, the government has either substantially interfered with freedom of expression, or had the purpose of interfering with freedom of expression? This is, to be clear, a single question which emphasizes the elevated threshold in the second *Dunmore* factor while encompassing the considerations of the first and third factors. Given what we see as the significant overlap among the factors — particularly between the first and second — this is, in our view, a salutary clarification of the *Baier* test, entirely consistent with this Court's approach in *Baier* and *Greater Vancouver Transportation Authority* . To be clear, s. 2(b) does not remove the authority that a legislature has to create or modify statutory platforms, because it does not include the right to access any statutory platform in particular. However, when a legislature chooses to provide such a platform, then it must comply with the Charter (*Haig*, at p. 1041).

26 If, therefore, a claimant can demonstrate that, by denying access to a statutory platform, the government has substantially interfered with freedom of expression or acted with the purpose of doing so, the claim may proceed. Despite being a positive claim, the claimant has demonstrated a limit to its s. 2(b) right, and — subject to justification of such limit under s. 1 — government action or legislation may be required.

27 There is no suggestion here that the Province acted *with the purpose* of interfering with freedom of expression, and we therefore confine our observations here to the claim presented — that is, a claim that a law has had *the effect* of substantially interfering with freedom of expression. In our view, a substantial interference with freedom of expression occurs where lack of access to a statutory platform has the effect of radically frustrating expression to such an extent that meaningful expression is "effectively preclude[d]" (Ontario (Public Safety and Security) v. Criminal Lawyers' Association, 2010 SCC 23, [2010] 1 S.C.R. 815, at para. 33). While meaningful expression need not be rendered absolutely impossible, we stress that effective preclusion represents an exceedingly high bar that would be met only in extreme and rare cases (*Baier* , at para. 27; *Dunmore* , at para. 25). For example, a statutory reduction of the length of an election campaign to two days may well, as a practical matter, be shown to have the effect of constituting a substantial interference with freedom of expression. In such a case, meaningful expression may very well be found to be effectively precluded.

28 The height of this bar of effective preclusion is demonstrated by *Baier* . There, legislation was amended to prohibit school employees from running for election as school trustees, and the Court — applying the *Dunmore* factors — concluded that no substantial interference with freedom of expression was demonstrated. The claim was grounded merely in access to a particular statutory platform governing school trusteeship, rather than a substantial interference with freedom of expression. And, in any event, there was no interference, substantial or otherwise, with the appellants' ability to express views on matters relating to the education system. Their exclusion from the statutory scheme deprived them only of one particular *means* of such expression (paras. 44 and 48).

(3) Application

(a) Nature of the Claim

29 The first question to answer in deciding this appeal is whether the City advances a positive claim. There are two ways in which the City's claim can be understood. Each leads to the conclusion that the claim is, in substance, a positive claim that must, therefore, show a substantial interference with freedom of expression.

30 The first possible view of the City's claim is that of *restoring an earlier statutory platform*, specifically the 47-ward structure. That this is so is evident from the City's requested disposition, which asks that the next municipal election be conducted under the previous framework (A.F., at para. 152). The City, then, would have the Province act (either by enacting new legislation or repealing the impugned provisions of the Act) to restore the previous statutory platform. This reveals a straightforward positive claim. The fact that the City and the participants in the election had previously enjoyed access to the 47-ward structure is of no legal significance. In *Baier* , this Court viewed a claim for restoring the status quo as a positive claim, equating it with a demand to legislate a framework for the first time. Such an approach is necessary to prevent fettering; "[t]o hold otherwise would mean that once a government had created a statutory platform, it could never change or repeal it without infringing s. 2(b)" (para. 36).

31 The second possible view of the City's claim is that of *maintaining an existing statutory platform*. The City frames its claim as asking the Province, once a municipal election period commences, to ensure access to whatever election platform existed at that time. In the City's view, what is otherwise political expression becomes what it calls "electoral expression" during an election period (A.F., at para. 54). Protection of this "electoral expression", it says, requires the maintenance of the particular electoral framework that was in place at the beginning of the electoral period. Framed thusly, the City's claim that the impugned provisions of the Act limited s. 2(b) turns squarely on the *timing* of the Act. Indeed, at the hearing of this appeal, the City conceded that barring any other potential issues, the Province was constitutionally permitted to enact this same legislation in the week *following* the election. Further, the City requested — in the event that this Court finds only that the timing of the Act was unconstitutional — a declaration to that effect, rather than a remedy that would restore the previous 47-ward structure.

32 The City's focus on the timing of the Act cannot, however, convert its positive claim into a negative one. While its claim is couched in language of non-interference — something that superficially resembles a negative claim to be considered under the *Irwin Toy* framework — the City does not seek protection of electoral participants' expression from restrictions tied to content or meaning (as was the case, for example, in *Greater Vancouver Transportation Authority*); rather, it seeks a particular platform (being whatever council structure existed at the outset of the campaign) by which to channel, and around which to structure, that expression.

33 So understood, the claim is akin to that rejected in *Baier* . The only point of distinction is that *Baier* involved a request for a specific type of legislative regime (i.e., one that permitted school employees to run for and serve as school board trustees), while the claim in this case is for temporary protection — that is, for the duration of the campaign — of whatever particular type of election structure existed at the outset of the election period. But, for the purposes of deciding constitutionality, there is no difference between the present case and a hypothetical scenario in which the Province were to scrap the ongoing election and replace it with a completely new platform with a different structure and a reasonable campaign period altogether. Here, the City is able to frame its claim only in terms of non-interference because the Act modified the existing structure without scrapping it. But the ultimate result is the same. The City's claim is still a claim for access to a particular statutory platform; the precise disposition requested simply depends on whatever electoral framework is in place at the outset of the election process. It is thus a positive claim. Because municipal elections are merely statutory platforms without a constitutional basis, provinces can — subject to the elevated threshold of a substantial interference — change the rules as they wish.

34 To hold otherwise would be to contemplate an unprecedented statutory freeze on provincial jurisdiction under s. 92(8), temporarily constitutionalizing a particular statutory platform for the duration of an election. What would normally be considered a positive claim under s. 2(b) would effectively transform into a negative claim for that period of time. This is constitutionally dubious, nonsensical, and even futile since the duration of such a freeze would depend entirely on the length of the election, over which the Province itself has ultimate authority. With respect, our colleague Abella J. ignores these concerns in holding that *Irwin Toy* ought to apply to a claim such as this. Provincial authority to legislate a change to Toronto's ward structure is accepted, but on our colleague's understanding this authority is operative only some of the time (para. 112). Combined

with her broad articulation of the *Irwin Toy* threshold in this context — whether legislation "destabiliz[es] the opportunity for meaningful reciprocal discourse" — such an understanding would effectively freeze legislative authority to even tangentially affect a municipal election for the duration of the campaign (para. 115). Such a freeze sits awkwardly with the plenary authority that provinces enjoy under s. 92(8) of the Constitution Act, 1867.

35 In sum, the City advances a positive claim and the *Baier* framework applies.

(b) Application of Baier

36 As explained above, the *Baier* framework asks whether the claimant demonstrated that, by denying access to a statutory regime, the government has substantially interfered with freedom of expression. To repeat, this is a demanding threshold, requiring the City to show that the Act radically frustrated the expression of election participants such that meaningful expression was effectively precluded. In our view, the City cannot do so and therefore has not established a limit on s. 2(b).

37 Here, the candidates and their supporters had 69 days — longer than most federal and provincial election campaigns — to re-orient their messages and freely express themselves according to the new ward structure. (Our colleague Abella J. is simply incorrect to suggest, at para. 104, that only one month of the campaign remained. It was twice that.) The Act did not prevent candidates from engaging in further political speech under the new structure. Candidates continued to campaign vigorously, canvassing and debating about issues unrelated to the impugned provisions, the size of council or the ward boundaries. And even had they not, nothing in the Act prevented them from doing so. It imposed no restrictions on the content or meaning of the messages that participants could convey. Many of the challengers who continued to campaign ultimately had, by any measure, successful campaigns, raising significant amounts of money and receiving significant numbers of votes. This would not have been possible had their s. 2(b) rights been so radically frustrated so as to effectively preclude meaningful expression.

38 It is of course likely that some of the candidates' prior expression may have lost its relevance; pamphlets or other campaign paraphernalia with an old ward designation on them, for instance, had to be revised or discarded. But, with the new ward structure — and larger ward populations — came higher campaign expenditure limits, so candidates were able to raise more funds over the 69 days they had left in the campaign. This is, therefore, a complaint that the prior expression of the candidates was no longer meaningful or helpful in their project to secure election. It is, at its root, a complaint about diminished *effectiveness*.

39 While diminished effectiveness might be enough to amount to a limit of s. 2(b) in its traditional negative orientation — see, for instance, Harper v. Canada (Attorney General), 2004 SCC 33, [2004] 1 S.C.R. 827, at para. 15, per McLachlin C.J. and Major J., dissenting in part, but not on this point, and *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569 — more is required under the *Baier* framework. In the context of a positive claim, only extreme government action that extinguishes the effectiveness of expression — for instance, instituting a two-day electoral campaign — may rise to the level of a substantial interference with freedom of expression; such an act may effectively preclude meaningful expression in the context of the election. That is simply not what happened here. Section 2(b) is not a guarantee of the effectiveness or continued relevance of a message, or that campaign materials otherwise retain their usefulness throughout the campaign.

40 Even accepting that the change in structure diminished the effectiveness of the electoral candidates' prior political speech by rendering some of their 47-ward campaign communications less relevant, this does not rise to the level of substantial interference. Again, the campaign that took place over 69 days following the imposition of the 25-ward system was vigorously contested by candidates whose freedom of expression was clearly not radically frustrated. We acknowledge that the application judge found a substantial interference with freedom of expression (para. 32). There are, however, three problems with his finding. First, this finding was made in the context of legal error, since he erroneously applied the *Irwin Toy* framework for a negative claim. Secondly, and relatedly, the reasons of the judge make clear that this finding was tied to the diminished effectiveness of the candidates' expression, something that, as explained, is simply insufficient to show a limit on freedom of expression under the *Baier* framework. Finally, given the truncated timelines of the matter at first instance, the judge was required to make this finding on a limited factual record. With the benefit of fresh evidence adduced by the Province and admitted at this Court, it is clear that the candidates were not effectively precluded from expressing themselves in the context of the campaign. They conducted vigorous, hard-fought campaigns about the issues that mattered to them.

41 The City says that the expression at issue here — again, what it calls "electoral expression" — is uniquely connected to, and dependent on, the framework of the election itself. Therefore, it says, the scope of s. 2(b) encompasses not only the expression itself but also the structure of the election. Put thusly, however, the claim is not dissimilar to the "unique role" of school trusteeship claimed by the appellants, and rejected by the Court, in *Baier* . Claiming a unique role or dependence on a statutory platform is not the same as claiming a fundamental freedom (*Baier* , at para. 44). Doing so is simply to seek access to that statutory platform. That is what the City seeks here.

42 In sum, the *Baier* threshold is not met here. The Act imposed no limit on freedom of expression.

43 Having found no limit to s. 2(b), we need not consider s. 1. We note, however, that our colleague Abella J. decides s. 1 against the Province on the basis that it "offered no explanation, let alone a pressing and substantial one, for why the changes were made in the middle of an ongoing election" (para. 161). This ignores the Province's written and oral submissions that the newly elected government proceeded expeditiously so as to be able to implement these changes within the time constraints of its own elected mandate, rather than wait four years until the next municipal election (R.F., at para. 149; transcript, at pp. 111-12).

(c) Effective Representation

44 The City also says that the impugned provisions of the Act infringe "effective representation", an incident of the guarantee contained in s. 3 of the Charter which, the City says, can be imported into s. 2(b).

45 Section 3 guarantees citizens the right to vote and run for office in provincial and federal elections, and includes a right to effective representation. The text of s. 3 makes clear, however, that it guarantees "only the right to vote in elections of representatives of the *federal* and the *provincial* legislative assemblies" (*Haig*, at p. 1031 (emphasis added)) and "*does not extend to municipal elections*" (p. 1031 (emphasis added), citing P. W. Hogg, *Constitutional Law of Canada* (3rd ed. 1992), vol. 2, at p. 42-2). Simply put, ss. 2(b) and 3 record distinct rights which must be given independent meaning (Thomson Newspapers Co. v. Canada (Attorney General), [1998] 1 S.C.R. 877, at paras. 79-80; *Harper* , at para. 67). Effective representation is not a principle of s. 2(b), nor can the concept be imported wholesale from a different *Charter* right.

46 In any event, effective representation connotes *voter parity* which, while not exhaustive of the requirements of effective representation, is the overarching concern and the condition of "prime importance" (Reference re Prov. Electoral Boundaries (Sask.) [1991] 2 S.C.R. 158, at p. 184). What matters is the *relative population* of the wards, *not* their *absolute size*. To hold otherwise implies keeping the population of wards relatively constant by increasing the number of councillors to keep pace with population growth, a notion unknown to Canadian law (in s. 3 or elsewhere) and which would not be without its own difficulties, including potentially unwieldly growth in the size of Toronto City Council (M. Pal, "The Unwritten Principle of Democracy" (2019), 65 McGill L.J. 269, at pp. 298-99; J. C. Courtney, *Commissioned Ridings: Designing Canada's Electoral Districts* (2001), at pp. 15 and 19).

47 And *even were* effective representation to apply as a consideration here, we would not find that the principle has been violated due only to the larger population sizes of the wards created by the Act. It is not disputed that the 25-ward structure of the Act enhanced voter parity, relative to the 47-ward structure preferred by the City (which was not even designed to achieve voter parity until 2026) (A.F., at para. 150; R.F., at paras. 35, 38, 133, 143 and 148). Indeed, the Toronto Ward Boundary Review's reasoning for having rejected the 25-ward structure was criticized on this very basis (R.R. (short), vol. II, at pp. 65, 69, 72-73 and 77-78). While the principle of effective representation encompasses more than simple voter parity, those who rely upon the principle of effective representation here fail to identify any other factors — geography, community history, community interests and minority representation — that could conceivably justify a departure from parity (see Reference re Prov. Electoral Boundaries (Sask.), at p. 184).

B. Democracy

48 The second issue on appeal is whether the impugned provisions of the Act are unconstitutional for violating the unwritten constitutional principle of democracy. Specifically, the City argues that the change in ward structure violated the unwritten

principle of democracy by denying voters effective representation and disrupting the election process (A.F., at para. 105). It therefore asks the Court to use the democratic principle as a basis for invalidating otherwise valid provincial legislation. It says this is made possible by drawing from this Court's s. 3 jurisprudence and from the concept of effective representation, and by viewing the principle as limiting provincial competence under s. 92(8). Conversely, and echoing the Court of Appeal on this point, the Attorney General of Ontario says that the unwritten constitutional principle of democracy cannot be used as a device for invalidating legislation, independently of written constitutional provisions and the law governing them. For the reasons that follow, the Attorney General is correct.

(1) Interpretive and Gap-Filling Roles of Unwritten Constitutional Principles

49 The Constitution of Canada embodies written and unwritten norms. This Court has recognized that our Constitution describes an architecture of the institutions of state and of their relationship to citizens that connotes certain underlying principles (Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, [1997] 3 S.C.R. 3, at para. 93; Reference re Secession of Quebec, [1998] 2 S.C.R. 217, at paras. 50-51). These principles, such as democracy and the rule of law, "infuse our Constitution" (*Secession Reference*, at para. 50). Although not recorded outside of "oblique reference[s]" in the preamble to the *Constitution Act, 1867* and to the *Constitution Act, 1982* (para. 51), these principles are "foundational" (para. 49), without which "it would be impossible to conceive of our constitutional structure" (para. 51). These principles have "full legal force" and may give rise to substantive legal obligations (para. 54, quoting *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, at p. 845). "[L]ike all principles of political morality, [they] can guide and constrain the decision-making of the executive and legislative branches" (C.A. reasons, at para. 84, citing British Columbia v. Imperial Tobacco Canada Ltd., 2005 SCC 49, [2005] 2 S.C.R. 473, at para. 52).

50 Unwritten principles are therefore part of *the law* of our Constitution, in the sense that they form part of the context and backdrop to the Constitution's written terms. Our colleague Abella J. seizes upon a statement from a dissenting opinion in *Reference re Resolution to Amend the Constitution* to support the proposition that "full legal force" necessarily includes the power to invalidate legislation. But the complete passage in *Reference re Resolution to Amend the Constitution*, and the jurisprudence cited therein, demonstrates that Martland and Ritchie JJ. are discussing *federalism* — and, while specific aspects of federalism may be unwritten and judicially developed, it is indisputable that federalism has a strong textual basis. Nor does our colleague's reliance upon *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725 (at para. 176), support the capacity of unwritten constitutional principles to invalidate legislation, since the finding there was that granting exclusive jurisdiction to the youth court would infringe ss. 96 to 101 and 129 of the Constitution Act, 1867. Regardless, any uncertainty on the question of whether unwritten constitutional principles may invalidate legislation that may have remained after the *Reference re Resolution to Amend the Constitution* and the *Secession Reference* was, as we will explain, fully put to rest in *Imperial Tobacco*

51 Further, the authorities she cites as "recogniz[ing] that unwritten constitutional principles have full legal force and can serve as substantive limitations on all branches of government" (para. 166) do not support the proposition that unwritten constitutional principles can be applied to invalidate legislation. Indeed, it is quite the contrary — for example, in *R. (on the application of Miller) v. Prime Minister*, [2019] UKSC 41, [2020] A.C. 373(U.K. S.C.) , at para. 41, the Supreme Court of the United Kingdom stated that the constitutional principle of parliamentary sovereignty means that *legislation itself* ("laws enacted by the Crown in Parliament"), under the Constitution of the United Kingdom, remains "the supreme form of law". While courts in the United Kingdom may find primary legislation to be inconsistent with the *European Convention on Human Rights*, 213 U.N.T.S. 221, they may only issue a declaration of incompatibility (*Human Rights Act 1998* (U.K.), 1998, c. 42, s. 4); they have not used unwritten constitutional principles to invalidate legislation.

52 Our colleague is concerned about the "rare case" where "legislation [that] elides the reach of any express constitutional provision ... is fundamentally at odds with our Constitution's 'internal architecture' or 'basic constitutional structure'" and recourse must be had to unwritten constitutional principles (para. 170, quoting Secession Reference, at para. 50, and *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at p. 57). But it is inconceivable that legislation which is repugnant to our "basic constitutional structure" would not infringe the Constitution itself. And that structure, recorded in the Constitution's text (as we discuss below), is interpreted with the aid of unwritten constitutional principles. This is clear from the context of Martland and Ritchie JJ.'s statement that unwritten principles have "full legal force in the sense of being employed to strike down legislative

enactments" (*Reference re Resolution to Amend the Constitution*, at p. 845). As noted above, that case was about federalism, as was the jurisprudence cited in support of their statement; Martland and Ritchie JJ. were describing the "constitutional requirements that are derived from the *federal character of Canada's Constitution*" (pp. 844-45 (emphasis added)). And this is precisely the point — while the specific aspects of federalism at issue there may not have been found in the express terms of the Constitution, *federalism is*.

53 To explain, federalism is fully enshrined *in the structure* of our Constitution, because it is enshrined *in the text* that is constitutive thereof — particularly, but not exclusively, in ss. 91 and 92 of the Constitution Act, 1867. Structures are not comprised of unattached externalities; they are embodiments of their constituent, conjoined parts. The structure of our Constitution is identified by way of its actual provisions, recorded in its text. This is why our colleague can offer no example of legislation that would undermine the structure of the Constitution that cannot be addressed as we propose, which is via purposive textual interpretation. It is also why, once "constitutional structure" is properly understood, it becomes clear that, when our colleague invokes "constitutional structure", she is in substance inviting judicial invalidation of legislation in a manner that is wholly untethered from that structure.

54 Ultimately, what "full legal force" means is dependent on the particular context. Any legal instrument or device, such as a contract or a will or a rule, has "full legal force" within its proper ambit. Our colleague's position — that because unwritten constitutional principles have "full legal force", they must necessarily be capable of invalidating legislation — assumes the answer to the preliminary but essential question: what *is* the "full legal force" of *unwritten constitutional principles*? And in our view, *because* they are unwritten, their "full legal force" is realized *not* in *supplementing* the written text of our Constitution as "provisions of the Constitution" with which no law may be inconsistent and remain of "force or effect" under s. 52(1) of the Constitution Act, 1982. Unwritten constitutional principles are not "provisions of the Constitution". Their legal force lies in their representation of general principles within which our constitutional order operates and, therefore, by which the Constitution's written terms — its *provisions* — are to be given effect. In practical terms, this means that unwritten constitutional principles may assist courts in only two distinct but related ways.

55 First, they may be used in the interpretation of constitutional provisions. Indeed, that is the "full legal force" that this Court described in *Secession Reference* (para. 54). In this way, the unwritten constitutional principles of judicial independence and the rule of law have aided in the interpretation of ss. 96 to 100 of the Constitution Act, 1867, which have come to safeguard the core jurisdiction of the courts which fall within the scope of those provisions (*Provincial Court Judges Reference*, at paras. 88-89; *MacMillan Bloedel* , at paras. 10-11 and 27-28; Trial Lawyers Association of British Columbia v. British Columbia (Attorney General), 2014 SCC 59, [2014] 3 S.C.R. 31, at paras. 29-33). When applied to *Charter* rights, unwritten principles assist with purposive interpretation, informing "the character and the larger objects of the Charter itself, ... the language chosen to articulate the specific right or freedom, [and] the historical origins of the concepts enshrined" (*Quebec (Attorney General)* , at para. 7, quoting *Big M Drug Mart Ltd.*, at p. 344; see also R. v. Poulin, 2019 SCC 47, at para. 32).

56 Secondly, and relatedly, unwritten principles can be used to develop structural doctrines unstated in the written Constitution *per se*, but necessary to the coherence of, and flowing by implication from, its architecture. In this way, structural doctrines can fill gaps and address important questions on which the text of the Constitution is silent, such as the doctrine of full faith and credit (*Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289); the doctrine of paramountcy (*Huson v. The Township of South Norwich*, (1895), 24 S.C.R. 145); the remedy of suspended declarations of invalidity (*Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721); and the obligations to negotiate that would follow a declaration of secession by a province (*Secession Reference*).

57 Neither of these functions support the proposition advanced by the City that the force of unwritten principles extends to invalidating legislation. Indeed, the truth of the matter is to the contrary. Attempts to apply unwritten constitutional principles in such a manner as an independent basis to invalidate legislation, whether alone or in combination, suffer from a normative and a practical deficiency, each related to the other, and each fatal on its own.

58 First, such attempts trespass into legislative authority to amend the Constitution, thereby raising fundamental concerns about the legitimacy of judicial review and distorting the separation of powers (*Imperial Tobacco*, at paras. 53-54, 60 and

64-67; J. Leclair, "Canada's Unfathomable Unwritten Constitutional Principles" (2002), 27 Queen's L.J. 389, at pp. 427-32). Our colleague's approach, which invites the use of unwritten constitutional principles in a manner that is wholly untethered from the text, ignores this fundamental concern.

59 Secondly, unwritten constitutional principles are "highly abstract" and "[u]nlike the rights enumerated in the Charter — rights whose textual formulations were debated, refined and ultimately resolved by the committees and legislative assemblies entrusted with constitution-making authority — the concep[t] of democracy ... ha[s] no canonical formulatio[n]" (C.A. reasons, at para. 85). Unlike the written text of the Constitution, then, which "promotes legal certainty and predictability" in the exercise of judicial review (*Secession Reference*, at para. 53), the nebulous nature of the unwritten principles makes them susceptible to be interpreted so as to "render many of our written constitutional rights redundant and, in doing so, undermine the delimitation of those rights chosen by our constitutional framers" (*Imperial Tobacco*, at para. 65). Accordingly, there is good reason to insist that "protection from legislation that some might view as unjust or unfair properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box" (para. 66). In our view, this statement should be understood as covering all possible bases for claims of right (i.e., "unjust or unfair" *or otherwise normatively deficient*).

60 We add this. Were a court to rely on unwritten constitutional principles, in whole or in part, to invalidate legislation, the consequences of this judicial error would be of particular significance given two provisions of our *Charter*. First, s. 33 preserves a limited right of legislative override. Where, therefore, a court invalidates legislation using s. 2(b) of the Charter, the legislature may give continued effect to *its* understanding of what the Constitution requires by invoking s. 33 and by meeting its stated conditions (D. Newman, "Canada's Notwithstanding Clause, Dialogue, and Constitutional Identities", in G. Sigalet, G. Webber and R. Dixon, eds., *Constitutional Dialogue: Rights, Democracy, Institutions* (2019), 209, at p. 232). Were, however, a court to rely *not* on s. 2(b) but *instead* upon an unwritten constitutional principle to invalidate legislation, this undeniable aspect of the constitutional bargain would effectively be undone, since s. 33 applies to permit legislation to operate "notwithstanding a provision included in section 2 or sections 7 to 15" *only*. Secondly, s. 1 provides a basis for the state to justify limits on "the rights and freedoms set out" in the Charter. Unwritten constitutional principles, being *unwritten*, are not "set out" in the Charter. To find, therefore, that they can ground a constitutional violation would afford the state no corresponding justificatory mechanism.

61 Our colleague says that the application of s. 33 "is not directly before us" (para. 182). As the City has advanced its claim on the basis of s. 2(b), coupled with the unwritten principle of democracy, the prospect of circumventing s. 33's application to the invalidation of legislation under s. 2(b) by recourse to unwritten constitutional principles is indeed squarely before us.

62 We note an important caveat to the foregoing. The unwritten constitutional principle of the honour of the Crown is *sui generis*. As correctly noted in submissions of the interveners the Métis Nation of Ontario and the Métis Nation of Alberta, the honour of the Crown arises from the assertion of Crown sovereignty over pre-existing Aboriginal societies (Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 32), and from the unique relationship between the Crown and Indigenous peoples (*Guerin v. The Queen*, [1984] 2 S.C.R. 335, at p. 385). We need not decide here whether the principle is capable of grounding the constitutional invalidation of legislation, but if it is, it is unique in this regard.

63 In sum, and contrary to the submissions of the City, unwritten constitutional principles cannot serve as bases for invalidating legislation. A careful review of the Court's jurisprudence supports this conclusion.

(a) The Provincial Court Judges Reference

64 In the *Provincial Court Judges Reference*, this Court considered whether judicial independence, "an unwritten norm, recognized and affirmed by the preamble to the *Constitution Act, 1867*" (para. 109), restricted the extent to which a provincial government could reduce the salaries of provincial court judges. That principle, the Court held, emerged from the reading together of s. 11(d) of the Charter, and the preamble and ss. 96 to 100 of the Constitution Act, 1867 (para. 124). For the majority, Lamer C.J. was explicit in emphasizing the merely *interpretive* role of the unwritten constitutional principle of judicial independence in supplementing the text of ss. 96 and 100:

> The point which emerges from this brief discussion is that the interpretation of ss. 96 and 100 has come a long way from what those provisions actually say. This jurisprudential evolution undermines the force of the argument that the written text of the Constitution is comprehensive and definitive in its protection of judicial independence. The only way to explain the interpretation of ss. 96 and 100, in fact, is by reference to a deeper set of unwritten understandings which are not found on the face of the document itself. [First and second emphasis added; third emphasis in original; para. 89.]

65 In other words, where the constitutional text is not itself sufficiently definitive or comprehensive to furnish the answer to a constitutional question, a court may use unwritten constitutional principles as interpretive aids. This is an approach that resorts to unwritten constitutional principles where necessary in order to give meaning and effect to constitutional text. It is thus not dissimilar to this Court's approach to purposive constitutional interpretation, which begins with and is grounded in the text (*Quebec (Attorney General)* , at paras. 8-10); unwritten constitutional principles inform the purpose of the provisions of the text, thus guiding the purposive definition (R. Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001), 80 Can. Bar Rev. 67, at p. 84). To be clear, this must be a textually faithful exercise; the text remains of primordial significance to identifying the purpose of a right, being "the first indicator of purpose" (*Quebec (Attorney General)* , at para. 11), and the application of constitutional principles to the interpretive exercise may not allow a court to overshoot that purpose (paras. 4 and 10-11). More particularly, and as the Court affirmed in *Quebec (Attorney General)* , the Constitution "is not 'an empty vessel to be filled with whatever meaning we might wish from time to time'" (para. 9, quoting *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at p. 394). Rather, constitutional interpretation "must first and foremost have reference to, and be constrained by, [its] text" (para. 9).

66 Our colleague resists this, notwithstanding the clear direction in *Quebec (Attorney General)* regarding the centrality to the interpretational exercise of constitutional text. Indeed, her approach is completely the opposite: far from being the primary element of the Constitution whose interpretation can be informed by unwritten constitutional principles, the text *itself* "emanates" from those principles, and thus it is *the principles* which are paramount (para. 168). This is entirely inconsistent with the *Provincial Court Judges Reference*, upon which she relies. Lamer C.J. applied the unwritten constitutional principle of judicial independence to guide his interpretation of the scope of provincial authority under s. 92(14) of the Constitution Act, 1867 and to fill a gap where provincial courts dealing with non-criminal matters were concerned (paras. 107-8). None of this supports applying unwritten constitutional principles as bases for invalidating legislation.

(b) The Secession Reference

67 In *Secession Reference*, this Court said:

> Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have "full legal force", as we described it in [*Reference re Resolution to Amend the Constitution*], *supra*, at p. 845), which constitute substantive limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments. [para. 54]

A faithful reading of this passage must acknowledge the force ascribed to unwritten constitutional principles. Of significance, however, is that such force was conditioned by the nature of the questions posed in the reference — the conditions for secession of a province from Confederation — which the Court was called upon to answer. The case combined "legal and constitutional questions of the utmost subtlety and complexity with political questions of great sensitivity" (para. 1, quoting *Reference re Manitoba Language Rights*, at p. 728) to which the Court proposed an answer (being an obligation to negotiate in some circumstances) which, while constituting a "*legal* framework" in the form of a set of rules to legitimize secession, was enforceable only *politically* as "it would be for the democratically elected leadership of the various participants to resolve their differences" (para. 101 (emphasis added); see also Elliot, at p. 97).

68 Of course, the Court made clear that it had identified "binding obligations under the Constitution of Canada" (para. 153), and that a breach of those obligations would occasion "serious legal repercussions" (para. 102). But the Court also acknowledged

the "non-justiciability of [the] political issues" involved (para. 102), which meant that the Court could have "no supervisory role" over the political negotiations (para. 100). Recognizing that the "reconciliation of the various legitimate constitutional interests is necessarily committed to the political rather than the judicial realm" (para. 153), the Court fashioned rules in the event of whose breach the "appropriate recourse" would lie in "the workings of the political process rather than the courts" (para. 102). This is another instance of the separation of powers: courts do not supervise the legislature or the executive as to political process.

69 Nothing, therefore, in the *Secession Reference* supports the proposition that unwritten constitutional principles can serve as an independent basis to invalidate legislation. While the obligations for the respective parties in that case had legal force by way of a judicial declaration, how that declaration would be given effect — that is, *enforced* — was deemed a question of political process, not legal process. Here again, as in the case of constitutional interpretation, the structural gap-filling role of unwritten constitutional principles was not and, we say, could not, be applied to *invalidate* legislation in the sense of declaring it under s. 52 to be of no force or effect.

(c) Babcock and Imperial Tobacco

70 At issue in *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3, was the constitutionality of a provision of the Canada Evidence Act, R.S.C. 1985, c. C-5, that allowed for an exception to disclosure, in litigation, based on Cabinet confidence. The respondents argued that the provision was *ultra vires* Parliament due to its inconsistency with the unwritten constitutional principles of the rule of law, judicial independence, and the separation of powers (by allowing the executive to prevent disclosure of evidence of its own unconstitutional conduct). McLachlin C.J., writing for the majority, held that "[a]lthough the unwritten constitutional principles are capable of limiting government actions, ... *they do not do so in this case*" (para. 54 (emphasis added)). She reached this conclusion on the basis that "unwritten principles must be balanced against the principle of Parliamentary sovereignty" (para. 55), concluding:

> It is well within the power of the legislature to enact laws, even laws which some would consider draconian, as long as it does not fundamentally alter or interfere with the relationship between the courts and the other branches of government. [para. 57]

71 McLachlin C.J.'s statement that unwritten constitutional principles are "capable of limiting government actions" was later explained by this Court in *Imperial Tobacco*. There, legislation authorizing action by the Province of British Columbia against tobacco manufacturers was challenged on the basis that it was inconsistent with, *inter alia*, the unwritten constitutional principle of the rule of law. For the Court, Major J. unequivocally rejected the appellants' proposed use of the rule of law to invalidate legislation for two reasons, only one of which is of relevance here:

> ... the appellants' arguments overlook the fact that several constitutional principles other than the rule of law that have been recognized by this Court — most notably democracy and constitutionalism — very strongly favour upholding the validity of legislation that conforms to the express terms of the Constitution (and to the requirements, such as judicial independence, that flow by <u>necessary implication</u> from those terms). Put differently, the appellants' arguments fail to recognize that in a constitutional democracy such as ours, protection from legislation that some might view as unjust or unfair properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box. [Emphasis added; para. 66.]

72 In other words, unwritten constitutional principles are indeterminate, such that they could be in theory deployed *not only* in service of *invalidating* legislation, but of *upholding* it. Major J. continued: the recognition of an unwritten constitutional principle such as the rule of law "is not an invitation to trivialize or supplant the Constitution's written terms", nor "is it a tool by which to avoid legislative initiatives of which one is not in favour. On the contrary, it requires that courts give effect to the Constitution's text, and apply, by whatever its terms, legislation that conforms to that text" (para. 67). From this, it follows that the statement in *Babcock* that unwritten constitutional principles are "capable of limiting government actions" is to be understood in a narrow and particular sense: legislative measures are restrained by the unwritten principle of the rule of law, "but only in the sense that they must comply with legislated requirements as to manner and form (i.e., the procedures by which

legislation is to be enacted, amended and repealed)" (*Imperial Tobacco*, at para. 60). Again, this understanding of unwritten constitutional principles precludes entirely their application to invalidate legislation under s. 52.

73 This, we would add, is a complete answer to our colleague Abella J.'s assertions that this Court has "never, to date, limited" the role of unwritten constitutional principles, and that their interpretive role is not "narrowly constrained by textualism" (paras. 171 and 179). Our colleague reads *Imperial Tobacco* as narrowing the use of one specific unwritten constitutional principle — the rule of law — and not unwritten constitutional principles generally. But the problem of indeterminacy would inevitably arise with the use of *any* unwritten constitutional principle to invalidate legislation. *Imperial Tobacco* thus unequivocally affirmed both a narrow interpretive role for unwritten principles, and the primacy of the text in constitutional adjudication.

(d) Trial Lawyers Association of British Columbia

74 In *Trial Lawyers Association of British Columbia* , this Court was called upon to decide the constitutionality of court hearing fees imposed by British Columbia that denied some people access to the courts. For the majority, McLachlin C.J. held that those fees, enacted pursuant to s. 92(14) of the Constitution Act, 1867, violated s. 96 of the Constitution Act, 1867 as they impermissibly infringed on the jurisdiction of superior courts by denying some people access to the courts (paras. 1-2). In *obiter*, she added that the connection between s. 96 and access to justice was "further supported by considerations relating to the rule of law" (para. 38), as "[t]here cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice" (para. 38, quoting *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, at p. 230). This was, she said, "consistent with the approach adopted by Major J. in *Imperial Tobacco*" (para. 37):

> The legislation here at issue — the imposition of hearing fees — must conform not only to the express terms of the Constitution, but to the "requirements ... that flow by necessary implication from those terms" (para. 66). The right of Canadians to access the superior courts flows by necessary implication from the express terms of s. 96 of the *Constitution Act, 1867* as we have seen. It follows that the province does not have the power under s. 92(14) to enact legislation that prevents people from accessing the courts. [Emphasis added; para. 37.]

75 In our view, McLachlin C.J.'s invocation of Major J.'s "necessary implication" threshold from *Imperial Tobacco* signifies that, where unwritten constitutional principles are used as interpretive aids, their substantive legal force must arise by necessary implication from the Constitution's text. We therefore see nothing in this that is inconsistent with the *Provincial Court Judges Reference* and, in particular, with the limited scope of application of unwritten constitutional principles. The rule of law was used in *Trial Lawyers Association of British Columbia* as an interpretive aid to s. 96, which in turn was used to narrow provincial legislative authority under s. 92(14). The rule of law was not being used as an independent basis for invalidating the impugned court fees. In this way, McLachlin C.J.'s reasoning simply reflects a purposive interpretation of s. 96 informed by unwritten constitutional principles.

(2) Relevance of the Democratic Principle to Municipal Elections

76 Democracy is, in light of the foregoing, a principle by which our Constitution is to be understood and interpreted. Though not explicitly identified in the text, the basic structure of our Constitution — including its establishment of the House of Commons and of provincial legislatures — connotes certain freely elected, representative, and democratic political institutions (*Secession Reference*, at para. 62).

77 The democratic principle has both individual and institutional dimensions (para. 61). It embraces not only the process of representative and responsible government and the right of citizens to participate in that process at the provincial and federal levels, but also substantive goals including the promotion of self-government (paras. 64-65). So understood, the democratic principle sits alongside and indeed overlaps with other unwritten constitutional principles that this Court has recognized, including federalism and the rule of law (paras. 66-67).

78 In this case, the democratic principle is relevant as a guide to the interpretation of the constitutional text. It supports an understanding of free expression as including political expression made in furtherance of a political campaign (*Reference*

re Prov. Electoral Boundaries (Sask.); *Reference re Alberta Statutes*, [1938] S.C.R. 100; *Switzman v. Elbling*, [1957] S.C.R. 285; *OPSEU*). But it cannot be used in a manner that goes beyond this interpretive role. In particular, it cannot be used as an independent basis to invalidate legislation.

(a) Section 92(8) of the Constitution Act, 1867

79 The structure of neither the *Constitution Act, 1867* nor the *Constitution Act, 1982* requires by necessary implication the circumscription of provincial lawmaking authority under s. 92(8) in the manner proposed. Subject to the Charter, the province has "absolute and unfettered legal power" to legislate with respect to municipalities (*Ontario English Catholic Teachers' Assn.* , at para. 58). And this Court cannot grant constitutional status to a third order of government "where the words of the Constitution read in context do not do so" (*Baier* , at para. 39).

80 Indeed, the City's submissions neglect the fact, recognized in the passage from *Imperial Tobacco*, at para. 66, cited above, that unwritten constitutional principles other than the rule of law that have been recognized by this Court, including democracy and constitutionalism, strongly favour *upholding* the validity of legislation that conforms to the text of the Constitution. It follows that the unwritten constitutional principle of democracy cannot be used to narrow legislative competence under s. 92(8); as this Court has recognized, the provinces have plenary jurisdiction under this head of power, unrestricted by any constitutional principle (*Public School Boards' Assn. of Alberta*).

(b) Section 3 of the Charter

81 Nor can the democratic principle be used to make s. 3 of the Charter — including its requirement of effective representation — relevant to the current case. There is no open question of constitutional interpretation here. Section 3 democratic rights were not extended to candidates or electors to municipal councils. This is not a gap to be addressed judicially. The absence of municipalities in the constitutional text is, on the contrary, a deliberate omission (*Imperial Tobacco*, at para. 65). As the intervener the Federation of Canadian Municipalities argues, municipalities (or at least chartered towns) predate the *Magna Carta* (1215). Their existence and importance would have been known to the framers in 1867. The constitutional status of municipalities, and whether they ought to enjoy greater independence from the provinces, was a topic of debate during patriation (*House of Commons Debates*, vol. X, 1st Sess., 32nd Parl., June 15, 1981, at p. 10585). In the end, municipalities were not constitutionalized, either in amendments to the *Constitution Act, 1867* or by reference in the democratic rights enshrined in the Charter.

82 Unlike in the *Provincial Court Judges Reference*, therefore, there is no textual basis for an underlying constitutional principle that would confer constitutional status on municipalities, or municipal elections. The entitlement to vote in elections to bodies not mentioned in s. 3 is therefore a matter for Parliament and provincial legislatures (*Haig*, at p. 1033; *Baier* , at para. 39). Again, and like the school boards at issue in *Baier* , municipalities are mere creatures of statute who exercise whatever powers, through officers appointed by whatever process, that provincial legislatures consider fit. Were the unwritten democratic principle applied to require *all* elections to conform to the requirements of s. 3 (including municipal elections, and not just elections to the House of Commons or provincial legislatures), the text of s. 3 would be rendered substantially irrelevant and redundant (*Imperial Tobacco*, at para. 65). To repeat: the withholding of constitutional status for municipalities, and their absence from the text of s. 3, was the product of a deliberate omission, not a gap. The City's submissions ignore that application of the democratic principle is properly applied to *interpreting* constitutional text, and not *amending* it or *subverting* its limits by ignoring "the primordial significance assigned by this Court's jurisprudence to constitutional text in undertaking purposive interpretation" (*Quebec (Attorney General)* , at para. 4). It is not for the Court to do by "interpretation" what the framers of our Constitution chose not to do by enshrinement, or their successors by amendment.

(3) Conclusion on the Democratic Principle

83 Even had the City established that the Act was inconsistent with the principle of democracy, it follows from the foregoing discussion that a court could not rely on that inconsistency to find the Act unconstitutional. The Act was enacted pursuant to a valid legislative process and the Province had no obligation to consult with the City before it introduced the legislation, or to

introduce the legislation at a particular time. (As the application judge correctly noted, the City of Toronto Act, 2006, S.O. 2006, c. 11, Sch. A, does not impose an immutable obligation to consult since the Province could enact the Act and overrule its previous enactment. Moreover, the related *Toronto-Ontario Cooperation and Consultation Agreement* did not bind the Province in law.)

84 In short, and despite their value as interpretive aids, unwritten constitutional principles cannot be used as bases for invalidating legislation, nor can they be applied to support recognizing a right to democratic municipal elections by narrowing the grant to provinces of law-making power over municipal institutions in s. 92(8) of the Constitution Act, 1867. Nor can they be applied to judicially amend the text of s. 3 of the Charter to require municipal elections or particular forms thereof. The text of our Constitution makes clear that municipal institutions lack constitutional status, leaving no open question of constitutional interpretation to be addressed and, accordingly, no role to be played by the unwritten principles.

V. Conclusion

85 We would dismiss the appeal.

Abella J. **(dissenting) (Karakatsanis, Martin and Kasirer JJ. concurring):**

86 Elections are to democracy what breathing is to life, and fair elections are what breathe life into healthy democracies. They give the public a voice into the laws and policies they are governed by, and a chance to choose who will make those laws and policies. It is a process of reciprocal political discourse.

87 The rules of an election, including the electoral boundaries and the timelines for campaigns, structure the process of reciprocal dialogue between candidates and voters in their electoral districts. The final act of voting, itself a form of political expression, is the culmination of the process of deliberative engagement throughout an election period. The stability of the electoral process is therefore crucial not only to political legitimacy, but also to the rights of candidates and voters to meaningfully engage in the political discourse necessary for voters to cast an informed vote, and for those elected to govern in response to the expressed views of the electorate.

88 The 2018 Toronto municipal election had been underway for three and a half months when the Province of Ontario enacted legislation that radically redrew the City of Toronto's electoral ward boundaries by reducing the number of wards from 47 to 25. Nominations had closed, campaigns were in full swing, and voters had been notified of who wanted to represent them and why.

89 The issue in this appeal is not whether the Province had the legal authority to change the municipal wards. It is whether the Province could do so in the middle of an ongoing municipal election, thereby destabilizing the foundations of the electoral process and interfering with the ability of candidates and voters to engage in meaningful political discourse during the period leading up to voting day.

90 Completely revamping the electoral process in the middle of an election was unprecedented in Canadian history. The question is whether it was also unconstitutional. In my respectful view, it was.

Background

91 In June 2013, City Council approved a Toronto Ward Boundary Review under its authority to establish, change or dissolve wards (City of Toronto Act, 2006, S.O. 2006, c. 11, Sch. A, s. 128(1)). The mandate of the Boundary Review was "to bring a recommendation to Toronto City Council on a ward boundary configuration that respects the principle of 'effective representation'" (Canadian Urban Institute, *Draw the Line: Toronto Ward Boundary Review Project Work Plan, Civic Engagement & Public Consultation Strategy*, April 28, 2014 (online), at p. 1). At the time, there were 44 wards in the City of Toronto.

92 Over the next nearly four years, the Boundary Review conducted research, held public hearings, and consulted extensively. External consultants were hired who developed recommendations, organized extensive stakeholder consultations, held meetings with City Council and the Mayor's staff, and individually interviewed members of the 2010-2014 City Council

and new 2014-2018 members. Altogether, they held over 100 face-to-face meetings with City Council, school boards and other stakeholders, as well as 24 public meetings and information sessions.

93 The four year process resulted in seven reports. A draft of each report was reviewed by an outside five-person Advisory Panel. The Boundary Review's *Options Report*, in August 2015, analyzed eight options for drawing new ward boundaries, concluding that five options met the requirement of effective representation. Of particular significance to this appeal, one of the rejected options was redesigning the wards to mirror the 25 federal electoral districts.

94 The Boundary Review's *Final Report*, in May 2016, recommended *increasing* the number of wards from 44 to 47.

95 At the direction of the Executive Committee of City Council, two further reports were prepared by the Boundary Review in 2016, one in August and one in October. Among other options, the 25 federal electoral district proposal was again examined. Those reports again recommended the 47-ward structure, concluding that applying the boundaries of the 25 federal electoral districts would not achieve effective representation or resolve significant population imbalances, in part, since they were based on the 2011 census and were expected to be redrawn after the 2021 census. The Boundary Review, on the other hand, was based on population estimates for 2026 "to ensure that any new ward structure will last for several elections and constant ward boundary reviews are not required" (*Additional Information Report*, August 2016 (online), at p. 10).

96 City Council adopted the 47-ward structure in November 2016, which was enacted through By-laws Nos. 267-2017 and 464-2017 in March and April 2017. The goal was to create a stable electoral framework for multiple elections. The By-laws were intended to govern the City of Toronto's municipal elections from 2018 to 2026, and, possibly, 2030.

97 The 47-ward structure was appealed to the Ontario Municipal Board by various individuals, including those seeking to have the city divided into wards that mirrored the 25 federal electoral districts. After seven days of hearings, a majority of the Board rejected the appeals and approved the By-laws on December 15, 2017 (Di Ciano v. Toronto (City)2017 CanLII 85757). In its decision, the Board explained why it found the By-laws to be reasonable:

> The Board finds that the work undertaken by the [Boundary Review] culminating in the By-laws setting out a 47-ward structure was comprehensive. The ward structure delineated in the By-laws provides for effective representation and corrects the current population imbalance amongst the existing 44 wards. The decision made by Council to adopt the By-laws was defensible, fair and reasonable. The decision by Council to implement a 47-ward structure does not diverge from the principles of voter equity and effective representation. In this regard, there is nothing unreasonable in the decision of Council. [para. 51]

98 An application was made to the Divisional Court for leave to appeal the Board's decision by two individuals who had unsuccessfully argued before the Board that the 25 federal electoral districts should be implemented. On March 6, 2018, the motion was dismissed (*Natale v. City of Toronto*, 2018 ONSC 1475, 1 O.M.T.R. 349). Swinton J. concluded that the Board applied the correct governing principle, namely, "effective representation":

> Setting electoral boundaries is an exercise that requires a weighing of many policy considerations. The Board heard from a number of expert witnesses over the course of a seven day hearing. It considered relative voter parity as well as other factors. It concluded that communities of interest are best respected in a 47 ward structure. It also noted that a 25 ward structure could increase voter population in the wards "resulting in a significant impact on the capacity to represent". [Citations omitted; para. 10.]

99 On May 1, 2018, nominations opened for candidates seeking election in Toronto's 47 wards.

100 On June 7, 2018, a new provincial government was elected. On the day that nominations for City Council closed, July 27, 2018, the Premier, Doug Ford, announced that the government intended to introduce legislation that would reduce the size of Toronto's City Council from 47 to 25 councillors.

101 The Boundary Review had researched the issue of effective representation for nearly 4 years, concluding that the 25 federal electoral districts would not achieve effective representation and would have an insignificant difference in terms of voter parity. Ontario did not conduct any redistricting studies or send the proposed legislation to Committee for consultation before it was enacted.

102 The legislation was introduced for the first reading in the Legislative Assembly on July 30, 2018 and came into force on August 14, 2018, 69 days before the scheduled election date. The election had been underway for three and a half months. By then, thousands of candidates had signed up and 509 were certified and actively campaigning in Toronto's 47 wards.

103 The nomination period was extended to September 14, 2018, but the election date remained the same — October 22, 2018. That gave candidates, all of whom would have to seek new nominations or notify the City Clerk of their intention to continue in the race by filing a change of ward notification form, just over one month to campaign in the new wards. Until nominations closed again on September 14, 2018, candidates and voters were in legal limbo awaiting the passage of regulations for the new electoral regime and the adjudication of a constitutional challenge to the mid-election changes that gave rise to this appeal. It was only after nominations closed that voters and candidates had a full picture of which candidates were running and in what wards.

104 The new one-month campaign period was also characterized by the disruptive impact of abruptly changing the number, size and boundaries of the wards. Candidates who had been canvassing, responding to local issues, incurring expenses and developing community relationships were now faced with deciding whether and where to run. The old wards were eradicated, many of the new ones were almost twice as large, the populations were different, and there was only one month left to change wards, meet the new constituencies, learn what their concerns were, and engage with them on those issues.

105 In the absence of any notice or additional time to fundraise, many previously certified candidates could no longer afford to run in these new and larger wards. Certified candidates had until September 14, 2018 to file a change of ward notification form or else their nominations would be deemed to be withdrawn (Better Local Government Act, 2018, S.O. 2018, c. 11 (“Act”), Sch. 3, s. 1; Municipal Elections Act, 1996, S.O. 1996, c. 32, Sch., s. 10.1(8)). When the present constitutional challenge was decided only days before that deadline, only 293 of the 509 previously certified candidates had taken the necessary steps to continue in the race. In the end, more than half of the previously certified candidates dropped out of the race before voting day.

106 The City of Toronto and a number of candidates and electors applied to the Ontario Superior Court of Justice for an order declaring the legislation reducing the number of wards from 47 to 25 of no force or effect, pursuant to s. 52(1) of the Constitution Act, 1982.

107 On September 10, 2018, Belobaba J. held that the Act was unconstitutional, infringing the rights of both candidates and voters under s. 2(b) of the Canadian Charter of Rights and Freedoms (2018 ONSC 5151, 142 O.R. (3d) 336). He held that the legislation violated the expressive rights of candidates by radically redrawing ward boundaries mid-election, and that it breached the rights of voters to cast a vote that could result in effective representation by doubling the population sizes of the wards.

108 On September 19, 2018, the Ontario Court of Appeal ordered an interim stay of Belobaba J.'s order, meaning that the election would take place based on the new 25-ward structure (2018 ONCA 761, 142 O.R. (3d) 481). It took place on October 22, 2018.

109 On September 19, 2019, the Court of Appeal allowed the appeal from Belobaba J.'s order (2019 ONCA 732, 146 O.R. (3d) 705). Writing for a 3-2 majority, Miller J.A. held that Belobaba J. "impermissibly extended the scope [of] s. 2(b)" to protect the effectiveness of efforts to convey political messages and to include a right to effective representation.

110 In dissent at the Court of Appeal, MacPherson J.A. held that the timing of the Act infringed s. 2(b), concluding that "[b]y extinguishing almost half of the city's existing wards midway through an active election, Ontario blew up the efforts, aspirations and campaign materials of hundreds of aspiring candidates, and the reciprocal engagement of many informed voters".

111 I agree with MacPherson J.A.

Analysis

112 Under s. 92(8) of the Constitution Act, 1867, the provinces have exclusive jurisdiction over "Municipal Institutions in the Province". The question therefore of whether the Province has the authority to legislate a change in Toronto's ward structure is not the issue in this appeal. The issue is whether this *timing* mid-way through a municipal election was in violation of s. 2(b) of the Charter, which states:

> **2** Everyone has the following fundamental freedoms:
>
> . . . . .
>
> **(b)** freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

113 The 2018 Toronto municipal election had already been underway for three and a half months when the number, size and boundaries of all the wards were changed.

114 It is entirely beside the point to observe that elected municipal councils are creatures of statute. Section 2(b) of the Charter applies with equal vigour to protect political discourse during a municipal election as a federal or provincial one. When a province chooses to vest certain powers in a democratic municipality, municipal elections invariably become the locus of deliberative engagement on those delegated policy issues. It is incumbent on a provincial legislature to respect the rights of its citizens to engage in meaningful dialogue on municipal issues during an election period and, in particular, the rights of candidates and voters to engage in meaningful exchanges before voting day.

115 When a democratic election takes place in Canada, including a municipal election, freedom of expression protects the rights of candidates and voters to meaningfully express their views and engage in reciprocal political discourse on the path to voting day. That is at the core of political expression, which in turn is at the core of what is protected by s. 2(b) of the Charter. When the state enacts legislation that has the effect of destabilizing the opportunity for meaningful reciprocal discourse, it is enacting legislation that interferes with the Constitution.

116 Municipal elections have been a part of political life in Canada since before Confederation, and municipalities are a crucial level of government. The 1996 Greater Toronto Area Task Force explained their significance, emphasizing that "services should be delivered by local municipalities to ensure maximum efficiency and responsiveness to local needs and preferences" (*Greater Toronto*, at p. 174; see also D. Siegel, "Ontario", in A. Sancton and R. Young, eds., *Foundations of Governance: Municipal Government in Canada's Provinces* (2009), 20, at p. 22; A. Flynn, "Operative Subsidiarity and Municipal Authority: The Case of Toronto's Ward Boundary Review" (2019), 56 Osgoode Hall L.J. 271, at pp. 275-76). As Professor Kristin R. Good explains, municipalities are not "mere 'creatures of the provinces'", they are

> important democratic governments in their own right. The variations in multicultural policy making in Canadian cities are evidence that local choices, policies, and politics matter. Municipalities are important vehicles of the democratic will of local communities as well as important sites of multicultural democratic citizenship.
>
> (*Municipalities and Multiculturalism: The Politics of Immigration in Toronto and Vancouver* (2009), at p. 5)

117 The democratically accountable character of municipalities is well established in our jurisprudence. In *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, La Forest J. wrote that "municipal councils are democratically elected by members of the general public and are accountable to their constituents in a manner analogous to that in which Parliament and the provincial legislatures are accountable to the electorates" (para. 51). Similarly, in *Catalyst Paper Corp. v. North Cowichan (District)*, [2012] 1 S.C.R. 5, McLachlin C.J. recognized that municipal councillors "serve the people who elected them and to whom they are ultimately accountable" (para. 19).

118 The increasing significance of municipal governance has been accompanied by an increasingly generous interpretation of municipal powers. Writing for a unanimous Court in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, Bastarache J. observed that "[t]he evolution of the modern municipality has produced a shift in the proper approach to the interpretation of statutes empowering municipalities" (para. 6). And in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241, L'Heureux-Dubé J. confirmed that "law-making and implementation are often best achieved at a level of government that is ... closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity" (para. 3; see also *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342).

119 These cases built on McLachlin J.'s dissent in *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, which stressed the "fundamental axiom" that

> courts must accord proper respect to the *democratic responsibilities of elected municipal officials and the rights of those who elect them*. This is important to the continued healthy functioning of democracy at the municipal level. If municipalities are to be able to respond to the needs and wishes of their citizens, they must be given broad jurisdiction to make local decisions reflecting local values. [Emphasis added; p. 245.]

120 The reciprocal relationship between the democratic responsibilities of elected municipal officials and the rights of those who elected them is crucial. It requires what Duff C.J. called "the free public discussion of affairs" so that two sets of duties can be discharged — the duties of elected members "to the electors", and of electors "in the election of their representatives" (*Reference re Alberta Statutes*, [1938] S.C.R. 100, at p. 133; see also *Switzman v. Elbling*, [1957] S.C.R. 285, at pp. 306 and 326-27; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at p. 583).

121 How then does all this relate to the rights in s. 2(b) of the Charter? Because in dealing with municipal elections, we are dealing with the political processes of democratic government and it is undeniable that s. 2(b) protects "the political discourse fundamental to democracy" (*R. v.* Sharpe, [2001] 1 S.C.R. 45, at para. 23; see also *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at p. 765).

122 In *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, this Court held that one of the three underlying principles of the s. 2(b) right is that "participation in social and political decision-making is to be fostered and encouraged" (p. 976). Professors P. W. Hogg and W. K. Wright have referred to political expression as being "at the core of s. 2(b)", and curtailed under s. 1 "only in service of the most compelling governmental interest" (*Constitutional Law of Canada* (5th ed. Supp.), at p. 43-9).

123 This brings us to the central issue in this appeal, namely, whether the timing of the legislation, in redrawing and reducing the number of wards from 47 to 25 in the middle of an election, infringed the expressive rights protected by s. 2(b) of the Charter.

124 *Irwin Toy* established a two-part test for adjudicating freedom of expression claims. The first asks whether the activity is within the sphere of conduct protected by freedom of expression. If the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee. The second part asks whether the government action, in purpose or effect, interfered with freedom of expression.

125 Dealing with the first part, the "activity" at the heart of this appeal is the expression of political views and the reciprocal political discourse among electoral participants during an election period, which engages the rights of both those seeking election and those deciding whom to elect. Political discourse undoubtedly has expressive content, and therefore, *prima facie* falls within the scope of the guarantee. Dickson C.J. in *R. v. Keegstra*, [1990] 3 S.C.R. 697, noted that

> *[t]he connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(b) guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy*. Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is

open to all persons. Such open participation must involve to a substantial degree the notion that all persons are equally deserving of respect and dignity. [Emphasis added; pp. 763-64.]

126 The second part of the test, namely, whether the state action interfered with the right in purpose or effect, is not, with respect, particularly complicated either. This Court's jurisprudence under s. 2(b) of the Charter has usually arisen in circumstances where the *purpose* of the government action was to restrict expression by regulating who can speak, what they can say or how their messages can be heard. [1] The case before us, on the other hand, deals with whether the *effect* of the legislation — redrawing the ward boundaries and cutting the number of wards nearly in half mid-election — was to interfere with these expressive activities.

127 Freedom of expression does not simply protect the right to speak; it also protects the right to communicate with one another (R. Moon, *The Constitutional Protection of Freedom of Expression* (2000), at pp. 3-4). The words of Marshall J., in dissent, resonate with the reciprocal nature of expression:

> ... the right to speak and hear — including the right to inform others and to be informed about public issues — are inextricably part of [the First Amendment]. The freedom to speak and the freedom to hear are inseparable; they are two sides of the same coin. But the coin itself is the process of thought and discussion. The activity of speakers becoming listeners and listeners becoming speakers in the vital interchange of thought is the "means indispensable to the discovery and spread of political truth." [Citations omitted.]
>
> (*Kleindienst v. Mandel*, 408 U.S. 753(1972), at p. 775)

128 In the electoral context, freedom of expression involves the rights of both candidates and voters to reciprocal deliberative engagement. The right to disseminate and receive information connected with elections has long been recognized as integral to the democratic principles underlying freedom of expression, and as a result, has attracted robust protection (see e.g. *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *R. v. Bryan*, [2007] 1 S.C.R. 527; *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827; *B.C. Freedom of Information and Privacy Association v. British Columbia (Attorney General)*, [2017] 1 S.C.R. 93; see also K. Roach and D. Schneiderman, "Freedom of Expression in Canada" (2013), 61 *S.C.L.R.* (2d) 429; J. Weinrib, "What is the Purpose of Freedom of Expression?" (2009), 67 U.T. Fac. L. Rev. 165).

129 Political expression during an election period is always "taking place within and being constrained by the legal and institutional framework of an election" (Y. Dawood, "The Right to Vote and Freedom of Expression in Political Process Cases Under the Charter" (2021), 100 *S.C.L.R.* (2d) 105, at p. 131). In *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, this Court explained that elections and referendums are "procedural structure[s] allowing for public discussion of political issues essential to governing", which serve to ensure "a reasonable opportunity to speak and be heard" and "the right of electors to be adequately informed of all the political positions advanced by the candidates and by the various political parties" (paras. 46-47).

130 The Intervener, the David Asper Centre for Constitutional Rights, cogently explained how there are different aspects of an election, each of which requires protection:

> Election campaigns provide a special forum for voters and candidates to interact with each other. Citizens engage in the democratic process when they identify issues, test policy positions, bring incumbents to account, and assess new candidates' skills, policies and positions. All exercises of expression, at each and every stage of the electoral process — not only the final act of voting — must receive consistent and robust *Charter* protection. [Footnotes omitted.]
>
> (I.F., at para. 8)

131 The democratic dialogue that occurs throughout an election period is crucial to the formation of public opinion and the ability to cast an informed vote. The process of deliberative engagement during an election period was aptly described by Professor Saul Zipkin:

> ... the electoral process is the primary site in which the representative relationship is constructed. Indeed, "[c]ampaigns ... are a main point — perhaps *the* main point — of contact between officials and the populace over matters of public policy." The period in which the putative representative goes before the voters for their approval is a time of creating that relationship, calling for special attention to the proper functioning of the democratic process at that time. As the representative relationship is historically a matter of constitutional concern, and is shaped by political activity and speech in the electoral setting, we might broaden the narrow focus on ballot-casting in our assessment of the democratic process. [Emphasis in original; footnotes omitted.]
>
> ("The Election Period and Regulation of the Democratic Process" (2010), 18 *Wm. & Mary Bill Rts. J.* 533, at pp. 545-46; see also A. Bhagwat and J. Weinstein, "Freedom of Expression and Democracy", in A. Stone and F. Schauer, eds., *The Oxford Handbook of Freedom of Speech* (2021), 82; N. Urbinati, "Free Speech as the Citizen's Right", in R. C. Post, *Citizens Divided: Campaign Finance Reform and the Constitution* (2014), 125.)

132 An election is a process of allowing candidates and voters, as both speakers and listeners, to participate in reciprocal discourse so that their respective views can be fully expressed and heard. It is only through this process of free public discussion and debate that an informed vote can be cast, and ultimately, those elected can be responsive to the views of the electorate.

133 State interference with individual and collective political expression in the context of an election strikes at the heart of the democratic values that freedom of expression seeks to protect, including "participation in social and political decision-making" (Irwin Toy , at p. 976). The *Irwin Toy* test is, as a result and as discussed later in these reasons, the appropriate legal framework for adjudicating the present claim of state interference with political expression during an election period.

134 A stable election period is crucial to electoral fairness and meaningful political discourse. Redrawing the number, size and boundaries of electoral wards during this period destabilizes the process by "[i]nterrupting an election mid-campaign to change the rules of the game, including the electoral districts upon which candidates have crafted their campaigns and voters will have their preferences channelled" (M. Pal, "The Unwritten Principle of Democracy” (2019), 65 McGill L.J. 269, at p. 302).

135 For three and a half months, candidates and voters engaged in political dialogue within the legal and institutional structure created in advance of the 2018 municipal election after years of research, public engagement and, finally, endorsement from the Ontario Municipal Board.

136 After the Act came into force, candidates and voters found themselves in a suddenly altered electoral landscape. The Act eradicated nearly half of the active election campaigns, requiring those candidates to file a change of ward notification form to continue in the race. The redrawing of ward boundaries meant that candidates needed to reach new voters with new priorities. Campaign materials such as lawn signs or advertisements for abolished wards "no longer play[ed] the function of electoral expression given the change to the underlying institutional context within which that expression [was] taking place" (Dawood, at p. 132). Voters who had received campaign information, learned about candidates' mandates and engaged with them based on the 47-ward structure had their democratic participation put into abeyance.

137 The impact on some of the candidates and voters provides illuminating metaphors. One candidate, for example, Dyanoosh Youssefi, explained that she had been canvassing, e-mailing and organizing since the beginning of the campaign for 12-15 hours per day and all of her efforts had "focused on the concerns and the needs of the approximately 55,000 residents of Ward 14" (A.R., vol. XV, at p. 80). Ward 14 was abolished by the Act.

138 Another candidate, Chiara Padovani, who had been campaigning in Ward 11, described the effect of combining Ward 11 and Ward 12 into a new Ward 5:

> Even before my registration as a candidate for the 2018 election, I engaged in substantial efforts to engage community members around important local issues in Ward 11 for over a one and a half year period such as flooding, road safety, and tenant rights. As a result, I ... know where residents feel there should be additional speedbumps, crosswalks, and reduction in speed limits. I do not have this type of knowledge for any other ward, including Ward 12.

. . . . .

> If I had notice of the change in ward boundaries prior to the commencement of the campaign, I would have been able to plan my ground strategy, and I would have attempted to gain a deeper knowledge of the local issues affecting residents in Ward 12 by actively canvassing in that ward. At this point, it will be impossible for me to carry out double the amount of canvassing that I have completed with the limited time remaining.
>
> (A.R., vol. XI, at pp. 15-16)

139 Ever since the 47-ward structure was enacted in 2017, Chris Moise, a Black and openly gay candidate, had been organizing a campaign in Ward 25. He had decided to run in Ward 25 because it encompassed the Gay Village and Yorkville. These were communities he felt he could meaningfully serve based on his experiences as a School Board Trustee for the area, an LGBTQ activist, a former police officer with an interest in police relations with the Black and LGBTQ communities in the Village, and a resident and property owner in Yorkville. When the legislation abolished Ward 25, he dropped out of the race because he could not pivot his campaign on such short notice to either the new Ward 13, which excluded Yorkville where he lived, or the new Ward 11, which had only a very small geographical overlap with the previous Ward 25 and excluded the Village where he had the most meaningful connections and policy goals.

140 Another candidate, Jennifer Hollett, explained the effect of the two week "legal limbo" (A.R., vol. XI, at p. 144) before the legislation received Royal Assent:

> Even after [the legislation] passed, my campaign team was uncertain what was going to happen to our campaign funds, and whether those funds could be transferred to a new campaign, or whether those funds could be refunded. It was only when regulations made pursuant to the Minister's powers in [the legislation] were passed that we received any direction. The effect of that uncertainty is that my team did not make any campaign expenditures after July 27.
>
> . . . . .
>
> The voters I speak with are confused. They understand that the rules have changed, but do not understand why those rules have changed and how. Instead of discussing municipal issues in the campaign, such as transit and safer streets, residents are asking about ward boundary changes and how they affect them. [pp. 145-46]

141 Megann Wilson, another candidate and participant in the Women Win TO's training program, described the ensuing uncertainty vividly:

> Since ... the imposition of a 25-ward model, I have struggled to engage with residents on my platform, or key issues and policies in the ward. Many residents are simply tired of the changing wards, and no longer know what ward they live in — and that is what I spend my time talking to residents about when I am canvassing. In my view, the level of confusion in my ward will make it more difficult for voters to make a good decision about what candidate to vote for since electors are not even aware of what ward they now live in let alone who the candidates are, given the sudden changes. Further, as a result of lack of communication to residents about the new ward boundaries, I have found myself having to fill that gap while canvassing residents — a significant distraction from the municipal issues I am trying to engage residents about.
>
> As a result of [the legislation] I am hindered in getting to the root of municipal issues affecting electors while I am canvassing. I am now spending most of my time with voters explaining the changes to the ward boundaries, and discussing the provincial politics that led to these sudden changes. Time with prospective voters is precious for all candidates and [the legislation] has interrupted my ability to engage directly with voters about my platform and my ideas for the ward and its residents.
>
> (A.R., vol. X, at p. 132)

142 Since the Act did not reset campaign finance limits, new candidates entered the race with untapped campaign spending limits, while candidates who had already been campaigning lost what they had invested in now-defunct districts and continued in the race on a reduced budget. Some previously certified candidates stopped producing campaign materials entirely due to

the uncertainty surrounding the transfer of campaign funds and expenditures to a new campaign. Others could not afford to compete in the new and larger wards. As one campaign volunteer described:

> We do not know whether a donor who donated the maximum amount to a Ward 23 candidacy can now make a fresh donation to a Ward 13 candidacy. This is important because funds were spent on materials for the Ward 23 candidacy that are no longer useable. ... It will likely not be possible to undertake sufficient fundraising to replace all of the items that are no longer usable, particularly given the limited amount of time in the campaign. Prior donors will likely not be able or willing to donate again, and it is unlikely we will be able to find enough new donors to produce sufficient new materials for a fresh campaign for a much larger ward area, particularly compared to more well-resourced incumbents.
>
> (A.R., vol. IX, at p. 125)

143 Voters, too, were affected. One voter, Ish Aderonmu, explained the consequence of candidates dropping out of the race as "deeply disappointing ... as an elector who has been working to advance one of these campaigns, expressing myself politically for the first time" (A.R., vol. IX, at p. 124). Another voter, who had endorsed a candidate who dropped out of the race, conveyed that "his own political expression has been compromised" and that "candidates remaining in the race are dealing with making major changes to their campaigns, and are not available to discuss [important] issues with him" (A.R., vol. IX, at p. 104).

144 It is important to remember the timeline. Nominations opened on May 1, 2018, and closed on July 27, 2018. On the same day that nominations closed, the government announced that it intended to introduce new legislation, cutting the wards nearly in half and radically redrawing ward boundaries mid-election. No one knew what the impact of the new boundaries would be. Candidates did not know how the new electoral wards would affect their campaigns, and voters had no idea who their new candidates would be. All this after being in an ongoing electoral process for almost three months.

145 The new legislation came into force two weeks later on August 14, 2018. By then, candidates had been campaigning and engaging with voters for 105 days in the existing 47 wards. Candidates who had developed mandates to respond to the specific needs and interests of their wards had their campaign efforts eradicated, along with their opportunity to meaningfully engage with the right voters on those issues. Voters who had formed opinions, been persuaded on issues, refined their preferences and expressed their views to their preferred representatives had their political expression thwarted. Some candidates persevered; others dropped out of the race. Volunteers quit, campaign endorsements were rescinded and confusion ensued.

146 Nominations were extended to September 14, leaving only five weeks — from the date that nominations closed, solidifying which candidates were running and in what wards — for an election that was supposed to last nearly six months. More importantly, those five weeks were marred by the destabilizing impact of the timing of the legislation in the middle of an election that was technically 60 percent complete. The additional month for *new* candidates to seek nomination could not undo the damage and uncertainty that the change had created for candidates who had already been certified and voters who had already participated in three and a half months of deliberative engagement.

147 The timing of the Act, in the middle of an ongoing election, breathed instability into the 2018 municipal election, undermining the ability of candidates and voters in their wards to meaningfully discuss and inform one another of their views on matters of local concern. For the remaining campaign period, candidates spent more time on doorsteps discussing the confusing state of affairs with voters than the relevant political issues. The timing of the legislation, by interfering with political discourse in the middle of an election, was a clear breach of s. 2(b) of the Charter.

148 With respect, this leaves no role for the legal framework set out in *Baier v. Alberta*, [2007] 2 S.C.R. 673. It was designed to address underinclusive statutory regimes. The line of authority preceding *Baier* involved claims by individuals or groups seeking inclusion in an existing statutory regime, alleging that the absence of government support for them constituted a substantial interference with their exercise of a fundamental freedom.[2] The *Baier* framework was originally developed for an underinclusive labour relations regime in *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, and then modified for an allegedly underinclusive school board trustee election regime in *Baier*. The framework specifically refers to "claims of

underinclusion", "exclusion from a statutory regime" and "underinclusive state action" (*Dunmore* , at paras. 24-26; *Baier* , at paras. 27-30). It has no relevance to the legal or factual issues in this case.

149 The *Baier* framework was, additionally, confined to its unique circumstances by this Court's subsequent decision in *Greater Vancouver Transportation Authority v. Canadian Federation of Students-British Columbia Component*, [2009] 2 S.C.R. 295. Writing for a 7-1 majority, Deschamps J. explained that *Baier* "summarized the criteria for identifying the limited circumstances in which s. 2(b) requires the government to extend an underinclusive means of, or 'platform' for, expression to a particular group or individual" (para. 30). She also cautioned against extending *Baier* beyond these narrow confines:

> ... taken out of context, [*Baier*] could be construed as transforming many freedom of expression cases into "positive rights claims". Expression in public places invariably involves some form of government support or enablement. Streets, parks and other public places are often created or maintained by government legislation or action. If government support or enablement were all that was required to trigger a "positive rights analysis", it could be argued that a claim brought by demonstrators seeking access to a public park should be dealt with under the *Baier* analysis because to give effect to such a claim would require the government to enable the expression by providing the necessary resource (i.e., the place). But to argue this would be to misconstrue *Baier*.
>
> When the reasons in *Baier* are read as a whole, it is clear that "support or enablement" must be tied to a claim requiring the government to provide a particular means of expression. In *Baier*, a *distinction* was drawn between *placing an obligation on government to provide individuals with a particular platform for expression* and *protecting the underlying freedom of expression of those who are free to participate in expression on a platform* (para. 42). [Emphasis added; paras. 34-35.]

150 The *Baier* test has no application to this appeal. As Deschamps J.'s full quote shows, it is clear that *Baier* only applies to claims "placing an obligation on government to provide individuals with a particular platform for expression". *Irwin Toy* , on the other hand, applies to claims that are about "protecting the underlying freedom of expression of those who are free to participate in expression on a platform", like the case before us.

151 None of the claimants involved in this case was excluded from participating in the 2018 Toronto municipal election, nor did they claim that s. 2(b) of the Charter requires the Province to provide them with a municipal election so that they can express themselves. The s. 2(b) claim in this case is about government interference with the expressive rights that attach to an electoral process. This is precisely the kind of claim that is governed by the *Irwin Toy* framework, not *Baier* (*Baier* , at para. 42; *Greater Vancouver Transportation Authority* , at para. 35; Ontario (Public Safety and Security) v. Criminal Lawyers' Association, [2010] 1 S.C.R. 815, at para. 31).

152 In any event, the distinction between positive and negative rights is an unhelpful lens for adjudicating *Charter* claims. During nearly four decades of *Charter* litigation, this Court has recognized that rights and freedoms have both positive and negative dimensions. That recognition has led the Court to adopt a unified purposive approach to rights claims, whether the claim is about freedom *from* government interference in order to exercise a right, or the right *to* governmental action in order to get access to it.[3] To paraphrase Gertrude Stein, a right is a right is a right. The threshold does not vary with the nature of the claim to a right. Each right has its own definitional scope and is subject to the proportionality analysis under s. 1 of the Charter.

153 All rights have positive dimensions since they exist within, and are enforced by, a positive state apparatus (S. Fredman, "Human Rights Transformed: Positive Duties and Positive Rights", [2006] P.L. 498, at p. 503; J. Rawls, *Political Liberalism* (exp. ed. 2005), at pp. 361-62; A. Sen, *The Idea of Justice* (2009), at p. 228). They also have negative dimensions because they sometimes require the state *not* to intervene. The distinction "is notoriously difficult to make .... Appropriate verbal manipulations can easily move most cases across the line" (S. F. Kreimer, "Allocational Sanctions: The Problem of Negative Rights in a Positive State" (1984), 132 U. Pa. L. Rev. 1293, at p. 1325).

154 It is true that freedom of expression was once described by L'Heureux-Dubé J. in *Haig v. Canada*, [1993] 2 S.C.R. 995, as prohibiting "gags" but not compelling "the distribution of megaphones" (p. 1035; see also K. Chan, "Constitutionalizing the Registered Charity Regime: Reflections on *Canada Without Poverty*" (2020), 6 *C.J.C.C.L.* 151, at p. 173). But even in *Haig*

— a precursor to *Baier* — L'Heureux-Dubé J. acknowledged that this was an artificial distinction that is "not always clearly made, nor ... always helpful" (p. 1039; see also *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627, at pp. 666-68, per L'Heureux-Dubé J., concurring).

155 There is no reason to superimpose onto our constitutional structure the additional hurdle of dividing rights into positive and negative ones for analytic purposes. Dividing the rights "baby" in half is not Solomonic wisdom, it is a jurisprudential sleight-of-hand that promotes confusion rather than rights protection.

156 The purpose of the s. 2(b) right is not merely to restrain the government from interfering with expression, but also to cultivate public discourse "as an instrument of democratic government" (Hogg and Wright, at p. 43-8; see also Weinrib). Political discourse is at the heart of s. 2(b). Protecting the integrity of reciprocal political discourse among candidates and voters during an election period is therefore integral to s. 2(b)'s purpose. Elevating the legal threshold, as the majority proposes to do by applying *Baier* , adds a gratuitous hurdle, making it harder to prove a breach of this core aspect of s. 2(b) than other expressive activities. What should be applied instead is the foundational framework in *Irwin Toy* , which simply asks whether the activity in question falls within the scope of s. 2(b) and whether the government action, in purpose or effect, interfered with that expressive activity.

157 Applying that framework, it is clear that the timing of the legislation violated s. 2(b) of the Charter. By radically redrawing electoral boundaries *during* an active election that was almost two-thirds complete, the legislation interfered with the rights of all participants in the electoral process to engage in meaningful reciprocal political discourse.

158 This brings us to s. 1 of the Charter. The purpose of the s. 1 analysis is to determine whether the state can justify the *limitation* as "demonstrably justified in a free and democratic society" (Charter, s. 1; Fraser v. Canada (Attorney General), 2020 SCC 28, at para. 125). The limitation on s. 2(b) rights in this case was the timing of the legislative changes.

159 But rather than explaining the purpose and justification for the *timing* of the changes, Ontario relied on the pressing and substantial objectives of the changes themselves as the basis for the s. 1 analysis, saying they were to achieve voter parity, improve efficiency and save costs. This was set out in the press release announcing the proposed legislation, which stated: "We ran on a commitment to restore accountability and trust, to reduce the size and cost of government, including an end to the culture of waste and mismanagement" (Office of the Premier, *Ontario's Government for the People Announces Reforms to Deliver Better Local Government*, July 27, 2018 (online)). And at the second reading of the legislation, the Minister of Municipal Affairs and Housing, the Hon. Steve Clark, declared:

> During the recent provincial election campaign, my caucus colleagues and I heard very strongly from Ontarians that they want us to respect those taxpayers' dollars. We heard very clearly from Ontarians that government is supposed to work for them. I think Ontario sent a very clear message on June 7 that they want a government that looks after those taxpayers' dollars, and that is exactly what we're doing with this bill.
>
> So, Speaker, I want to get into some of the details of the bill, and specifically I want to talk first about the city of Toronto. The bill, if passed, would reduce the size of Toronto city council to 25 councillors from the present 47 plus the mayor. This would give the taxpayers of Toronto a streamlined, more effective council that is ready to work quickly and puts the needs of everyday people first.
>
> (Legislative Assembly of Ontario, *Official Report of Debates (Hansard)*, No. 14, 1st Sess., 42nd Parl., August 2, 2018, at p. 605)

160 Leaving aside that voter parity was hardly mentioned in the legislative debates, this Court has never found voter parity to be the electoral lodestar, asserting, on the contrary, that the values of a free and democratic society "are better met by an electoral system that focuses on effective representation than by one that focuses on mathematical parity" (Reference re Prov. Electoral Boundaries (Sask.) [1991] 2 S.C.R. 158, at p. 188).

161 But of overriding significance, the government offered no explanation, let alone a pressing and substantial one, for why the changes were made in the middle of an ongoing election. There was no hint of urgency, nor any overwhelming immediate policy need.

162 In the absence of any evidence or explanation for the *timing* of the Act, no pressing and substantial objective exists for this limitation and it cannot, therefore, be justified in a free and democratic society. The legislation is, as a result, an unjustified breach of s. 2(b).

163 While this dispenses with the merits of the appeal, the majority's observations circumscribing the scope and power of unwritten constitutional principles in a way that reads down this Court's binding jurisprudence warrants a response.

164 In the Reference re Secession of Quebec [1998] 2 S.C.R. 217 ("Secession Reference"), the Court identified the unwritten constitutional principles of democracy, judicial independence, federalism, constitutionalism and the rule of law, and the protection of minorities. These principles are derived from the preamble to the *Constitution Act, 1867*, which describes our Constitution as "a Constitution similar in Principle to that of the United Kingdom" (*Secession Reference*, at paras. 44-49; see also P. C. Oliver, "'A Constitution Similar in Principle to That of the United Kingdom': The Preamble, Constitutional Principles, and a Sustainable Jurisprudence" (2019), 65 McGill L.J. 207).

165 The precedential Constitution of the United Kingdom is not a written document, but is comprised of unwritten norms, Acts of Parliament, Crown prerogative, conventions, custom of Parliament, and judicial decisions, among other sources (Oliver, at p. 216; M. Rowe and N. Déplanche, "Canada's Unwritten Constitutional Order: Conventions and Structural Analysis" (2020), 98 Can. Bar Rev. 430, at p. 438). Our Constitution, as a result, "embraces unwritte[n] as well as written rules" (Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island [1997] 3 S.C.R. 3 ("Provincial Judges Reference"), at para. 92, per Lamer C.J.).

166 It is notable that many Parliamentary systems, notwithstanding their different constitutional arrangements, have also recognized that unwritten constitutional principles have full legal force and can serve as substantive limitations on all branches of government. [4]

167 Unwritten constitutional principles have been held to be the "lifeblood" of our Constitution (*Secession Reference*, at para. 51) and the "vital unstated assumptions upon which the text is based" (para. 49). They are so foundational that including them in the written text "might have appeared redundant, even silly, to the framers" (para. 62).

168 Unwritten constitutional principles are not, as the majority suggests, merely "context" or "backdrop" to the text. On the contrary, unwritten principles are our Constitution's most basic normative commitments from which specific textual provisions derive. The specific written provisions are "elaborations of the underlying, unwritten, and organizing principles found in the preamble to the *Constitution Act, 1867*" (*Provincial Judges Reference*, at para. 107; see also *Switzman*, at p. 306, per Rand J.). Constitutional text emanates from underlying principles, but it will not always be exhaustive of those principles. In other words, the text is not exhaustive of our Constitution (*New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, at p. 378, per McLachlin J.).

169 Apart from written provisions of the Constitution, principles deriving from the Constitution's basic structure may constrain government action. Those principles exist independently of and, as in the case of implied fundamental rights before the promulgation of the Charter, prior to the enactment of express constitutional provisions (see e.g. *Reference re Alberta Statutes* , per Duff C.J.; *Switzman*, at pp. 327-28, per Abbott J.; *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at p. 57, per Beetz J.). As Beetz J. wrote for the majority in *OPSEU*, at p. 57, "quite apart from *Charter* considerations, the legislative bodies in this country must conform to these basic structural imperatives and can in no way override them":

> There is no doubt in my mind that the basic structure of our Constitution, as established by the *Constitution Act, 1867*, contemplates the existence of certain political institutions, including freely elected legislative bodies at the federal and provincial levels. In the words of Duff C.J. in *Reference re Alberta Statutes*, at p. 133, "such institutions derive their efficacy

> from the free public discussion of affairs ...." and, in those of Abbott J. in *Switzman v. Elbling*, at p. 328, neither a provincial legislature nor Parliament itself can "abrogate this right of discussion and debate". Speaking more generally, I hold that neither Parliament nor the provincial legislatures may enact legislation the effect of which would be to substantially interfere with the operation of this basic constitutional structure. [p. 57]

170 This leads inescapably to the conclusion — supported by this Court's jurisprudence until today — that unwritten principles may be used to invalidate legislation if a case arises where legislation elides the reach of any express constitutional provision but is fundamentally at odds with our Constitution's "internal architecture" or "basic constitutional structure" (*Secession Reference*, at para. 50; *OPSEU*, at p. 57). This would undoubtedly be a rare case. But with respect, the majority's decision to foreclose the possibility that unwritten principles be used to invalidate legislation in all circumstances, when the issue on appeal does not require them to make such a sweeping statement, is imprudent. It not only contradicts our jurisprudence, it is fundamentally inconsistent with the case law confirming that unwritten constitutional principles can be used to review legislation for constitutional compliance. Reviewing legislation for constitutional compliance means upholding, revising or rejecting it. Otherwise, there is no point to reviewing it.

171 In the *Secession Reference*, a unanimous Court confirmed that "[u]nderlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have 'full legal force', as we described it in the *Patriation* Reference, supra, at p. 845), which constitute substantive limitations upon government action" (para. 54, quoting *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 ("*Patriation Reference*, "); see also Babcock v. Canada (Attorney General), [2002] 3 S.C.R. 3, at para. 54, per McLachlin C.J.). That means they can be used to assess state action for constitutional compliance, which in turn can lead to endorsing, rejecting, limiting or expanding the acts of the executive or legislative branches of government. Again, with respect, we have never, to date, limited their role in the manner the majority proposes.

172 The Court's reference to *Patriation Reference* dispels any doubt as to what it meant when it said that these principles have "full legal force". In the passage cited approvingly from the *Patriation Reference*, Martland and Ritchie JJ., dissenting in part, explained that unwritten constitutional principles "*have been* accorded full legal force in the sense of *being employed to strike down legislative enactments*" (p. 845 (emphasis added)). While Martland and Ritchie JJ. dissented in the result in the *Patriation Reference*, they cited judgments in support of the principle of federalism that remain good law and were viewed as necessary to "preserving the integrity of the federal structure" (p. 821), notably *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 326 (P.C.), and *Attorney General of Nova Scotia v. Attorney General of Canada*, [1951] S.C.R. 31 (see also Secession Reference, at para. 81, citing *Reference re Authority of Parliament in relation to the Upper House*, [1980] 1 S.C.R. 54, at p. 71). In other words, structural doctrine helps identify what the unwritten principles *are*, it does not limit their role.

173 This Court expressly endorsed the unwritten principles of democracy as the "baseline against which the framers of our Constitution, and subsequently, our elected representatives under it, have always operated" (*Secession Reference*, at para. 62); the rule of law as "a fundamental postulate of our constitutional structure" (*Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 142, per Rand J.), "the very foundation of the Charter" (*B.C.G.E.U., Re*, [1988] 2 S.C.R. 214(S.C.C.) , at p. 229, per Dickson C.J.), and the source of judicial authority to override legislative intent "where giving effect to that intent is precluded by the rule of law" (Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65, at para. 23); federalism as "a foundational principle of the Canadian Constitution" (References re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11, at para. 3, per Wagner C.J.); and judicial independence as a "constitutional imperative" in light of "the central place that courts hold within the Canadian system of government" (*Provincial Judges Reference*, at para. 108). And of course, the unwritten constitutional principle of the honour of the Crown has been affirmed by this Court and accorded full legal force (Beckman v. Little Salmon/Carmacks First Nation, [2010] 3 S.C.R. 103, at para. 42, per Binnie J.; Haida Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511, at para. 16, per McLachlin C.J.).

174 In the *Provincial Judges Reference*, this Court relied, in part, on the unwritten constitutional principle of judicial independence to strike down legislative provisions in various provincial statutes. The issue was whether the principle of judicial independence restricts the manner and extent to which provincial legislatures can reduce the salaries of provincial court judges. While the principle of judicial independence finds expression in s. 11(d) of the Charter , which guarantees the right of an accused to an independent tribunal, and ss. 96 to 100 of the Constitution Act, 1867, which govern superior courts in the province, the

unwritten principle of judicial independence was used to fill a gap in the written text to cover provincial courts in circumstances not covered by the express provisions. Writing for the majority, Lamer C.J. held that

> [j]udicial independence is an unwritten norm, recognized and affirmed by the preamble to the *Constitution Act, 1867*. In fact, it is in that preamble, which serves as the grand entrance hall to the castle of the Constitution, that the true source of our commitment to this foundational principle is located. [para. 109]

175 In *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, this Court invoked the unwritten principle of the rule of law to create a novel constitutional remedy — the suspended declaration of constitutional invalidity. The Court developed this remedy notwithstanding that the text of s. 52(1) of the Constitution Act, 1982 states that unconstitutional laws are "of no force or effect" suggesting, when interpreted technically and in isolation from underlying constitutional principles, that declarations of invalidity can only be given immediate effect. As Karakatsanis J. wrote for the majority in *Ontario (Attorney General) v. G*, 2020 SCC 38, although s. 52(1) "does not explicitly provide the authority to suspend a declaration, in adjudicating constitutional issues, courts 'may have regard to unwritten postulates which form the very foundation of the Constitution of Canada'" (para. 120, quoting *Manitoba Language Rights*, at p. 752).

176 Beyond the Reference context, in *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, this Court used the rule of law principle to read down s. 47(2) of the Young Offenders Act, R.S.C. 1985, c. Y-1, which granted youth courts exclusive jurisdiction over contempt of court by a young person, so as not to oust the jurisdiction of superior courts. Writing for the majority, Lamer C.J. held that Parliament cannot remove the contempt power from a superior court without infringing "the principle of the rule of law recognized both in the preamble and in all our conventions of governance" (para. 41).

177 And in *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, [2014] 3 S.C.R. 31, this Court struck down a regulation imposing hearing fees that were found to deny people access to the courts based in part on the unwritten constitutional principle of the rule of law, and relatedly, access to justice.

178 The majority's emphasis on the "primordial significance" of constitutional text is utterly inconsistent with this Court's repeated declarations that *unwritten* constitutional principles are the foundational organizing principles of our Constitution and have full legal force. Being unwritten means there is no text. They serve to give effect to the structure of our Constitution and "function as independent bases upon which to attack the validity of legislation ... since they have the same legal status as the text" (R. Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001), 80 Can. Bar Rev. 67, at p. 95; see also H.-R. Zhou, "Legal Principles, Constitutional Principles, and Judicial Review" (2019), 67 Am. J. Comp. L. 889, at p. 924). By definition, an emphasis on the words of the Constitution demotes unwritten principles to a diluted role. "Full legal force" means full legal force, independent of the written text.

179 Unwritten constitutional principles do not only "give meaning and effect to constitutional text" and inform "the language chosen to articulate the specific right or freedom", they also assist in developing an evolutionary understanding of the rights and freedoms guaranteed in our Constitution, which this Court has long described as "a living tree capable of growth and expansion" (*Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 156, quoting *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136). Unwritten constitutional principles are a key part of what makes the tree grow (*Secession Reference*, at para. 52; *Provincial Judges Reference*, at para. 106). This Court has never held that the interpretive role of unwritten constitutional principles is narrowly constrained by textualism.

180 Unwritten constitutional principles are, additionally, substantive legal rules in their own right. As Lamer C.J. wrote in the *Provincial Judges Reference*:

> [The preamble] recognizes and affirms the basic principles which are the very source of the substantive provisions of the *Constitution Act, 1867*. As I have said above, those provisions merely elaborate those organizing principles in the institutional apparatus they create or contemplate. As such, *the preamble is not only a key to construing the express provisions of the Constitution Act, 1867, but also invites the use of those organizing principles to fill out gaps in the express*

terms of the constitutional scheme. It is the means by which the underlying logic of the Act can be given *the force of law*. [Emphasis added; para. 95.]

181 Professor Mark D. Walters effectively explained why the role of unwritten constitutional principles has not been limited as the majority suggests:

> The relationship between unwritten and written constitutional law in Canada may be conceived in different ways. At one point, Chief Justice Antonio Lamer observed that the role of unwritten principles is "to fill out gaps in the express terms of the constitutional scheme." This statement might suggest that judges are just reading between the lines in order to make the text complete. Or, to use another metaphor, judges are constructing bridges over the waters that separate islands of constitutional text, creating a unified and useable surface.
>
> *But the gap-filling and bridge metaphors do not capture fully the theory of unwritten constitutionalism as it has developed in the Canadian cases*.... We must alter the bridge metaphor accordingly: The textual islands are merely the exposed parts of a vast seabed visible beneath the surrounding waters, and the bridges constructed by judges between these islands are actually causeways moulded from natural materials brought to the surface from this single underlying foundation. *The constitutional text is not just supplemented by unwritten principles; it rests upon them*. [Emphasis added; footnote omitted.]
>
> ("Written Constitutions and Unwritten Constitutionalism", in G. Huscroft, ed., *Expounding the Constitution: Essays in Constitutional Theory* (2008 (reprinted 2010)), 245, at pp. 264-65)

182 It is also difficult to understand the need for the majority's conclusion that using unwritten constitutional principles to strike down legislation would circumvent the legislative override power in s. 33 of the Charter . This question is not directly before us.

183 Finally, I see no merit to the majority's argument that courts cannot declare legislation invalid on the basis of unwritten constitutional principles because s. 52(1) of the Constitution Act, 1982 only applies to written text. This argument extinguishes the entire jurisprudence establishing that unwritten principles have full legal force. Section 52(1) provides that "any law that is inconsistent with the *provisions* of the Constitution is ... of no force or effect". The majority's reading of s. 52(1), like much of the rest of its analysis, is a highly technical exegetical exercise designed to overturn our binding authority establishing that unwritten constitutional principles are a full constitutional partner with the text, including for the purposes of s. 52 (*New Brunswick Broadcasting Co.*, at pp. 375-78; *Manitoba Language Rights*, at p. 752; *Ontario (Attorney General) v. G*, at para. 120).

184 It is true that in *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473, the Court questioned whether the rule of law could be used to invalidate legislation based on its content, but this was based on the specific contours of one unwritten principle, not unwritten principles in general. The Court did not constrain the reach of judicial independence, the other unwritten constitutional principle raised in that case. As Major J. explained in describing the limits of the content of the rule of law:

> ... it is difficult to conceive of how the rule of law could be used as a basis for invalidating legislation such as the Act based on its content. That is because none of the principles that the rule of law embraces speak directly to the terms of legislation. The first principle requires that legislation be applied to all those, including government officials, to whom it, by its terms, applies. The second principle means that legislation must exist. And the third principle, which overlaps somewhat with the first and second, requires that state officials' actions be legally founded. See R. Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001), 80 *Can. Bar Rev.* 67, at pp. 114-15. [para. 59]

Never, however, has this Court, until now, foreclosed the possibility of *all* unwritten constitutional principles ever invalidating legislation.

185 The inevitable consequence of this Court's decades-long recognition that unwritten constitutional principles have "full legal force" and "constitute substantive limitations" on all branches of government is that, in an appropriate case, they may well

continue to serve, as they have done in the past, as the basis for declaring legislation unconstitutional (*Secession Reference*, at para. 54; see also Elliot, at p. 95; (A.) J. Johnson, "The Judges Reference and the Secession Reference at Twenty: Reassessing the Supreme Court of Canada's Unfinished Unwritten Constitutional Principles Project" (2019), 56 Alta. L. Rev. 1077, at p. 1082; P. Bobbitt, *Constitutional Fate: Theory of* the Constitution (1982)). There is no need, as a result, to constrain the role of unwritten constitutional principles and newly declare that their full legal force does not include the ability, in appropriate circumstances, to declare legislation to be constitutionally invalid.

186 I would allow the appeal and restore Belobaba J.'s declaration that the timing of the Act unjustifiably infringed s. 2(b) of the Charter .

Appeal dismissed.

Pourvoi rejeté.

Footnotes

1 This Court's jurisprudence has involved, for example, restrictions on: *publication* (*Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *R. v. Bryan*, [2007] 1 S.C.R. 527); *obscene content* (*R. v. Butler*, [1992] 1 S.C.R. 452; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120); *advertising* (*Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Greater Vancouver Transportation Authority v. Canadian Federation of Students-British Columbia Component*, [2009] 2 S.C.R. 295); *language* (*Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *Devine v. Quebec (Attorney General)*, [1988] 2 S.C.R. 790); *harmful content* (*R. v. Sharpe*, [2001] 1 S.C.R. 45; *R. v. Keegstra*, [1990] 3 S.C.R. 697); *manner or place of expression* (*Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139; *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084; *Montréal (City) v. 2952-1366 Québec Inc.*, [2005] 3 S.C.R. 141); *who can participate in a statutory platform for expression* (*Haig v. Canada*, [1993] 2 S.C.R. 995; *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627; *Baier v. Alberta*, [2007] 2 S.C.R. 673); *voluntary expression* (such as mandatory letters of reference or public health warnings) (*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Canada (Attorney General) v. JTI-Macdonald Corp.*, [2007] 2 S.C.R. 610); *expenditures on expression* (*Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569; *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827); or *access to information* (such as court proceedings or government documents) (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 S.C.R. 815). This case does not fall into any of these categories.

2 *Haig v. Canada*, [1993] 2 S.C.R. 995 (s. 2(b) challenge to exclusion of Quebec resident from federal referendum); *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627 (s. 2(b) challenge to exclusion of Native Women's Association of Canada from federal funding to present on Charlottetown Accord); *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989, overruled by *Mounted Police Association of Ontario v. Canada (Attorney General)*, [2015] 1 S.C.R. 3 (s. 2(d) challenge to exclusion of RCMP members from labour relations legislation); *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016 (s. 2(d) challenge to exclusion of agricultural workers from labour relations legislation).

3 The same legal standard has applied to claims with respect to: *freedom of association under s. 2(d)* (*Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391 (right to collective bargaining); *Ontario (Attorney General) v. Fraser*, [2011] 2 S.C.R. 3 (right to good faith bargaining); *Mounted Police Association of Ontario v. Canada (Attorney General)*, [2015] 1 S.C.R. 3 (right to statutory protections for collective bargaining)); the *right to life, liberty and security of the person under s. 7* (*Carter v. Canada (Attorney General)*, [2015] 1 S.C.R. 331 (physician-assisted dying); *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (abortion); *Canada (Attorney General) v. PHS Community Services Society*, [2011] 3 S.C.R. 134 (safe injection facility)); and *equality under s. 15* (*Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 (interpretation services for deaf hospital patients); *Vriend v. Alberta*, [1998] 1 S.C.R. 493 (legislative protection against discrimination on the basis of sexual orientation)), to name a few examples.

4 See also other jurisdictions in which unwritten constitutional principles have been accorded full legal force in the sense of being employed to invalidate legislative or executive action: *United Kingdom* (*R. (on the application of Miller) v. Prime Minister*, [2019] UKSC 41, [2020] A.C. 373 (parliamentary sovereignty and accountability); *R. (on the application of Jackson) v. Attorney General*,

[2005] UKHL 56, [2006] 1 A.C. 262(Eng. H.L.) , at para. 102, per Lord Steyn (judicial independence); R. (Privacy International) v. Investigatory Powers Tribunal[2019] UKSC 22[2020] A.C. 491, at paras. 100 and 144, per Lord Carnwath (judicial independence and rule of law); *AXA General Insurance Ltd. v. Lord Advocate*, [2011] UKSC 46, [2012] 1 A.C. 868(U.K. S.C.) , at para. 51, per Lord Hope (judicial independence and rule of law)); Australia (Brandy v. Human Rights and Equal Opportunity Commission1995183 C.L.R. 245 (judicial independence); Kable v. Director of Public Prosecutions (NSW)1996189 C.L.R. 51 (federalism); *Re Residential Tenancies Tribunal (NSW); Ex parte* Defence Housing Authority1997190 C.L.R. 410 (federalism); Lange v. Australian Broadcasting Corp.1997189 C.L.R. 520 (H.C.) (freedom of political communication); Roach v. Electoral Commissioner[2007] HCA 43233 C.L.R. 162 (the right to vote)); *South Africa* (*South African Association of Personal Injury Lawyers v. Heath*, [2000] ZACC 22, 2001 (1) S.A. 883 (separation of powers); *Fedsure Life Assurance Ltd. v. Greater Johannesburg Transitional Metropolitan Council*, [1998] ZACC 17, 1999 (1) S.A. 374, at para. 58 (legality)); *Germany* (*Elfes Case*, BVerfG, 1 BvR 253/56, Decision of January 16, 1957 (rule of law and social welfare state)); and India (Kesavananda v. State of Kerala, A.I.R. 1973 S.C. 1461, at pp. 1899-1900 (secularism, democracy and individual freedom)).

Tab 2

1986 CarswellNat 1004
Supreme Court of Canada

Beauregard v. Canada

1986 CarswellNat 1004, 1986 CarswellNat 737, [1986] 2 S.C.R. 56, [1986] S.C.J. No. 50, 26 C.R.R. 59, 30 D.L.R. (4th) 481, 70 N.R. 1, J.E. 86-939, EYB 1986-67283

Her Majesty The Queen, Appellant v. Marc Beauregard, Respondent

Dickson C.J. and Beetz, Estey, McIntyre and Lamer JJ.

Judgment: October 4, 1985
Judgment: September 16, 1986
Docket: 17884

Proceedings: On Appeal from the Federal Court of Appeal

Counsel: *W. I. C. Binnie, Q.C.*, and *D. M. Low*, for the appellant.
David W. Scott, Q.C., and *Carole Brown*, for the respondent.

Related Abridgment Classifications
Constitutional law
VII Distribution of legislative powers
VII.4 Areas of legislation
VII.4.l Judicature
VII.4.l.ii Payment of judges' income
Constitutional law
X Canadian Bill of Rights
X.1 Human rights and freedoms
X.1.c Equality before law and protection of law
X.1.c.ii Valid federal objective
Judges and courts
I Appointment, removal, disqualification, and discipline of judges and other court officers
I.2 Payment of judges' incomes [Constitution Act, 1867, s. 100]
Pensions
I Private pension plans
I.2 Payment of pension
I.2.h Determination of benefits payable
I.2.h.iii Miscellaneous

The judgment of Dickson C.J. and Estey and Lamer JJ. was delivered by *The Chief Justice*:

1 This appeal concerns the financial position and security of federally appointed judges. Relatively narrow amendments by Parliament to a federal law relating to pension benefits for judges, and pensions for their dependants, gave rise to the case. The legal issues which must be addressed are, however, quite broad. They involve careful consideration of at least three important relationships — the federal Parliament and the judiciary, the executive branch of the federal government and the judiciary, and the federal government and provincial governments. Moreover, it is crucial to the resolution of this appeal to develop a proper understanding and application of the fundamental constitutional principle of judicial independence.

I

Facts

2 The law attacked in this appeal, the *Statute Law (Superannuation) Amendment Act, 1975*, S.C. 1974-75-76, c. 81, came into force on December 20, 1975. But the events relevant to the appeal started a year and a day earlier, and there are other important dates in the chronology.

3 On December 19, 1974 the federal Government introduced a bill to amend the *Judges Act*, R.S.C. 1970, c. J-1. At that time the *Judges Act* provided provincial superior court judges with salaries of $38,000, pensions [1] after retirement, and pensions for surviving spouses and children of deceased judges. Judges were not required to pay for, or contribute toward, the costs of these pensions. The bill introduced by the Government on December 19, 1974 dealt with only the first and third components of the regime then in existence. The bill made provision for a 39 per cent increase in the salaries of superior court judges and a 50 per cent increase in the pensions for their surviving spouses and children. But further changes were foreshadowed; on the date the bill was introduced the federal Minister of Justice wrote to all federally appointed judges, stating in part:

> However, these improvements were achieved in the context of a comprehensive review of federal policies in relation to pensions which has just recently been concluded. As a result, it may become necessary at some future time to ask judges now in office to make a modest contribution towards the cost of the improved pensions for widows, and to ask persons who are in the future appointed to judicial office to contribute in some measure to pension benefit costs.

4 On February 17, 1975 the judicial contribution to pension costs, signalled in the Minister's letter, was initiated. On that date the *Statute Law (Superannuation) Amendment Act, 1975* was introduced. It provided that judges appointed before February 17, 1975 would contribute 1.5 per cent of salary toward the cost of pensions (this was intended to be a contribution toward improved pensions for the spouses and children of judges), and judges appointed after that date would contribute 6 per cent of salary toward the cost of pensions plus $^{1}/_{2}$ per cent, rising later to 1 per cent, toward indexing them to keep pace with inflation. The relevant portion of this amendment, which became s. 29.1 of the *Judges Act*, reads:

> *29.1*(1) Every judge appointed before the 17th day of February, 1975 to hold office as a judge of a superior or county court shall, by reservation from his salary under this Act, contribute to the Consolidated Revenue Fund one and one-half per cent of his salary.
>
> (2) Every judge appointed after the 16th day of February, 1975 to hold office as a judge of a superior or county court, to whom subsection (1) does not apply, shall, by reservation from his salary under this Act,
>
> > (*a*) contribute to the Consolidated Revenue Fund an amount equal to six per cent of his salary; and
> >
> > (*b*) contribute to the Supplementary Retirement Benefits Account established in the accounts of Canada pursuant to the *Supplementary Retirement Benefits Act*,
> >
> > > (i) prior to 1977, an amount equal to one-half of one per cent of his salary, and
> > >
> > > (ii) commencing with the month of January 1977, an amount equal to one per cent of his salary.

5 The next relevant date is July 4, 1975. On that date the bill amending the *Judges Act* to increase salaries by 39 per cent and pensions to surviving spouses and children by 50 per cent became law.

6 On July 24, 1975 the respondent, Marc Beauregard, was appointed a judge of the Superior Court of Quebec. The financial arrangements for a superior court judge in Quebec on that date were a salary of $53,000 (an increase of 39 per cent from the salary in effect just three weeks before), entitlement to a non-contributory retirement pension and a pension, in certain circumstances, for his widow and children. When the respondent assumed his position on July 24, 1975 the *Statute Law (Superannuation) Amendment Act, 1975* had not been enacted. It was still before Parliament and had been before Parliament since the previous February. The respondent contended, however, and the Crown conceded, that he did not know of its existence

when he accepted his judicial appointment. In other words, on July 24, 1975 the 'salary and increased benefits' component of the proposed amendments to the *Judges Act* was in place but the negative aspect of the package (from the perspective of the respondent and, presumably, other superior court judges) was not.

7 The contributory requirement of the pension scheme became effective on the last relevant date in the chronology, December 20, 1975. On that date the amendments introduced on February 17, 1975 were enacted. Although the respondent's salary remained at $53,000, as a consequence of the amendments he was required to contribute 6 $^{1}/_{2}$ per cent of his total salary to his pension plan until 1977 and 7 per cent thereafter.

8 The respondent, as plaintiff, challenged the constitutionality of the new s. 29.1 of the *Judges Act*. His challenge was two-pronged. First, he alleged that s. 29.1 violated s. 100 of the *Constitution Act, 1867* which provides:

> *100.* The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada.

Secondly, the respondent contended that the words "before the 17th day of February, 1975" in s. 29.1(1) of the *Judges Act* and the whole of s. 29.1(2) were inoperative because they violated his right to equality before the law recognized by s. 1(*b*) of the *Canadian Bill of Rights* which provides:

> *1.* It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely
>
> . . . . .
>
> (*b*) the right of the individual to equality before the law and the protection of the law;

II

Judgments

Federal Court, Trial Division

9 In his judgment, reported at [1981] 2 F.C. 543, Addy J. held that s. 29.1(2) of the *Judges Act* was *ultra vires* in so far as it applied to the respondent. He said that the effect of this provision was to reduce the salaries of incumbent judges and that this was unconstitutional for two reasons: first, because it intruded into provincial jurisdiction under s. 92(14) of the *Constitution Act, 1867* with respect to the 'administration of justice' (i.e. reductions in salary for superior court judges would require a constitutional amendment in which both the federal and provincial governments would participate); and secondly, because nonreduction of the salaries of incumbent judges is a fundamental principle of constitutional law which Canada inherited from the United Kingdom.

10 Addy J. dismissed the respondent's argument based on s. 1(*b*) of the *Canadian Bill of Rights*. He said that that provision was not concerned with issues relating to the "mere quantum of remuneration for services rendered". Additionally, following the language of McIntyre J. of this Court in *MacKay v. The Queen*, [1980] 2 S.C.R. 370 at p. 406, he held that the requirement of making contributions for pension and survivor benefits was not "arbitrary, capricious or unnecessary" and therefore did not constitute a denial of equality before the law.

Federal Court of Appeal

11 The majority of the Federal Court of Appeal, in a decision reported at [1984] 1 F.C. 1010, agreed with the conclusion of Addy J. but disagreed with his reasoning (and with the reasoning of each other).

12 Thurlow C.J. held that Parliament had the power under s. 100 of the *Constitution Act, 1867* to fix the salaries of superior court judges. He further held that the power to fix salaries included the power to reduce them and that this reduction could

be achieved by federal statute and did not require constitutional amendment. Thurlow C.J. concluded, however, that s. 100 of the *Constitution Act, 1867* does not give Parliament the power to dictate how judges use their salaries. Both parts of s. 29.1 of the *Judges Act* impermissibly do this by compulsorily taking from judges part of their salaries to help pay for their pension and survivor benefits.

13 Heald J. concluded that the clear wording of s. 100 of the *Constitution Act, 1867* meant that Parliament had to pay the total cost of the pensions of superior court judges. It followed that s. 29.1(2) of the *Judges Act* was *ultra vires* because it compelled a contribution to the pensions of judges by the judges themselves. Section 29.1(1) of the *Judges Act*, however, was *intra vires* because it was dedicated exclusively to the cost of the improved pensions for widowed spouses and other dependants of judges.

14 Pratte J. dissented. He held that the words "fixed and provided" in s. 100 of the *Constitution Act, 1867* gave Parliament a plenary power with respect to the salaries of superior court judges. This included the power to change them.

15 Although the three justices of the Federal Court of Appeal disagreed sharply on the interpretation of s. 100 of the *Constitution Act, 1867* and its application to s. 29.1 of the *Judges Act* they were in agreement, both amongst themselves and with Addy J., that the respondent's argument based on s. 1(*b*) of the *Canadian Bill of Rights* failed.

16 In summary, the respondent's *Canadian Bill of Rights* attack on s. 29.1 of the *Judges Act* failed in both the Federal Court, Trial Division and the Federal Court of Appeal. He was, however, successful in both courts in his argument based on s. 100 of the *Constitution Act, 1867*. Addy J. held that s. 100 prevented Parliament from reducing the compensation paid to *incumbent* judges. The majority of the Court of Appeal held that it would be unconstitutional for Parliament to require *any* superior court judge to contribute to his or her pension plan.

III

Issues

17 Although there are a myriad of legal issues to be addressed, they are all subsumed in the two constitutional questions stated by this Court on March 22, 1984:

> 1. Is section 29.1 of the *Judges Act*, as amended by s. 100 of the *Statute Law (Superannuation) Amendment Act, 1975*, S.C. 1974-75-76, c. 81, inconsistent with s. 100 of the *Constitution Act, 1867* and, therefore, in whole or in part, *ultra vires* the Parliament of Canada?
>
> 2. Is section 29.1 of the *Judges Act* as amended by s. 100 of the *Statute Law (Superannuation) Amendment Act, 1975*, S.C. 1974-75-76, c. 81, inconsistent with s. 1(*b*) of the *Canadian Bill of Rights* and to the extent of the inconsistency is it of no force or effect?

IV

Section 100 of the Constitution Act, 1867 and s. 29.1 of the Judges Act

18 For convenience of reference I set out again s. 100 of the *Constitution Act, 1867*:

> *100.* The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada.

In the context of this appeal, it seems to me that three introductory points can be made about this provision. First, it deals explicitly with both judicial *salaries* and *pensions*. Secondly, it stands as a constitutional affirmation that superior, district and county court judges will receive at least *some* salary and pension benefits. Thirdly, it assigns the responsibility, in both a federalism sense and a separation of powers sense, for providing judicial salaries and pensions. In the federalism sense, the

assignment is to Parliament, not the provincial governments. In the separation of powers sense, the assignment is to the federal legislative branch, Parliament, not to any component of the executive branch.

19 The respondent makes three distinct arguments about the relationship between s. 100 of the *Constitution Act, 1867* and s. 29.1 of the *Judges Act*. These arguments correspond quite closely to the different bases for decision in the judgments of Addy J. at trial and Thurlow C.J. and Heald J. on appeal. They include:

> (1) Under the Constitution, Parliament could not, on December 20, 1975, diminish, reduce or impair the established benefits of the respondent.
>
> (2) Section 100 of the *Constitution Act, 1867* requires Parliament to provide to superior court judges non-contributory retirement pensions.
>
> (3) Section 100 does not authorize Parliament to compel superior court judges to contribute to a fund through deductions from their salaries.

20 Although different points are made under each of these arguments, there is a common thread running through all three. This common thread is the principle of judicial independence. The respondent contends that judicial independence is an important principle of Canadian constitutional law which must be interpreted to invalidate the legislation under review. Before assessing the merits of the specific arguments above, it is important to examine the principle of judicial independence.

V

Judicial Independence

1. General Considerations

21 Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider — be it government, pressure group, individual or even another judge — should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence. Nevertheless, it is not the entire content of the principle.

22 Of recent years the general understanding of the principle of judicial independence has grown and been transformed to respond to the modern needs and problems of free and democratic societies. The ability of individual judges to make decisions in discrete cases free from external interference or influence continues, of course, to be an important and necessary component of the principle. Today, however, the principle is far broader. In the words of a leading academic authority on judicial independence, Professor Shimon Shetreet: "The judiciary has developed from a dispute-resolution mechanism, to a significant social institution with an important constitutional role which participates along with other institutions in shaping the life of its community" ("The Emerging Transnational Jurisprudence on Judicial Independence: The IBA Standards and Montreal Declaration", in S. She treet and J. Deschênes (eds.), *Judicial Independence: The Contemporary Debate* (1985), at p. 393).

23 There is, therefore, both an individual and a collective or institutional aspect to judicial independence. As stated by Le Dain J. in *Valente v. The Queen*, [1985] 2 S.C.R. 673, at pp. 685 and 687:

> [Judicial independence] connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees.
>
> . . . . .
>
> It is generally agreed that judicial independence involves both individual and institutional relationships: the individual independence of a judge, as reflected in such matters as security of tenure, and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government.

24 The rationale for this two-pronged modern understanding of judicial independence is recognition that the courts are not charged solely with the adjudication of individual cases. That is, of course, one role. It is also the context for a second, different and equally important role, namely as protector of the Constitution and the fundamental values embodied in it — rule of law, fundamental justice, equality, preservation of the democratic process, to name perhaps the most important. In other words, judicial independence is essential for fair and just dispute-resolution in individual cases. It is also the lifeblood of constitutionalism in democratic societies.

2. Foundations of Judicial Independence in Canada

25 It is trite history that the Canadian court system has its primary antecedents in the United Kingdom. (This is not true of our substantive law which has deep roots in both the United Kingdom and France.) In the United Kingdom the cornerstone of the constitutional system has been for centuries, and still is today, the principle of parliamentary supremacy. But it is not the only principle. The rule of law is another. Judicial independence is a third. The history of the Constitution of the United Kingdom reveals continuous growth towards independent judicial authority. That history is well-described in Professor Lederman's classic article, "The Independence of the Judiciary" (1956), 34 *Can. Bar Rev.* 769-809 and 1139-1179. Judicial authority in the United Kingdom has matured into a strong and effective means of ensuring that governmental power is exercised in accordance with law. Judicial independence is the essential prerequisite for this judicial authority. In the recent words of Lord Lane: "Few constitutional precepts are more generally accepted there in England, the land which boasts no written constitution, than the necessity for the judiciary to be secure from undue influence and autonomous within its own field" ("Judicial Independence and the Increasing Executive Role in Judicial Administration", in S. Shetreet and J. Deschênes (eds.), *Judicial Independence: The Contemporary Debate* (1985), at p. 525).

26 In Canada, the constitutional foundation for the principle of judicial independence is derived from many sources. Because the sources for the principle are both varied and powerful, the principle itself is probably more integral and important in our constitutional system than it is in the United Kingdom.

27 Indeed, two of the sources of, or reasons for, judicial independence in Canada do not exist in the United Kingdom. First, Canada is a federal country with a constitutional distribution of powers between federal and provincial governments. As in other federal countries, there is a need for an impartial umpire to resolve disputes between two levels of government as well as between governments and private individuals who rely on the distribution of powers. In most federal countries the courts play this umpiring role. In Canada, since Confederation, it has been assumed and agreed that the courts would play an important constitutional role as umpire of the federal system. Initially, the role of the courts in this regard was not exclusive; in the early years of Confederation the federal government's disallowance power contained in s. 55 of the *Constitution Act, 1867* was also central to federal-provincial dispute-resolution. In time, however, the disallowance power fell into disuse and the courts emerged as the ultimate umpire of the federal system. That role, still fundamental today, requires that the umpire be autonomous and completely independent of the parties involved in federal-provincial disputes.

28 Secondly, the enactment of the *Canadian Charter of Rights and Freedoms* (although admittedly not relevant to this case because of its date of origin) conferred on the courts another truly crucial role: the defense of basic individual liberties and human rights against intrusions by all levels and branches of government. Once again, in order to play this deeply constitutional role, judicial independence is essential.

29 Beyond these two fundamental sources of, or reasons for, judicial independence there is also textual recognition of the principle in the *Constitution Act, 1867*. The preamble to the *Constitution Act, 1867* states that Canada is to have a Constitution "similar in Principle to that of the United Kingdom". Since judicial independence has been for centuries an important principle of the Constitution of the United Kingdom, it is fair to infer that it was transferred to Canada by the constitutional language of the preamble. Furthermore, s. 129 of the *Constitution Act, 1867* continued the courts previously in existence in the federating provinces into the new Dominion. The fundamental traditions of those courts, including judicial independence, were also continued. Additionally, the judicature provisions of the *Constitution Act, 1867*, especially ss. 96, 99 and 100, support judicial

authority and independence, at least at the level of superior, district and county courts. As Lord Atkin said in *Toronto Corporation v. York Corporation*, [1938] A.C. 415 at p. 426:

> While legislative power in relation to the constitution, maintenance and organization of Provincial Courts of Civil Jurisdiction, including procedure in civil matters, is confided to the Province, *the independence of the judges* is protected by provisions that the judges of the Superior, District, and County Courts shall be appointed by the Governor-General (s. 96 of the British North America Act, 1867), that the judges of the Superior Courts shall hold office during good behaviour (s. 99), and that the salaries of the judges of the Superior, District, and County Courts shall be fixed and provided by the Parliament of Canada (s. 100). These are three principal pillars in the temple of justice, and they are not to be undermined.

(Emphasis added.)

30 In summary, Canadian constitutional history and current Canadian constitutional law establish clearly the deep roots and contemporary vitality and vibrancy of the principle of judicial independence in Canada. The role of the courts as resolver of disputes, interpreter of the law and defender of the Constitution requires that they be completely separate in authority and function from *all* other participants in the justice system.

31 I emphasize the word 'all' in the previous sentence because, although judicial independence is usually considered and discussed in terms of the relationship between the judiciary and the executive branch, in this appeal the relevant relationship is between the judiciary and Parliament. Nothing turns on this contextual difference. Although particular care must be taken to preserve the independence of the judiciary from the executive branch (because the executive is so often a litigant before the courts), the principle of judicial independence must also be maintained against all other potential intrusions, including any from the legislative branch. In *McEvoy v. Attorney General for New Brunswick*, [1983] 1 S.C.R. 704 , the Court said, at p. 720:

> The judicature sections of the *Constitution Act, 1867* guarantee the independence of the Superior Courts; they apply to Parliament as well as to the Provincial Legislatures.

In a similar vein, these sections, including s. 100, apply to both the executive and legislative branches of government.

3. Content of the Principle of Judicial Independence

32 Turning from the general definition and constitutional foundations of judicial independence, it becomes necessary to consider its content or conditions in a Canadian setting. In the context of this appeal, it is particularly important to discuss the question of financial security as a component of judicial independence.

33 There is, and has been at least since the *Act of Settlement*, 1700 (Engl.), 12 & 13 Will. 3, c. 2, agreement that judicial independence requires security of tenure and financial security. In recent years, important international documents have fleshed out in more detail the content of the principle of judicial independence in free and democratic societies: see, for example, the thirty-two articles in the *Syracuse Draft Principles on the Independence of the Judiciary* (1981), the forty-seven standards enunciated in the *International Bar Association Code of Minimum Standards of Judicial Independence* (1982), and, especially, the *Universal Declaration of the Independence of Justice* (adopted at the final plenary session of the First World Conference on the Independence of Justice held in Montréal in 1983). Invariably, financial security has been recognized as a central component of the international concept of judicial independence. For a recent example, the *Universal Declaration of the Independence of Justice* (the Montreal Declaration) provides:

> *2.21*a) During their terms of office, judges shall receive salaries and after retirement, they shall receive pensions.
>
> b) The salaries and pensions of judges shall be adequate, commensurate with the status, dignity and responsibility of their office, and be regularly adjusted to account fully for price increases.
>
> c) Judicial salaries shall not be decreased during the judges' term of office, except as a coherent part of an overall public economic measure.

34 This international understanding of one of the essential features of judicial independence is, in my opinion, given powerful expression in a Canadian context by s. 100 of the *Constitution Act, 1867*, earlier quoted. Speaking of financial security in *Valente*, Le Dain J. said, at p. 704:

> The second essential condition of judicial independence ... is ... what may be referred to as financial security. That means security of salary or other remuneration, and, where appropriate, security of pension. The essence of such security is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the Executive in a manner that could affect judicial independence.

I agree with this passage, although I believe it requires a somewhat broader expression by reason of the circumstances of this appeal. *Valente* dealt substantially, although not exclusively, with the relationship between the executive branch of a provincial government and a statutory court. In that context, Le Dain J.'s discussion of judicial independence in terms of the prevention of arbitrary interference "by the Executive" is, in my opinion, both apposite and correct. In this appeal, the relevant relationship is different; it is between the legislative branch of the federal government and a superior court with its combination of a constitutional position and statutory and equitable jurisdiction. In the context of this appeal it must be declared that the essence of judicial independence for superior court judges is complete freedom from arbitrary interference by *both* the executive and the legislature. Neither the executive nor the legislature can interfere with the financial security of superior court judges. That security is crucial to the very existence and preservation of judicial independence as we know it.

35 Against this background of the historical foundations for, and contemporary content of, judicial independence in Canada it is now possible to consider the three specific grounds of attack on s. 29.1 of the *Judges Act*.

VI

Grounds of Attack

1. Parliament cannot diminish, reduce or impair established salary or remunerative benefits

36 Of the three arguments made by the respondent this is the one, in my opinion, deserving of special consideration. It is contended that Parliament cannot impair or diminish the established salary or benefits of incumbent judges because this might interfere in fact, or be perceived as interfering, with the independence of those judges. Since I have already concluded that judicial independence is an important constitutional value in Canada, the relevant question becomes: does the scheme for contributory pensions established in s. 29.1 of the *Judges Act* violate this principle?

37 The starting point in this inquiry is recognition that *someone* must provide for judicial salaries and benefits and that, by virtue of s. 100 of the *Constitution Act, 1867*, that someone is, explicitly, Parliament.

38 What then can Parliament do and not do in meeting its constitutional obligation to provide salaries and pensions to superior court judges? As a general observation, Canadian judges are Canadian citizens and must bear their fair share of the financial burden of administering the country. Thus, for example, judges must pay the general taxes of the land. See *Judges v. Attorney-General of Saskatchewan*, [1937] 2 D.L.R. 209 (P.C.) Judges also have an amount deducted from their salaries as a contribution to the Canada Pension Plan. These two liabilities are, of course, general in the sense that all citizens are subject to them whereas the contributions demanded by s. 29.1 of the *Judges Act* are directed at judges only. (Other legislation, federal and provincial, establishes similar pension schemes for a substantial number of other Canadians.) Conceding the factual difference that s. 29.1 of the *Judges Act* is directed only at judges, I fail to see that this difference translates into any legal consequence. As I have earlier indicated, the essential condition of judicial independence at the individual level is the necessity of having judges who feel totally free to render decisions in the cases that come before them. On the institutional plane, judicial independence means the preservation of the separateness and integrity of the judicial branch and a guarantee of its freedom from unwarranted intrusions by, or even intertwining with, the legislative and executive branches. It is very difficult for me to see any connection between these essential conditions of judicial independence and Parliament's decision to establish a pension scheme for judges and to expect judges to make contributions toward the benefits established by the scheme. At the end of the day, all s. 29.1 of

the *Judges Act* does, pursuant to the constitutional obligation imposed by s. 100 of the *Constitution Act, 1867*, is treat judges in accordance with standard, widely used and generally accepted pension schemes in Canada. From that factual reality it is far too long a stretch, in my opinion, to the conclusion that s. 29.1 of the *Judges Act* violates judicial independence.

39 I want to qualify what I have just said. The power of Parliament to fix the salaries and pensions of superior court judges is not unlimited. If there were any hint that a federal law dealing with these matters was enacted for an improper or colourable purpose, or if there was discriminatory treatment of judges *vis-à-vis* other citizens, then serious issues relating to judicial independence would arise and the law might well be held to be *ultra vires* s. 100 of the *Constitution Act, 1867*.

40 There is no suggestion, however, of any of these considerations in the present appeal. First, the motive underlying s. 29.1 of the *Judges Act*, especially when viewed in the context of the substantial increase in salaries received by superior court judges at virtually the same time, was, without question, to try to deal fairly with judges and with judicial salaries and pensions. Secondly, although superior court judges were required to contribute to their pension benefits commencing December 20, 1975, the contributory scheme was effectively introduced as part of a remuneration package which included a 39 per cent salary increase and a 50 per cent increase in pensions to dependants. The salary and pension changes were intended to be complementary and, as a comprehensive package, did not diminish, reduce or impair the financial position of federally-appointed judges. Thirdly, there was no discriminatory treatment of judges. Contributory pension schemes are now widespread in Canada; s. 29.1 of the *Judges Act* merely moved superior court judges into the mainstream of Canadian pension schemes. Recognition of that reality draws me, by way of conclusion on this point, to the words of Holmes and Frankfurter JJ. in two American cases. Article III, section 1 of the Constitution of the United States also protects judicial tenure and financial security. Speaking generally about this article, and admittedly in the context of a 'taxation', not a 'pension', fact situation, Holmes J. (dissenting) said in *Evans v. Gore*, 253 U.S. 245 (1920), at p. 265:

> I see nothing in the purpose of this clause of the Constitution to indicate that the judges were to be a privileged class, free from bearing their share of the cost of the institutions upon which their well-being if not their life depends.

In the same vein, Frankfurter J. said in *O'Malley v. Woodrough*, 307 U.S. 277 (1939), at p. 282:

> To suggest that it makes inroads upon the independence of judges who took office after Congress had thus charged them with the common duties of citizenship, by making them bear their aliquot share of the cost of maintaining the Government, is to trivialize the great historic experience on which the framers based the safeguards of Article III, s. 1. To subject them to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering.

2. Section 100 mandates non-contributory retirement pensions

41 There are two separate arguments that have been advanced in support of the claim that Parliament must provide non-contributory retirement pensions to superior court judges. I would label one the 'federalism' argument and the other the 'strict construction' argument.

42 The 'federalism' argument is that s. 100 of the *Constitution Act, 1867* must be read against the backdrop of s. 92(14) of the *Constitution Act, 1867* which gives provincial legislatures jurisdiction to make laws in relation to 'the administration of justice in the province'. Since that phrase includes matters relating to the judiciary, it follows that Parliament alone cannot change the basis of judicial pensions from non-contributory to contributory. Such a change would require a constitutional amendment following on from the proper degree of legal participation and consent of the federal and provincial governments.

43 It is true that s. 92(14) of the *Constitution Act, 1867* gives the provincial governments jurisdiction over the field of the administration of justice. It is also true that, even more specifically, s. 92(14) entrusts to the provinces "the constitution, maintenance and organization of provincial courts" which, without question, includes superior courts. Without more, it would not be a large step to move from these constitutional foundations to recognition of a provincial role in setting salaries and providing benefits, including pensions, to superior court judges. But s. 92(14) of the *Constitution Act, 1867* cannot be read in

isolation. Although it is "intended to have [a] wide meaning" (*Di Iorio v. Warden of the Montreal Jail*, [1978] 1 S.C.R. 152 at p. 204), it must be read in light of other provisions of the Constitution. There are subtractions from what would appear, without more, to be complete provincial jurisdiction with respect to the justice system. One such subtraction, and it is a major one, is federal jurisdiction by virtue of s. 91(27) of the *Constitution Act, 1867* over criminal law and criminal procedure. See *Di Iorio*, at p. 199. A second subtraction flows from s. 96 of the same Act. Although provincial governments have the power to establish, maintain and organize provincial superior courts, s. 96 explicitly provides that only the Governor General, in effect the Governor General in Council, has power to appoint the judges of those courts. See, among many cases, *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220.

44 Section 100 of the *Constitution Act, 1867* provides a third, and particularly explicit, subtraction from provincial jurisdiction with respect to the administration of justice. It states that the salaries and pensions of superior court judges shall be fixed and provided by the Parliament of Canada. It is difficult to conceive of clearer words. To attempt to create a provincial role in the determination of the salaries and pensions of superior court judges is blithely to ignore this clear mandate. Indeed, it turns s. 100 on its head. Just as s. 96 of the *Constitution Act, 1867* provides for federal appointment of superior court judges, so s. 100 provides for federal jurisdiction over their salaries and pensions. Both the intent and the actual wording of s. 100 are clear. There is no 'federalism' limitation on Parliament's capacity to change the basis of pensions for superior court judges from non-contributory to contributory.

45 I turn now to what I have labelled the 'strict construction' argument. It has two dimensions. First, it is contended that, since judges received non-contributory pensions before and at Confederation, the word 'pensions' in s. 100 of the *Constitution Act, 1867* meant then, and must continue to mean today, non-contributory pensions. Secondly, it is contended that the words 'fixed and provided' mean that Parliament must pay for the full cost of the pensions of superior court judges, which rules out a contributory scheme.

46 With respect to the first of these arguments, I do not think s. 100 imposes on Parliament the duty to continue to provide judges with precisely the same type of pension they received in 1867. The Canadian Constitution is not locked forever in a 119-year old casket. It lives and breathes and is capable of growing to keep pace with the growth of the country and its people. Accordingly, if the Constitution can accommodate, as it has, many subjects unknown in 1867 — airplanes, nuclear energy, hydroelectric power — it is surely not straining s. 100 too much to say that the word 'pensions', admittedly understood in one sense in 1867, can today support federal legislation based on a different understanding of 'pensions'.

47 The second 'strict construction' argument is, as noted above, that the words "Pensions ... *shall be* fixed and *provided*" in s. 100 impose on Parliament an obligation to pay the full cost of the pension. This is the argument which Heald J. accepted in the Federal Court of Appeal. He was particularly drawn to this argument because of the contrast he saw between the wording of s. 100 dealing with judicial pensions ("shall be fixed and provided") and s. 91(8) dealing with pensions for federal public servants ("The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada"). In his words, at p. 1040:

> In my view, subsection 91(8) is in no way analogous or comparable to section 100. Subsection 91(8) is an enabling section. It empowers Parliament to provide for the salaries of civil servants but does not require it to do so. There is no provision in the subsection at all for the pensions of civil servants. Section 100, on the other hand, imposes a responsibility, *inter alia*, to provide the pensions of judges. The word "for" in subsection 91(8) is absent from section 100. In my view, the obligation imposed by section 100 to provide pensions imposes a duty on Parliament to provide the total amount of those pensions.

48 I accept Heald J.'s description of the mandatory — permissive distinction between ss. 100 and 91(8). Section 100 makes it clear that superior court judges will have *some* salary and pension benefits. Section 91(8) does not go that far. It merely authorizes, in a federalism sense, Parliament to make laws respecting salaries and pensions for federal public servants; it does not require Parliament to legislate.

49 Agreement with the mandatory — permissive distinction between the two provisions, however, does not necessarily entail acceptance of the conclusion which Heald J. suggests flows from it, namely that Parliament must pay the total cost of

the pensions of superior court judges. I fail to see how the absence of the word 'for' in s. 100 leads to this conclusion. My view is that what emerges clearly from the word 'provided' in s. 100 is that Parliament must provide salaries and pensions to superior court judges. What does not emerge clearly from this word is any constitutional qualification on the type, scheme or even amount of these salaries or pensions. In light of the modern-day reality that a great many people pay for a portion of their pension benefits, it is, in my opinion, construing too literally the word 'provided' to say that it means that Parliament must pay every cent of the pensions of superior court judges.

50 In my view, strict construction is rarely controlling in constitutional interpretation. My conclusion on the respondent's 'strict construction' arguments is simply that the word 'pensions' in s. 100 of the *Constitution Act, 1867* is not limited to the type of pensions known and in existence for the judiciary in 1867 and the word 'provided' does not necessarily mean that Parliament must pay the total cost of judicial pensions. Parliament's ability to implement a widely used and accepted latter-day pension model is not constrained by either of these words in terms of their strict construction.

3. Parliament cannot dictate how judges spend their salaries by requiring pension contributions

51 The respondent's argument here is that nothing in the *Constitution Act, 1867*, including s. 100, authorizes Parliament to make any deductions from the salaries of superior court judges because such deductions constitute an unconstitutional direction as to how judges are to spend their salaries and therefore a direct interference on judicial independence. For three reasons, I cannot accept what the respondent tries to read into s. 100.

52 First, there is a close relationship between salaries and pensions. They are both remunerative benefits. Superior court judges are not in any sense 'employees' of anyone, including the federal government. Yet, as I have noted, they must be paid by someone and that someone, according to s. 100, is Parliament. In fulfilling its constitutional obligation to establish salaries and pensions for superior court judges, it is reasonable that Parliament would ask: what is an appropriate total benefit package and what components should constitute the package? Salary and pension must be two of the components and Parliament must consider the relationship between them. It did this in 1975; the 1975 'package' significantly raised judicial salaries and increased certain benefits but, at the same time, compelled judges to contribute to their own pension schemes. Parliament could have reached precisely the same financial result by leaving the former non-contributory pension scheme in place but not raising salaries as much as it did. No one contests that this would have been constitutional. But if that is so, I see no reason why Parliament cannot achieve the same result in the way it chose. There is nothing in the wording of s. 100 to suggest the limitation on Parliament's jurisdiction contended for by the respondent.

53 Indeed, there is wording in s. 100 that points the other way, which brings me to the second reason for holding against the respondent on this issue. The fatal defect of the respondent's argument is that it ignores the word 'pensions' in s. 100 of the *Constitution Act, 1867*. Although it might well be unconstitutional in most contexts for Parliament to direct how judges are to spend their salaries, the word 'pensions' in s. 100 specifically authorizes Parliament to deal with this subject-matter. In exercising that jurisdiction Parliament must legislate with respect to both the quantum and the scheme of judicial pensions. The 1975 law dealt with the scheme. Since the scheme chosen was a widely used and accepted one and since it was introduced in conjunction with other changes to judicial benefits in 1975, I see no objection to it on the ground contended for by the respondent.

54 Thirdly, the limitation proposed by the respondent would have nothing to do with my understanding of proper governmental respect for the independent role of the courts; neither would it bear directly upon the relationship between the judiciary and either Parliament or the executive; nor would it have any meaning in a federal-provincial sense. In short, I simply do not see any conceptual, principled or practical reason for drawing a line in the place contended for by the respondent.

55 For all of these reasons I conclude that s. 29.1 of the *Judges Act* does not violate s. 100 of the *Constitution Act, 1867*.

VII

Section 1(b) of the Canadian Bill of Rights and s. 29.1 of the Judges Act

56 For convenience of reference I set out again the relevant part of s. 1(*b*) of the *Canadian Bill of Rights*:

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

. . . . .

(*b*) the right of the individual to equality before the law and the protection of the law;

I commence by noting that the respondent calls this his subsidiary argument and that it was dismissed by all four of the judges of the Federal Court, Trial Division and Federal Court of Appeal who heard the case.

57 The respondent's argument is not that he or other superior court judges are being treated differently and more harshly than other Canadians. As discussed above, because of the broad use throughout the country of contributory pension schemes, such an argument would not be possible. Rather, the respondent's argument is that s. 29.1 of the *Judges Act* treats him more harshly than other superior court judges and that s. 1(*b*) of the *Canadian Bill of Rights* protects him from this treatment.

58 The fact situation underlying this claim is somewhat complex and needs to be understood clearly before proceeding. There are three, not two, categories of judges affected by s. 29.1 of the *Judges Act* because, although the section was introduced into Parliament on February 17, 1975 and that date was selected as the cut-off for imposition of the contributory payments on judges, the section was not enacted until December 20, 1975. Accordingly, the three categories of judges are:

1. Judges appointed before February 17, 1975 (they are 'grandfathered' from the contributory schemes in s. 29.1(2); they must, however, pay 1 $^{1}/_{2}$ per cent of their salaries toward improving pension benefits for their spouses and children).

2. Judges appointed after December 20, 1975 (the law would be in force; they must pay under s. 29.1(2) of the Act).

3. Judges appointed after February 17, 1975 but before December 20, 1975 (the law would not be in force when they were appointed but, once enacted, it purports to reach backward and apply to them).

The respondent is in the third category which, I understand, consists of a relatively small number of judges.

59 The respondent's argument is that "equality before the law" in s. 1(*b*) of the *Canadian Bill of Rights* prohibits the different statutory treatment of some judges *vis-à-vis* other judges with respect to their pensions. In assessing this argument it is important to be aware of the cases in which s. 1(*b*) has been considered by this Court and the conclusion reached in each such case.

60 Only in *R. v. Drybones*, [1970] S.C.R. 282, did a majority of the Court hold a federal statute to be inconsistent with s. 1(*b*) of the *Canadian Bill of Rights*. In that case, a provision of the *Indian Act* made it an offence for an Indian to be intoxicated outside an Indian reserve. The gist of Ritchie J.'s reasons is summarized in the following passage at p. 297:

> ... I am therefore of opinion that an individual is denied equality before the law if it is made an offence punishable at law, on account of his race, for him to do something which his fellow Canadians are free to do without having committed any offence or having been made subject to any penalty.

There is not the faintest resemblance between *Drybones*, which involved racial discrimination regarding a quasi-criminal offence, and the present case, which involves a legislative distinction on the basis of the appointment date of judges.

61 In *Attorney General of Canada v. Lavell*, [1974] S.C.R. 1349, the Court had occasion to consider another provision of the *Indian Act*. The legislation under review stipulated that an Indian woman who married a non-Indian man lost her Indian status, although an Indian man who married a non-Indian woman retained his Indian status. A majority of the Court held that this did not offend "equality before the law" under s. 1(*b*).

62 A third provision of the *Indian Act* was assessed against s. 1(*b*) of the *Canadian Bill of Rights* in *Attorney General of Canada v. Canard*, [1976] 1 S.C.R. 170. In this case the legislation denied the widow of a deceased Indian the right to administer the estate of her late husband. A majority of the Court rejected the claim that such differential treatment of Indians violated the

equality provision of the *Canadian Bill of Rights*, noting that this type of legislative distinction was within federal competence under s. 91(24) of the *Constitution Act, 1867*.

63 In *R. v. Burnshine*, [1975] 1 S.C.R. 693, the majority again found no violation of equality before the law under the *Canadian Bill of Rights*. A provision in the *Prisons and Reformatories Act* called for sentences of "indeterminate" length for offenders under the age of twenty-two. A person older than twenty-two would not in the circumstances have been subjected to indeterminate sentences under the *Criminal Code*. The law had application only in Ontario and British Columbia since the requisite special correctional facilities were unavailable in other provinces. The legislation thus created distinctions on the basis of both age and province of residence. Martland J., writing for the majority, noted at p. 702:

> I am not prepared to accept the respondent's submission as to the meaning of the phrase "equality before the law" in s. 1(*b*) of the *Bill of Rights*. Section 1 of the Bill declared that six defined human rights and freedoms "have existed" and that they should "continue to exist". All of them had existed and were protected under the common law. The Bill did not purport to define new rights and freedoms. What it did was to declare their existence in a statute, and, further, by s. 2, to protect them from infringement by any federal statute.

He referred with approval to the passage in the judgment of Ritchie J. in *Lavell*, in which equality before the law was said to mean that the law must apply to all individuals without exemption from the duty to obey it. Martland J. also quoted with approval the following passage from *Curr v. The Queen*, [1972] S.C.R. 889 at p. 899:

> ... compelling reasons ought to be advanced to justify the Court in this case to employ a statutory (as contrasted with a constitutional) jurisdiction to deny operative effect to a substantive measure duly enacted by a Parliament constitutionally competent to do so, and exercising its powers in accordance with the tenets of responsible government, which underlie the discharge of legislative authority under the *British North America Act*.

The majority concluded with the observation that in order to have succeeded Burnshine would have to have demonstrated that Parliament was not seeking to achieve a "valid federal objective".

64 In *Prata v. Minister of Manpower and Immigration*, [1976] 1 S.C.R. 376, the appellant claimed that a limitation on the discretionary power of the Immigration Appeal Board to quash a deportation order on compassionate grounds was contrary to equality before the law. The limitation was triggered by the filing of a certificate by the Minister, based upon intelligence reports, that it would be contrary to the national interest for the Board to so exercise its discretion. The prospective deportee had no statutory right to a hearing to go behind the Minister's certificate to challenge the accuracy of the intelligence reports. The Court disposed of the s. 1(*b*) claim easily, saying that the limitation sought to achieve a valid federal objective.

65 *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183, involved provisions in the *Unemployment Insurance Act, 1971* which denied the standard unemployment insurance benefits to persons whose employment was interrupted by pregnancy. Although the Act provided maternity benefits, it required a longer qualification period for maternity benefits than for standard benefits. Mrs. Bliss had satisfied the qualification period for standard benefits, but not for maternity benefits. In holding that these provisions did not offend the appellant's right to equality before the law, the judgment of the Court, delivered by Ritchie J., emphasized that s. 91 of the *British North America Act, 1867* had been amended in 1940 by the addition of unemployment insurance as a class of subjects reserved to Parliament. Since the impugned legislation was an integral part of Parliament's unemployment insurance scheme it was enacted for the purpose of achieving a valid federal objective. Ritchie J. also quoted the excerpt from *Curr* which I have reproduced above.

66 The last case is *MacKay v. The Queen, supra*. The legislation under review created a special criminal procedure and forum for servicemen charged with criminal offences. Amongst other attributes, the court martial procedure deprived the accused serviceman of a preliminary hearing, the right to a jury trial, and in some circumstances the plea of *autrefois convict*. The majority judgment again relied on the "valid federal objective" test in denying any conflict between the *National Defence Act* and s. 1(*b*) of the *Canadian Bill of Rights*.

67 This short history of "equality before the law" under s. 1(*b*) of the *Canadian Bill of Rights* demonstrates that a majority of the Court was never prepared to review impugned legislation according to an exacting standard which would demand of Parliament the most carefully tailored, finely crafted legislation. On the contrary, a majority of the Court was consistently prepared to look in a general way to whether the legislation was in pursuit of a valid federal legislative objective. This approach was followed in cases involving legislative distinctions on the basis of race, sex and age, and in cases involving profoundly important interests of the person asserting the equality right. The passages which I have quoted from these cases indicate that the Court was concerned with the merely statutory status of the *Canadian Bill of Rights* and the declaratory nature of the rights it conferred. I believe the day has passed when it might have been appropriate to re-evaluate those concerns and to reassess the direction this Court has taken in interpreting that document.

68 Against this background of previous cases under s.1(b), the questions in this appeal are: Was it discriminatory for Parliament to choose *any* cut-off date in s. 29.1 of the *Judges Act*? Was the specific cut-off date chosen, February 17, 1975, legal?

69 I have no trouble with the first question. Parliament could have imposed the new scheme on all superior court judges, including those appointed before 1975. However, taking into account the settled expectations of those earlier appointees, Parliament decided to 'grandfather' them. I can see no objection to this decision. Nor, in fairness, does the respondent. His complaint is not so much against the 'old judge/new judge' line drawn by Parliament. Rather, his complaint is against Parliament's assignment of him, by virtue of the February 17, 1975 cut-off date, to the 'new judge' side of the line.

70 That brings me to the second question, which is whether the February 17, 1975 cut-off date chosen by Parliament and reflected in s. 29.1 of the *Judges' Act* unlawfully discriminates against the respondent. I cannot see how it does. Once it is accepted that the general substance of the law is consistent with the valid federal objective of providing for remuneration of s. 96 judges and that it is not discriminatory of Parliament to draw some line between present incumbents and future appointees, I do not think the jurisprudence I have summarized above allows the courts to be overly critical in reviewing the precise line drawn by Parliament in *Canadian Bill of Rights* cases. *Some* line is fair and is not discriminatory. From the respondent's perspective a line drawn on December 20, 1975 would obviously be preferable. But that does not mean that the choice of a different date, February 17, 1975, is illegal. In light of the validity of the overall policy reflected in the 1975 amendments and the legality and fairness of Parliament's attempt to protect the settled expectations of incumbent judges, I cannot say that the choice of February 17, 1975 as the cut-off date was contrary to the *Canadian Bill of Rights*.

71 For these reasons, I conclude that s. 29.1 of the *Judges Act* does not violate s. 1(*b*) of the *Canadian Bill of Rights*. Accordingly, in my view, neither Addy J. at trial nor any of the justices of the Federal Court of Appeal erred in this aspect of their judgments.

VIII

Conclusion

72 I would answer the constitutional questions stated in this appeal as follows:

1. *Question*:Is section 29.1 of the *Judges Act*, as amended by s. 100 of the *Statute Law (Superannuation) Amendment Act, 1975*, S.C. 1974-75-76, c. 81, inconsistent with s. 100 of the *Constitution Act, 1867* and, therefore, in whole or in part, *ultra vires* the Parliament of Canada?

• *Answer*:No.

2. *Question*:Is section 29.1 of the *Judges Act* as amended by s. 100 of the *Statute Law (Superannuation) Amendment Act, 1975*, S.C. 1974-75-76, c. 81, inconsistent with s. 1(*b*) of the *Canadian Bill of Rights* and to the extent of the inconsistency is it of no force or effect?

• *Answer*:No.

73 The appeal should be allowed, the judgments below set aside and the action dismissed. There should be no costs payable in this Court or in the courts below.

The reasons of Beetz and McIntyre JJ. were delivered by *Beetz J.* (dissenting in part):

74 This is an appeal from a judgment of the Federal Court of Appeal, [1984] 1 F.C. 1010 (Thurlow C.J., Heald J., concurring in the result but for different reasons, and Pratte J., dissenting), which upheld (but on different grounds) the judgment of the Federal Court, Trial Division, [1981] 2 F.C. 543, wherein Addy J. ordered and declared that s. 29.1(2) of the *Judges Act*, R.S.C. 1970, c. J-1, as amended by s. 100 of the *Statute Law (Superannuation) Amendment Act, 1975*, S.C. 1974-75-76, c. 81, is, in so far as the respondent is concerned, *ultra vires* the Parliament of Canada.

I — The Facts

75 As was put by the trial judge (at p. 545):

> The facts in this case are undisputed: no witnesses were called and the case was tried on the basis of admissions in the pleadings, an agreed statement of facts and certain exhibits which were filed on consent.

76 On July 24, 1975, the respondent, now a judge of the Quebec Court of Appeal, accepted to be and was appointed a puisne judge of the Superior Court for the District of Montréal, with, as stated in the commission issued to him under the Great Seal of Canada in the name of Her Majesty the Queen,

> ... all and every the powers, rights, authority, privileges, profits, emoluments and advantages unto the said office of right and by law appertaining during your good behaviour ....

77 On the date of the respondent's appointment, the *Judges Act*, R.S.C. 1970, c. J-1, as amended by R.S.C. 1970 (2nd Supp.), c. 16; S.C. 1972, c. 17: S.C. 1973-74, c. 17; S.C. 1974-75-76, c. 19; S.C. 1974-75-76, c. 48, and the *Supplementary Retirement Benefits Act*, R.S.C. 1970 (1st Supp.), c. 43 as amended by R.S.C. 1970 (2nd Supp.), c. 30 and by S.C. 1973-74, c. 36, provided that puisne judges of the Superior Court in and for the Province of Quebec enjoyed the following "profits, emoluments and advantages":

> 1. Global salaries of $53,000 (*Judges Act*, as amended, ss. 9 and 20);
>
> 2. Non-contributory retirement annuities (*Judges Act*, as amended, s. 23);
>
> 3. Non-contributory annuities for the judges' widows and children (*Judges Act*, as amended, s. 25);
>
> 4. Non-contributory supplementary retirement benefits (the *Supplementary Retirement Benefits Act* as amended).

78 The *Judges Act* was-enacted pursuant to s. 100 of the *Constitution Act, 1867* which provides:

> *100.* The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada.

It will be observed that the pensions of judges' widowed spouses and children are not a benefit mentioned in s. 100 of the *Constitution Act, 1867*.

79 Subsequent to the date of his appointment, namely from July 24 to December 20, 1975, the respondent's net monthly income was calculated and paid on the basis of the foregoing salary of $53,000 per annum, the same salary as that of all his fellow puisne judges of the Quebec Superior Court. In addition, he was not required any more than any one of them to contribute or pay anything towards the cost of his pension or that of his widow and children.

80 On December 20, 1975, approximately five months after the respondent's appointment, Parliament enacted the legislative provisions impugned in this case, s. 29.1 of the *Judges Act*, added to this Act by s. 100 of the *Statute Law (Superannuation) Amendment Act, 1975*, S.C. 1974-75-76, c. 81, an enactment which, it is important to note, was introduced in the House of Commons and given first reading on February 17, 1975.

81 Section 29.1 of the *Judges Act* provides in part:

> *29.1*(1) Every judge appointed before the 17th day of February, 1975 to hold office as a judge of a superior or county court shall, by reservation from his salary under this Act, contribute to the Consolidated Revenue Fund one and one-half per cent of his salary.
>
> (2) Every judge appointed after the 16th day of February, 1975 to hold office as a judge of a superior or county court, to whom subsection (1) does not apply, shall, by reservation from his salary under this Act.
>
> > (*a*) contribute to the Consolidated Revenue Fund an amount equal to six per cent of his salary; and
> >
> > (*b*) contribute to the Supplementary Retirement Benefits Account established in the accounts of Canada pursuant to the *Supplementary Retirement Benefits Act*,
> >
> > > (i) prior to 1977, an amount equal to one-half of one per cent of his salary, and
> > >
> > > (ii) commencing with the month of January 1977, an amount equal to one per cent of his salary.

Here is how the trial judge characterized the effect of s. 29.1(2) upon the respondent:

> Its effect was to oblige the plaintiff thenceforth to contribute six per cent of his salary toward the cost of his own retirement and the annuities for his widow and children as well as one-half of one per cent prior to the 1st of January, 1977 and thereafter one per cent, for the indexing of retirement annuities under the *Supplementary Retirement Benefits Act*. He thus suffered a reduction of seven per cent of the salary to which he was entitled as of the date of his appointment and for some five months following that appointment.

82 The extent of a more global effect upon the respondent has been agreed upon by the parties in the pleadings as amended by the agreed statement of facts:

> The Plaintiff's contribution towards his retirement pension plan for the year 1977 will amount to $3,815.00 and for the year of 1978 to $3,955.00 and in subsequent years such contribution, it is to be expected, will be calculated on any and all adjustments to the Plaintiff's salary. On the assumption that the Plaintiff retires at the minimum age of 65, after 27 years in office, his contribution towards such annuities and supplementary retirement benefits will be at least $100,000.00 and in the light of adjustments from time to time to the Plaintiff's salary, his contribution is likely to be in the order of $125,000.00.
>
> . . . . .
>
> Upon his retirement, the Plaintiff's minimum contribution of $3,815.00 per annum with interest compounded annually using a rate of interest of ten per cent per annum will have established in the hands of the defendant a capital sum in the order of $400,000.00 an amount more than sufficient to take care of the Plaintiff's retirement annuities and the Plaintiff's supplementary retirement benefits.

83 On the other hand all the respondent's fellow puisne judges of the Superior Court appointed before February 17, 1975 and who until then had received the same salary as that of the respondent and had not been required to contribute and pay anything towards the cost of their pensions or that of their widowed spouses and children, remained entitled to the same salary as well as dispensed from contributions except, under s. 29.1(1), to the extent of one and one-half per cent of their salary, a contribution described as being "in respect of the cost of the improved annuities for widowed spouses and other dependants" in a letter sent on February 17, 1975, by the Minister of Justice and Attorney General of Canada to all federally appointed judges.

84 In other words, the new measure "grandfathered" incumbent superior court judges, but it did not "grandfather" them all; a small minority of them, including the respondent, that is those appointed after February 16, 1975, but before December 20, 1975, were not so "grandfathered": the impugned provisions were not in force when these judges were appointed, but they were retroactive to the date of first reading and reached the judges in question *ex post facto* on the date of enactment. Until the latter date, the respondent belonged to the class of incumbent puisne superior court judges, all the members of which were treated equally under the *Judges Act*. With respect to non-contributory and contributory retirement annuities, the impugned enactment transferred him from that class into the class of judges who were not incumbent judges at the time of the enactment and who were not treated as favourably as judges who had been "grandfathered". The respondent was no longer the equal of his colleagues. Where there had been equality, the impugned provisions introduced inequality.

85 On the date of his appointment, July 24, 1975, the respondent was unaware of the existence of the bill which was to amend the *Judges Act* by adding s. 29.1 thereto, and the Minister of Justice did not mention the existence of the bill to the respondent at the time that his appointment was discussed.

86 I should state at once however that the respondent's unawareness of the existence of the bill is in my view irrelevant. The bill was before Parliament and was not yet law. One is presumed to know the law and to act accordingly, but not a bill which may or may not become law.

87 In November 1977, the respondent launched a declaratory action in the Trial Division of the Federal Court. The statement of claim concludes with the following prayer for relief:

WHEREFORE the Plaintiff claims:

a) A declaration that the words "before February 17, 1975" of Section 29.1 and that the whole of Section 29.1(2) of the *Judges Act*, as enacted by Section 100 of 1974-75-76, c. 81 are

i) *ultra vires* of the Parliament of Canada, or,

in the alternative:

ii) *ultra vires* of the Parliament of Canada insofar as the Plaintiff is concerned:

or, in the alternative,

b) A declaration that the words "before February 17, 1975" of Section 29.1 and the whole Section 29.1(2) of the *Judges Act*, as enacted by Section 100 of 1974-75-76, c. 81 are inoperative insofar as the Plaintiff is concerned;

c) His costs of the within proceedings;

d) Such further and other relief as to this Honourable Court may seem meet.

88 The declaration claimed in paragraph a) of the prayer for relief is allegedly founded upon s. 99 of the *Constitution Act, 1867*, relating to the tenure of office of judges as well as upon s. 100 of the same Act, quoted above and relating to the salaries, allowances, and pensions of judges.

89 The declaration claimed in paragraph b) of the prayer for relief is allegedly founded upon s. 1(*b*) of the *Canadian Bill of Rights* which provides:

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

. . . . .

(*b*) the right of the individual to equality before the law and the protection of the law;

II — The Judgments of the Courts Below

90 In the Trial Division, Addy J. found that the effect of the impugned amendment to the *Judges Act* was to reduce the salary of the respondent and held that Parliament has no legislative authority to reduce the salary of a judge during his or her tenure of office. However he rejected the submission that s. 29.1 of the *Judges Act* contravened s. 1(*b*) of the *Canadian Bill of Rights*. He granted the respondent a declaration that s. 29.1(2) of the *Judges Act* was *ultra vires* of the Parliament of Canada in so far as the respondent was concerned.

91 The appellant appealed to the Federal Court of Appeal and the respondent cross-appealed from the refusal of the trial judge to grant him a declaration that the impugned enactment was inoperative because it infringed s. 1(*b*) of the *Canadian Bill of Rights*.

92 The Federal Court of Appeal dismissed the appeal by a majority judgment but was unanimous in dismissing the cross-appeal. All three judges of the Federal Court of Appeal held, contrarily to the trial judge, that Parliament can reduce judges' salaries, provided it is not for a colourable purpose such, for instance, as to undermine the independance of the judiciary, which nobody has suggested was the case with respect to the impugned legislation. However, the majority of the Federal Court of Appeal held that it is *ultra vires* of Parliament to require any judge appointed pursuant to s. 96 of the *Constitution Act, 1867*, whenever appointed, to participate in a contributory pension plan for his own or her own pension, an issue not dealt with by the trial judge.

93 Thurlow C.J., who characterized the impugned enactment as effecting a forced contribution to a pension scheme rather than a reduction in salary, took the view that whereas under s. 100 of the *Constitution Act, 1867* Parliament must fix and provide judges salaries, it "has no authority to dictate how they are to be used by the recipient or to require that they be used for any particular purpose". Thurlow C.J. accordingly held that s. 29.1 of the *Judges Act* is wholly *ultra vires*, including s. 29.1(1), which, as stated above, was said to be "in respect of the cost of the improved annuities for widowed spouses and other dependants".

94 Heald J., for his part, was of the opinion that the obligation set out in s. 100 of the *Constitution Act, 1867* imposes a duty on Parliament to provide the total amount of judges' pensions and s. 29.1(2) is contrary to s. 100 of the *Constitution Act, 1867* and *ultra vires* in that it requires judges to pay a portion of the cost of their own pension. However, s. 29.1(1) of the *Judges Act* is not *ultra vires* in his view since the deduction provided for therein is dedicated to the cost of improved annuities for widowed spouses and other dependants of judges.

95 Pratte J., dissenting, found that s. 29.1 of the *Judges Act* does not affect the judges' right to a pension but rather their right to salaries. The real question then was whether Parliament has the power to reduce the salaries of incumbent judges. He held that Parliament has this power.

96 In the result, the declaration of unconstitutionality granted by the trial judge with respect to s. 29.1(2) of the *Judges Act* remained undisturbed.

97 The appellant appealed to this Court by leave of this Court. The respondent cross-appealed pursuant to s. 29(1) of the Rules of this Court asking for the declaration claimed in paragraph b) of his prayer for relief on the basis of s. 1(*b*) of the *Canadian Bill of Rights*.

III — Constitutional Questions

98 On March 22, 1984, Dickson J., as he then was, stated the two following constitutional questions:

> 1. Is section 29.1 of the *Judges Act*, as amended by section 100 of the *Statute Law (Superannuation) Amendment Act, 1975*, S.C. 1974-75-76, c. 81, inconsistent with s. 100 of the *Constitution Act, 1867* and therefore in whole or in part, *ultra vires* the Parliament of Canada?

2. Is section 29.1 of the *Judges Act* as amended by s. 100 of the *Statute Law (Superannuation) Amendment Act, 1975*, S.C. 1974-75-76, c. 81, inconsistent with s. 1(*b*) of the *Canadian Bill of Rights* and to the extent of the inconsistency is it of no force or effect?

99 With the greatest of respect for those who hold a contrary view, I have reached the conclusion that, subject to one qualification to be mentioned later, the second constitutional question should receive an affirmative answer. However, this may not be sufficient to dispose of the entire case, given the declaration of unconstitutionality granted by the trial judge. In any event, the variety of opinions expressed in the courts below on the issues raised by the first constitutional question and the need for certainty in this important area of the law make it preferable that I also answer the first constitutional question.

IV — The Constitution Act, 1867 and s. 29.1 of the Judges Act

100 I have had the advantage of reading the reasons for judgment written by the Chief Justice. I agree with his general considerations on judicial independance, on the foundation of judicial independance in Canada and on the content of the principle of judicial independance. I also agree with him that the first constitutional question should be answered in the negative, and I agree with his reasons for so answering it.

101 I now turn to the second constitutional question.

V — Section 1(b) of the Canadian Bill of Rights and s. 29.1 of the Judges Act

102 As was already stated above, all the judges in the courts below held that s. 29.1 of the *Judges Act* was not inconsistent with s. 1(*b*) of the *Canadian Bill of Rights*. They had different reasons for so deciding however.

103 The reasons of the trial judge read in part as follows at pp. 554 to 557 of the Federal Court Reports:

> The plaintiff, in arguing that the words "before the 17th day of February, 1975" in subsection 29.1(1) and "after the 16th day of February, 1975" in subsection 29.1(2) offend the principle of equality before the law, relied on and referred to the following cases: *The Queen v. Drybones*, [1970] S.C.R. 282; *Curr v. The Queen*, [1972] S.C.R. 889 ; *Attorney General of Canada v. Lavell*, [1974] S.C.R. 1349; *The Queen v. Burnshine*, [1975] 1 S.C.R. 693; *Prata v. Minister of Manpower and Immigration*, [1976] 1 S.C.R. 376; *Bliss v. The Attorney General of Canada*, [1979] 1 S.C.R. 183; and *MacKay v. The Queen*, [1980] 2 S.C.R. 370.
>
> All of these cases with the exception of the *Bliss* case, which dealt with entitlement to unemployment insurance benefits and where in fact the *Canadian Bill of Rights* was held not to apply, dealt with loss or denial of very substantive fundamental rights of some kind or involved criminal or quasi-criminal responsibility and had nothing to do with the mere quantum of remuneration for services rendered.
>
> "Equality before the law" in the *Canadian Bill of Rights* has, since its enactment, been interpreted as understood by Dicey, namely, that there are no exemptions from the ordinary law of the land for any privileged class. As Ritchie J. stated in *Curr v. The Queen, supra*, at page 916:
>
>> ...I prefer to base this conclusion on my understanding that the meaning to be given to the language employed in the *Bill of Rights* is the meaning which it bore at the time when the Bill was enacted ...

104 The trial judge then referred to and quoted reasons to the same effect written by Ritchie J. in *Attorney General of Canada v. Lavell*, [1974] S.C.R. 1349, including the second meaning proposed by Dicey for the principle of the "rule of law":

> It means again equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts; the "rule of law" in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary courts.

The trial judge noted that these reasons of Ritchie J. had been quoted with approval by Martland J. speaking for the majority in *R. v. Burnshine*, [1975] 1 S.C.R. 693. The trial judge continued:

> Even section 3 of the *Canadian Human Rights Act*, S.C. 1976-1977, c. 33 which has been enacted since then (proclaimed in force on the 14th of July, 1977) and by means of which counsel for the plaintiff sought to draw an analogy with the *Canadian Bill of Rights*, does not prohibit discrimination generally on grounds other than "race, national or ethnic origin, colour, religion, age, sex, marital status, conviction for which a pardon has been granted and, in matters related to employment, physical handicap...." It seems obvious that, in the case at bar, there exists no discrimination on any of the above-mentioned grounds.
>
> Counsel for the plaintiff emphasized particularly the following statement of McIntyre J. in the *MacKay* case, *supra*, which is found at page 406 of the above-mentioned report:
>
> > The question which must be resolved in each case is whether such inequality as may be created by legislation affecting a special class — here the military — is arbitrary, capricious or unnecessary, or whether it is rationally based and acceptable as a necessary variation from the general principle of universal application of law to meet special conditions and to attain a necessary and desirable social objective.
>
> This statement, in my view, does not support the proposition advanced on behalf of the plaintiff. As Martland J. stated in delivering the judgment for the Supreme Court of Canada in the *Prata* case, *supra*, at page 382 of the above-cited report of the case:
>
> > This Court has held that s. 1(*b*) of the *Canadian Bill of Rights* does not require that all federal statutes must apply to all individuals in the same manner. Legislation dealing with a particular class of people is valid if it is enacted for the purpose of achieving a valid federal objective (*R. v. Burnshine* (1974), 44 D.L.R. (3d) 584).
>
> Since I find that the plaintiff cannot succeed under paragraph 1(*b*) of the *Canadian Bill of Rights* because the term "equality before the law" as used in that enactment does not refer and was never intended to refer to a question of equal pay for equal work, I shall refrain from dealing with the further answer advanced on behalf of the defendant to the effect that, even if "inequality" is found to exist, it in effect arises in the pursuit of a valid federal objective and that, in addition, the plaintiff has failed to discharge the onus of establishing that the requirement of making contributions is arbitrary, capricious or unnecessary.

105 To summarize the trial judge's reasons on this issue, as I understand them, s. 29.1 does not contravene the *Canadian Bill of Rights* because: first, s. 29.1 does not offend the kind of equality defined by Dicey in the second meaning he gave to the rule of law; second, the provisions of the *Canadian Bill of Rights* cannot be held to apply to "the mere quantum of remuneration for services rendered" without trivializing these provisions. Furthermore, the trial judge may also have suggested as is indicated by his reference to the *Canadian Human Rights Act*, that discrimination is not prohibited by the *Canadian Bill of Rights*, except on specifically mentioned grounds.

106 In the Federal Court of Appeal, Thurlow C.J. speaking for himself and for Heald J. had this to say on the *Canadian Bill of Rights* issue, at pp. 1016-17 of the Federal Court Reports:

> The argument on the last-mentioned point, as I understood it, was that inequality before the law was created by the enactment because under it the respondent no longer enjoyed his right to salary without deductions for contributions to the same extent as other judges who held office before December 20, 1975. Reliance was placed on the reasoning of McIntyre J., in *MacKay v. The Queen*, [1980] 2 S.C.R. 370, at page 406, and it was said that there was no valid federal objective to be attained by discriminating on December 20, 1975 between judges appointed on or before and those appointed after February 16, 1975, and that to do so was arbitrary, capricious and unnecessary.
>
> . . . . .

The submission is thus based on the assumption that the legislation is within the legislative powers of Parliament. On that basis it seems to me that it cannot be said that Parliament, in requiring judges to participate in and contribute to a contributory pension scheme, was not seeking to achieve a valid federal objective. Moreover, the distinction made in the statute between judges appointed before a fixed date, for whom non-contributory pension provisions were already in existence, and judges to be appointed after that date so as ultimately, by the attrition of senior appointees through deaths and resignations, the whole body of the judiciary would be participants in and contributors to the contributory pension scheme seems to me to be but a manner of achieving the otherwise valid federal objective. Difficulty arises from the fact that the particular date chosen was earlier than the date of the coming into force of the Act but, harsh as the result may seem to be to one who did not know, as opposed to one who did know when appointed, that a contributory scheme to be applicable to all judges appointed after the date of the introduction of the bill was to be imposed, I do not think it can on that account be said that it has been established, in the sense referred to by Ritchie J., in the same case (*MacKay v. The Queen*, [1980] 2 S.C.R. 370, at page 393, citing *The Queen v. Burnshine*, [1975] 1 S.C.R. 693), that the provisions of the bill, including the choice of the date, were not enacted for the purpose of achieving the valid federal objective or that it was arbitrary or capricious or unnecessary for Parliament to have defined the class required to make contributions by reference to their being appointed after the date of the introduction of the bill. Accordingly, I would reject the contention and dismiss the cross-appeal.

107 At pages 1035 and 1036 of the Federal Court Reports, Pratte J. agreed with Addy J. that the Dicey concept of equality before the law had not been offended by the impugned provision. He also agreed that the whole of s. 29.1 of the *Judges Act* has been enacted by Parliament for the purpose of achieving a valid federal objective.

108 In this Court, counsel for the appellant did not reply upon the reasons of the trial judge to support their submission that the second constitutional question should be answered in the negative. They relied essentially upon the reasons of Thurlow C.J. on this point. They quoted part of these reasons in their factum and amplified them as follows:

The policy decision reflected in section 29.1 is that all federally funded and administered pension plans should be on a contributory basis, so that all those who might eventually receive retirement benefits from the Consolidated Revenue Fund will have contributed toward the cost of those benefits and thereby reduce the financial burden on future taxpayers. It is submitted that a decision to shift part of the costs of the plan to its beneficiaries cannot be considered arbitrary, capricious or unnecessary.

If the policy that the beneficiary should contribute is not unreasonable it is submitted that the means chosen to implement that policy do not render it objectionable or invalid in relation to the right to equality before the law. Parliament could have chosen to impose a contribu tory requirement at the full rate of 6 $^{1}/_{2}$% and then 7% on all judges. However, it chose to protect the position of judges who were appointed prior to the introduction of the amending legislation and to phase in the contributory requirements progressively, by requiring contributions at the higher rate only from newly appointed judges. This progressive implementation of full contributions protected the legitimate expectations of the judges appointed prior to April [*sic*] 17, 1975, but it necessarily put them in a different position from that of judges appointed after the "trigger date" for the higher contributions.

109 While no submissions were made to us by counsel for the appellant with respect to the reasons of the trial judge on the *Canadian Bill of Rights* issue, I feel that these reasons should be addressed.

110 I first wish to dispel any suggestion that, in order to offend the *Canadian Bill of Rights*, a discriminatory provision must be discriminatory on some specifically mentioned ground such as race, national origin, colour, etc. The learned trial judge erred in this respect. In *Curr v. The Queen*, [1972] S.C.R. 889, Laskin J. as he then was, speaking for himself and six other members of the Court stated at pp. 896-97:

In considering the reach of ... s. 1(*b*) ... I do not read it as making the existence of any of the forms of prohibited discrimination a *sine qua non* of its operation. Rather, the prohibited discrimination is an additional lever to which federal legislation must respond. Putting the matter another way, federal legislation which does not offend s. 1 in respect of any of the prohibited kinds of discrimination may nonetheless be offensive to s. 1 if it is violative of what is specified in any

> of the clauses (*a*) to (*f*) of s. 1. It is, *a fortiori*, offensive if there is discrimination by reason of race so as to deny equality before the law. That is what this Court decided in *Regina v. Drybones* and I need say no more on this point.
>
> It is, therefore, not an answer to reliance by the appellant on ... s. 1(*b*) of the *Canadian Bill of Rights* that [a particular provision] does not discriminate against any person by reason of race, national origin, colour, religion or sex. The absence of such discrimination still leaves open the question whether [a particular provision] can be construed and applied without abrogating, abridging or infringing the rights of the individual listed in ... s. 1(*b*).

111 See also the *Burnshine* case, *supra*, at p. 700, and *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183, at p. 191.

112 As for the Diceyan concept of equality and the rule of law, perhaps its most classical application in Canadian jurisprudence was in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, a case which antedates the *Canadian Bill of Rights*. It is true that this concept was sometimes adopted for the purposes of the *Canadian Bill of Rights*, but the early *dicta* in *Curr* and in *Lavell*, *supra*, to which Addy J. refers, do not represent the opinion of the majority of this Court in those cases. However, that concept was adopted by the majority of this Court in *Burnshine*, *supra*, although the extent to which the latter case turned on this adoption is not clear.

113 The adoption of Dicey's concept of equality for the purposes of the *Canadian Bill of Rights* was criticized in some doctrinal works. Dicey's concept of equality was said to be outdated, unduly narrow and otherwise inappropriate for the purposes of the *Canadian Bill of Rights*: W.S. Tarnopolsky, *The Canadian Bill of Rights* (2nd ed. 1975), pp. 120, 158 to 160, 297 and 298.

114 Of the five equality cases decided by this Court after the *Burnshine* case, *supra*, on the basis of the *Canadian Bill of Rights* that is, *Attorney General of Canada v. Canard*, [1976] 1 S.C.R. 170, *Prata v. Minister of Manpower and Immigration*, [1976] 1 S.C.R. 376, the *Bliss* case, *supra*, and *MacKay v. The Queen*, [1980] 2 S.C.R. 370, only one, the *Bliss* case, alludes to the Dicey concept of equality, at p. 192. But on the same page, Ritchie J., who delivered the judgment of the Court, mentioned a broader test applied by Pratte J. of the Federal Court of Appeal:

> ... the right to equality before the law could be defined as the right of an individual to be treated as well by the legislation as others who, if only relevant facts were taken into consideration, would be judged to be in the same situation.
>
> Mr. Justice Pratte concluded that where difference in treatment of individuals is based on a relevant distinction, the right to equality before the law would not be offended.

Not only did Ritchie J. not disapprove this other test but, on p. 193, he proceeded to apply it to decide that the legislation challenged in that case did not offend the *Canadian Bill of Rights*. Furthermore, in the *Canard* case, *supra*, Ritchie J. with whom Martland and Judson JJ. agreed, in concurring reasons allowing the appeal, took at p. 191, at least in terms if not in the result, a much broader approach than the narrow Diceyan test:

> The *Bill of Rights* was designed to eradicate any discriminatory laws passed by the Parliament of Canada and to guarantee the rights and freedoms therein specified to all Canadian citizens, but these guarantees are expressly declared in the preamble to the Bill to be enacted so as to "reflect the respect of Parliament for its constitution", and s. 91(24) of that document clearly vests in the Parliament of Canada the authority to pass laws concerning Indians which are different from the laws which the provincial legislatures may enact concerning the citizens of the various provinces.

115 I accordingly think that this Court is not bound by the Dicey test of equality nor prevented from adopting a more egalitarian approach.

116 Finally I come to the trivialization point made by the trial judge to the effect that the *Canadian Bill of Rights* should not be applied to "the mere quantum of remuneration for services rendered" and "to a question of equal pay for equal work".

117 Before I do so however, I should perhaps define my position with respect to the characterization of the impugned enactment. The trial judge and Pratte J. dissenting, held that s. 29.1 of the *Judges Act* operated a reduction in the respondent's salary whereas Thurlow C.J., and as it seems, Heald J., held that the provision did not reduce the amount credited to the respondent as salary but forced him to contribute to a pension scheme. Given the form of s. 29.1, I am rather inclined to share

the view of Thurlow C.J. on this point although, on the *Canadian Bill of Rights* issue, it does not matter whether the respondent suffered a reduction in salary or was forced to contribute to a pension scheme with a corresponding reduction of the amount actually paid to him as his salary.

118 In my view however, this case has nothing to do with the "equal pay for equal work" principle. It does have to do with money and the financial benefits attached to the respondent's office, but I think that the uneven distribution of financial benefits is quite capable of producing the type of inequality forbidden by s. 1(*b*) of the *Canadian Bill of Rights*. It was the entitlement of women to unemployment insurance benefits that was in issue in the *Bliss* case, *supra*, and nobody suggested that on that ground the case was incapable of or somehow unworthy of giving rise to arguable submissions advanced pursuant to the equality provisions of the *Canadian Bill of Rights*. More individuals were affected by the *Bliss* case, than by the case at bar. However, the amounts involved in the case at bar are considerably more substantial than those in the *Bliss* case.

119 Furthermore, the benefits involved in the case at bar represent an important incident attached to the status of a high judicial officer and are linked with the dignity of his office, in real as well as in symbolic terms. The following remarks written by Thurlow C.J. are apposite. They are indicative of the gravity of the issues raised by this case, and that is the sole reason I quote them. At pages 1024 and 1025 of the Federal Court Reports, the learned Chief Justice wrote:

> The commission issues upon appointment of a judge by the Governor General under the authority of section 96 and the provincial statute setting up the office. It constitutes a grant both of the office with its authority and of the salary and other benefits attached by law at that time to the office as fixed by Parliament under section 99. The grant entitles the appointee to the salary so fixed in much the same way as a grant of money or land vests title to the money or the land in the grantee. It is something that cannot be taken from him except by due process of law. Due process may include expropriation by the authority of the legislature, but it is established principle that the legislature is not, in the absence of a clear expression of intent to the contrary, to be taken as intending to expropriate without due compensation. And a taking without compensation is extraordinary. It is something that Parliament, ordinarily at least, avoids. It is, in my view, the reason why, in a number of statutes relating to judges' salaries, provisions referred to as grandfather clauses to protect the position of incumbent judges have been included. But the fact they have been included is not in itself a basis for saying that Parliament does not have the legal power to expropriate without compensation or to take away rights that have been lawfully granted.
>
> As Parliament has under section 100 the responsibility to fix and provide the salaries of judges, it seems to me that as a matter of interpretation of the language of the section Parliament must have a continuing power to fix such salaries and that that power is not restricted to the fixing of salaries for judges to be subsequently appointed. Plainly Parliament can increase the salaries of judges who are in office and it seems to me that as a matter of naked power it can also decrease them even though such decrease may be regarded by the incumbent judges as confiscatory and unjust and may be in substance a derogation from the grant lawfully made by the Governor General in the judge's commission.

120 Finally if, as I think, the impugned enactment contravenes s. 1(*b*) of the *Canadian Bill of Rights*, it takes on an added dimension in that it treats unevenly judges who are expected to administer justice with an even hand. Furthermore, it emanates from the very Parliament which is the custodian of judges' independence. While the impugned enactment is not sufficiently severe to impair the independence of judges, it is one that tend to affect the serenity of those concerned for the rest of their term of office. Judges may be expected to rise above such considerations but it is difficult to see how it could be conducive to the better administration of justice that they should be put to the test.

121 I now turn to the "valid federal objective" argument retained by the majority of the Federal Court of Appeal and advanced by the appellant in support of the impugned enactment.

122 Relying on the authority of *Burnshine*, *supra*, at pp. 707 and 708, and of *Bliss*, *supra*, at p. 194, the appellant submits that the onus lies with the respondent to demonstrate that a valid federal objective was not being sought by Parliament. The extent to which this onus is of an evidentiary or of a persuasive nature, and whether this onus, whatever its weight, can be discharged by inferences drawn from the impugned legislation, are questions which may ultimately require clarification. I should have thought that where a challenged provision *prima facie* offends against the principle of equality before the law and does so for reasons

which neither appear on its face nor can be inferred from its nature, then it would be incumbent upon the Attorney General, who is in a much better position to do so, to demonstrate what valid objective was being sought by the legislation.

123 Be that as it may, the question of onus does not really arise in the case at bar since I am quite prepared to accept that s. 29.1 of the *Judges Act* was enacted by Parliament in the pursuit of a valid federal objective, as was held by the Federal Court of Appeal and as is submitted by the appellant.

124 Paraphrasing the above-quoted reasons of Thurlow C.J. and the submissions of the appellant, I would describe the valid federal objective in question as follows: the policy decision reflected in s. 29.1 of the *Judges Act* is that judges' pension plans should be on a contributory basis in order to reduce the financial burden on future taxpayers; Parliament chose to phase in the contributory requirement, by requiring contributions at the higher rate only from newly appointed judges so that, through the attrition of senior appointees as a result of death and resignations, the whole body of the judiciary would eventually participate in the contributory scheme.

125 To repeat, I am prepared to accept that the above-mentioned federal objective is a valid one.

126 What I am not prepared to agree with, on the other hand, with great respect for those who hold a contrary view, is that the manner or means chosen to achieve this valid federal objective, which manner or means themselves establish a new classification and discriminate between incumbent judges, should be immunized from the principle of universal application of the law. So to dispense altogether such manner or means from the equality provision of the *Canadian Bill of Rights* would have the effect of emasculating this provision; in my view, it is in part to guard against this danger that McIntyre J., writing for himself and for Dickson J., as he then was, wrote his concurring reasons in the *MacKay* case, *supra*. I find it appropriate to quote a substantial portion of those reasons. The main issue in that case was set out in these words at p. 401:

> Whether the provisions of the *National Defence Act* which authorize the trial by a service tribunal of military personnel charged with criminal offences committed in Canada contrary to the *Narcotic Control Act* or the *Criminal Code* are inoperable by reason of the *Canadian Bill of Rights*.

At page 402, McIntyre J. dealt with the historical background of military law and, at pp. 403 to 405, with the application of s. 2(*f*) of the *Canadian Bill of Rights* to the facts of that case. Then, at pp. 405 and following, McIntyre J. dealt with the application of s. 1(*b*) of the *Canadian Bill of Rights*:

> The appellant's second point raises the question of whether the trial of servicemen by court martial under military law for an offence under the criminal law of Canada or as here under the *Narcotic Control Act* deprives the serviceman of equality before the law contrary to the provisions of s. 1(*b*) and s. 2 of the *Canadian Bill of Rights*.
>
> This Court decided in *Regina v. Drybones*, [1970] S.C.R. 282, that the *Canadian Bill of Rights* was effective to render inoperative validly enacted federal legislation where such legislation infringed the right of a subject to equality before the law. Judicial construction of the words "equality before the law" found in such cases as *The Queen v. Burnshine*, [1975] 1 S.C.R. 693, *Prata v. The Minister of Manpower and Immigration*, [1976] 1 S.C.R. 376, and *Bliss v. A.G. Canada*, [1979] 1 S.C.R. 183, has advanced the proposition that legislation passed by Parliament does not offend against the principle of equality before the law if passed in pursuance of a "valid federal objective". The significance of these words must be examined.
>
> Prior to the passing of the *Canadian Bill of Rights*, Parliament could have passed in the exercise of its power under s. 91(7) of the *British North America Act* without restriction such legislation in respect of the governance and control of the armed forces as it wished. The *Canadian Bill of Rights*, however, has introduced another dimension and federal legislation must now be construed according to its precepts. Certainly the creation and maintenance of the armed forces of the land constitute a valid federal objective within the legislative competence of the federal Parliament. A valid federal objective, however, must mean something more than an objective which simply falls within the federal legislative competence under the *British North America Act*. Even in the absence of the *Canadian Bill of Rights*, a federal enactment could not be supported constitutionally if it did not embody such an objective. The word "valid" in this context must import a concept

of validity not only within the field of constitutional legislative competence but also valid in the sense that it does not offend the *Canadian Bill of Rights*. Our task then is to determine whether in pursuit of an admittedly constitutional federal objective Parliament has, contrary to the provisions of the *Canadian Bill of Rights*, created for those subject to military law a condition of inequality before the law.

It seems to me that it is incontestable that Parliament has the power to legislate in such a way as to affect one group or class in society as distinct from another without any necessary offence to the *Canadian Bill of Rights*. The problem arises however when we attempt to deter mine an acceptable basis for the definition of such a separate class, and the nature of the special legislation involved. Equality in this context must not be synonymous with mere universality of application. There are many differing circumstances and conditions affecting different groups which will dictate different treatment. The question which must be resolved in each case is whether such inequality as may be created by legislation affecting a special class — here the military — is arbitrary, capricious or unnecessary, or whether it is rationally based and acceptable as a necessary variation from the general principle of universal application of law to meet special conditions and to attain a necessary and desirable social objective.

There are many such acceptable distinctions recognized in the law. If we are to have safety on the highways, the blind or those with deficient sight must be forbidden to drive. If young people and children are to be protected and their welfare fostered in youth, we have long recognized that special legislative provisions must be made for them imposing restrictions and limitations upon their freedom more stringent than upon adults. In matters of criminology, differences which have been considered conductive to the welfare of society and to young offenders have been considered permissible (see *Regina v. Burnshine*, *supra*). There are many such cases where the needs of society and the welfare of its members dictate inequality for the achievement of socially desirable purposes. It would be difficult, if not impossible, to propound an all-embracing test to determine what departures from the general principle of the equal application of law would be acceptable to meet a desirable social purpose without offence to the *Canadian Bill of Rights*. I would be of the opinion, however, that as a minimum it would be necessary to inquire whether any inequality has been created for a valid federal constitutional objective, whether it has been created rationally in the sense that it is not arbitrary or capricious and not based upon any ulterior motive or motives offensive to the provisions of the *Canadian Bill of Rights*, and whether it is a necessary departure from the general principle of universal application of the law for the attainment of some necessary and desirable social objective. Inequalities created for such purposes may well be acceptable under the *Canadian Bill of Rights*.

Applying this test, it seems to me that the creation of a body of military law and the tribunals necessary for its administration, involving as a necessary incident thereto different treatment at law for servicemen in certain cases from that afforded to civilians, does not by itself constitute a denial of equality before the law contrary to the provisions of the *Canadian Bill of Rights*. It is apparent that the creation of military law and its courts was undertaken in pursuit of a constitutional federal objective. It has been done in my view rationally, not arbitrarily or capriciously, and no ulterior motive has been shown which could be construed as an assault upon any of the rights, liberties and freedoms protected by the *Canadian Bill of Rights*. It seems abundantly clear to me that the emergence of a body of military law with its judicial tribunals has been made necessary because of the peculiar problems which face the military in the performance of its varied tasks. In my opinion, the recognition of the military as a class within society in respect of which special legislation exists dealing with legal rights and remedies, including special courts and methods of trial, fulfilling as it does a socially desirable, objective, does not offend the *Canadian Bill of Rights*.

It must not however be forgotten that, since the principle of equality before the law is to be maintained, departures should be countenanced only where necessary for the attainment of desirable social objectives, and then only to the extent necessary in the circumstances to make possible the attainment of such objectives. The needs of the military must be met but the departure from the concept of equality before the law must not be greater than is necessary for those needs. The principle which should be maintained is that the rights of the serviceman at civil law should be affected as little as possible considering the requirements of military discipline and the efficiency of the service. With this concept in mind, I turn to the situation presented in this case.

Section 2 of the *National Defence Act* defines a service offence as "an offence under this Act, the *Criminal Code*, or any other Act of the Parliament of Canada, committed by a person while subject to the Code of Service Discipline". The Act also provides that such offences will be triable and punishable under military law. If we are to apply the definition of service offence literally, then all prosecutions of servicemen for any offences under any penal statute of Canada could be conducted in military courts. In a country with a well-established judicial system serving all parts of the country in which the prosecution of criminal offences and the constitution of courts of criminal jurisdiction is the responsibility of the provincial governments, I find it impossible to accept the proposition that the legitimate needs of the military extend so far. It is not necessary for the attainment of any socially desirable objective connected with the military service to extend the reach of the military courts to that extent. It may well be said that the military courts will not, as a matter of practice, seek to extend their jurisdiction over the whole field of criminal law as it affects the members of the armed services. This may well be so, but we are not concerned here with the actual conduct of military courts. Our problem is one of defining the limits of their jurisdiction and in my view it would offend against the principle of equality before the law to construe the provisions of the *National Defence Act* so as to give this literal meaning to the definition of a service offence. The all-embracing reach of the questioned provisions of the *National Defence Act* goes far beyond any reasonable or required limit.

. . . . .

It is of course evident that there are many matters peculiar to the military which require a special code and special courts. I refer to what I would describe as specifically military offences, such as absence without leave, desertion, insubordination, failure to observe and comply with military regulations regarding care and handling and use of military store and equipment, failure to obey lawful commands of officers and a host of other matters dealt with in the *National Defence Act* which relate to service matters and concerns and which require special military rules and procedures. These form part of the proper field of military law and military courts. There are, in addition, other offences which, while offences under the civil law, are also, when committed by servicemen in relation to military service, properly to be considered within the scope of the military courts. Theft is a criminal offence punishable in the civil courts but it would, I suggest, be impossible to say that theft by one soldier from another in barracks is not as well an offence which could be categorized as a military offence and come within the purview of military law. The same is true of trafficking or possession of forbidden narcotics in barracks, the same is true of many other matters and the military courts must have power to deal with them in addition to those offences which could be categorized as military offences pure and simple.

The question then arises: how is a line to be drawn separating the service-related or military offence from the offence which has no necessary connection with the service? In my view, an offence which would be an offence at civil law, when committed by a civilian, is as well an offence falling within the jurisdiction of the courts martial and within the purview of military law when committed by a serviceman if such offence is so connected with the service in its nature, and in the circumstances of its commission, that it would tend to affect the general standard of discipline and efficiency of the service. I do not consider it wise or possible to catalogue the offences which could fall into this category or try to describe them in their precise nature and detail. The question of jurisdiction to deal with such offences would have to be determined on a case-by-case basis. A serviceman charged in a service court who wished to challenge the jurisdiction of the military court on this basis could do so on a preliminary motion. It seems, by way of illustration, that a case of criminal negligence, causing death resulting from the operation of a military vehicle by a serviceman in the course of his duty, would come within the jurisdiction of the court martial, while the same accident, occurring while the serviceman was driving his own vehicle on leave and away from his military base or any other military establishment, would clearly not. It may be observed that, on an admittedly different constitutional basis, this approach has been taken in American courts where a possible conflict of jurisdiction has arisen between the military tribunals and the civil courts.

I would therefore hold that the provisions of the *National Defence Act*, in so far as they confer jurisdiction upon courts martial to try servicemen in Canada for offences which are offences under the penal statutes of Canada for which civilians might also be tried, and where the commission and nature of such offences has no necessary connection with the service, in the sense that their commission does not tend to affect the standards of efficiency and discipline of the service, are inoperative as being contrary to the *Canadian Bill of Rights* in that they create inequality before the law for the serviceman involved.

> Turning to the case at bar, I have no difficulty in holding that the offences here under consideration are sufficiently connected with the service to come within the jurisdiction of the military courts. Trafficking and possession of narcotics, in a military establishment, can have no other tendency than to attack the standards of discipline and effeciency of the service and must clearly come within the jurisdiction of the military courts and I would, therefore, dismiss the appeal.

127 I adopt the above-quoted reasons in *MacKay*, *supra*.

128 The test which is emphasized throughout those reasons is that of the necessity of a specific discrimination with respect to the attainment of a desirable social objective:

> The question which must be resolved in each case is whether such inequality as may be created by legislation affecting a special class ... is arbitrary, capricious or *unnecessary*, or whether it is rationally based and acceptable as a *necessary* variation from the general principle of universal application of law to meet special conditions and to attain a necessary and desirable social objective.

(Emphasis added.)

129 Furthermore, the test is all the more exacting in that it includes an essential element of proportionality; even where variation from the principle of universal application of the law is justified, the principle cannot be tampered with to a degree or to an extent which goes beyond what is necessary to reach a desirable social objective:

> ... since the principle of equality before the law is to be maintained, departures should be countenanced only where *necessary* for the attainment of desirable social objectives, and then *only to the extent necessary* in the circumstances to make possible the attainment of such objectives. The needs of the military must be met but *the departure from the concept of equality before the law must not be greater than is necessary* for those needs.

(Emphasis added.)

130 To the extent that a specific discrimination is unnecessary to achieve a valid social objective, it is arbitrary or capricious and in violation of the principle of equality.

131 It seems to me that this test, including its element of proportionality, clearly extends to the manner or means chosen to achieve a valid federal objective, particularly where this manner or these means introduce the very inequality complained of. This manner or these means must then be carefully scrutinized by the courts and they must be struck down whenever they do not meet the test.

132 Applying this test to the facts of the case at bar, it evidently cannot be said that the distinction made by s. 29.1 of the *Judges Act* between incumbent judges was necessary to achieve the abovementioned federal objective. This distinction was effected by the selection of the date of first reading of the bill as a cut-off point to implement the phasing-in feature of the federal enactment and there was clearly no necessity to select this date.

133 In order to prevent hoarding and other type of speculation, budgetary measures are sometimes enforced from the time they are announced in the House of Commons and there might be similar rational motives to make a law retroactive to the time it was introduced in Parliament. But no such rational motives have been advanced or appear to exist in the case at bar where the selection of the cut-off point, with its discriminatory effect, is entirely arbitrary and capricious. The selection of a cut-off point reaching back two or three years earlier for instance would appear even more glaringly arbitrary and in my view, in the circumstances of the case at bar, there is no difference in the date of first reading that makes its selection any less arbitrary and capricious than the selection of an earlier date.

134 It may well be that if Parliament wanted to phase-in the implementation of the new measure *and* to abide by s. 1(*b*) of the *Canadian Bill of Rights*, its only choice as to the cut-off date was the date of enactment. The selection of the latter date would admittedly have put all incumbent judges and judges appointed after the date of enactment on a different footing.

But that is what "grandfather" clauses are about and it is accepted in the case at bar that "grandfathering" was an essential feature of the valid federal objective pursued by Parliament. The only alternative would be to hold that Parliament could not "grandfather" incumbent judges at all without offending the principle of equality before the law. Nobody has made such a far-reaching submission which would run contrary to a seemingly ancient and constant usage, as was indicated by Addy J. at p. 557 of the Federal Court Reports:

> ... the numerous Canadian statutes effecting judges' salaries enacted since 1846 until 1932 quoted by the defendant ... clearly establish various categories of compensation for judges of equal rank from time to time, without the slightest objection being raised even indirectly on the grounds that the legislation was dis criminatory. It is important to note also, however, that in this legislation whenever required to protect the compensation being paid to incumbents, "grandfather" clauses were inserted in the legislation and that, in the one or two cases where that precaution was not taken at the time of the passing of the legislation, an amending statute was subsequently enacted to rectify the situation. (V.g.: S.C. 1927, c. 33 which reduced the retirement annuity of certain judges to two-thirds of salary was amended by S.C. 1930, c. 27 where retirement at full salary of those judges was restored).

135 Furthermore, judges appointed after the date of enactment know or are presumed to know the law when they freely accept the appointment, and none of them has ever been treated on the same footing as judges who have been "grandfathered": they are members of a new class the creation of which was necessary to attain a valid federal objective.

136 Assuming that Parliament is under no constitutional obligation to "grandfather" any incumbent judge, it may appear anomalous, at first, that it should be blamed for not "grandfathering" all incumbent judges, but only some of them, albeit the majority in this case. The apparent anomaly is explained however when it is remembered that the principle of equality is capable of being offended against by the uneven granting of favourable treatment within a class, as well as by the uneven imposition of unfavourable treatment.

137 In the above-quoted passage of their factum, counsel for the appellant write that the

> ... progressive implementation of full contributions protected the *legitimate expectations* of the judges appointed prior to April [*sic*] 17, 1975 ...

(Emphasis added.) And I note that in his reasons for judgment, the Chief Justice characterizes the same concept as "the settled expectations" of earlier appointees. With the greatest of respect, I fail to see why the respondent's expectations were any less settled or legitimate than those of his fellow judges appointed before the date of first reading of the bill.

138 Implicit in the position of the appellant is the following proposition: if the respondent, unlike judges appointed before February 17, 1975 could have no *expectations* susceptible to be protected, it must be because he was put on notice that the *Judges Act* was likely to be amended by the mere fact of first reading of the bill, and he should have been alerted to the risk of changing his position. It is the only rational explanation that comes to mind for the selection of the cut-off date and it is the only one that is inferentially suggested in appellant's factum. It is also an explanation which must have crossed the mind of the trial judge who, at p. 548 of the Federal Court Reports wrote as follows, and correctly so in my view:

> Although one is deemed to know the law of the land, there is no such presumption in the case of Bills not yet enacted. No one is bound by their contents. Having regard to the substantive and progressive emasculation of certain Bills in their stormy passage through Parliament, such Bills as are finally passed into law frequently bear little resemblance either in substance or in form to the original proposal. It would be grossly unjust to impute to anyone, other than perhaps a Member of Parliament, constructive knowledge of the business of Parliament.

139 The suggestion that the respondent may have been put on notice by the mere fact of first reading is not only factually erroneous in this case where it is conceded that he was unaware of that fact: it is also founded on a dangerous and far-reaching error in law in that it presumes knowledge of and reliance upon a bill as opposed to knowledge of and reliance upon the law.

140 On January 27, 1976, the Minister of Justice and Attorney General of Canada responded in writing to a letter written to him by the respondent. After stating that the impugned enactment had received Royal Assent on December 20, 1975, with its provisions unchanged, the Minister's letter continues as follows:

> Prior to this event I had raised your concerns with several of my colleagues and indeed, an attempt was made while the Bill was before the joint House of Commons-Senate Committee to amend the clause so that the higher rate of contributions would apply only to judges appointed to office after the Royal Assent date. Unfortunately, the amendment that would have had this result was ruled out of order on procedural grounds.

141 In my opinion, this late and unsuccessful attempt to have the bill amended along the lines indicated by the Minister, and the Minister's letter constitute an admission that the bill in question was flawed in that it unnecessarily discriminated against certain incumbent judges.

142 I have reached the conclusion that s. 29.1(2) of the *Judges Act* is inconsistent with s. 1(*b*) of the *Canadian Bill of Rights* and that the respondent is entitled to a declaration that this subsection is inoperative in so far as the respondent is concerned.

143 In addition, the respondent seeks a declaration that the words "before February 17, 1975" in s. 29.1(1) of the *Judges Act* are inoperative in so far as he is concerned. The reason why the respondent is seeking such a declaration, according to his factum, is to avoid being placed on a higher footing than that of his senior colleagues, appointed before February 17, 1975, who at present, have to contribute one and one-half per cent of their salary to the Consolidated Revenue Fund. In other words, the respondent is asking us to remedy one element of inequality with his colleagues, but not at the cost of creating or leaving another element of inequality within the same class of judges.

144 On the face of it, we could not grant such a declaration at large without creating an insoluble problem: judges appointed after February 16, 1975 would then have to contribute one and one-half per cent of their salary in addition to the seven per cent they have to contribute under s. 29.1(2). However, no problem would arise, so far as I can see, if the effect of the declaration is limited to the respondent.

145 The respondent is not asking us to redraft the impugned enactment but simply to declare these few words inoperative in so far as he is concerned, in order to restore complete equality within the class to which he belongs. I have reached the conclusion that it is legitimate for him to seek complete redress in a case of this sort and that he is entitled to the full declaration he is requesting.

146 Before I reach my final conclusion, I should perhaps state that a short time before the respondent's appointment, judges' salaries were increased by 39 per cent, and pensions to widowed spouses and children by 50 per cent: *An Act to amend the Judges Act and certain other Acts for related purposes and in respect of the reconstitution of the Supreme Courts of Newfoundland and Prince Edward Island*, S.C. 1974-75-76, c. 48. These increases together with the subsequent enactment of s. 29.1 of the *Judges Act* were sometimes referred to as a "package" and may be relevant to a discussion of the first constitutional question. In my view however, these increases are entirely irrelevant in so far as the second constitutional question is concerned since all incumbent judges profited by these increases, including those appointed before February 17, 1975.

VI — Conclusion

147 I would allow the appeal, set aside the judgment of the Federal Court of Appeal and the declaration granted by the trial judge. I would allow the cross-appeal and, to the declaration granted by the trial judge, I would substitute the following declaration:

148 The words "before February 17, 1975" of s. 29.1(1) and the whole of s. 29.1(2) of the *Judges Act*, as enacted by s. 100 of S.C. 1974-75-76, c. 81, are inoperative in so far as the plaintiff is concerned.

149 I would answer the first constitutional question in the negative.

150 I would answer the second constitutional question as follows:

151 The words "before February 17, 1975" of s. 29.1(1) and the whole of s. 29.1(2) of the *Judges Act* as amended by s. 100 of the *Statute law (Superannuation) Amendment Act, 1975*, S.C. 1974-75-76, c. 81, are inconsistent with s. 1(*b*) of the *Canadian Bill of Rights* and, to the extent of the inconsistency, of no force or effect in so far as the respondent is concerned.

152 I would allow the respondent his costs throughout.

Appeal allowed, Beetz and McIntyre JJ. dissenting in part.

Solicitors of record:
Solicitor for the appellant: *Roger Tassé*, Ottawa.
Solicitor for the respondent: *David W. Scott*, Ottawa.

Footnotes

1 In the English version of the *Judges Act*, ss. 23-29 are found under the heading « Annuities » and the benefits to judges, spouses and children provided in these sections are referred to as 'annuities'. The heading at the start of the French version of these sections is *Pensions* and the word *pension* is used throughout the sections. In this judgment I have used the word 'pension' because I think it corresponds more closely to the ordinary understanding of the benefits being considered. Furthermore, s. 100 of the *Constitution Act, 1867*, which is the pivotal constitutional provision in this appeal, uses the word 'Pensions'; in the interests of consistency and ease of understanding I will use it to describe the benefits conferred by the *Judges Act* and in issue in this appeal.

Tab 3

1995 CarswellNat 1280
Federal Court of Canada — Trial Division

P.I.P.S.C. v. Canadian Museum of Nature

1995 CarswellNat 1280, 1995 CarswellNat 1281, [1995] 3 F.C. 643, [1995]
F.C.J. No. 1321, 102 F.T.R. 7, 58 A.C.W.S. (3d) 388, 63 C.P.R. (3d) 449

The Professional Institute of the Public Service of Canada (Applicant) v. The Director of the Canadian Museum of Nature (Respondent)

Noël J.

Heard: September 25, 1995
Judgment: October 5, 1995
Docket: T-2689-94

Counsel: *Peter J. Barnacle* for applicant.
Michael F. Ciavaglia for respondent.

Related Abridgment Classifications
Privacy and freedom of information
V Freedom of information
  V.2 Federal legislation
    V.2.d Miscellaneous

Table of Authorities

CASES JUDICIALLY CONSIDERED

CONSIDERED:

Cineplex Odeon Corp. v. M.N.R. (1994), 114 D.L.R. (4th) 141, 26 C.P.C. (3d) 109, [1994] 2 C.T.C. 293; 94 DTC 6407 (Ont. Gen. Div.).

REFERRED TO:

Anderson v. Bank of British Columbia (1876), 2 Ch. D. 644 (C.A.)

Waugh v. British Railways Board, [1980] A.C. 521 (H.L.).

STATUTES AND REGULATIONS JUDICIALLY CONSIDERED

Access to Information Act, R.S.C., 1985, c. A-1, ss. 2, 4, 23, 41, 48.

Auditor General Act, R.S.C., 1985, c. A-17, ss. 6, 7, 13.

Museums Act, S.C. 1990, c. 3, s. 30.

The following are the reasons for order rendered in English by *Noël J.*:

1 This is an application for judicial review, pursuant to section 41 of the *Access to Information Act*, R.S.C., 1985, c. A-1 (the Act), of the decision of the Canadian Museum of Nature (the Museum) to deny the Professional Institute of the Public Service of Canada (the PIPSC) access to a forensic accounting report that was prepared for the Board of Trustees of the Canadian Museum of Nature.

1. Facts

2 The relevant facts are as follows: 1. In 1994, the Museum declared surplus seven positions and laid off the incumbent employees filling these positions. The PIPSC's union committee investigated the circumstances surrounding the lay-offs and

subsequently published a report criticizing the Museum's management and handling of funds. 2. In March 1994, the Museum ordered that a special forensic audit be carried out by the accounting firm of Peat Marwick and Thorne to review the allegations in the PIPSC's report. In a letter to the Chief Operating Officer of the Museum dated February 25, 1994, the Department of Justice, the Museum's solicitor, had recommended that a forensic audit be carried out to determine whether it was prudent to proceed to litigation. A letter from Peat Marwick and Thorne dated February 28, 1994 which confirmed the ordering of the forensic audit indicated that the report would be prepared in order to support a potential action in defamation against the authors. 3. On April 13, 1994, the President of the Museum stated before the Canadian Heritage Parliamentary Committee that he believed the audit would show that the PIPSC's report was based on material presented out of context, largely misrepresented and factually incorrect. 4. On May 25, 1994, the Audit and Finance Committee of the Museum's Board of Trustees reviewed the audit and concluded that the audit cleared the Museum's management of any wrongdoing but that the audit would not be released based on solicitor-client privilege. 5. The role of the Auditor General was discussed at the meeting of May 25, 1994. A representative of the Office of the Auditor General expressed concern that the Auditor General must be prepared to answer any questions asked (presumably, about the PIPSC's allegations). A representative of the Department of Justice present at the meeting suggested that the Auditor General could access the work while still maintaining privilege on the material. The Auditor General was allowed access to the forensic report, which was referred to in the Auditor General's financial audit of that year. 6. On May 31, 1994 the PIPSC sought disclosure of the forensic audit under the *Access to Information Act*. The Museum refused disclosure on the ground that the audit was exempt from disclosure under section 23 of the Act. The PIPSC filed a complaint with the Information Commissioner of Canada over the Museum's refusal. On September 23, 1994 the Information Commissioner dismissed the complaint, finding that the forensic audit was privileged information under section 23 of the Act. 7. The PIPSC seeks disclosure of the forensic audit to obtain information concerning the financial operations of the Museum and in order to be able to respond to the Museum's allegations that the PIPSC's report was misleading or inaccurate.

2. Relevant Statutory Provisions

2.1 Access to Information Act

3 The relevant provisions are as follows:

PURPOSE OF ACT

2. (1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.

. . . . .

Right of Access

4. (1) Subject to this Act, but notwithstanding any other Act of Parliament, every person who is

(*a*) a Canadian citizen, or

(*b*) a permanent resident within the meaning of the Immigration Act, has a right to and shall, on request, be given access to any record under the control of a government institution.

. . . . .

Solicitor-client privilege

23. The head of a government institution may refuse to disclose any record requested under this Act that contains information that is subject to solicitor-client privilege.

. . . . .

REVIEW BY THE FEDERAL COURT

41. Any person who has been refused access to a record requested under this Act or a part thereof may, if a complaint has been made to the Information Commissioner in respect of the refusal, apply to the Court for a review of the matter within forty-five days after the time the results of an investigation of the complaint by the Information Commissioner are reported to the complainant under subsection 37(2) or within such further time as the Court may, either before or after the expiration of those forty-five days, fix or allow.

. . . . .

Burden of proof

48. In any proceedings before the Court arising from an application under section 41 or 42, the burden of establishing that the head of a government institution is authorized to refuse to disclose a record requested under this Act or a part thereof shall be on the government institution concerned.

2.2 Auditor General Act [1]

4 The relevant provisions are as follows:

Report to House of Commons

6. The Auditor General shall examine the several financial statements required by section 64 of the *Financial Administration Act* to be included in the Public Accounts, and any other statement that the President of the Treasury Board or the Minister of Finance may present for audit and shall express his opinion as to whether they present fairly information in accordance with stated accounting policies of the federal government and on a basis consistent with that of the preceding year together with any reservations he may have.

7. (1) The Auditor General shall report annually to the House of Commons

(*a*) on the work of his office; and

(*b*) on whether, in carrying on the work of his office, he received all the information and explanations he required.

(2) Each report of the Auditor General under subsection (1) shall call attention to anything that he considers to be of significance and of a nature that should be brought to the attention of the House of Commons, including any cases in which he has observed that

(*a*) accounts have not been faithfully and properly maintained or public money has not been fully accounted for or paid, where so required by law, into the Consolidated Revenue Fund;

(*b*) essential records have not been maintained or the rules and procedures applied have been insufficient to safeguard and control public property, to secure an effective check on the assessment, collection and proper allocation of the revenue and to ensure that expenditures have been made only as authorized;

(*c*) money has been expended other than for purposes for which it was appropriated by Parliament;

(*d*) money has been expended without due regard to economy or efficiency; or

(*e*) satisfactory procedures have not been established to measure and report the effectiveness of programs, where such procedures could appropriately and reasonably be implemented.

. . . . .

Access to Information

13. (1) Except as provided by any other Act of Parliament that expressly refers to this subsection, the Auditor General is entitled to free access at all convenient times to information that relates to the fulfilment of his responsibilities and he is also

entitled to require and receive from members of the public service of Canada such information, reports and explanations as he deems necessary for that purpose.

(2) In order to carry out his duties more effectively, the Auditor General may station in any department any person employed in his office, and the department shall provide the necessary office accommodation for any person so stationed.

(3) The Auditor General shall require every person employed in his office who is to examine the accounts of a department or of a Crown corporation pursuant to this Act to comply with any security requirements applicable to, and to take any oath of secrecy required to be taken by, persons employed in that department or Crown corporation.

(4) The Auditor General may examine any person on oath on any matter pertaining to any account subject to audit by him and for the purposes of any such examination the Auditor General may exercise all the powers of a commissioner under Part I of the *Inquiries Act*.

3. Questions in Issue

5 The PIPSC contends that the forensic audit was not obtained for the dominant purpose of litigation, and thus is not privileged information under section 23 of the Act. Alternatively, if the forensic audit was obtained for the dominant purpose of litigation, the PIPSC contends that it has since been used and disclosed for other purposes with the result that the solicitor-client privilege has been waived. In the further alternative, the PIPSC contends that parts of the forensic audit are reasonably severable from the nondisclosable parts and hence these ought to be accessible as public information.

4. Discussion

6 The first argument raised by the PIPSC may be disposed of fairly quickly. What is being claimed in this instance is the litigation privilege. It applies to protect from disclosure communications between a solicitor and client as well as with third parties, so long as these communications are made in the course of preparation for any existing or reasonably contemplated litigation. The only further requirement which the courts have placed on this extension of the traditional solicitor-client privilege[2] is that the communications so protected must have been generated for the dominant purpose of litigation. In this respect, the PIPSC alleges that litigation was not the dominant purpose behind the confection of the forensic report. Indeed, the PIPSC suggests that the use that has been made of the report since its creation demonstrates that it was confected primarily for public relations purposes and specifically, to allow the Museum and its senior management to better posture itself in the public eye in the wake of the allegations made by the PIPSC.

7 The fact that the use actually made of the report after its confection may have been quite different from that which was originally intended, while relevant to the issue of waiver, has little or no bearing on the PIPSC's first contention. It is well established that the dominant purpose of a document is to be assessed as of the time at which it is brought into existence as it is the dominant purpose for its creation that is in issue.[3] In this respect, the record unequivocally shows that the forensic audit was originally ordered to be conducted on the recommendation of legal counsel for the purpose of ultimately allowing the Museum to pursue an action in defamation. The record also shows that that purpose was known and acknowledged by the authors of the report at the time of their engagement, and that they were to act under the direction of the Museum's legal counsel. No purpose other than litigation can be gleaned from the written exchanges between counsel, the Museum and the authors of the report. I would have to ignore that evidence altogether and in effect treat it as a sham to ascribe to the report, at the time of its creation, a prime purpose other than that which the Museum contends.

8 It follows that while I have no doubt that the report was capable of different uses, I must conclude on the evidence before me that the dominant purpose for its creation was litigation. The PIPSC's first contention is accordingly rejected.

9 The allegation that the Museum subsequently waived the privilege is more compelling. Specifically, the PIPSC contends that the Museum waived its privilege by voluntarily disclosing the report for a detailed review by the Auditor General in the course of the preparation of its annual report. The Museum counters that the disclosure of the forensic report to the Auditor

General should not be viewed as a disclosure to a third party and that, in any event, the disclosure was not voluntary as the Museum was bound to disclose the report to the Auditor General.

10 In *Cineplex Odeon Corp. v. Minister of National Revenue* (1994), 114 D.L.R. (4th) 141 (Ont. Gen. Div.), the Minister of National Revenue sought the production of otherwise privileged documents which had been released by the external auditor's tax group to its audit group. The Minister of National Revenue contended that the release of the documents by the tax group to the audit group constituted disclosure to a third party with the result that the privilege which existed while the documents were in the hands of the tax group had been lost. Haley J., in rejecting this contention, had this to say about the relationship between external auditors and their clients, at page 145:

> Peats as external auditor for the applicant corporation is governed by the guidelines set out in the handbook of the Canadian Institute of Chartered Accountants. The auditor is called upon to give an objective opinion of the fairness and accuracy of the financial statements prepared by the management of the corporation. Ms Levine agreed that the auditor must maintain an independence from the management of the corporation in performing the audit. The auditor's report is prepared for the shareholders of the corporation as opposed to the management.
>
> *If such an audit were conducted by another firm of chartered accountants there would be no question that they would be third parties in relation to the corporation and disclosures to those auditors would constitute waiver of privilege ....* [Emphasis is mine.]

11 Later in the course of his judgment, Haley J. outlined the practice of outside auditors in the United States when confronted with documents belonging to a client which are privileged but which are nevertheless required to conduct an independent audit. He stated, at page 150:

> It appears from the practice in the United States outlined in an article "Lawyers' Responses to Audit Inquiries and the Attorney-Client Privilege", Arthur B. Hooker; in (1980), 35 Bus. Law. 1021, that auditors will often request, privileged documents from clients or their attorneys in the course of the audit. To the extent that these disclosures are necessary to permit the independent auditor to fulfil his obligations the client will be required to waive the privilege.

12 The reason behind such a practice is obvious. Because of the higher duty which they owe to the shareholders, external auditors are bound to disclose otherwise privileged information which comes to their attention and which may have a material impact on the financial statements under audit so that the release of such information to the auditors is a *de facto* abandonment of the privilege by the client.

13 The Auditor General is by law the auditor of the Museum.[4] As such his responsibilities and functions are essentially the same as those of external auditors. He acts as a "public watchdog" which demands in turn that he maintain total independence at all times. He owes no fidelity to the entities which he is called upon to audit. His only obligation in relation to any given audit is to state for the benefit of the responsible minister and Parliament whether the statements audited present information fairly in accordance with stated accounting principles on a basis consistent with prior years together with any reservations he may have.[5]

14 Keeping the foregoing in mind, I believe that the Auditor General must be looked upon as a third party *vis-à-vis* the government entities that he is called upon to audit. In terms of the privilege, it is also apparent that the disclosure of an otherwise privileged document to the Auditor General in the course of an audit is wholly inconsistent with an intent to maintain the privilege and as such amounts to a waiver. The mere fact that the Auditor General cannot be confined by a privilege belonging to the entity which he is called upon to audit,[6] and that he must indeed make use of relevant and material information that comes to his attention in the fulfilment of his statutory mandate clearly establishes that the voluntary release of information to the Auditor General must be understood as a waiver of privilege by all those concerned.

15 The Museum argues, however, that the release of the forensic report to the Auditor General was not voluntary as it was disclosed pursuant to statutory provisions requiring such disclosure. The record does not bear this out. What the record does indicate is that the forensic report was turned over to the Auditor General further to the recommendation of the Audit

and Finance Committee of the Museum made during an *in camera* meeting which was attended by officers of the Office of the Auditor General. The minutes indicate that one of these officers expressed a need for the Office of the Auditor General to satisfy itself that the forensic report was confected in accordance with its standards. This need arose from the view expressed by the same officer that the Auditor General had to be prepared to answer questions about the management of the Museum. [7]

16 That is the context in which the forensic report was turned over to the Office of the Auditor General. There is no evidence that the Auditor General invoked any of his statutory powers to compel the Museum to disclose the report nor is there any indication that the Auditor General would have resorted to any such powers if the Museum had refused disclosure on the grounds of privilege. Furthermore, even if the Auditor General wanted to use his statutory powers, it is not clear that he possessed the power to actually compel the production of the report. Finally, even if he did possess such powers, and if I could read from the record a *de facto* invocation of these powers, it is not obvious to me that the Museum's privilege could not have been validly invoked to resist disclosure.

17 The Museum further argues that the mere possibility that, in the absence of turning over the record, the Auditor General could have reported to the House of Commons its failure to cooperate [8] was sufficient compulsion in itself, and that on that ground alone, the disclosure of the forensic report cannot be said to have been voluntary. I rather think that this highlights the fact that the Museum was confronted with a choice and that it opted to disclose the information rather than preserve its confidentiality.

18 I therefore reject the contention that the Museum was compelled to disclose the report to the Auditor General. The report was turned over to the Auditor General voluntarily and with the full knowledge that it would be reviewed and used in conformity with the Auditor General's statutory mandate. [9] Indeed, it was so used and as it turned out, the Museum and its management were vindicated by the published report of the Auditor General to the responsible Minister which stated, *inter alia*:

> Our review of the KMPG report did not disclose any matters that would have an impact on the financial statements nor have we noted any other matters emerging from the report that would result in a non-compliance issue. [10]

19 In the process, however, the Museum waived the privilege. I have therefore concluded that there is no ground upon which the Museum can maintain the refusal to disclose the report and an order compelling the release of the report to the PIPSC will be issued, with costs against the Museum.

20 In order to preserve the confidentiality of the subject report pending the possible exercise by the Museum of its right of appeal, the release order will be effective thirty days from today's date.
Solicitors of record:
Nelligan Power, Ottawa, for applicant.
Deputy Attorney General of Canada for respondent.

Footnotes

1 R.S.C., 1985, c. A-17.

2 The traditional solicitor-client privilege, and the rationale behind it, is summarized by the Court of Chancery in *Anderson v. Bank of British Columbia* (1876), 2 Ch. D. 644 (C.A.), at p. 649.

3 See *Waugh v. British Railways Board*, [1980] A.C. 521 (H.L.), at p. 544, *per* Lord Edmund-Davies.

4 *Museums Act*, S.C. 1990, c. 3, s. 30.

5 *Auditor General Act*, s. 6.

6 S. 13(3) which compels the staff of the Office of the Auditor General to take any oath of secrecy required to be taken by employees of the entity under audit cannot be construed as preventing the Auditor General from making use of and disclosing to Parliament any information of significance which he has the duty to bring to the attention of Parliament under s. 7.

7 Applicant's application record, Vol. 1, p. 81, at p. 82. The Museum's president, in a subsequent announcement, described the Auditor General's interest in the document as follows:

Because of the lingering influence of the allegations made against the museum's management team with respect to the way it conducted the financial management of the corporation, the OAG felt it necessary to review in detail the financial sections of the forensic audit.

Applicant's application record, Vol. 1, p. 86.

8 See s. 7(1)(*b*) of the *Auditor General Act*.

9 The record reveals that the Audit and Finance Committee was specifically advised that the audit would extend beyond the norms and that the Auditor General had the right (indeed the duty) to report to the Minister, and that the final report would belong to the Minister. Applicant's application record, Vol. 1, p. 83.

10 Applicant's application record, Vol. 1, p. 87.

Tab 4

IPPERWASH PUBLIC INQUIRY

COMMISSIONER'S RULING
RE MOTION BY THE ONTARIO PROVINCIAL POLICE AND THE ONTARIO PROVINCIAL POLICE ASSOCIATION

Introduction

1. The Ontario Provincial Police (the "OPP") and the Ontario Provincial Police Association (the "OPPA") have brought a motion requesting that I set aside the summons that I issued to Commissioner Gwen Boniface of the OPP on June 15, 2005 (the "Summons").

2. The Summons requires Commissioner Boniface to attend before the Inquiry and to produce the following documents:

> (1) The discipline files maintained by the OPP in respect of the "discredible conduct" of Detective Constable James Dyke and Detective Constable Darryl Whitehead;
>
> (2) The discipline files maintained by the OPP in respect of the mugs and t-shirt distributions; and
>
> (3) The orders, policies, guidelines and/or procedures maintained by the OPP in respect of the usage of "informal discipline" including those that would have governed in respect of the informal discipline used under paragraphs 1 and 2.

3. The OPP resists production of the records sought in items (1) and (2) in the absence of a judicial order. The OPP's position is that sections 69(9) and 80 of the *Police Services Act*, R.S.O. 1990, c. P.15 prevent disclosure of internal complaint files to a public inquiry; that a third party records analysis as undertaken in *A.M.* v. *Ryan,* [1997] 1 S.C.R. 157 before a judge of the Superior Court of Justice is necessary before the records can be disclosed; and that the records are privileged on the basis of common law privilege principles.

4. The OPPA objects to the disclosure or production of the contents of the discipline files on the basis of statutory prohibition under sections 69 and 80 of the *Police Services Act.* The OPPA submits further that the materials sought are inadmissible evidence at a public inquiry by virtue of sections 69(9) and 69(10) of the *Police Services Act*, section 11 of the *Public Inquiries Act*, and common law rules governing third party records and confidentiality. The OPPA submits that before the records can be produced to the Commission for inspection, the test for production of third party records as set out in *R.* v. *O'Connor* (1995), 103 C.C.C. (3d) 1 (S.C.C.) must be met.

5. The Province of Ontario objects to the production of the materials on the basis that they are not relevant to the mandate of the Inquiry, and in the alternative are privileged. In the Province's view, an *O'Connor* or *Ryan* application is not necessary, and the issue can be decided on the basis of privilege.

6. Aboriginal Legal Services of Toronto ("ALST") responds to the motion of the OPP and the OPPA and requests that their motion to quash the Summons to Commissioner Gwen Boniface dated June 15, 2005 be dismissed, and that the materials subject to the Summons be produced to the parties with standing. ALST argues that sections 69 and 80 of the *Police Services Act* are inapplicable to the records over which privilege is asserted, and that the records do not satisfy the test for "case-by-case" privilege under the common law.

7. The Chiefs of Ontario opposes the motion of the OPP and OPPA on the basis that the documents sought under the Summons are highly relevant and that there is no statutory or common law bar to the Commission issuing the Summons.

8. Written submissions were received by the Commission from the parties that decided to make submissions, and oral argument was heard in public at the Inquiry on July 19 and July 20, 2005.

Facts

9. On May 31, 2005, Deputy Commissioner John Carson of the OPP testified before this Inquiry about comments made by Officers Dyke and Whitehead on September

5, 1995. On September 5, 1995, Officers Dyke and Whitehead were engaged in surveillance of the Ipperwash Provincial Park and the Army Camp, during the course of which they made a videotape. The following exchange occurs in the videotape entered as Exhibit P-452 at the Inquiry and transcribed at pages 239-241 of the May 31, 2005 hearing transcript:

SPEAKER 1: What the fuck is this? UP --
25 SPEAKER 2: You're not supposed to be
1 drinking over in that area.
2 SPEAKER 1: Yeah, what we're freelance?
3 SPEAKER 2: (laughs) What --
4 SPEAKER 1: What are we supposed to be,
5 UPS?
6 SPEAKER 2: UPA.
7 SPEAKER 1: He said UPS. Where are you
8 guys from? UPS.
9 SPEAKER 2: UPS.
10 SPEAKER 1: United --
11 SPEAKER 2: Parcel Service, sir.
12 SPEAKER 1: -- Postal.
13 SPEAKER 2: And we're disgruntled. Still
14 a lot of press down there?
15 SPEAKER 1: No, there's no one down
16 there. Just a big, fat fuck Indian.
17 SPEAKER 2: The camera's rolling.
18 SPEAKER 1: Yeah. We had this plan, you
19 know. We thought if we could five (5) or six (6) cases
20 of Labatt's 50, we could bait them.
21 SPEAKER 2: Yeah.
22 SPEAKER 1: And we'd have this big net at
23 a pit.
24 SPEAKER 2: Creative thinking.
25 SPEAKER 1: Works in the south with
1 watermelon.

10. Deputy Commissioner Carson testified on May 31, 2005 that internal disciplinary action was taken against both officers involved in this exchange (*May 31, 2005 transcript, page 241, lines 15 and 16*). He stated that he was not aware of the particular disciplinary action, but knew that a formal hearing under the *Police Services Act* was not held (*May 31, 2005 transcript, page 242, lines 3 and 6).*

11. On June 1, 2005 after informing himself of additional information about the discipline imposed on Officers Dyke and Whitehead, Deputy Commissioner Carson testified that when the incident came to light, Officer Dyke had retired from the OPP and was working for the OPP on a contract basis. At the conclusion of the investigation into the incident, Officer Dyke no longer provided services to the OPP (*June 1, 2005 transcript, page 16, lines 8-25*). Officer Whitehead accepted informal discipline which consisted of forfeiting three days pay and attending four days of First Nations awareness training (*June 1, 2005 transcript, page 18, lines 2-25*).

12. Also on June 1, 2005 Deputy Commissioner Carson testified that several officers had been subject to informal discipline as a result of their involvement in the production and distribution of mugs and t-shirts in relation to Ipperwash (*June 1 transcript, page 26, lines 9-11*). A CD-Rom with images of the mugs and t-shirts was entered as Exhibit P-458 at the Inquiry. The mug depicts a "Team Ipperwash '95" logo and an image of an arrow through an OPP shoulder flash. The t-shirt depicts an "E.R.T., T.R.U., '95" logo with a horizontal white feather underneath it. In aboriginal tradition, the arrow and feathers symbolize dead warriors (*June 1 transcript, page 28, lines 19-22*).

13. On June 1, 2005, counsel for ALST requested production through Commission counsel of: the discipline files maintained by the OPP in respect of the "discredible conduct" of Officers Dyke and Whitehead consisting of the videotaped verbal exchange; the discipline files maintained by the OPP in respect of the mug and t-shirt distributions; and the orders, policies, guidelines and/or procedures maintained by the OPP in respect of the usage of "informal discipline".

14. On June 7, 2005, Counsel for the OPP wrote to Commission counsel and refused to produce the discipline files, stating: "The OPP as a matter of policy and in

reliance upon existing statutory authority, cannot produce, upon request, internal complaint files."

15. On June 15, 2005, I issued the Summons to Commissioner Gwen Boniface of the OPP requiring Commissioner Boniface to attend before the Inquiry and to produce:

> (1) The discipline files maintained by the OPP in respect of the "discredible conduct" of Detective Constable James Dyke and Detective Constable Darryl Whitehead;
>
> (2) The discipline files maintained by the OPP in respect of the mugs and t-shirt distributions; and
>
> (3) The orders, policies, guidelines and/or procedures maintained by the OPP in respect of the usage of "informal discipline" including those that would have governed in respect of the informal discipline used under paragraphs 1 and 2.

16. The OPP has provided to the Commission the orders and policies referred to in item (3) but has refused to produce the files referred to in (1) and (2).

17. The general course of conduct adhered to by this Commission to obtain documents from the OPP has been as follows: Commission counsel have requested that documents be produced and the OPP has then asked that a summons be issued. Once a summons has been served, the OPP has produced the records sought to the Commission. In this case, notwithstanding that a summons was issued, the OPP refused to produce the documents.

<u>Powers of the Commission</u>

18. I have been appointed Commissioner to conduct this Inquiry by an Order in Council (1662/2003) dated November 12, 2003. Pursuant to section 3 of the *Public Inquiries Act*, R.S.O. 1990, Chapter P. 41, the conduct of an inquiry is under the control and direction of the commission conducting the inquiry.

19. Section 2 of the *Public Inquiries Act* states a commission may be appointed when the Lieutenant Governor in Council:

> considers it expedient to cause inquiry to be made concerning any matter connected with or affecting the good government of Ontario or the conduct of any part of the public business thereof or of the administration of justice therein or that the Lieutenant Governor in Council declares to be a matter of public concern . . . the Lieutenant Governor in Council may, by commission, appoint one or more persons to conduct the inquiry.

20. Under the Order in Council that established this Commission, the Lieutenant Governor in Council has appointed me as Commissioner to:

> (a) inquire into and report on events surrounding the death of Dudley George; and
>
> (b) make recommendations directed to the avoidance of violence in similar circumstances.

21. The Commission has a fact-finding mandate and broad powers to summon relevant witnesses and documents to fulfill that mandate. Subsection 7(1) of the *Public Inquiries Act* provides:

> Power to summon witnesses, papers, etc.
>
> 7.(1) A commission may require any person by summons,
>
> (a) to give evidence on oath or affirmation at an inquiry; or
>
> (b) to produce in evidence at an inquiry such documents and things as the commission may specify,
>
> relevant to the subject-matter of the inquiry and not inadmissible in evidence at the inquiry under section 11.

22. Section 11 of the *Public Inquiries Act* provides:

> Privilege
>
> 11. Nothing is admissible in evidence at an inquiry that would be inadmissible in a court by reason of any privilege under the law of evidence.

23. Pursuant to the *Act*, the legislature has signaled that a public inquiry may admit evidence that is otherwise inadmissible in a court of law subject to one exception: assuming it is relevant, the only evidence that is inadmissible in a public inquiry is evidence protected by a privilege.

24. The legislature's intention to allow for the broad admission of evidence in public inquiries is consistent with the purpose of public inquiries. As Cory J. stated in *Canada (Attorney General)* v. *Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 457 (at para. 30), citing *Phillips* v. *Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97 (at pp. 137-138), one of the primary functions of public inquiries is fact-finding and investigation. According to Cory J. in *Canada (Attorney General)* v. *Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 457 (at para. 34):

> A commission of inquiry is neither a criminal trial nor a civil action for the determination of liability. It cannot establish either criminal culpability or civil responsibility for damages. Rather, an inquiry is an investigation into an issue, event, or series of events. The findings of a commissioner relating to that investigation are simply findings of fact and statements of opinion reached by the commissioner at the end of the inquiry. They are unconnected to normal legal criteria. They are based upon and flow from a procedure which is not bound by the evidentiary or procedural rules of a courtroom. There are no legal consequences attached to the determinations of a commissioner. They are not enforceable and do not bind courts considering the same subject matter. The nature of an inquiry and its limited consequences were correctly set out in *Beno* v. *Canada (Commissioner and Chairperson, Commission of Inquiry into the Deployment of Canadian Forces to Somalia),* [1997] 2 F.C. 527, at para. 23:
>
> > "A public inquiry is not equivalent to a civil or criminal trial. . . In a trial, the judge sits as an adjudicator, and it is the responsibility of the parties alone to present the evidence. In an inquiry, the commissioners are endowed with wide-ranging investigative powers to fulfil their investigative mandate . . . The rules of evidence and procedure are

> therefore considerably less strict for an inquiry than for a court. Judges determine rights as between parties; the Commission can only "inquire" and "report" . . .Judges may impose monetary or penal sanctions; the only potential consequence of an adverse finding . . . is that reputations could be tarnished."

Rules of Procedure and Practice of this Inquiry

25. I have determined, pursuant to my authority under section 3 of the *Public Inquiries Act* and the Order in Council, that this Inquiry will be conducted under the Inquiry's Rules of Procedure and Practice (the "Rules"). All parties to the Inquiry have agreed to abide by the Rules. The Order in Council establishing this Inquiry provides in paragraph 9:

> All ministries, Cabinet Office, the Premier's Office, and all boards, agencies and commissions of the government of Ontario shall, subject to any privilege or other legal restrictions, assist the commission to the fullest extent so that the commission may carry out its duties.

26. Rule 13 of the Rules of the Inquiry specifically highlights that all relevant evidence is admissible in a public inquiry unless it is privileged:

> Subject to section 11 of the *Public Inquiries Act*, the Commissioner is entitled to receive any relevant evidence at the Inquiry, which might otherwise be inadmissible in a court of law. The strict rules of evidence will not apply to determine the admissibility of evidence.

27. Under the Inquiry Rules, I have the power to order production of documents over which privilege has been claimed to Commission counsel. Rule 32 provides:

> The Commission expects all relevant documents to be produced to the Commission by any party with standing where the documents are in the possession, control or power of the party. Where a party objects to the production

> of any documents on the grounds of privilege, the document shall be produced in its original unedited form to Commission counsel who will review and determine the validity of the privilege claim. The party and/or that party's counsel may be present during the review process. In the event the party claiming privilege disagrees with Commission counsel's determination, the Commissioner, on application, may either inspect the impugned document(s) and make a ruling or may direct the issue to be resolved by the Regional Senior Justice in Toronto or His designate.

28. In *Lyons* v. *Toronto Computer Leasing Inquiry* (2004), 70 O.R (3d) 39 (Div. Ct.), Jeffrey Lyons sought an order quashing a ruling of the Honourable Denise Bellamy, Commissioner of the Toronto Computer Leasing Inquiry, which provided for Commission counsel to review documents over which Mr. Lyons was claiming solicitor-client privilege. In its decision, the Divisional Court confirmed that a commissioner has the power to determine whether documents are privileged and, therefore, inadmissible in Commission hearings (*Lyons* v. *Toronto Computer Leasing Inquiry* at para. 35). The Court also upheld the procedure of Commission counsel screening documents for privilege (at paras. 38-44).

<u>There is no statutory privilege</u>

29. In my view, the sections of the *Police Services Act*, upon which the OPP and the OPPA rely, do not create a statutory privilege over the documents.

30. Section 80 of the *Police Services Act* provides:

> Every person engaged in the administration of this Part shall preserve secrecy with respect to all information obtained in the course of his or her duties under this Part and shall not communicate such information to any other person except,
>
> (a) as may be required in connection with the administration of this Act and the regulations;
>
> (b) to his or her counsel;

(c) as may be required for law enforcement purposes; or

(d) with the consent of the person, if any, to whom the information relates.

31. Statutory secrecy and confidentiality provisions do not confer privilege. In *Transamerica Life Insurance Co. of Canada* v. *Canada Life Assurance Co*. (1995), 27 O.R. (3d) 291 (Gen. Div.), Justice Sharpe considered the issue of whether the Office of the Superintendent of Financial Institutions was required to produce documents in light of the following confidentiality provisions:

(a) section 22 of the *Office of the Superintendent of Financial Services Act*, R.S.C. 1985, c. 18 which provides: "(1) All information (a) regarding the business or affairs of a financial institution or persons dealing therewith that is obtained by the Superintendent, or by any person acting under the direction of the Superintendent, as a result of the administration or enforcement of any Act of Parliament . . . . is confidential and shall be treated accordingly"; and

(b) section 672 of the *Insurance Companies Act*, S.C. 1991, c, 47 which provides: "(1) Subject to section 673, all information regarding the business or affairs of a company, society, foreign company or provincial company or persons dealing therewith that is obtained by the Superintendent, or by any person acting under the direction of the Superintendent, as a result of the administration or enforcement of any Act of Parliament is confidential and shall be treated accordingly."

32. Justice Sharpe in the *Transamerica Life Insurance* decision at paragraph 25 said the following with respect to statutory confidentiality:

> . . . a statutory promise of confidentiality does not constitute an absolute bar to the information sought here, in my view, a statutory promise of confidentiality does not constitute an absolute bar to compelling production of the documents and information in the possession and control of OSFI. I see no reason to give statutory confidentiality a higher degree of protection that any other form of confidentiality. There is no reason why Parliament should be taken to have adopted the legal category of confidentiality without intending that category to have its ordinary legal meaning and effect. It is well established that confidential information may be

> subpoenaed and introduced in evidence if ordered by a court. The general rule is that although information is confidential, it must be produced unless the test laid down in *Slavutych* v. *Baker,* [1976] 1 S.C.R. 254 is met. Parliament could have provided that the information and documents at issue here could not be compelled by summons, but in my view, to accomplish this end, specific language to that effect would be required.

33. The OPP sought to distinguish this case on the basis that section 80 of the *Police Services Act* is different from the provisions considered by Justice Sharpe because it contains exceptions for when information may be communicated. In my view, the enumeration of these exceptions does not change the nature of section 80 of the *Police Services Act*: it is a confidentiality or secrecy provision, and not a privilege provision.

34. The OPP also submitted that it relies on the following passage by Peter Hogg in *Liability of the Crown,* quoted in the *Transamerica Life Insurance* decision: "Many statutes contain provisions that expressly make information confidential . . . The scope of these provisions is a matter of interpretation in each case. Those provisions that specifically prohibit the introduction of evidence in court will obviously be effective to withhold the protected material from litigation . . . ". In my view, this statement points to the necessity of looking to the specific language of a statute to interpret its provisions in a given case.

35. If the legislature intended to establish a privilege, it would have done so explicitly. The *Education Act*, for example*,* creates a statutory privilege over pupil records:

> A record is **privileged** for the information and use of supervisory officers and the principal and teachers of the school for the improvement of instruction of the pupil, and such record,
>
> (a) subject to subsections (2.1), (3) and (5), is not available to any other person; and
>
> (b) except for the purposes of subsection (5), is not **admissible in evidence for any purpose in any trial, inquest, inquiry, examination, hearing or other**

> **proceeding**, except to prove the establishment, maintenance, retention or transfer of the record,
>
> without the written permission of the parent or guardian of the pupil or, where the pupil is an adult, the written permission of the pupil. R.S.O. 1990, c. E.2, s. 266 (2); 1991, c. 10, s. 7 (2). [emphasis added]

36. Subsection 69(9) of the *Police Services Act* provides:

> (9) No document prepared as a result of a complaint is admissible in a civil proceeding, except at a hearing held under this Part.

37. Subsection 69(9) of the *Police Services Act* uses neither the word "privileged", nor does it delineate a broad category of proceedings as is the case in the *Education Act*; instead, it refers only to documents being inadmissible in civil proceedings.

38. Pursuant to section 11 of the *Public Inquiries Act* and in accordance with the broad investigative mandate of public inquiries, evidence that is inadmissible in civil proceedings may be admissible in public inquiries: the only exclusion is for privilege. If the legislature had intended to exclude evidence that is inadmissible in a civil proceeding from admission in public inquiries, the legislature would have referred to this exclusion expressly. When a provision specifically mentions one or more items but is silent with respect to other items that are comparable, it is presumed that the silence is deliberate and reflects an intention to exclude the items that are not mentioned (Sullivan, *Sullivan and Driedger on the Construction of Statutes,* Fourth Edition (2002), Butterworths: at p. 187).

39. In my view, section 11 of the *Public Inquiries Act* is a full answer to the question of whether the *Police Services Act* prevents the admission of the discipline files as evidence at the Inquiry; however, the OPP and the OPPA have raised the issue of whether a public inquiry is a "civil proceeding" as referred to in section 69 of the *Police Services Act*.

40. *Canada (Solicitor General)* v. *Ontario (Royal Commission of Inquiry into Confidentiality of Health Records)*, [1981] 2 S.C.R. 494, the case relied on by the OPP and the OPPA for the proposition that a public inquiry is a civil proceeding does not interpret "civil proceeding" to include a judicial inquiry. This decision stands for the proposition that the police informer privilege applies to a public inquiry. It does not define a public inquiry as a civil proceeding.

41. The OPPA relies on *Re Newfoundland and Labrador & Royal Newfoundland Constabulary Association*, (2004) 133 L.A.C. (4th) 289 (Arbitrator Oakley) as authority for the proposition that a judicial inquiry is a civil proceeding. This case is distinguishable as it relates to the interpretation of a collective agreement.

42. In my view, a public inquiry is not a "civil proceeding" as referred to in the *Police Services Act*. A public inquiry is an investigative and not an adjudicative process. It is inquisitorial not adversarial. Under the mandate of this Inquiry, I can make no determination of civil or criminal liability, nor can I impose damages or penalties. The Order in Council establishing the Commission provides that:

> The commission shall perform its duties without expressing any conclusions or recommendation regarding the civil or criminal liability of any person or organization. The commission, in the conduct of its inquiry, shall ensure that it does not interfere with any ongoing legal proceedings relating to these matters.

43. My conclusion that the phrase "civil proceedings" does not include public inquiries is supported by legal dictionary definitions of the words "civil" and "proceeding":

(a) The *Canadian Law Dictionary* (Fourth Edition (1999), Barron's: at p. 47) provides the following definition of the word "civil" but does not contain a definition of "proceeding":

> **CIVIL** 1. The branch of law that pertains to suits other than criminal practice and is concerned with the rights and duties of persons in contract, tort, etc.; 2. civil law as opposed to common law;

(b) The *Dictionary of Canadian Law* (Third Edition (2004), Thomson Carswell: at p. 192 and 998-999) provides the following definition of the words "civil" and "proceeding":

> **CIVIL**. *adj*. 1. Of legal matters, private as opposed to criminal. 2. Used to distinguish the criminal courts and proceedings in them from military court and proceedings. 3. Used to distinguish secular from religious.
>
> . . . .
>
> **PROCEEDING.** *n*. . . . . 8. Includes an action, application or submission to any court or judge or other body having authority by law or by consent to make decisions as to the rights of persons.

44. A public inquiry is of a very different nature from both civil trials and administrative hearings. In civil actions and purely administrative hearings, there is some *lis* between the participants, which the decision-maker must determine. An adversarial process is engaged and the role of the judge or tribunal is to reach a decision with respect to that *lis* based on the evidence and argument presented. In contrast, there is no *lis* in a public inquiry. Public inquiries are investigative.

45. The OPP has argued that because section 69(9) of the *Police Services Act* defines “civil proceeding” to include hearings held under Part V of the *Police Services Act*, which can result in findings of misconduct similar to those that may be made in public inquiries, a “civil proceeding” must also include a public inquiry. In my view, a hearing under the *Police Services Act* is quite different from a public inquiry because it is adversarial and because it can result in penalties being imposed on the officers involved.

46. Accordingly, the *Police Services Act* does not provide a statutory bar to the Commission’s receipt of the summonsed discipline files, or to production of the allegedly privileged documents to Commission counsel.

Third Party Records Analysis

47. The third party records analysis proposed by the OPP and the OPPA has no application. While some of the criminal cases in which records relating to officers’

misconduct and discipline are sought by accused persons do refer to the privacy interest of officers in relation to their employment records, in the cases that follow *R.* v. *O'Connor* (1985), 103 C.C.C. (3d) 1 (S.C.C.), in the context of police discipline files, the "third party" is the police and not the individual officer. Typically, an accused will seek production of documents relating to the investigating officers. Such documents are in the possession of the police and not in the possession of the Crown. The documents are therefore not automatically producible to the accused under the Crown's disclosure obligations.

48. In this case, the documents are within the possession of a party to this proceeding, which, as such, has an obligation to produce relevant documents. It is within my mandate to make decisions regarding relevance and privilege.

Case-by-Case Privilege

49. I have determined that there is no statutory privilege or bar in the *Police Services Act* with respect to the documents sought. There may be a claim of common law case-by-case privilege based on the Wigmore criteria as referred to in *Slavutych* v. *Baker,* [1976] 1 S.C.R. 254 and *A.M.* v. *Ryan*, [1997] 1 S.C.R. 157 at para. 20; however, without access to the documents, neither Commission counsel nor I can assess whether the documents are privileged.

50. My decision with respect to possible case-by-case privilege is reserved pending review of the documents by Commission counsel and if necessary, by me.

Waiver

51. ALST submitted that privilege, to the extent that it is found to exist at law and on these facts, over the discipline files in relation to Officers Dyke and Whitehead has been waived by virtue of Deputy Commissioner Carson's disclosure to the Commission and to the public of the details of the discipline imposed on the officers. In my view, there has been no waiver by the OPP or its officers as a result of the disclosure to the Commission or to the public of the details of the discipline with the consent of the officers.

Ruling

52. In my view, the documents should be produced to Commission counsel. Accordingly, my ruling is as follows:

(i) Documents over which privilege are claimed should be produced to Commission counsel in accordance with Rule 32, which delineates the procedure upheld in *Lyons* v. *Toronto Computer Leasing Inquiry*, (2004) 70 O.R (3d) 39 (Div. Ct.);

(ii) There is no statutory privilege or bar preventing the production of the documents required by my summons to Commissioner Boniface dated June 15, 2005; and

(iii) A third party records analysis by a Judge of the Superior Court of Justice has no application because the documents are held by a party to this Inquiry.

53. The OPP is required to produce the discipline files in respect of the "discredible conduct" of Detective Constable James Dyke and Detective Constable Darryl Whitehead on September 5, 1995, and the discipline files maintained by the OPP in respect of the mugs and t-shirt distributions. The documents should be produced to Commission counsel who will review the documents. I will then make my decision regarding the claim of common law, case-by-case privilege.

54. Therefore, the motions to set aside the Summons are dismissed. I direct that:

(i) The OPP shall deliver the following documents to Commission counsel by no later than 5:00 p.m. August 22, 2005:

(1) The discipline files maintained by the OPP in respect of the "discredible conduct" of Detective Constable James Dyke and Detective Constable Darryl Whitehead; and

(2) The discipline files maintained by the OPP in respect of the mugs and t-shirt distributions.

(ii) Commission counsel shall review the documents for relevance and possible privilege;

(iii) The review will be conducted confidentially on Inquiry premises;

(iv) Counsel for the OPP and the OPPA may attend and participate in the review; and

(v) Relevant and non-privileged material will be distributed to parties with standing in the usual manner employed by this Inquiry.

55. The OPPA has requested that if after hearing submissions I want to enforce the Summons by requiring the OPP to produce the documents to Commission counsel, I should first state a case in writing to the Divisional Court in accordance with subsection 6(1) of the *Public Inquiries Act*. If, after consideration of this ruling, the OPPA still wishes me to state a case, the OPPA should provide confirmation of this request including the particulars of the case to be stated no later than 5:00 p.m. on August 19, 2005.

Released: August 15, 2005

The Honourable Sidney B. Linden
Commissioner

Tab 5

1998 CarswellOnt 1
Supreme Court of Canada

Rizzo & Rizzo Shoes Ltd., Re

1998 CarswellOnt 1, 1998 CarswellOnt 2, [1998] 1 S.C.R. 27, [1998] A.C.S. No. 2, [1998] S.C.J. No. 2, 106 O.A.C. 1, 154 D.L.R. (4th) 193, 221 N.R. 241, 33 C.C.E.L. (2d) 173, 36 O.R. (3d) 418 (headnote only), 50 C.B.R. (3d) 163, 76 A.C.W.S. (3d) 894, 98 C.L.L.C. 210-006, J.E. 98-201

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez and Lindy Wagner on their own behalf and on behalf of the other former employees of Rizzo & Rizzo Shoes Limited, Appellants v. Zittrer, Siblin & Associates, Inc., Trustees in Bankruptcy of the Estate of Rizzo & Rizzo Shoes Limited, Respondent and The Ministry of Labour for the Province of Ontario, Employment Standards Branch, Party

Gonthier, Cory, McLachlin, Iacobucci, Major JJ.

Heard: October 16, 1997
Judgment: January 22, 1998
Docket: 24711

Proceedings: reversing (1995), 30 C.B.R. (3d) 1 (C.A.); reversing (1991), 11 C.B.R. (3d) 246 (Ont. Gen. Div.)

Counsel: *Steven M. Barrett* and *Kathleen Martin*, for the appellants.
Raymond M. Slattery, for the respondent.
David Vickers, for the Ministry of Labour for the Province of Ontario, Employment Standards Branch.

Related Abridgment Classifications
Bankruptcy and insolvency
X Priorities of claims
  X.2 Preferred claims
    X.2.d Wages and salaries of employees
      X.2.d.iv Type of wages claimable
Labour and employment law
III Employment standards legislation
  III.2 Object of legislation
Labour and employment law
III Employment standards legislation
  III.13 Termination of employment
    III.13.b Termination pay
      III.13.b.i Entitlement
Labour and employment law
III Employment standards legislation
  III.13 Termination of employment
    III.13.c Severance pay
      III.13.c.i Entitlement

Table of Authorities
Cases considered by / Jurisprudence citée par *Iacobucci J.*:

Abrahams v. Canada (Attorney General), [1983] 1 S.C.R. 2, 142 D.L.R. (3d) 1, 46 N.R. 185, 83 C.L.L.C. 14,010 (S.C.C.) — referred to

British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of), 40 C.B.R. (3d) 25, [1996] 7 W.W.R. 652, 21 B.C.L.R. (3d) 91 (B.C. S.C.) — considered

Canada (Procureure générale) c. Hydro-Québec, *(*sub nom. *R v. Hydro-Québec)* 118 C.C.C. (3d) 97, *(*sub nom. *R. v. Hydro-Québec)* 151 D.L.R. (4th) 32, 9 C.R. (5th) 157, *(*sub nom. *R. v. Hydro-Québec)* 217 N.R. 241, *(*sub nom. *R. v. Hydro-Québec)* [1997] 3 S.C.R. 213, 24 C.E.L.R. (N.S.) 167 (S.C.C.) — referred to

Friesen v. R., 95 D.T.C. 5551, *(*sub nom. *Friesen v. Canada)* [1995] 3 S.C.R. 103, *(*sub nom. *Friesen v. Minister of National Revenue)* 186 N.R. 243, *(*sub nom. *Friesen v. Minister of National Revenue)* 102 F.T.R. 238 (note), *(*sub nom. *Friesen v. Canada)* 127 D.L.R. (4th) 193, *(*sub nom. *Friesen v. Canada)* [1995] 2 C.T.C. 369 (S.C.C.) — referred to

Hills v. Canada (Attorney General), 88 C.L.L.C. 14,011, [1988] 1 S.C.R. 513, 48 D.L.R. (4th) 193, 84 N.R. 86, 30 Admin. L.R. 187 (S.C.C.) — referred to

Kemp Products Ltd., Re (1978), 27 C.B.R. (N.S.) 1 (Ont. S.C.) — distinguished

Machtinger v. HOJ Industries Ltd., 40 C.C.E.L. 1, [1992] 1 S.C.R. 986, *(*sub nom. *Lefebvre v. HOJ Industries Ltd.; Machtinger v. HOJ Industries Ltd.)* 53 O.A.C. 200, 91 D.L.R. (4th) 491, 7 O.R. (3d) 480n, *(*sub nom. *Lefebvre v. HOJ Industries Ltd.; Machtinger v. HOJ Industries Ltd.)* 136 N.R. 40, 92 C.L.L.C. 14,022 (S.C.C.) — considered

Malone Lynch Securities Ltd., Re, [1972] 3 O.R. 725, 17 C.B.R. (N.S.) 105, 29 D.L.R. (3d) 387 (Ont. S.C.) — not followed

Mills-Hughes v. Raynor (1988), 19 C.C.E.L. 6, 47 D.L.R. (4th) 381, 25 O.A.C. 248, 38 B.L.R. 211, 68 C.B.R. (N.S.) 179, 63 O.R. (2d) 343 (Ont. C.A.) — considered

R. v. Morgentaler, 157 N.R. 97, 125 N.S.R. (2d) 81, 349 A.P.R. 81, [1993] 3 S.C.R. 463, 107 D.L.R. (4th) 537, 85 C.C.C. (3d) 118, 25 C.R. (4th) 179 (S.C.C.) — considered

R. v. Paul, [1982] 1 S.C.R. 621, 27 C.R. (3d) 193, 67 C.C.C. (2d) 97, 138 D.L.R. (3d) 455, 42 N.R. 1 (S.C.C.) — referred to

R. v. TNT Canada Inc. (1996), 17 C.C.E.L. (2d) 1, 131 D.L.R. (4th) 289, 96 C.L.L.C. 210-015, 87 O.A.C. 326, 27 O.R. (3d) 546 (Ont. C.A.) — considered

R. v. Vasil, [1981] 1 S.C.R. 469, 20 C.R. (3d) 193, 58 C.C.C. (2d) 97, 35 N.R. 451, 121 D.L.R. (3d) 41 (S.C.C.) — referred to

R. v. Z. (D.A.), 16 C.R. (4th) 133, [1992] 2 S.C.R. 1025, 76 C.C.C. (3d) 97, 5 Alta. L.R. (3d) 1, 140 N.R. 327, 131 A.R. 1, 25 W.A.C. 1 (S.C.C.) — referred to

Royal Bank v. Sparrow Electric Corp., 193 A.R. 321, 135 W.A.C. 321, [1997] 2 W.W.R. 457, 46 Alta. L.R. (3d) 87, 208 N.R. 161, 143 D.L.R. (4th) 385, 44 C.B.R. (3d) 1, [1997] 1 S.C.R. 411, *(*sub nom. *R. v. Royal Bank)* 97 D.T.C. 5089 (S.C.C.) — referred to

Telegram Publishing Co. v. Zwelling (1972), 1 L.A.C. (2d) 1 (Ont. Arb.) — considered

U.F.C.W., Local 617P v. Royal Dressed Meats Inc. (Trustee of) (1989), 76 C.B.R. (N.S.) 86, 70 O.R. (2d) 455, 63 D.L.R. (4th) 603 (Ont. S.C.) — referred to

Verdun v. Toronto Dominion Bank, 94 O.A.C. 211, 203 N.R. 60, [1996] 3 S.C.R. 550, 139 D.L.R. (4th) 415, 28 B.L.R. (2d) 121, 12 C.C.L.S. 139 (S.C.C.) — referred to

Wallace v. United Grain Growers Ltd. (1997), 152 D.L.R. (4th) 1, 219 N.R. 161 (S.C.C.) — referred to

Statutes considered / Législation citée:

Bankruptcy and Insolvency Act/Faillité et l'insolvabilité, Loi sur la, R.S.C./L.R.C. 1985, c. B-3

Generally — referred to

s. 121(1) — considered

Employment Standards Act, R.S.O. 1970, c. 147

s. 13 — referred to

s. 13(2) — considered

Employment Standards Act, 1974, S.O. 1974, c. 112

s. 40(7) — considered

Employment Standards Act, R.S.O. 1980, c. 137

Generally — referred to

s. 7(5) [en. 1986, c. 51, s. 2] — considered

s. 40 [am. 1981, c. 22, s. 1; am. 1987, c. 30, s. 4] — considered

s. 40(1) [rep. & sub. 1987, c. 30, s. 4(1)] — considered

s. 40(2) — referred to

s. 40(5) [rep. & sub. 1981, c. 22, s. 1(1)] — referred to

s. 40(7)(a) [en. 1981, c. 22, s. 1(3)] — considered

s. 40a [en. 1981, c. 22, s. 2(1)] — considered

s. 40a(1) [en. 1981, c. 22, s. 2(1)] — considered

s. 40a(1)(a) [en. 1981, c. 22, s. 2(1)] — referred to

s. 40a(1a) [en. 1987, c. 30, s. 5(1)] — considered

Employment Standards Amendment Act, 1981, S.O. 1981, c. 22

s. 2(1) — considered

s. 2(3) — considered

Interpretation Act, R.S.O. 1980, c. 219

s. 10 — considered

Interpretation Act/Interprétation, Loi d', R.S.O./L.R.O. 1990, c. I.11

s. 10 — considered

s. 17 — considered

Labour Relations and Employment Statute Law Amendment Act, 1995/Relations de travail et l'emploi, Loi de 1995 modifiant des lois en ce qui concerne les, S.O./L.O. 1995, c. 1

s. 74(1) — considered

s. 75(1) — considered

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

1 This is an appeal by the former employees of a now bankrupt employer from an order disallowing their claims for termination pay (including vacation pay thereon) and severance pay. The case turns on an issue of statutory interpretation. Specifically, the appeal decides whether, under the relevant legislation in effect at the time of the bankruptcy, employees are entitled to claim termination and severance payments where their employment has been terminated by reason of their employer's bankruptcy.

1. Facts

2 Prior to its bankruptcy, Rizzo & Rizzo Shoes Limited ("Rizzo") owned and operated a chain of retail shoe stores across Canada. Approximately 65% of those stores were located in Ontario. On April 13, 1989, a petition in bankruptcy was filed against the chain. The following day, a receiving order was made on consent in respect of Rizzo's property. Upon the making of that order, the employment of Rizzo's employees came to an end.

3 Pursuant to the receiving order, the respondent, Zittrer, Siblin & Associates, Inc. (the "Trustee") was appointed as trustee in bankruptcy of Rizzo's estate. The Bank of Nova Scotia privately appointed Peat Marwick Limited ("PML") as receiver and manager. By the end of July, 1989, PML had liquidated Rizzo's property and assets and closed the stores. PML paid all wages, salaries, commissions and vacation pay that had been earned by Rizzo's employees up to the date on which the receiving order was made.

4 In November 1989, the Ministry of Labour for the Province of Ontario (Employment Standards Branch) (the "Ministry") audited Rizzo's records to determine if there was any outstanding termination or severance pay owing to former employees under the *Employment Standards Act*, R.S.O. 1980, c. 137, as amended (the "*ESA*"). On August 23, 1990, the Ministry delivered a proof of claim to the respondent Trustee on behalf of the former employees of Rizzo for termination pay and vacation pay thereon in the amount of approximately $2.6 million and for severance pay totalling $14,215. The Trustee disallowed the claims, issuing a Notice of Disallowance on January 28, 1991. For the purposes of this appeal, the relevant ground for disallowing the claim was the Trustee's opinion that the bankruptcy of an employer does not constitute a dismissal from employment and thus, no entitlement to severance, termination or vacation pay is created under the *ESA*.

5 The Ministry appealed the Trustee's decision to the Ontario Court (General Division) which reversed the Trustee's disallowance and allowed the claims as unsecured claims provable in bankruptcy. On appeal, the Ontario Court of Appeal overturned the trial court's ruling and restored the decision of the Trustee. The Ministry sought leave to appeal from the Court of Appeal judgment, but discontinued its application on August 30, 1993. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested an order granting them leave to appeal. This Court's order granting those applications was issued on December 5, 1996.

2. Relevant Statutory Provisions

6 The relevant versions of the *Bankruptcy Act* (now the *Bankruptcy and Insolvency Act*) and the *Employment Standards Act* for the purposes of this appeal are R.S.C. 1985, c. B-3 (the "*BA*"), and R.S.O. 1980, c. 137, as amended to April 14, 1989 (the "*ESA*") respectively:

Employment Standards Act, R.S.O. 1980, c. 137, as amended:

7.--

(5) Every contract of employment shall be deemed to include the following provision:

All severance pay and termination pay become payable and shall be paid by the employer to the employee in two weekly instalments beginning with the first full week following termination of employment and shall be allocated to such weeks accordingly. This provision does not apply to severance pay if the employee has elected to maintain a right of recall as provided in subsection 40a (7) of the *Employment Standards Act*.

40.-- (1) No employer shall terminate the employment of an employee who has been employed for three months or more unless the employee gives,

(a) one weeks notice in writing to the employee if his or her period of employment is less than one year;

(b) two weeks notice in writing to the employee if his or her period of employment is one year or more but less than three years;

(c) three weeks notice in writing to the employee if his or her period of employment is three years or more but less than four years;

(d) four weeks notice in writing to the employee if his or her period of employment is four years or more but less than five years;

(e) five weeks notice in writing to the employee if his or her period of employment is five years or more but less than six years;

(f) six weeks notice in writing to the employee if his or her period of employment is six years or more but less than seven years;

(g) seven weeks notice in writing to the employee if his or her period of employment is seven years or more but less than eight years;

(h) eight weeks notice in writing to the employee if his or her period of employment is eight years or more,

and such notice has expired.

. . . . .

(7) Where the employment of an employee is terminated contrary to this section,

(a) the employer shall pay termination pay in an amount equal to the wages that the employee would have been entitled to receive at his regular rate for a regular non-overtime work week for the period of notice prescribed by subsection (1) or (2), and any wages to which he is entitled;

. . . . .

40*a* ...

(1a) Where,

(a) fifty or more employees have their employment terminated by an employer in a period of six months or less and the terminations are caused by the permanent discontinuance of all or part of the business of the employer at an establishment; or

(b) one or more employees have their employment terminated by an employer with a payroll of $2.5 million or more,

the employer shall pay severance pay to each employee whose employment has been terminated and who has been employed by the employer for five or more years.

Employment Standards Amendment Act, 1981, S.O. 1981, c. 22

2.--(1) Part XII of the said Act is amended by adding thereto the following section:

(3) Section 40*a* of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

Bankruptcy Act, R.S.C. 1985, c. B-3

121. (1) All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act.

Interpretation Act, R.S.O. 1990, c. I.11

10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of any thing that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

. . . . .

17. The repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law.

3. Judicial History

A. Ontario Court (General Division) (1991), 6 O.R. (3d) 441 (Ont. Gen. Div.)

7 Having disposed of several issues which do not arise on this appeal, Farley J. turned to the question of whether termination pay and severance pay are provable claims under the *BA*. Relying on *U.F.C.W., Local 617P v. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86 (Ont. S.C.), he found that it is clear that claims for termination and severance pay are provable in bankruptcy where the statutory obligation to provide such payments arose prior to the bankruptcy. Accordingly, he reasoned that the essential matter to be resolved in the case at bar was whether bankruptcy acted as a termination of employment thereby triggering the termination and severance pay provisions of the *ESA* such that liability for such payments would arise on bankruptcy as well.

8 In addressing this question, Farley J. began by noting that the object and intent of the *ESA* is to provide minimum employment standards and to benefit and protect the interests of employees. Thus, he concluded that the *ESA* is remedial legislation and as such it should be interpreted in a fair, large and liberal manner to ensure that its object is attained according to its true meaning, spirit and intent.

9 Farley J. then held that denying employees in this case the right to claim termination and severance pay would lead to the arbitrary and unfair result that an employee whose employment is terminated just prior to a bankruptcy would be entitled to termination and severance pay, whereas one whose employment is terminated by the bankruptcy itself would not have that right. This result, he stated, would defeat the intended working of the *ESA*.

10 Farley J. saw no reason why the claims of the employees in the present case would not generally be contemplated as wages or other claims under the *BA*. He emphasized that the former employees in the case at bar had not alleged that termination pay and severance pay should receive a priority in the distribution of the estate, but merely that they are provable (unsecured and unpreferred) claims in a bankruptcy. For this reason, he found it inappropriate to make reference to authorities whose focus was the interpretation of priority provisions in the *BA*.

11 Even if bankruptcy does not terminate the employment relationship so as to trigger the *ESA* termination and severance pay provisions, Farley J. was of the view that the employees in the instant case would nevertheless be entitled to such payments as these were liabilities incurred prior to the date of the bankruptcy by virtue of s. 7(5) of the *ESA*. He found that s. 7(5) deems every employment contract to include a provision to provide termination and severance pay following the termination of employment and concluded that a contingent obligation is thereby created for a bankrupt employer to make such payments from the outset of the relationship, long before the bankruptcy.

12 Farley J. also considered s. 2(3) of the *Employment Standards Amendment Act, 1981*, S.O. 1981, c. 22 (the "*ESAA*"), which is a transitional provision that exempted certain bankrupt employers from the newly introduced severance pay obligations until the amendments received royal assent. He was of the view that this provision would not have been necessary if the obligations of employers upon termination of employment had not been intended to apply to bankrupt employers under the *ESA*. Farley J. concluded that the claim by Rizzo's former employees for termination pay and severance pay could be provided as unsecured and unpreferred debts in a bankruptcy. Accordingly, he allowed the appeal from the decision of the Trustee.

B. Ontario Court of Appeal (1995), 22 O.R (3d) 385

13 Austin J.A., writing for a unanimous court, began his analysis of the principal issue in this appeal by focussing upon the language of the termination pay and severance pay provisions of the *ESA*. He noted, at p. 390, that the termination pay provisions use phrases such as "[n]o employer shall terminate the employment of an employee" (s. 40(1)), "the notice required by an employer to terminate the employment" (s. 40(2)), and "[a]n employer who has terminated or proposes to terminate the employment of employees" (s. 40(5)). Turning to severance pay, he quoted s. 40*a*(1)(*a*) (at p. 391) which includes the phrase

"employees have their employment terminated by an employer". Austin J.A. concluded that this language limits the obligation to provide termination and severance pay to situations in which the employer terminates the employment. The operation of the *ESA*, he stated, is not triggered by the termination of employment resulting from an act of law such as bankruptcy.

14 In support of his conclusion, Austin J.A. reviewed the leading cases in this area of law. He cited *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725 (Ont. S.C.), wherein Houlden J. (as he then was) concluded that the *ESA* termination pay provisions were not designed to apply to a bankrupt employer. He also relied upon *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1 (Ont. S.C.), for the proposition that the bankruptcy of a company at the instance of a creditor does not constitute dismissal. He concluded as follows at p. 395:

> The plain language of ss. 40 and 40*a* does not give rise to any liability to pay termination or severance pay except where the employment is terminated by the employer. In our case, the employment was terminated, not by the employer, but by the making of a receiving order against Rizzo on April 14, 1989, following a petition by one of its creditors. No entitlement to either termination or severance pay ever arose.

15 Regarding s. 7(5) of the *ESA*, Austin J.A. rejected the trial judge's interpretation and found that the section does not create a liability. Rather, in his opinion, it merely states when a liability otherwise created is to be paid and therefore it was not considered relevant to the issue before the court. Similarly, Austin J.A. did not accept the lower court's view of s. 2(3), the transitional provision in the *ESAA*. He found that that section had no effect upon the intention of the Legislature as evidenced by the terminology used in ss. 40 and 40*a*.

16 Austin J.A. concluded that, because the employment of Rizzo's former employees was terminated by the order of bankruptcy and not by the act of the employer, no liability arose with respect to termination, severance or vacation pay. The order of the trial judge was set aside and the Trustee's disallowance of the claims was restored.

4. Issues

17 This appeal raises one issue: does the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the *ESA*?

5. Analysis

18 The statutory obligation upon employers to provide both termination pay and severance pay is governed by ss. 40 and 40*a* of the *ESA*, respectively. The Court of Appeal noted that the plain language of those provisions suggests that termination pay and severance pay are payable only when the employer terminates the employment. For example, the opening words of s. 40(1) are: "No employer shall terminate the employment of an employee...." Similarly, s. 40*a*(1) begins with the words, "Where...fifty or more employees have their employment terminated by an employer...." Therefore, the question on which this appeal turns is whether, when bankruptcy occurs, the employment can be said to be terminated "by the employer".

19 The Court of Appeal answered this question in the negative, holding that, where an employer is petitioned into bankruptcy by a creditor, the employment of its employees is not terminated "by the employer", but rather by operation of law. Thus, the Court of Appeal reasoned that, in the circumstances of the present case, the *ESA* termination pay and severance pay provisions were not applicable and no obligations arose. In answer, the appellants submit that the phrase "terminated by the employer" is best interpreted as reflecting a distinction between involuntary and voluntary termination of employment. It is their position that this language was intended to relieve employers of their obligation to pay termination and severance pay when employees leave their jobs voluntarily. However, the appellants maintain that where an employee's employment is involuntarily terminated by reason of their employer's bankruptcy, this constitutes termination "by the employer" for the purpose of triggering entitlement to termination and severance pay under the *ESA*.

20 At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance

pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.

21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Recent cases which have cited the above passage with approval include: *Canada (Procureure générale) c. Hydro-Québec*, *(*sub nom. *R. v. Hydro-Québec)* [1997] 3 S.C.R. 213 (S.C.C.); *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.); *Verdun v. Toronto Dominion Bank*, [1996] 3 S.C.R. 550 (S.C.C.); *Friesen v. R.*, [1995] 3 S.C.R. 103 (S.C.C.).

22 I also rely upon s. 10 of the *Interpretation Act*, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit."

23 Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the *ESA*, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues.

24 In *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 (S.C.C.), at p. 1002, the majority of this Court recognized the importance that our society accords to employment and the fundamental role that it has assumed in the life of the individual. The manner in which employment can be terminated was said to be equally important (see also *Wallace v. United Grain Growers Ltd.* (1997), 219 N.R. 161 (S.C.C.). It was in this context that the majority in *Machtinger* described, at p. 1003, the object of the *ESA* as being the protection of "...the interests of employees by requiring employers to comply with certain minimum standards, including minimum periods of notice of termination." Accordingly, the majority concluded, at p. 1003, that, "...an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protection to as many employees as possible, is to be favoured over one that does not."

25 The objects of the termination and severance pay provisions themselves are also broadly premised upon the need to protect employees. Section 40 of the *ESA* requires employers to give their employees reasonable notice of termination based upon length of service. One of the primary purposes of this notice period is to provide employees with an opportunity to take preparatory measures and seek alternative employment. It follows that s. 40(7)(a), which provides for termination pay in lieu of notice when an employer has failed to give the required statutory notice, is intended to "cushion" employees against the adverse effects of economic dislocation likely to follow from the absence of an opportunity to search for alternative employment. (Innis Christie, Geoffrey England and Brent Cotter, *Employment Law in Canada* (2nd ed. 1993), at pp. 572-81.

26 Similarly, s. 40*a*, which provides for severance pay, acts to compensate long-serving employees for their years of service and investment in the employer's business and for the special losses they suffer when their employment terminates. In *R. v. TNT Canada Inc.* (1996), 27 O.R. (3d) 546 (Ont. C.A.), Robins J.A. quoted with approval at pp. 556-57 from the words of D.D. Carter in the course of an employment standards determination in *Telegram Publishing Co. v. Zwelling* (1972), 1 L.A.C. (2d) 1 (Ont. Arb. Bd.), at p. 19, wherein he described the role of severance pay as follows:

> Severance pay recognizes that an employee does make an investment in his employer's business -- the extent of this investment being directly related to the length of the employee's service. This investment is the seniority that the employee builds up during his years of service....Upon termination of the employment relationship, this investment of years of service

is lost, and the employee must start to rebuild seniority at another place of work. The severance pay, based on length of service, is some compensation for this loss of investment.

27 In my opinion, the consequences or effects which result from the Court of Appeal's interpretation of ss. 40 and 40*a* of the *ESA* are incompatible with both the object of the Act and with the object of the termination and severance pay provisions themselves. It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, *supra*, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes, supra*, at p. 88).

28 The trial judge properly noted that, if the *ESA* termination and severance pay provisions do not apply in circumstances of bankruptcy, those employees 'fortunate' enough to have been dismissed the day before a bankruptcy would be entitled to such payments, but those terminated on the day the bankruptcy becomes final would not be so entitled. In my view, the absurdity of this consequence is particularly evident in a unionized workplace where seniority is a factor in determining the order of lay-off. The more senior the employee, the larger the investment he or she has made in the employer and the greater the entitlement to termination and severance pay. However, it is the more senior personnel who are likely to be employed up until the time of the bankruptcy and who would thereby lose their entitlements to these payments.

29 If the Court of Appeal's interpretation of the termination and severance pay provisions is correct, it would be acceptable to distinguish between employees merely on the basis of the timing of their dismissal. It seems to me that such a result would arbitrarily deprive some employees of a means to cope with the economic dislocation caused by unemployment. In this way the protections of the *ESA* would be limited rather than extended, thereby defeating the intended working of the legislation. In my opinion, this is an unreasonable result.

30 In addition to the termination and severance pay provisions, both the appellants and the respondent relied upon various other sections of the *ESA* to advance their arguments regarding the intention of the legislature. In my view, although the majority of these sections offer little interpretive assistance, one transitional provision is particularly instructive. In 1981, s. 2(1) of the *Employment Standards Amendment Act, 1981*, ("*ESAA*") introduced s.40*a*, the severance pay provision, to the *ESA*. Section 2(2) deemed that provision to come into force on January 1, 1981. Section 2(3), the transitional provision in question provided as follows:

> **2.** ...
>
> > (3) Section 40*a* of the said Act does not apply to an employer who became bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

31 The Court of Appeal found that it was neither necessary nor appropriate to determine the intention of the legislature in enacting this provisional subsection. Nevertheless, the court took the position that the intention of the legislature as evidenced by the introductory words of ss. 40 and 40*a* was clear, namely, that termination by reason of a bankruptcy will not trigger the severance and termination pay obligations of the *ESA*. The court held that this intention remained unchanged by the introduction of the transitional provision. With respect, I do not agree with either of these findings. Firstly, in my opinion, the use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise and one which has often been employed by this Court (see, e.g., *R. v. Vasil*, [1981] 1 S.C.R. 469 (S.C.C.), at p. 487; *R. v. Paul*, [1982] 1 S.C.R. 621 (S.C.C.), at pp. 635, 653 and 660). Secondly, I believe that the transitional provision indicates that the Legislature intended that termination and severance pay obligations should arise upon an employers' bankruptcy.

32 In my view, by extending an exemption to employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent, s. 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. It seems to me that, if this were not the case, no readily apparent purpose would be served by this transitional provision.

33 I find support for my conclusion in the decision of Saunders J. in *Royal Dressed Meats Inc.*, *supra*. Having reviewed s. 2(3) of the *ESAA*, he commented as follows:

> ...any doubt about the intention of the Ontario Legislature has been put to rest, in my opinion, by the transitional provision which introduced severance payments into the *ESA*...it seems to me an inescapable inference that the legislature intended liability for severance payments to arise on a bankruptcy. That intention would, in my opinion, extend to termination payments which are similar in character.

34 This interpretation is also consistent with statements made by the Minister of Labour at the time he introduced the 1981 amendments to the *ESA*. With regard to the new severance pay provision he stated:

> The circumstances surrounding a closure will govern the applicability of the severance pay legislation in some defined situations. For example, a bankrupt or insolvent firm will still be required to pay severance pay to employees to the extent that assets are available to satisfy their claims.
>
> . . . . .
>
> ...the proposed severance pay measures will, as I indicated earlier, be retroactive to January 1 of this year. That retroactive provision, however, will not apply in those cases of bankruptcy and insolvency where the assets have already been distributed or where an agreement on a proposal to creditors has already been reached. [Ontario, Legislative Assembly, *Debates*, No. 36, at pp. 1236-37 (June 4, 1981)]

Moreover, in the legislative debates regarding the proposed amendments the Minister stated:

> For purposes of retroactivity, severance pay will not apply to bankruptcies under the Bankruptcy Act where assets have been distributed. However, once this Act receives royal assent, employees in bankruptcy closures will be covered by the severance pay provisions. [Ontario, Legislative Assembly, *Debates*, No. 48, at p. 1699 (June 16, 1981)]

35 Although the frailties of Hansard evidence are many, this Court has recognized that it can play a limited role in the interpretation of legislation. Writing for the Court in *R. v. Morgentaler*, [1993] 3 S.C.R. 463 (S.C.C.), at p. 484, Sopinka J. stated:

> ...until recently the courts have balked at admitting evidence of legislative debates and speeches....The main criticism of such evidence has been that it cannot represent the "intent" of the legislature, an incorporeal body, but that is equally true of other forms of legislative history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation.

36 Finally, with regard to the scheme of the legislation, since the *ESA* is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant (see, e.g., *Abrahams v. Canada (Attorney General)*, [1983] 1 S.C.R. 2 (S.C.C.), at p. 10; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513 (S.C.C.), at p. 537). It seems to me that, by limiting its analysis to the plain meaning of ss. 40 and 40*a* of the *ESA*, the Court of Appeal adopted an overly restrictive approach that is inconsistent with the scheme of the Act.

37 The Court of Appeal's reasons relied heavily upon the decision in *Malone Lynch*, *supra*. In *Malone Lynch*, Houlden J. held that s. 13, the group termination provision of the former *ESA*, R.S.O. 1970, c. 147, and the predecessor to s. 40 at issue in the present case, was not applicable where termination resulted from the bankruptcy of the employer. Section 13(2) of the *ESA* then in force provided that, if an employer wishes to terminate the employment of 50 or more employees, the employer

must give notice of termination for the period prescribed in the regulations, "and until the expiry of such notice the terminations shall not take effect." Houlden J. reasoned that termination of employment through bankruptcy could not trigger the termination payment provision, as employees in this situation had not received the written notice required by the statute, and therefore could not be said to have been terminated in accordance with the Act.

38 Two years after *Malone Lynch* was decided, the 1970 *ESA* termination pay provisions were amended by the *Employment Standards Act, 1974*, S.O. 1974, c. 112. As amended, s. 40(7) of the 1974 *ESA* eliminated the requirement that notice be given before termination can take effect. This provision makes it clear that termination pay is owing where an employer fails to give notice of termination and that employment terminates irrespective of whether or not proper notice has been given. Therefore, in my opinion it is clear that the *Malone Lynch* decision turned on statutory provisions which are materially different from those applicable in the instant case. It seems to me that Houlden J.'s holding goes no further than to say that the provisions of the 1970 *ESA* have no application to a bankrupt employer. For this reason, I do not accept the *Malone Lynch* decision as persuasive authority for the Court of Appeal's findings. I note that the courts in *Royal Dressed Meats*, *supra*, and *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25 (B.C. S.C.), declined to rely upon *Malone Lynch* based upon similar reasoning.

39 The Court of Appeal also relied upon *Re Kemp Products Ltd.*, *supra*, for the proposition that although the employment relationship will terminate upon an employer's bankruptcy, this does not constitute a "dismissal". I note that this case did not arise under the provisions of the *ESA*. Rather, it turned on the interpretation of the term "dismissal" in what the complainant alleged to be an employment contract. As such, I do not accept it as authoritative jurisprudence in the circumstances of this case. For the reasons discussed above, I also disagree with the Court of Appeal's reliance on *Mills-Hughes v. Raynor* (1988), 63 O.R. (2d) 343 (Ont. C.A.), which cited the decision in *Malone Lynch*, *supra* with approval.

40 As I see the matter, when the express words of ss. 40 and 40*a* of the *ESA* are examined in their entire context, there is ample support for the conclusion that the words "terminated by the employer" must be interpreted to include termination resulting from the bankruptcy of the employer. Using the broad and generous approach to interpretation appropriate for benefits-conferring legislation, I believe that these words can reasonably bear that construction (see *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025 (S.C.C.)). I also note that the intention of the Legislature as evidenced in s. 2(3) of the *ESSA*, clearly favours this interpretation. Further, in my opinion, to deny employees the right to claim *ESA* termination and severance pay where their termination has resulted from their employer's bankruptcy, would be inconsistent with the purpose of the termination and severance pay provisions and would undermine the object of the *ESA*, namely, to protect the interests of as many employees as possible.

41 In my view, the impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the *ESA*, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Further, I believe that such an interpretation would defeat the true meaning, intent and spirit of the *ESA*. Therefore, I conclude that termination as a result of an employer's bankruptcy does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the *BA* for termination and severance pay in accordance with ss. 40 and 40*a* of the *ESA*. Because of this conclusion, I do not find it necessary to address the alternative finding of the trial judge as to the applicability of s. 7(5) of the *ESA*.

42 I note that subsequent to the Rizzo bankruptcy, the termination and severance pay provisions of the *ESA* underwent another amendment. Sections 74(1) and 75(1) of the *Labour Relations and Employment Statute Law Amendment Act, 1995*, S.O. 1995, c. 1, amend those provisions so that they now expressly provide that where employment is terminated by operation of law as a result of the bankruptcy of the employer, the employer will be deemed to have terminated the employment. However, s. 17 of the *Interpretation Act* directs that, "the repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law." As a result, I note that the subsequent change in the legislation has played no role in determining the present appeal.

6. Disposition and Costs

43 I would allow the appeal and set aside paragraph 1 of the order of the Court of Appeal. In lieu thereof, I would substitute an order declaring that Rizzo's former employees are entitled to make claims for termination pay (including vacation pay due thereon) and severance pay as unsecured creditors. As to costs, the Ministry of Labour led no evidence regarding what effort it made in notifying or securing the consent of the Rizzo employees before it discontinued its application for leave to appeal to this Court on their behalf. In light of these circumstances, I would order that the costs in this Court be paid to the appellant by the Ministry on a party-and-party basis. I would not disturb the orders of the courts below with respect to costs.

Appeal allowed.

Pourvoi accueilli.

Tab 6

2016 ONSC 5620
Ontario Superior Court of Justice (Divisional Court)

DiBiase v. Vaughan (City)

2016 CarswellOnt 14568, 2016 ONSC 5620, 270 A.C.W.S. (3d) 873, 55 M.P.L.R. (5th) 173

MICHAEL DIBIASE (Applicant) and CITY OF VAUGHAN and THE INTEGRITY COMMISSIONER OF THE CITY OF VAUGHAN (Respondents)

Marrocco A.C.J.S.C., C. Horkins, Varpio JJ.

Heard: May 17, 18, 2016
Judgment: September 16, 2016
Docket: 309/15 JR

Counsel: Morris Manning Q.C., for Applicant
Robert A. Centa, for City of Vaughan
Freya Kristjanson, Julia Wilkes, for Integrity Commissioner of the City of Vaughan

Related Abridgment Classifications
Municipal law
IV Council members
IV.8 Conflict of interest
IV.8.f Practice and procedure
Table of Authorities
Cases considered by *Marrocco A.C.J.S.C.*:

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s. 123 — referred to

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Generally — referred to

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s. 223.2 [en. 2006, c. 32, Sched. A, s. 98] — considered

s. 223.3 [en. 2006, c. 32, Sched. A, s. 98] — considered

s. 223.4 [en. 2006, c. 32, Sched. A, s. 98] — considered

s. 223.4(3) [en. 2006, c. 32, Sched. A, s. 98] — considered

s. 223.4(4) [en. 2006, c. 32, Sched. A, s. 98] — considered

s. 223.4(5) [en. 2006, c. 32, Sched. A, s. 98] — considered

s. 223.5 [en. 2006, c. 32, Sched. A, s. 98] — considered

s. 223.5(1) [en. 2006, c. 32, Sched. A, s. 98] — considered

s. 223.6 [en. 2006, c. 32, Sched. A, s. 98] — referred to

s. 223.6(2) [en. 2006, c. 32, Sched. A, s. 98] — considered

s. 223.6(3) [en. 2006, c. 32, Sched. A, s. 98] — referred to

s. 223.7 [en. 2006, c. 32, Sched. A, s. 98] — considered

s. 223.8 [en. 2006, c. 32, Sched. A, s. 98] — considered

Rules considered:

Federal Courts Rules, SOR/98-106
R. 317 — considered

***Marrocco A.C.J.S.C.*:**

1 The City of Vaughan Integrity Commissioner received a complaint about the applicant in December 2014. The complaint alleged that the applicant, the Deputy Mayor and a Councillor, had, contrary to the City of Vaughan's Code of Ethical Conduct for Members of Council("Code of Conduct"), (a) received a benefit from Maystar General Contractors ("Maystar"), (b) assisted Maystar in its attempts to obtain city business and (c) voted improperly on matters before City of Vaughan Council. Maystar had been providing construction services to the City since approximately 2002.

2 After receiving the complaint, the Integrity Commissioner sent the complaint to the applicant for a response. Counsel for the applicant responded on January 30, 2015. Counsel's response contained the following assertions:

• the complainant was a defeated political rival;

• the complainant was the source of a CBC article attached to the complaint and upon which the complainant relied;

• the CBC could not confirm the complainant's allegations that Maystar, a long time City of Vaughan contractor, paid for construction work on the applicant's family cottage;

• the complainant's allegation that the applicant was lying about the renovations to the family cottage was unsupported by any facts;

• the complainant's allegation that the applicant was a vocal proponent of Maystar was unsupported by any facts;

• the complainant's allegation that the applicant influenced members of the Vaughan Public Library Board and tried to interfere in the Civic Centre Resource Library tendering process was unsupported by any facts;

• the complainant was inviting the Integrity Commissioner to go on a "fishing expedition" to look for support for his baseless allegations;

• the complainant had produced copies of the applicant's personal emails without explaining how he got them. The Integrity Commissioner should not condone such behaviour by relying upon "illegally obtained materials and misrepresentations";

• the "illegally obtained" emails provided evidence that Maystar did not do construction work on the applicant's family cottage.

3 Despite counsel for the applicant's response, the Integrity Commissioner decided to investigate two allegations that in her view were described in Issue 1 located in Appendix 2 of the complaint. Those two allegations were:

• The applicant's improper interference with tendering processes to assist Maystar; and

• The applicant's attempt to exercise influence to benefit Maystar.

4 On March 27, 2015, the Integrity Commissioner forwarded preliminary findings from her investigation to the applicant's counsel for comment.

5 On April 13, 2015, counsel for the applicant provided the Integrity Commissioner with seven pages of objections to her preliminary findings.

6 On April 14, 2015, the Integrity Commissioner placed a Draft Report concerning her investigation without recommendations before the Committee of the Whole of the City of Vaughan Council. The Committee of the Whole is composed of the City of Vaughan Councillors sitting in committee.

7 After hearing from counsel for the applicant, the Committee of the Whole deferred consideration of the matter to the City of Vaughan Council meeting on April 21, 2015.

8 On April 17, 2015, the Integrity Commissioner forwarded her Final Report concerning her investigation to the City of Vaughan Council.

9 On the same day, counsel for the applicant provided City of Vaughan Council with a further 15 pages of objections to the Integrity Commissioner's process and objectivity, written in response to the Integrity Commissioner's Draft Report.

10 On April 21, 2015, the City of Vaughan Council accepted the Integrity Commissioner's report and imposed the penalty she recommended — a suspension of pay for 90 days.

11 The applicant unsuccessfully brings this judicial review application to quash both the Integrity Commissioner's Final Report and the decision of the City of Vaughan Council accepting it.

The Statutory Scheme Governing the Integrity Commissioner

12 The Integrity Commissioner is subject to a statutory scheme set out in the *Municipal Act, 2001*, S.O. 2001, c. 25 ("*Municipal Act*"), the Code of Conduct, the Complaint Protocol for Council Code of Conduct (the "Complaint Protocol") and the applicable City of Vaughan policies and procedures.

13 The Integrity Commissioner is a statutory office created under the *Municipal Act*, which was amended effective January 1, 2007 to add a new Part V.1, entitled "Accountability and Transparency." Part V.1 of the *Municipal Act* authorizes municipal councils to establish codes of conduct for members of councils (s. 223.2), and to appoint Integrity Commissioners (s. 223.3). The Integrity Commissioner is responsible for investigating and reporting on complaints regarding alleged breaches of the Code of Conduct by city councillors. The Integrity Commissioner reports to municipal councils (s. 223.6), and is responsible for "performing in an independent manner the functions assigned by the municipality" (s. 223.3) with respect to the application of codes of conduct for members of council.

14 The City of Vaughan Council established the Office of the Integrity Commissioner, as well as the Code of Conduct that sets out the ethical rules governing the conduct of members of Vaughan Council. The Integrity Commissioner responds to complaints within the framework of the Complaint Protocol, a Council by-law that sets out the process for receiving, investigating and reporting her opinion to the Council.

15 The Code of Conduct prohibits, among other things, the improper use of a member's office to influence City affairs and City staff, the release of confidential information, and reprisals against staff.

16 The Integrity Commissioner has significant powers to access information and documents in the course of her investigation. The *Municipal Act* provides:

> 223.4.(3) The municipality and its local boards shall give the Commissioner such information as the Commissioner believes to be necessary for an inquiry.
>
> (4) The Commissioner is entitled to have free access to all books, accounts, financial records, electronic data processing records, reports, files and all other papers, things or property belonging to or used by the municipality or a local board that the Commissioner believes to be necessary for an inquiry.

17 The Integrity Commissioner and her staff are subject to a statutory duty of confidentiality under the *Municipal Act*:

> 223.5 (1) The Commissioner and every person acting under the instructions of the Commissioner shall preserve secrecy with respect to all matters that come to his or her knowledge in the course of his or her duties under this Part.

18 Following an investigation, the Integrity Commissioner "reports to the municipality... his or her opinion about whether a member of Council has contravened the applicable code of conduct..." (*Municipal Act*, s. 223.6(2)).

19 In a report on conduct following an investigation the Commissioner "may disclose in the report such matters as in the Commissioner's opinion are necessary for the purposes of the report" (*Municipal Act*, s.223.6 (2)).

20 Section 223.4(5) of the *Municipal Act* provides that if the Integrity Commissioner reports to the municipality that in his or her opinion the member has contravened the Code of Conduct, then the council of the municipality, if it accepts the report, may impose either of the following penalties:

- a reprimand; or
- a suspension of the remuneration paid to the member in respect of his or her services as a member of council ...for a period of up to 90 days.

21 The municipality must make public the Integrity Commissioner's reports (*Municipal Act*, s. 223.6(3)).

The Role of the Integrity Commissioner

22 The applicant raises a number of procedural fairness and substantive arguments on this application. While the issues of procedural fairness are resolved by taking into account the factors in *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.) (*Baker*), the substantive arguments require the standard of review analysis. Because the standard of review is related to the role and expertise of the Integrity Commissioner, the following comments on ethical urban government from Volume Two (Good Government) of the widely acclaimed Bellamy Report are helpful:

> ***Page 44:***
>
> In a municipal government ..., [the Office of the Integrity Commissioner] is valuable for the following reasons.
>
> - An integrity commissioner can help ensure consistency in applying the [municipality's] code of conduct. Compliance with policy improves when everyone is seen to be held accountable under the same set of rules.
> - Busy councillors and staff cannot be expected to track with precision the development of ethical norms. The Integrity Commissioner can therefore serve as an important source of ethical expertise.
> - An Integrity Commissioner provides significant profile to ethical issues inside City government and sends an important message to constituents about the City's commitment to ethical governance.
> - No matter how comprehensive the rules, there will on occasion be situations where the ethical course of action is not clear and an individual will need authoritative advice and guidance.
> - Without enforcement, the rules are only guidelines. Although research shows that a values-based approach to ethics policy, focusing on defining values and encouraging employee commitment, is preferable to a system of surveillance and punishment, where the public interest is involved, there should be a deterrent in the form of consequences for bad behavior. The rules must have teeth.
>
> ***Page 46:***
>
> An effective Integrity Commissioner system provides two basic services:
>
> - An advisory service, to help councillors and staff who seek advice before they act.
> - An investigative or enforcement service, to examine conduct alleged to be an ethical breach.

23 In making this reference, I wish to make it clear that where the applicant has raised a question of procedural fairness, the Court does not engage in a standard of review analysis. Rather the Court determines whether the requisite level of procedural fairness has been accorded, taking into account the factors in *Baker*.

The December 2014 Complaint

24 The December 2014 complaint about the applicant was particularized in two Appendices:

- Appendix 1 listed the sections of the Code of Conduct allegedly violated by the applicant;

- Appendix 2 set out two "Issues" describing the behaviour of the applicant requiring investigation.

25 The relevant portion of Appendix 2 provides as follows:

> **Issue 1**
>
> As part of my affidavit, I am bringing forward details that I believe require further investigation into the relationship between Councillor DiBiase and Maystar General Contractors.
>
> Based on my personal research of public records and the activities of Regional Councillor Michael DiBiase, I believe that councillor DiBiase has violated the ethical code of conduct. The findings of my investigation, which were reported by the CBC (article attached), clearly show that Councillor DiBiase's relationship with long time City of Vaughan contractor Maystar General Contractors is completely inappropriate. I ask that the Integrity Commissioner use the CBC article as a basis for the investigation.
>
> The reported findings by the CBC describe Councillor DiBiase's personal and financial ties with Maystar General Contractors that I strongly believe to contravene sections of the Ethical Code of Conduct. This inappropriate relationship requires further investigation to understand how deep these ties go.
>
> Within the CBC article, Councillor DiBiase denies that Maystar General Contractors is involved with the construction of his family cottage however there is sufficient evidence to contradict Councillor DiBiase's story. I consider Councillor DiBiase's denial to be an outright lie to the public, which in itself can be considered to be a contravention of the Ethical Code of Conduct.
>
> Given the history, Maystar General Contractors has had a controversial past with the City of Vaughan. I have reason to believe that Councillor DiBiase has been a vocal proponent of Maystar General Contractors. I believe that Councillor DiBiase has used his influence as a Councillor to further Maystar's business interests within the City of Vaughan.
>
> I have reason to believe that members of the Vaughan Public Library Board were influenced by Councillor DiBiase in the matter of the construction of the Pleasant Ridge Library. I encourage the Integrity Commissioner to interview the members of the Library Board, as they would have or ought to have direct knowledge of this matter.
>
> I also have reason to believe that Councillor DiBiase may have tried to interfere in the tendering process in the matter of the Vaughan Civic Center Resource Library. This may have been the subject of a closed session meeting.
>
> I encourage the Integrity Commissioner to interview City Solicitor Mary Lee Farrugia, Acting City Manager Barbara Cribbett and Director of Purchasing Asad Chugtai to understand the details of what transpired, as they would have or ought to have direct knowledge of this matter.
>
> As part of the CBC article, it was reported that one of the contractors who worked on Councillor DiBiase's cottage, revealed that his company was not only hired by Maystar General Contractors, but was also paid by Maystar General Contractors for the work that they performed on the cottage. This would be considered a violation of the Ethical Code of Conduct and also a violation of provincial statues [sic].

I encourage the Integrity Commissioner to interview Maystar General Contractors and the contractor in question to determine what payments were made on behalf of Councillor DiBiase's [sic]. I would also encourage the Integrity Commissioner to request copies of invoices and cancelled cheques from these respective parties. In the event that Maystar General Contractors and the contractor in question refuse to voluntarily speak to the Integrity Commissioner or produce any financial records, I would encourage the Integrity Commissioner to consider invoking her powers under the Public Inquiries Act to compel testimony and to compel the production of the records in question.

Issue 2

[This issue concerned the applicant's voting record. It was not pursued by the Integrity Commissioner.]

26 Before considering the applicant's objections to Integrity Commissioners report and process, I will refer to a few preliminary matters that arose during the course of the Integrity Commissioner's investigation.

The Integrity Commissioner's Decision to Investigate and Report

27 As indicated, counsel for the applicant responded to the Integrity Commissioner's preliminary findings in a letter dated April 13, 2015. In that letter, counsel demanded among other things "copies of the submitted materials you reviewed at the beginning of your investigation that prompted you to interview 32 individuals and access the Regional Councillors server."

28 In my view the Integrity Commissioner properly refused this demand.

29 Counsel made this demand relying upon section 10 of the Complaint Protocol. The supporting material referred to in that section is the material provided by the complainant. It does not include every document, submitted by anyone, that causes the Integrity Commissioner to commence her investigation.

30 The Complaint Protocol does not require any threshold to be met before an investigation can occur. The Complaint Protocol invites individuals who identify or witness behaviour that "they believe is in contravention of the Code of Conduct for Members of Council" to file a complaint.

31 The Complaint Protocol provides that the complaint must be on a Complaints Form. The complaint must include the complainant's reason for thinking a Councillor has contravened the Code of Ethical Conduct. The Complaints Form must include the provisions of the Code of Conduct allegedly violated, the facts constituting the contravention and the complainant's contact information.

32 The Complaints Form with which we are concerned met these requirements. Even if the Complaints Form did not contain all of this information, it would be open to the Integrity Commissioner to contact the complainant and supplement the information provided.

33 The Complaints Form must also name witnesses in support of the allegation. A simple read of Appendix 2, Issue 1, discloses the following witnesses: members of the Vaughan Public Library Board who dealt with the construction of the Pleasant Ridge Library, the City Solicitor, the Acting City Manager, the Director of Purchasing and a contractor named in the CBC article attached to the Complaints Form.

34 The Complaint Protocol does not require the complainant to name every witness. This is confirmed by section 10(2) of the Complaint Protocol, which provides as follows:

10(2) If necessary, after reviewing the submitted materials, the Integrity Commissioner may speak to anyone, access and examine any other documents or electronic materials and may enter any City work location relevant to the complaint for the purpose of investigation and potential resolution.

35 The requirement that witnesses be named is intended to assist the Integrity Commissioner should she decide to pursue the matter.

36 The Integrity Commissioner decided to investigate two allegations that in her view were described in Issue 1 in Appendix 2. In the Integrity Commissioner's view those two allegations were: the applicant's improper interference with tendering processes, and the applicant's attempt to exercise influence to benefit Maystar.

37 This Court will always be reluctant to permit judicial review of a decision by the Integrity Commissioner to commence an investigation. The decision to commence an investigation does not decide or prescribe the legal rights, powers, privileges, immunities, duties or liabilities of the Councillor who will be investigated. The decision to investigate does not decide whether the Councillor is eligible to receive or to continue to receive a benefit. Permitting judicial review of this class of decisions will inevitably result in two hearings instead of one. Finally, there is no basis for reviewing this Integrity Commissioner's decision to commence this investigation.

The Integrity Commissioner's Decision to Reformulate the Complaint

38 On March 27, 2015, the Integrity Commissioner forwarded preliminary findings from her investigation to the applicant's counsel for comment. The Integrity Commissioner's letter disclosed that she had reformulated Issue 1 of Appendix 2 into four allegations.

39 The applicant did not object to the reformulation of the original complaint and it is therefore unnecessary to refer to this in detail. Nevertheless, I think it is helpful to observe that the Integrity Commissioner has the power to reformulate a complaint received from a member of the public and to investigate the reformulated complaint.

40 Part V.1 of the *Municipal Act* authorizes municipal councils to establish Codes of Conduct for members of Council and to appoint Integrity Commissioners. See the *Municipal Act* sections 223.2 and 223.3.

41 The Complaint Protocol is a by-law passed by the City of Vaughan Council which sets out the procedure for investigating complaints about a City of Vaughan Municipal Councillor. A Complaints Form is attached to this protocol.

42 In exercising the powers conferred upon her, the Integrity Commissioner must be able to interpret and reformulate complaints submitted by members of the public who may lack specific knowledge of the Code of Conduct and the Complaints Protocol and who may, therefore, not be familiar with how to identify and formulate alleged breaches.

43 By interpreting and applying the Code of Conduct and the Complaint Protocol when reformulating a complaint, the Integrity Commissioner essentially applies what can be considered her "home statute". See *Eagle's Nest Youth Ranch Inc. v. Corman Park No. 344 (Rural Municipality)*, 2016 SKCA 20 (Sask. C.A.) at para. 49, (2016), 395 D.L.R. (4th) 24 (Sask. C.A.). Such decisions are reviewed on the standard of reasonableness, unless they involve a broad question of decision maker's authority. See *New Brunswick (Board of Management) v. Dunsmuir*, [2008] 1 S.C.R. 190 (S.C.C.) at para. 54, (2008), 291 D.L.R. (4th) 577 (S.C.C.); *A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61 (S.C.C.) at paras. 38-42, [2011] 3 S.C.R. 654 (S.C.C.); and *Kerry (Canada) Inc. v. Ontario (Superintendent of Financial Services)*, 2009 SCC 39 (S.C.C.) at para. 34, [2009] 2 S.C.R. 678 (S.C.C.).

44 A simple reading of what the complainant described as "Appendix 2 Issue 1" leads to the conclusion that the Integrity Commissioner's redraft of the complaint into four allegations parallels the language used by the complainant in his description of Issue 1.

45 As a result, the Integrity Commissioner's recasting of Issue 1 into four allegations easily passes a reasonableness standard of review.

Setting the Context for the Applicant's Objections

46 In an effort to contextualize further the applicant's objections to the Integrity Commissioner's Final Report and the City of Vaughan Council's decision to accept that report, I will set out the Integrity Commissioner's preliminary findings concerning the reformulated allegations and her further finding of misconduct based on the applicant's attempt to obstruct her investigation. I will set out the applicant's various responses to the Integrity Commissioner's Draft and Final Reports. I will also set out how the Integrity Commissioner's Final Report came to be accepted by the City of Vaughan Council.

The Integrity Commissioner's Preliminary Findings Concerning the Reformulated Complaint

The reformulated first allegation

47 The first reformulated allegation was that there was an inappropriate relationship between the applicant and Maystar. The Integrity Commissioner found that this was on its face an allegation of a criminal nature and as a result she referred the complainant to the appropriate police service pursuant to section 6(3)(a) of the Complaint Protocol.

48 Needless to say the applicant disagrees with this allegation. The applicant does not, however, seek judicial review of the Integrity Commissioner's decision that the Complaint Protocol required her to refer the complainant to the police.

The reformulated fourth allegation

49 This allegation involved the applicant's voting record and was not pursued by the Integrity Commissioner

The reformulated second and third allegations

50 The Integrity Commissioner determined that two allegations made in Issue 2 Appendix 1 of the original complaint merited investigation:

- The applicant's improper interference with tendering processes to assist Maystar; and
- An attempt by the applicant to exercise influence to benefit Maystar.

51 I will now outline generally the Integrity Commissioner's findings concerning these allegations.

52 The Integrity Commissioner made a preliminary finding that the applicant had interfered in the City of Vaughan's tendering processes in contravention of its procurement rules. The Integrity Commissioner's preliminary conclusion was that the applicant had contravened the City's procurement rules by inquiring with City Staff and third parties about particular tenders and prequalification results during the Blackout Period. The applicant's inquiries concerned Maystar.

53 For our purposes it is sufficient to say that the Blackout Period is the date between the call for bids and the date a contract award is recommended to City Council by the Committee of the Whole. For our purposes it is also sufficient to say that contractors who were not prequalified for the projects up for award could not bid on them.

54 The Integrity Commissioner also made a preliminary finding that after the prequalification process ended, the applicant provided information about actual procurements to a private citizen and used information in emails from that citizen to criticize Maystar's competitors to the Mayor, City Councillors, City Staff and as the basis for a Council resolution calling for re-examination of the procurement process. The Integrity Commissioner's preliminary finding was that the applicant had forwarded confidential information to this outside person along with a request for help with drafting emails back to staff and others.

55 The Integrity Commissioner made a preliminary finding that the applicant applied inappropriate pressure to Staff with a view to exercising influence or assisting Maystar with the business of the municipality. The Integrity Commissioner made a preliminary finding that the applicant had created a "culture of fear" for City Staff.

56 The Integrity Commissioner indicated that her preliminary finding was that the applicant had seriously undermined the Code of Conduct by his actions in both procurement matters and his improper conduct with staff.

The additional finding that the applicant attempted to obstruct her investigation.

57 In addition to her findings concerning the complainant's reformulated allegations, the Integrity Commissioner also made a separate finding concerning the applicant's attempts to interfere with her investigation.

58 The Integrity Commissioner made a preliminary finding that the applicant had breached Rules 19(1) and (2) of the Code of Conduct. Rule 19(1) of the Code of Conduct prohibits obstructing the Integrity Commissioner when she is carrying out her responsibilities. Rule 19(2) prohibits threatening or undertaking reprisals against persons providing information to the Integrity Commissioner.

59 The Integrity Commissioner set out her preliminary finding that during the course of her investigation, the applicant had made inquiries about individuals who had cooperated with her. Those persons advised the Integrity Commissioner that since speaking with her, the applicant had started scrutinizing their actions in an unusual way and disproportionately criticising their professional decision-making.

The applicant's response to the preliminary findings

60 In her March 27, 2015 letter to counsel for the applicant, the Integrity Commissioner asked counsel for his comments on the enclosed preliminary findings. The Integrity Commissioner indicated that her next step would be to report to the Committee of the Whole on April 14, 2015.

61 On April 13, 2015, counsel for the applicant provided a 7-page written response to the Integrity Commissioner's preliminary findings. In his letter, counsel advanced a number of propositions which I set out in the next few paragraphs.

62 Counsel for the applicant informed the Integrity Commissioner that she had no jurisdiction to place a report before the Committee of the Whole because her mandate had expired and, as a result, the Committee of the Whole had to reject her report.

63 Counsel informed the Integrity Commissioner that her actions demonstrated that she should not be allowed to continue with her investigation. Counsel complained that he was not given adequate time to respond.

64 Counsel claimed that the Integrity Commissioner "condemned" the applicant without giving him an opportunity to know the case against him. Counsel claimed that his client did not know the case against him because the Integrity Commissioner had failed to make adequate disclosure. Specifically, she had failed to provide copies of the materials that she reviewed at the beginning of her investigation, and which prompted her to interview 32 individuals and to look at the applicant's emails. In addition, she failed to disclose the names of the persons interviewed, their witness statements and all documentation upon which she relied.

65 Counsel accused the Integrity Commissioner of illegally reviewing the applicant's emails and failing to provide the applicant with copies of his own emails so that he could respond to them.

66 He accused the Integrity Commissioner of relying upon a complaint that failed to name witnesses or specific facts.

67 He accused the Integrity Commissioner of letting her desire to make her report public overtake her duty of fairness because she listed her investigation on the agenda of the Committee of the Whole, thereby making public the fact that she was investigating the applicant before she had the applicant's response to her preliminary findings.

68 He accused the Integrity Commissioner of improperly relying on a previous complaint concerning the applicant that she informally resolved.

69 Counsel accused the Integrity Commissioner of conducting herself in a way that created a reasonable apprehension of bias. As a result, counsel demanded that the Integrity Commissioner not file her report and remove herself from the matter.

70 Counsel then listed a series 16 questions to which he required answers, before he could effectively respond. These questions attempted to highlight the lack of disclosure, the alleged lack of authority to "rummage through the Councillor's emails", and the lack of evidence supporting a finding of obstruction.

Counsel for the applicant makes a second response

71 Counsel for the applicant made a second response directed to the City of Vaughan Council. In addition to setting out counsel's response I will set out the procedure which led to it. This procedure is also relevant to a further procedural objection advanced by the applicant.

72 As indicated, when the Integrity Commissioner sent her preliminary findings to counsel for the applicant, she indicated that her next step would be to place a draft report containing those preliminary findings before the Committee of the Whole. And that is exactly what she did.

The Meeting of the Committee of the Whole

73 The Integrity Commissioner placed her Draft Report without recommendations before the Committee of the Whole on April 14, 2015. The Integrity Commissioner did not place her recommendations before the Committee of the Whole because she was waiting for counsel for the applicant to provide any comments concerning those recommendations.

74 Counsel's letter of April 13, 2015 was also placed before the Committee of the Whole.

75 At the meeting of the Committee of the Whole, counsel for the applicant made an oral response to the Integrity Commissioner's preliminary findings. Counsel spoke for the allotted five minutes, during which he said that the Integrity Commissioner:

- had conducted herself like a "Court of Star Chamber";
- had been unfair from the outset of her investigation; and
- had made up her mind on the basis of allegations rather than evidence.

Finally, counsel asked the Committee of the Whole to reject the Integrity Commissioner's Draft Report and give the entire matter to an independent person with an open mind.

76 The Committee of the Whole rejected counsel's submission but otherwise took no action on the Draft Report except to defer the entire matter to the City of Vaughan Council Meeting on April 21, 2015.

77 The motion to defer was moved by the Mayor and seconded by Councillor Iafrate.

The City of Vaughan Council Meeting on April 21, 2015

78 The Integrity Commissioner provided her Final Report to the City Clerk on April 17, 2015.

79 Counsel for the applicant also provided a further written set of objections to the City Clerk for the City of Vaughan on April 17, 2015. In this set of objections counsel made a number of claims.

80 Counsel claimed that the Integrity Commissioner's investigation was procedurally and jurisdictionally flawed, resulting in the City of Vaughan Council lacking jurisdiction to deal with her Final Report.

81 Counsel objected to the fact that the Integrity Commissioner placed her Draft Report before the Committee of the Whole after her mandate as Integrity Commissioner had expired. Counsel for the applicant advised the City of Vaughan Council that the Integrity Commissioner was "functus officio."

82 Counsel complained that the Draft Report placed before the Committee of the Whole was different than the preliminary findings that he had received on March 27, 2015. Counsel accused the Integrity Commissioner of deliberately and unfairly trying to "blind side my client" at the Committee of the Whole.

83 Counsel complained about the release of the Draft Report to the public.

84 Counsel accused the Integrity Commissioner of going "out of [her] way to parade for public consumption" the fact that portions of the complaint were criminal in nature and accused the Integrity Commissioner of doing so to prejudice the case against the applicant.

85 Counsel complained that the Integrity Commissioner's failure to provide the details of her investigation made it impossible for the applicant to properly respond. Counsel also accused the Integrity Commissioner of falsely stating that his client had an opportunity to respond to her report. Counsel reiterated that his client denied the allegations in the complaint.

86 Counsel criticized the Integrity Commissioner for failing to investigate how the complainant acquired copies of the applicant's emails.

87 Counsel claimed that the Integrity Commissioner was influenced by a previous complaint against the applicant, which she had resolved on an informal basis.

88 Counsel repeated his allegation that the Integrity Commissioner's behaviour had caused his client to have a reasonable apprehension of bias. Counsel demanded that this matter be turned over to an independent and unbiased person.

89 Counsel criticized the Integrity Commissioner for telling the Committee of the Whole that case law supported her decision to withhold the names and witness statements of the 32 persons she interviewed, without providing him with the cases upon which she relied.

90 Counsel referred at length to a Federal Court decision that counsel said supported his right to the names of witnesses, their statements and documents.

91 Counsel for the applicant demanded details of all communication that the Integrity Commissioner had with Councillors Iafrate and Schefman, claiming that comments made by those two Councillors at the Committee of the Whole meeting indicated they had predetermined the matter.

92 Counsel demanded that Councillor Iafrate not participate in any decision concerning the applicant, as a result of comments she had made at the Committee of the Whole meeting.

93 Counsel demanded that the Mayor not participate in any decision concerning the applicant because comments made by the Mayor at the Committee of the Whole, indicated that the Mayor had prejudged his client.

94 The City Clerk distributed counsel's 15 page April 17 submission to the City of Vaughan Councillors.

City of Vaughan Council rejects the applicant's submissions

95 For the sake of completeness, The City of Vaughan Council unanimously accepted and endorsed the Integrity Commissioner's Final Report, which did contain her recommendations. There was one abstention by a council member who was, for unrelated reasons, precluded from voting on matters brought forward by the Integrity Commissioner.

The Applicant's Motion before this Court

96 As indicated, the applicant unsuccessfully moves for two orders:

• an order quashing the decision of the City of Vaughan Council dated April 21, 2015 suspending the applicant's pay for his services as a member of Council for a period of 90 days; and

• an order quashing the decision of the Integrity Commissioner contained in her report dated April 17, 2015.

97 In paragraph 35 of his factum, produced verbatim below, counsel for the applicant sets out the issues he raises.

(i) Whether the Commissioner and the City denied the Applicant natural justice and breached procedural fairness by relying on a non-transparent investigation process that significantly prejudiced him by finding that he had committed serious wrongdoing;

(ii) Whether the City erred in law by relying on the Commissioner's errors in law in misinterpreting and misapplying the City's own Protocol for receiving and investigating complaints of breach of the Code of Conduct and the provisions in the Protocol and the Municipal Act 2001 in respect of providing disclosure of information necessary to allow the Applicant to be fully informed in order to make full answer and defence. The Applicant submits that he did not receive sufficient information of all the details regarding the manner in which the investigation was conducted in order to be able to defend himself and was thereby denied natural justice.

(iii) Whether the decision of the City should be quashed as it was made in response to a motion of and a vote in participation with Councillor Iafrate whose comments made in response to the Commissioner's report demonstrated a predisposition against the Applicant and by it a reasonable apprehension of bias. The Applicant submits that the decision of the City should be quashed as the process was tainted by reason of the bias of Councillor Iafrate.

(iv) Whether all of the Commissioner's actions taken subsequent to the expiry of her appointment were made without jurisdiction and precluded any lawful acts by the City in adopting and approving them. The Applicant submits that the acts of the City taken as a result of the approval of a report made by a person who no longer had legal authority to act rendered the City's acts being without jurisdiction.

98 I set out the gist of each one of the applicant's submissions in bold and my reasons for rejecting them.

The Commissioner and the City denied the applicant natural justice and breached procedural fairness by relying on a non-transparent investigation process

99 I reject this submission. The applicant knew the case against him; he decided not to respond to the substance of it.

100 I begin by listing the information available to the applicant.

The Integrity Commissioner set out the conduct she found concerning

101 The Integrity Commissioner found that Maystar failed to pre-qualify for two construction projects.

102 The applicant approached staff within the Blackout Period and asked for the results of the prequalification process.

103 The Integrity Commissioner found that the applicant was told by senior city officials and in particular the City Solicitor that his inquiries at all times, but particularly during the Blackout Period, posed a serious risk to the City of Vaughan because the applicant was at a critical time inappropriately inserting himself into the procurement process.

104 The Integrity Commissioner found that when City Staff responded to the applicant's requests for information during the Blackout Period by advising him to respect the procurement process, they were met with defiance, abusive language and intimidating actions. Specific examples of the applicant's statements were provided. The Integrity Commissioner's finding was that some City Staff were outraged, others felt hopeless and some felt intimidated because the applicant, a veteran member of City Council, was insisting that city staff give him confidential information in direct contravention of the procurement rules.

105 The Integrity Commissioner indicated that she received information about the applicant's interference from interviews she conducted. The Integrity Commissioner refused to identify the individuals, but did include the actual comments attributed to the applicant that she found important. She also specified whether the source of her information was a City Staff person or a Board Member.

106 The Integrity Commissioner referred to specific emails of the applicant that suggested that the applicant responded to staff about the prequalification results using verbatim text originating from an individual who was not employed by the city. The emails demonstrated that the applicant cut and pasted the scripted responses from the private citizen into his own emails back to senior city staff and members of the Council. This outside person also drafted a motion that the applicant put before City Council concerning the procurement process. Specific examples of this cutting and pasting were included in the preliminary findings.

107 The Integrity Commissioner set out the specific Rules in the Code of Conduct that appeared to have been breached.

The Integrity Commissioner described her investigation

108 The Integrity Commissioner specified that her preliminary findings concerned the procurement process involving prequalification of contractors for the Father Ermanno Bulfon Community Centre Construction Project and the Civic Centre Resource Library Construction Project.

109 In her preliminary findings, the Integrity Commissioner indicated that she conducted interviews with 32 persons, six of whom provided her with documentary evidence.

110 The Integrity Commissioner indicated that she reviewed public and confidential city documents, the city's past and current procurement bylaws, emails, video surveillance, and audio recordings of committee and Council meetings, as well as minutes of in camera board meetings.

111 The Integrity Commissioner revealed that she searched the applicant's city email account by using key word search requests.

Information demanded by counsel for the applicant before he claimed to be able to respond

112 With that context in mind, I list everything demanded by the applicant's counsel before he claimed to be able to respond:

- copies of all materials relied upon by the Integrity Commissioner at the beginning of her investigation that prompted her to interview the 32 individuals and look at the applicant's emails;

- the names and witness statements of the 32 witnesses interviewed by the Integrity Commissioner;

- all documentation upon which the Integrity Commissioner relied;

- copies of the case law which the Integrity Commissioner claimed supported her position not to disclose the names and witness statements; and

- all information that passed between the Integrity Commissioner and Councillors Iafrate and Schefman with respect to the complaint against the applicant.

113 At paragraph 35 of his factum, counsel for the applicant frames this as a procedural fairness/denial of natural justice objection, to the way in which the Integrity Commissioner had conducted herself.

114 The degree of participation to which the applicant is entitled is determined by considering the factors enumerated by the Supreme Court in *Baker* at paras. 21-28.

The Baker Factors

(i) The nature of the decision and (ii) The role of the decision within the statutory scheme

115 The Integrity Commissioner investigates complaints that Councillors violated the Code of Conduct and reports the results of her investigations to the City of Vaughan Council. The report contains factual conclusions and recommendations concerning penalty.

116 The Integrity Commissioner's Report has no binding effect upon the applicant.

117 The City of Vaughan Council considers the Report of the Integrity Commissioner along with the response to the complaint by the person concerned, and then accepts or rejects the Report. The City of Vaughan Council imposes the penalty.

118 The Complaint Protocol, which is a City bylaw and therefore also part of the statutory scheme, does not contemplate participation by the applicant after responding to the complaint. It does not require that the subject of the investigation receive preliminary findings or get the opportunity to respond to those findings.

119 Section 223.5 of the *Municipal Act*, which is also part of the statutory scheme, provides that the Integrity Commissioner shall preserve secrecy with respect to all matters that come to his or her knowledge in the course of her duties.

120 The statutory scheme provides the Integrity Commissioner with significant autonomy regarding the disclosure of her investigation. Specifically, section 223.6(2) of the *Municipal Act* provides as follows:

> 223.6 (2) If the Commissioner reports to the municipality or to a local board his or her opinion about whether a member of council or of the local board has contravened the applicable code of conduct, the Commissioner may disclose in the report such matters as in the Commissioner's opinion are necessary for the purposes of the report. 2006, c. 32, Sched. A, s. 98.

121 This section recognizes that when deciding how much information must be disclosed, the Integrity Commissioner may take into account specific local concerns associated with such disclosure that require confidentiality or protection of informants' identities. In the case of the City of Vaughan, a survey tabled at the time of the Integrity Commissioner's Final Report, indicated that approximately one-third of responding City Staff strongly disagreed or disagreed with the statement that "staff can raise concerns to management without fear of reprisal." See Responding Application Record of the Respondent, the Integrity Commissioner of Vaughan, Tab 1AA at 232.

122 Finally, the statutory scheme in section 223.7 of the *Municipal Act* provides that the Integrity Commissioner and her staff are not competent or compellable in connection with anything done by her in an investigation.

(iii) The importance of the decision to the individual affected

123 The maximum penalty that may be imposed by the Council is a suspension of pay for 90 days. The applicant cannot lose his elected position, and the Integrity Commissioner cannot make the applicant civilly liable.

124 The decision is important to the applicant because it affects his reputation.

(iv) The legitimate expectations of the person challenging the decision where undertakings were made concerning the procedure to be followed

125 The Integrity Commissioner was quite straightforward in this matter. The Integrity Commissioner did nothing that would give rise to any legitimate expectation that she intended to behave in a manner different from the manner in which she actually behaved.

126 The Integrity Commissioner made the applicant aware of the original complaint and asked the applicant to respond.

127 Although not required to do so by the Complaint Protocol, the Integrity Commissioner provided the applicant with her preliminary findings and asked the applicant's counsel for his comments "prior to finalizing [her] report and submitting [her] recommendations to Council for consideration."

128 The Complaint Protocol did not require the Integrity Commissioner to identify the 32 witnesses she interviewed. It also did not require her to provide any of the documentation obtained from those individuals. The Integrity Commissioner never directly or by implication suggested that she would provide the applicant's counsel with the information he demanded.

129 Section 223.5 of the *Municipal Act* provides that the Integrity Commissioner shall preserve secrecy with respect to all matters that come to her knowledge in the course of her duties.

130 Neither the statutory scheme nor the conduct of the Integrity Commissioner created any legitimate expectation that the applicant would receive the disclosure that he demanded.

(vi) The choice of procedure

131 The City of Vaughan Council is the master of its own procedure. Indeed, the members of the City of Vaughan Council are the persons investigated by the Integrity Commissioner. The Councillors have codified the procedure or protocol for investigations of complaints about themselves in a bylaw entitled Complaint Protocol for Council Code of Conduct, which I have referred to as the Complaint Protocol.

132 Who better to decide the procedure or protocol governing those investigations?

133 In devising the Complaints Protocol, the Councillors thought it prudent to provide for confidentiality. Specifically, section 18 of the Complaint Protocol provides as follows:

> 18 (1) The Integrity Commissioner and every person acting under his or her jurisdiction shall preserve confidentiality where appropriate and where this does not interfere with the course of any investigation, except as required by law and as required by this complaint protocol.
>
> (2) At the time of the Integrity Commissioner's report to Council, and as between the parties, the identity of a complainant and the identity of the person who is the subject of the complaint shall not be treated as confidential information.
>
> (3) All reports from the Integrity Commissioner to Council will be made available to the public.

134 The Legislature also thought confidentiality was important. Section 223.5 of the *Municipal Act* provides:

> 223.5(1) The Commissioner and every person acting under the instructions of the Commissioner shall preserve secrecy with respect to all matters that come to his or her knowledge in the course of his or her duties under this Part. 2006, c. 32, Sched. A, s. 98.

135 In short, there is nothing in the *Municipal Act* or the Complaint Protocol that suggests a procedure requiring the degree of disclosure, demanded by counsel for the applicant.

136 In addition, there is no genuine basis for suggesting that the Integrity Commissioner failed to comply with the Complaint Protocol.

137 The Integrity Commissioner thought that the inappropriate relationship allegation was criminal in nature and, pursuant to the Complaint Protocol section 6(3)(a), referred the complainant to the appropriate police service. The Integrity Commissioner provided the applicant with the complaint and the supporting material received from the complainant pursuant to section 10(1)(a) of the Complaint Protocol. The Integrity Commissioner complied with the timeline set out in the Complaint Protocol.

Conclusion concerning the Baker factors

138 When I consider all of the *Baker* factors, I am satisfied that the Integrity Commissioner exercised her discretion in a manner that properly balanced the applicant's right to meaningfully respond to allegations in the complaint and the need to protect City Staff who had cooperated in her investigation.

139 The applicant knew the case against him; he decided not to respond to the substance of it.

140 The applicant relied extensively in his correspondence and in argument before this Court upon the Federal Court decision of *Marchand c. Canada (Commissaire à l'intégrité du secteur public)*, 2014 FC 329, 452 F.T.R. 182 (F.C.) [*Marchand*].

141 I am satisfied that the City of Vaughan Council and the Integrity Commissioner were correct in deciding that this decision had no application to this matter.

142 The *Marchand* decision was an appeal from a decision of a Prothonotary ordering the disclosure of material that was not before the decision-maker, pursuant to Rule 317 of the *Federal Court Rules*. In *Marchand*, the applicant was seeking access to documents which were not before the decision-maker, and the decision-maker was resisting on the basis that on an application for judicial review, only the documents that were before the decision maker should be considered.

143 In the present case, the Integrity Commissioner disclosed the substance of the evidence of witnesses, including verbatim statements received from City Staff and Board Members that she thought important. She also provided examples of the applicant cutting and pasting, into his own emails and into a City of Vaughan Council motion, materials and comments prepared by an outside person.

144 In this case, unlike *Marchand*, we are dealing with a situation where the Integrity Commissioner reported that staff were "met with defiance, abusive language and intimidating actions" when they told the applicant that providing the information he requested would be contrary to the City of Vaughan's procurement policies. And the Integrity Commissioner stated that she could not "stress strongly enough the sentiments of worry and concern voiced by City Staff that [she] interviewed during the course of the investigation" and that staff implored her "not to disclose their identity".

145 In *Marchand*, unlike this case, there was a substantial response to the allegations. Specifically, Mr. Marchand's defence was that he was the victim of a political war waged by a group of individuals who were unhappy with their employer's decision to declare their positions surplus to meet mandatory budget cuts. In the current case, the only substantial response made by the applicant was that there were no reasonable grounds for the complainant's belief that a Code of Conduct violation had occurred and that the complainant was a disgruntled defeated former municipal candidate. Even after receiving the Integrity Commissioner's preliminary findings, the applicant made no attempt to offer a defence. For example, the applicant produced no affidavits from Board members or City Staff inconsistent with the preliminary findings.

146 An administrative body that investigates and makes recommendations must disclose the substance of the allegations. The Supreme Court of Canada in two cases affirmed the following statement by Lord Denning in *Selvarajan v. Race Relations Board* (1975), [1976] 1 All E.R. 12 (Eng. C.A.), p. 19:

> The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some such way adversely affected by the investigation and report then he should be told the case made against him and be afforded a fair opportunity of answering it. The investigating body is, however, the master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice it if the broad grounds are given. It need not name its informants. It can give the substance only.
>
> *Syndicat des employés de production du Québec & de l'Acadie v. Canada (Human Rights Commission)*, [1989] 2 S.C.R. 879 (S.C.C.), at para. 27.
>
> *Irvine v. Canada (Restrictive Trade Practices Commission)*, [1987] 1 S.C.R. 181 (S.C.C.), at para. 71, citing *Jenkins v. McKeithen*, 395 U.S. 411 (U.S. Sup. Ct. 1969), Harlan J. (dissenting), pp. 442-443.

147 Accordingly, the Integrity Commissioner and the City of Vaughan Council were correct in declining to follow the *Marchand* decision.

148 When I consider the Baker factors, the case law to which I have referred, and the disclosure provided in this case; namely the original complaint, the preliminary findings, the Draft Report, anonymized portions of witness statements and copies of relevant emails, I am satisfied that the Integrity Commissioner exercised her discretion in a manner that properly balanced the applicant's right to meaningfully respond to allegations in the complaint and the need to protect City Staff who had cooperated in her investigation.

149 The Integrity Commissioner was not, in the words of Lord Denning in *Selvarajan*, required to provide the applicant with "every detail of the case against" him. The Integrity Commissioner was not required to "name [her] informants". It was sufficient "if the broad grounds [were] given".

The Procedural Unfairness complaint at paragraph 24 of the Applicant's Factum

150 At paragraphs 19 to 31 of his factum the applicant makes a complaint of procedural unfairness which does not seem to be referenced in the list of objections set out in paragraph 35 of his factum. If this is a separate objection, I reject it for the reasons that follow.

151 I reproduce the gist of the objection below.

The Integrity Commissioner filed a report (the 28-page report) prior to the meeting of the Committee of the Whole that was different than the 10 pages of preliminary findings forwarded to counsel for the applicant on March 27, 2015 (the 10-page report) and to which the applicant had no opportunity to respond. The 28 page report did not contain counsel's letter of April 13, 2015. The applicant also claims that the Integrity Commissioner Final Report was different than both her Draft Report and her preliminary findings.

152 I reject this argument.

153 The applicant complains that the Integrity Commissioner's reports presented to the Committee of the Whole on April 14 and to the City Council on April 21, were not provided to him in time to allow him to respond before the hearings. The applicant feels that this denial of an opportunity to respond made the process unfair.

154 At paragraph 24 of the applicant's factum, the applicant complains that the 28-page report provided to the City did not contain a copy of the applicant's letter of April 13, 2015. This letter represented the applicant's response to the Integrity Commissioner's preliminary findings of March 27, 2015.

155 If this submission was intended to convey that the Committee of the Whole did not have counsel's letter of April 13, 2015, it seems at odds with the documentation.

156 At page 103 of the Record of Proceedings there is an extract from Council Minutes of April 21, 2015. This extract contains the decision of the Committee of the Whole deferring the Integrity Commissioner's Report to the Council Meeting of April 21, 2015. This extract specifically recommends receipt of counsel's letter of April 13, 2015. This suggests that counsel's letter of April 13 was before the Committee of the Whole.

157 In addition, at page 147 of the Record of Proceedings there is a transcript of an excerpt of the proceedings before the Committee of the Whole meeting. As indicated, counsel for the applicant made oral submissions at this meeting and stated at one point: "you will see in *my detailed letter* to her I have listed the correspondence that went back and forth and most particularly my request to be given the names of 32 people whom she claims made allegations and their statements" (emphasis added). While counsel does not give the date of the letter to which he refers, it is clear that his letter of January 30, 2015 contains no references to correspondence "that went back and forth." In addition, the January 30, 2015 letter contains no demand concerning

the names of the 32 people interviewed by the Integrity Commissioner. It appears that the "detailed letter" to which counsel must have been referring was his 7-page letter of April 13, 2015.

158 At paragraphs 19 to 29, the applicant complains that he did not receive the 28-page Draft Report presented by the Integrity Commissioner to the Committee of the Whole on April 14 until the day of the meeting. The applicant claims that the 28-page Draft Report "differed in a number of important aspects" from the preliminary 10-page report to which he provided a response earlier.

159 If this submission was intended to convey that the applicant was unable to respond to the 28 page report, I reject such a conclusion.

160 A comparison of the preliminary findings presented to the applicant on March 27, 2015 and the Draft Report presented to the Committee of the Whole on April 14, 2015 reveals that the Draft Report included more detail about the Commissioner's investigative process and jurisdiction as well as her observations about the underlying purposes of the Code of Ethical Conduct. The preliminary findings had slightly more detail about the applicant's actions.

161 Finally, in terms of timing, the Complaint Protocol in section 12 (1) required the Integrity Commissioner to file a final or interim report within 90 days of the start of an investigation. The Integrity Commissioner filed her Draft Report to comply with that time requirement.

162 The Committee of the Whole made no decision concerning the applicant, except to defer the matter to the City of Vaughan Council for consideration at its April 21, 2015 meeting. At that meeting, City of Vaughan Council had before it, counsel's 15-page April 17 response as well as his 7-page April 13 response, which was attached to it.

163 At paragraphs 30 to 31, the applicant complains that the Final Report presented by the Integrity Commissioner to the City Council on April 17, was also different from her two previous reports.

164 If this submission was intended to convey that the applicant was unable to respond to the Integrity Commissioner's Final Report, I reject such a conclusion.

165 The Final Report provided more information about the applicant's counsel's objection to the timeline suggested by the Integrity Commissioner for a response to her preliminary findings, than the Integrity Commissioner's Draft Report. The Integrity Commissioner originally wanted a response by April 2, 2015. Counsel for the applicant was out of the country and correspondence passed between the two about the timeline for a response. Details of this correspondence were included in the Final Report, but not in the Draft Report. Counsel was well aware of this correspondence.

166 The Final Report dealt with the allegations in a different order.

167 The Final Report contains the Integrity Commissioner's recommendations and her reasons for those recommendations. The Integrity Commissioner indicated in her Draft Report that she had refrained from tendering a Final Report and any recommendations to allow the applicant's counsel to provide comments.

168 Counsel was well aware of the Integrity Commissioner's recommendations. The Commissioner's email to the applicant's counsel dated April 10 and her letter dated April 13, indicate that the recommendations were provided to the applicant for his response.

169 The Final Report provides more detail to the Integrity Commissioner's finding that the applicant violated the obstructions and reprisals rule (section 19 of the Complaint Protocol). According to the report, the applicant disproportionately called into question the professional decision-making of city employees who had cooperated with the Integrity Commissioner, and asked those employees to explain the basis upon which they had first been hired by the City of Vaughan. This finding was included in the preliminary findings forwarded to counsel on March 27, 2015. The Final Report adds the detail that the questioning took place at budget time.

170 The applicant's counsel had the Final Report four days prior to the Council Meeting. The applicant's counsel had an opportunity to respond to the specifics associated with this finding and did not.

171 I am satisfied that, prior to voting to accept the Integrity Commissioner's Report, City of Vaughan Council had before it all of the responses that counsel for the applicant chose to make to the Integrity Commissioners findings and recommendations and that no significance attaches to any differences between the preliminary findings, that Draft Report and the Final Report.

The Decision of the City should be quashed because it was tainted by reason of the bias of Councillor Iafrate

172 I reject this submission.

173 Counselor Iafrate made the remarks to which the applicant objects at the Committee of the Whole Meeting. She made her remarks at that portion of the meeting where the Committee of the Whole was considering the Integrity Commissioner's Draft Report.

174 Apparently, the City of Vaughan Council sets aside time when it sits as a Committee of the Whole for items of public interest and permits members of the public to speak to those items. One such item was the Integrity Commissioner's investigation of the applicant. As a result, when this matter came up on the Committee of the Whole agenda, counsel for the applicant spoke to the matter.

175 Counsel for the applicant spoke for five minutes (the allotted time) and asked the Committee of the Whole to reject Integrity Commissioner's Report. Counsel referred the Committee of the Whole to the detailed response that he had provided. Counsel informed the Committee of the Whole that the Integrity Commissioner had refused his demand for the names and witness statements of the 32 people she interviewed. He accused the Integrity Commissioner of conducting herself like a "Court of Star Chamber", being unfair from the outset of her investigation and having made up her mind on the basis of allegations rather than evidence. Finally, he asked the Committee of the Whole to review his material and reject the Integrity Commissioner's Report and to give the entire matter affecting his client to an independent person with an open mind.

176 The Integrity Commissioner then attempted to defend herself from this attack.

177 When the Integrity Commissioner completed her remarks, Councillor Iafrate made the impugned comment which I set out in its entirety:

> I was just going to say wow, well done. I am not going to be as eloquent as the Mayor, but I do want to thank the Integrity Commissioner, and you have my full support, never doubt that. This has been a very comprehensive review, and I do fully, fully, trust that no, no, doubt whatsoever that you followed every rule by the dot and by the crossing of the T, so I will await your final report and recommendations and I will respect what you come forward with. I also wish, and want to make this public statement for our staff at this point in time that I will continue to, and I am sure the rest of my colleagues will continue to, advocate for a safe and professional works place for all of them. Again I just want to thank you for the work that you have done.

178 The Committee of the Whole voted to defer this matter to the City of Vaughan Council. The motion to that effect was moved by the Mayor and seconded by Councillor Iafrate.

179 Obviously the Committee of the Whole rejected counsel for the applicant's submissions because it did not reject the Draft Report.

180 The test for finding a reasonable apprehension of bias is well known:

> ... what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously,

would not decide fairly. See *Yukon Francophone School Board*, *Education Area #23 v. Yukon (Attorney General)*, [2015] 2 S.C.R. 282 at para. 20.

181 Councillor Iafrate indicated in her comment that she "will await your final report and recommendations", coupled with a commitment to respect the Integrity Commissioner's final product. Her commitment to respect the final product, reflected the fact that she had rejected the only objection made to it; namely that it was the product of unfair process.

182 The balance of the Councillor's remarks, to the effect that she and her colleagues were committed to a safe and professional work environment, was an attempt to reassure members of staff that City Council was committed to those values.

183 Councillor Iafrate comments do not reflect the fact that she was going to decide unfairly; they reflect the fact that after listening to counsel for the applicant and considering his submissions, she did not think that Integrity Commissioner's Draft Report should be rejected for the procedural reasons advanced by the applicant's counsel.

184 Counsellor Iafrate confirmed her rejection of counsel's assertion that his client had been subjected to an unfair procedure by seconding the Mayor's motion to defer the matter to the City of Vaughan Council.

185 I recognize that it was not likely that anything would change between April 14, 2015 (the date of the Committee of the Whole meeting) and the Council meeting on April 21, 2015. Counsel for the applicant objected to the Integrity Commissioner's Report for the reasons he outlined. The Integrity Commissioner had no intention of producing the witnesses' names and statements for the reasons she had given. The Committee of the Whole did not agree that the Integrity Commissioner had treated the applicant unfairly.

186 There was no unfairness in this. There was simply a rejection of counsel for the applicant's procedural objections to the Integrity Commissioner's Draft Report.

Actions taken by the Integrity Commissioner after the expiry of her appointment were made without jurisdiction and precluded lawful acts by the City of Vaughan in adopting and approving them

187 I reject this argument.

188 The Integrity Commissioner's appointment expired on April 5, 2015. On April 13, 2015, the Committee of the Whole recommended that the Integrity Commissioner be re-appointed for a term coincident with the 2014-2018 Term of Council retroactive to April 5, 2015. On April 21, 2015, City of Vaughan Council approved this recommendation.

189 Counsel for the applicant took the position during oral argument that the work done by the Integrity Commissioner between April 4 and April 21, 2015 was done by someone without authority to do it and what was required was a bylaw declaring that all of her work done within that period was authorized.

190 I am satisfied that counsel's retroactive appointment amounted to an approval of all work done by the Integrity Commissioner during the period when her appointment had expired.

191 Ontario municipalities may exercise their powers with retroactive effect unless the enabling legislation either expressly or impliedly forbids it. See *Toronto (City) v. Seemayer* (1982), 24 M.P.L.R. 132 (Ont. Co. Ct.). The relevant provisions of the *Municipal Act* do not preclude Council from retroactively appointing an Integrity Commissioner.

192 Council expressed its intention to retroactively appoint the Integrity Commissioner in clear and unequivocal language.

193 If the Integrity Commissioner had done nothing during the period when her appointment was at an end, there would have been no need to retroactively appoint her. The only purpose in retroactively appointing the Integrity Commissioner had to have been to retroactively approve the work that she did and the actions that she took during the time when her appointment was at an end.

Other Objections advanced by the Applicant

The Integrity Commissioner did not comply with section 223.8 of the Municipal Act because once she found something criminal, no part of her inquiry could continue until the conclusion of the police investigation

194 While this objection does not appear to be referenced in paragraph 35 of the applicant's factum, an argument to this effect was advanced at the hearing of this application.

195 I reject this argument.

196 Section 6(3)(a) of the Complaint Protocol provides as follows:

> 6(3)(a) If the complaint on its face is an allegation of a criminal nature consistent with the *Criminal Code of Canada*, the complainant shall be advised that if the complainant wishes to pursue any such allegation, the complainant must pursue it with the appropriate Police Service.

197 Section 6 (3) of the Complaint Protocol refers to "the complaint" — not the Complaints Form in its entirety. Section 6(3)(a) does not say that all the complaints contained in the Complaint Form must also be treated as if they were criminal in nature, or that having decided to refer a complainant to the appropriate police service, the Integrity Commissioner can take no further action on other complaints in the Complaints Form which on their face are not of a criminal nature.

198 Section 223.8 of the *Municipal Act* provides as follows:

> 223.8 If the Commissioner, when conducting an inquiry, determines that there are reasonable grounds to believe that there has been a contravention of any other Act or of the *Criminal Code* (Canada), the Commissioner shall immediately refer the matter to the appropriate authorities and suspend the inquiry until any resulting police investigation and charge have been finally disposed of, and shall report the suspension to council. 2006, c. 32, Sched. A, s. 98.

199 The two provisions are consistent with each other and together provide a code for dealing with complaints which are criminal in nature:

> • If the complaint on its face is an allegation of a criminal nature, *the complainant* is to be advised to pursue the allegation with the appropriate police service.
>
> • If, during the course of an investigation, the Commissioner determines that there are reasonable grounds to believe there has been a contravention of the *Criminal Code* (or any other Act), the Commissioner must immediately refer *the matter* to the appropriate authorities.
>
> [Emphasis added.]

200 Despite the fact that they form a complete code for considering allegations that are criminal in nature, neither section 223.8 of the *Municipal Act* nor section 6 (3) (a) of the Complaint Protocol, state that once an Integrity Commissioner decides that an allegation in the complaints form is on its face criminal in nature, she must take no further action on any noncriminal complaints in the Complaints Form.

201 Accordingly, the Integrity Commissioner could continue to investigate redrafted allegations within the Complaint Form, which were not on their face allegations "of a criminal nature", unless or until her investigation revealed reasonable and probable grounds to believe that an offense had been committed.

202 The redrafted allegations dealing with the applicant's interference in various tendering processes in a way that contravened the City of Vaughan's procurement rules or the pressuring of staff to assist Maystar, were not on their face allegations "of a criminal nature".

203 It is not sufficient for the alleged behaviour to be relevant to a criminal investigation; the allegation "on its face" must be of a "criminal nature" before section 6(3)(a) of the Complaint Protocol is engaged.

204 Finally, the Integrity Commissioner did not investigate the inappropriate relationship allegation and therefore has no knowledge whether it was true. As a result, she could not determine whether she had reasonable grounds to believe that the applicant had committed offenses contrary to section 122 or 123 of the *Criminal Code*, by interfering in the procurement process or pressuring staff to assist Maystar General Contractors.

205 Some aspects of the Integrity Commissioner's jurisdiction in this regard require elaboration.

The Integrity Commissioner may conduct a preliminary investigation to determine whether the complaint must be referred to the police service or other appropriate authorities

206 According to section 8 of the Complaint Protocol, the Commissioner possesses a discretion to refuse to proceed with an investigation if she is of the opinion that the complaint is frivolous, vexatious or not made in good faith. Accordingly, the Complaint Protocol allows the Integrity Commissioner to make inquiries to determine whether there is an "air of reality" to the allegation and to clear the air of groundless allegations, including those of criminal conduct by Councillors. If the Integrity Commissioner decides that there is no air of reality to the allegation, the Commissioner may include such a conclusion in her report.

207 Before deciding that an allegation appears on its face to be criminal in nature, the Integrity Commissioner can engage in redrafting the complaint in an effort to make certain that only genuine allegations of criminal conduct are referred to the appropriate police service.

208 The decision that an allegation appears on its face to be criminal in nature, is a decision based upon a consideration of the allegation and the constituent elements of the *Criminal Code* offenses arising from the allegation. Such a decision goes to the jurisdiction of the Integrity Commissioner to continue her investigation of that complaint because the Complaint Protocol in paragraph 6(3)(a) states that a criminal allegation is to be pursued with the appropriate police service, which must mean that the Integrity Commissioner is not to pursue such an allegation. This type of decision is reviewable on a correctness standard. See *Dunsmuir* at paras. 54, 58 & 59.

The Integrity Commissioner's jurisdiction to deal with the complaint does not disappear even if the complaint is of a criminal nature

209 Allegations of a criminal nature will almost always allege conduct which also offends the Code of Conduct. For this reason, the Integrity Commissioner's jurisdiction does not disappear because she determines that the alleged free family cottage construction allegation is criminal in nature. Rather her jurisdiction is suspended until the appropriate police service completes its investigation.

210 The onus of proof in a criminal case is higher than the onus of proof in a civil matter. This means that a police service may decide not to lay charges, or charges may be dismissed because they are not provable beyond a reasonable doubt. Conduct that cannot be proven beyond a reasonable doubt may be provable on a balance of probabilities and thus a violation of the Code of Ethical Conduct may be proven despite an acquittal or a decision not to proceed with criminal charges.

211 If no charges are laid or the applicant is acquitted, the Integrity Commissioner's jurisdiction is restored and the Integrity Commissioner can, if she thinks it advisable, determine whether a violation of the Code of Conduct has nevertheless occurred. If charges are laid, the Integrity Commissioner will not proceed until the criminal proceedings have been completed.

The Integrity Commissioner was not under an obligation to investigate or refer the actions of the complainant to the police

212 Counsel for the applicant maintained that there were two violations of the *Criminal Code* disclosed by the complaint: the inappropriate relationship claim and the complainant's possession of the applicant's emails.

213 While not referenced in paragraph 35 of counsel's factum, at paragraph 90 counsel submits that:

> Having received copies of the emails the Commissioner was on notice that she had an obligation in law to determine if the interception of private communications was lawful by determining whether there was consent or judicial authorization. The record does not reveal any interceptions in accordance with s.184 (2) of the Criminal Code. Therefore the Commissioner had information revealing that the complainant had committed Criminal Code offenses namely the unlawful interception of private communications pursuant to s.184 (1) of the Criminal Code and the further offense of disclosing information received from an unlawful interception contrary to s.193.1 (1) of the Criminal Code. This knowledge, in turn, required her to comply with the provisions of s.223.8 of the *Municipal Act*, namely to report the matter to the police, suspend any inquiry and notify Council of the suspension.

214 Accordingly, I propose to deal with this submission.

215 I reject this submission.

216 Section 223.2 of the *Municipal Act* authorizes a municipality to establish a code of conduct for members of municipal council. Section 223.3 authorizes a municipality to appoint an Integrity Commissioner to apply the code of conduct to members of Council. Specifically, the Code of Conduct for the City of Vaughan contains the following in its Introduction: "It is the purpose of this Code of Ethical Conduct to establish rules that guide Members of Council in performing their diverse roles..."

217 The applicant's complaint about the fact that the complainant came into possession of some of the applicant's emails, does not engage the Code of Conduct and the Complaint Protocol.

218 Section 223.8 of the *Municipal Act* provides as follows:

> 223.8 If the Commissioner, when conducting an inquiry, determines that there are reasonable grounds to believe that there has been a contravention of any other Act or of the Criminal Code (Canada), the Commissioner shall immediately refer the matter to the appropriate authorities and suspend the inquiry until any resulting police investigation and charge have been finally disposed of, and shall report the suspension to council.

219 Contrary to the assertion in paragraph 90 of the applicant's factum, the Integrity Commissioner had no "obligation in law" to determine if the interception of private communications was lawful. Section 223.8 mandates the Integrity Commissioner to suspend her inquiry if she determines that there are reasonable grounds to believe that the Criminal Code has been breached. It is clear that the Integrity Commissioner did not make such a determination and until she did, section 223.8 of the *Municipal Act* was not engaged.

220 Finally, the Integrity Commissioner did not know the source of the emails provided by the complainant.

221 If the Integrity Commissioner, upon receipt of the complaint, had immediately suspended any inquiry into the complaint and called the police to investigate the complainant, her actions would have suggested that the City of Vaughan had no genuine interest in a robust complaints process.

The applicant objected to the seizure of the targeted search of his email address hosted on the City of Vaughan's computer system.

222 Counsel for the applicant submits at paragraph 84 of his factum that neither the *Municipal Act* nor section 10 (2) of the Complaint Protocol permit an examination of the applicant's emails. Counsel refers to the targeted search conducted by the Integrity Commissioner as a breach of privacy.

223 The applicant referred to these emails as his personal emails and claimed that the Integrity Commissioner exceeded her jurisdiction in searching those emails, without his consent or some form of judicial authorization.

224 I reject this argument.

225 There was nothing procedurally unfair or illegal about the Integrity Commissioner targeted search of the applicant's email address, hosted on the City of Vaughan's computer systems.

226 Section 223.4 of the *Municipal Act* confers broad powers on the Integrity Commissioner to obtain information from the municipality in the course of her investigation, including the statutory right to free access to all documents and information within the municipality that the Commissioner believes necessary for an inquiry.

227 The applicant's email address is hosted on the City's computer systems. The emails copied were not personal in nature. As a result, there is no reason to view them as anything other than "property belonging to the Municipality".

228 In addition, Section 10(2) of the Complaint Protocol provides as follows:

> 10. (2) If necessary, after reviewing the submitted materials, the Integrity Commissioner may speak to anyone, access and examine any other documents or electronic materials and may enter any City work location relevant to the complaint for the purpose of investigation and potential resolution.

229 In *R. v. Cole*, 2012 SCC 53 (S.C.C.) at para. 52 the Supreme Court recognized that although ownership of data is not determinative, an employee's expectation of privacy in relation to information stored on employer's equipment is diminished by the policies, practices, and customs of the workplace that relate to the use of computers by employees.

230 The purpose of the Code of Conduct is, according to its Introduction, "to establish rules that guide Members of Council in performing their diverse roles in representing their constituents and recognize Members accountability for managing City resources allocated to them."

231 The Code of Conduct is a guide which the City of Vaughan Council chose to impose and enforce upon itself, through the application of the procedures set out in Complaint Protocol.

232 The applicant, as a Member of the City of Vaughan Council, agreed and consented to the procedures in the Complaint Protocol, with the result that it binds not only the Integrity Commissioner but also those Members of Council who are investigated.

233 The applicant cannot now, in view of section 10(2), complain about the targeted search of the email account provided to him for his use as a Councillor.

The City of Vaughan erred in law in accepting the Integrity Commissioner's Final Report

234 Because I am satisfied that there is no merit in any of the applicant's submissions, I reject the applicant's contention that the City of Vaughan erred in law in accepting the Integrity Commissioner's Final Report.

Conclusion

235 This application is dismissed. The parties advised that they are not seeking costs.

Application dismissed.

Tab 7

DATE: 2007-10-10

INQUIRY INTO PEDIATRIC FORENSIC PATHOLOGY IN ONTARIO

RULING ON THE CPSO MOTION FOR DIRECTIONS

COMMISSIONER GOUDGE:

On April 25, 2007, Ontario established this Commission pursuant to the *Public Inquiries Act*, R.S.O. 1990, c. P.41 (the *PIA*). Broadly stated, its mandate is to conduct a systemic review of the role pediatric forensic pathology has played in the criminal justice system in Ontario in order to make recommendations to restore and enhance its ability to properly fulfill that role in the future.

Pursuant to that mandate, and s. 7 of the *PIA*, the Commission delivered a summons to the Registrar of the College of Physicians and Surgeons of Ontario (CPSO) on September 17, 2007. It requires the Registrar to attend before the Commission to give evidence and produce the following documents:

1. all documents related to any complaints filed by D.M. regarding Dr. Charles R. Smith (including but not limited to File 27860), and the CPSO's investigation and disposition of that complaint, including but not limited to the Complaints Committee brief;

2. all documents related to any complaints filed by Maurice Gagnon regarding Dr. Charles R. Smith (including but not limited to File 40735) and the CPSO's investigation and disposition of that complaint, including but not limited to the Complaints Committee brief;

3. all documents related to complaints filed by Brenda Waudby regarding Dr. Charles R. Smith (including but not limited to File 46947), and the CPSO's investigation and disposition of that complaint, including but not limited to the Complaints Committee brief;

4. all documents related to any other complaints filed by anyone regarding Dr. Charles R. Smith;

5. all policies, procedures, guidelines or protocols, considered, adopted or used by the CPSO when dealing with complaints made about the conduct of pathologists, forensic pathologists, pediatric forensic pathologists, or coroners; and

6. all documents relevant to policies, procedures, practices, accountability and oversight mechanisms, or quality control measures for pediatric forensic pathology in Ontario from 1981 to 2001.

CPSO takes the position that it and its Registrar are precluded from complying with the summons because of the provisions of s. 36 of the *Regulated Health Professions Act,* 1991, S.O. 1991, c. 18 (the *RHPA*). It has therefore moved for directions regarding whether it is permitted to comply with the summons. If its arguments are successful, the

summons will effectively be set aside or quashed. If CPSO is unsuccessful, it has made clear that it will comply with my direction.

CPSO is joined in this motion by Dr. Smith. He supports CPSO, but also argues that the summons cannot compel the documents sought in paragraphs 1 to 4 because those documents are not relevant to the Commission's mandate and are subject to a privilege that Dr. Smith can and does assert.

Commission counsel argues that none of these arguments have merit and that I should order the Registrar to comply with the summons.

I turn first to the issue of relevance. CPSO does not contest the potential relevance of the documents sought by the summons. However, Dr. Smith says that the documents sought in paragraphs 1 to 4 of the summons fall outside the Commission's mandate, and are, therefore, irrelevant and cannot be summonsed.

To be admissible, the documents must be reasonably relevant to the mandate of the Commission: see *Bortolotti v. Ontario* (*Ministry of Housing*) (1977), 15 O.R. (2d) 617 at 624-625 (C.A.). Paragraph 4 of the Order in Council establishing the Commission

requires it, *inter alia*, to conduct a systemic review of the accountability and oversight mechanisms of pediatric forensic pathology in Ontario from 1981 to today.

Dr. Smith does not dispute that the documents referred to in paragraphs 1 to 3 of the summons relate to complaints to CPSO about his work as a pediatric forensic pathologist in three specific cases in Ontario within the relevant time frame. However, he argues that because the complaints process occurred after his work in these cases was concluded, it had no effect on that work, nor could it provide general guidance for pediatric forensic pathology because it dealt only with three specific cases. Thus he says these documents do not speak to an oversight or accountability mechanism of pediatric forensic pathology.

I disagree. The three cases were included in the Chief Coroner's Review that led to the establishment of the Commission. They will be included in the inquiry that the Commission must make. The complaints in these cases and the way CPSO dealt with them constitute one way in which Dr. Smith was held to account for his work as a pediatric forensic pathologist. A complaints process like this is no less a way of overseeing the work of a professional because it deals with specific cases. Thus, I think that these documents speak directly to an oversight or accountability mechanism that the Commission is required to examine and evaluate. The documents are, therefore, clearly relevant to the Commission's mandate.

Dr. Smith argues that paragraph 4 of the summons seeks documents that may relate to his work as a pathologist in non-forensic cases and that these would be outside the Commission's mandate.

Again, I disagree. How CPSO dealt with complaints that may have been made about Dr. Smith's pathology skills in non-forensic cases is relevant to his work in forensic cases because he was applying many of the same skills. Oversight by CPSO through its complaints process of Dr. Smith's expertise as a pathologist, albeit in non-forensic cases, must therefore be part of the Commission's evaluation of one of the oversight mechanisms of pediatric forensic pathology.

In summary, I would conclude that the documents sought by paragraphs 1 to 4 of the summons are relevant to the Commission's mandate.

CPSO's position turns not on relevance but on s. 36 of the *RHPA*. It says that ss. 36(1) and (3) prevent the Registrar from producing the documents sought by the summons. CPSO relies particularly on s. 36(1) and the confidentiality requirement it contains. While it acknowledges that the exceptions to that requirement were expanded by legislative

amendment in June 2007, it argues that none of them apply to a public inquiry. Section 36(1) (with the recent amendments underlined) and s. 36(3) read as follows:

> **Confidentiality**
>
> 36. (1) Every person employed, retained or appointed for the purposes of the administration of this Act, a health profession Act or the *Drug and Pharmacies Regulation Act* and every member of a Council or committee of a College shall keep confidential all information that comes to his or her knowledge in the course of his or her duties and shall not communicate any information to any other person except,
>
> > (a) to the extent that the information is available to the public under this Act, a health profession Act or the *Drug and Pharmacies Regulation Act*;
> >
> > (b) in connection with the administration of this Act, a health profession Act or the *Drug and Pharmacies Regulation Act*, including, without limiting the generality of this, in connection with anything relating to the registration of members, complaints about members, allegations of members' incapacity, incompetence or acts of professional misconduct or the governing of the profession;
> >
> > (c) to a body that governs a profession inside or outside of Ontario;
> >
> > (d) as may be required for the administration of the *Drug Interchangeability and Dispensing Fee Act*, the *Healing Arts Radiation Protection Act*, the *Health Insurance Act*, the *Independent Health Facilities Act*, the *Laboratory and Specimen Collection Centre Licensing Act*, the *Ontario Drug Benefit Act*, the *Coroners Act*, the *Controlled Drugs and Substances Act (Canada)* and the *Food and Drugs Act* (Canada);

(e) to a police officer to aid an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

(f) to the counsel of the person who is required to keep the information confidential under this section;

(g) to confirm whether the College is investigating a member, if there is a compelling public interest in the disclosure of that information;

(h) where disclosure of the information is required by an Act of the Legislature or an Act of Parliament;

(i) if there are reasonable grounds to believe that the disclosure is necessary for the purpose of eliminating or reducing a significant risk of serious bodily harm to a person or group of persons; or

(j) with the written consent of the person to whom the information relates.

Evidence in civil proceedings

(3) No record of a proceeding under this Act, a health profession Act or the *Drug and Pharmacies Regulation Act,* no report, document or thing prepared for or statement given at such a proceeding and no order or decision made in such a proceeding is admissible in a civil proceeding other than a proceeding under this Act, a health profession Act or the *Drug and Pharmacies Regulation Act* or a proceeding relating to an order under section 11.1 or 11.2 of the *Ontario Drug Benefit Act.* 1991, c. 18, s. 36(3); 1996, c. 1, Sched. G, s. 27(2).

In my view, neither s. 36(1) nor s. 36(3) stand in the way of the Registrar complying with the summons.

Turning first to s. 36(1), whatever the reach of the confidentiality requirement, the recent expansion of the exceptions would seem to signal a general legislative intent that its reach be somewhat diminished. Moreover, it is clear that the provision of a statutory promise of confidentiality does not bar the compelled production of documents by summons unless the documents meet the test for privilege, or the legislature has used language specifically prohibiting their introduction into evidence. See *Transamerica Life Insurance Co. of Canada v Canada Life Assurance Co.* (1995), 27 O.R. (3d) 291 at 301-2.

While s. 36(1) is clearly effective to require documents to be kept confidential in many circumstances, there is no explicit language that puts those documents beyond the reach of a summons. Nor do I think that the listing of exceptions in s. 36(1) can be said to do so by inference. However, even if that were so, and it could be said that the documents sought cannot be summonsed unless an exception applies, the CPSO position cannot prevail.

It is clear that if an exception is required, s. 36(1)(h) applies. Disclosure of the documents summonsed is required by the *PIA*. Sections 7(1) and 11 of that Act read as follows:

> **Power to summon witnesses, papers, etc.**
>
> 7. (1) A commission may require any person by summons,
>
> (a) to give evidence on oath or affirmation at an inquiry; or
>
> (b) to produce in evidence at an inquiry such documents and things as the commission may specify,
>
> relevant to the subject-matter of the inquiry and not inadmissible in evidence at the inquiry under section 11. R.S.O. 1990, c. P.41, s. 7(1).
>
> ...
>
> **Privilege**
>
> 11. Nothing is admissible in evidence at an inquiry that would be inadmissible in a court by reason of any privilege under the law of evidence. R.S.O. 1990, c. P.41, s. 11.

As I have explained, the documents sought are relevant to the Commission's mandate, and CPSO asserts no privilege over all of them. To argue that non-privileged relevant documents that are confidential can only be summonsed if, in addition, the Act authorizing the summons explicitly provides that the summons overrides the confidentiality requirement is to effectively amend s. 7(1) of the *PIA* by adding a third

condition to relevance and privilege. There is no warrant to do so. The plain meaning of s. 36(1)(h) is met by s. 7(1) of the *PIA,* which requires that the Registrar respond to the summons.

Moreover, in my view, it is of no moment that the recent amendment to the exception found in s. 36(1)(d) added the *Coroners Act*, R.S.O. 1990, c. C.37, but not the *PIA*. That exception addresses information required for the administration of the listed Acts. The *Coroners Act* entitles the coroner to obtain information in the investigation of deaths entirely apart from his or her power to summons documents at an inquest. The recent amendment to s. 36(1)(d) has removed the confidentiality impediment to that aspect of the coroner's work. By contrast, the *PIA* gives a commission no entitlement to acquire information except by summons. Thus, s. 36(1)(d) removes an impediment to a method of acquiring information that is unavailable to public inquiries. It is unsurprising, therefore, that the *PIA* is not included in that exception.

CPSO also argues that even if this is so, s. 36(3) prevents the Registrar from complying because a public inquiry is a civil proceeding and, therefore, no document prepared for a proceeding under the *RHPA* is admissible at this inquiry. Dr. Smith supports this position.

In assessing this argument, the recent case of *Winters v. Legal Services Society* [1999] 3 S.C.R. 160 is helpful. The relevant issue there was the meaning of the term "civil proceedings" in the *Legal Services Society Act,* R.S.B.C. 1979, c. 227, s. 3. Although he dissented in the result, Cory J. spoke for the Supreme Court on this issue. He concluded that the term must take its meaning from the particular statute in question. He looked for guidance to Black's Law Dictionary and then concluded that "civil proceedings" in the legislation in issue refers to the enforcement, redress or protection of private rights. At paragraph 62, he said this:

> [62] In *Black's Law Dictionary*, 6th ed. (1990), "civil" is defined as follows: "Of or relating to the state or its citizenry. Relating to private rights and remedies sought by civil actions as contrasted with criminal proceedings." The definition of a "civil action" is an "[a]ction brought to enforce, redress, or protect private rights. In general, all types of actions other than criminal proceedings." This definition essentially accords with that offered by the Legal Services Society: "civil proceedings", as defined in s. 3(2)(*b*), refers to the enforcement, redress or protection of private rights.

In the Ipperwash Public Inquiry, Commissioner Linden was required to consider the meaning of "civil proceeding" in s. 69(9) of the *Police Services Act*, R.S.O. 1990, c. P.15. That subsection precluded certain documents prepared pursuant to that Act from admission in a civil proceeding. Using the same approach as Cory J., he concluded that this prohibition does not apply to a public inquiry because an inquiry is an investigative, not an adjudicative process, and he could make no finding of civil or criminal liability. As he put it at paragraph 44 of his ruling: "... there is no *lis* in a public inquiry."

I would take the same approach in determining whether "civil proceeding" in s. 36(3) extends to a public inquiry. In my view, the purpose of the subsection is to allow the complaints process under the *RHPA* to function without fear that a participant or a third party will use documents prepared for it for the collateral purpose of building or defending a civil case. This protects the integrity of the complaints process by preventing it from being used as a vehicle to assist in vindicating one's rights in another proceeding.

While I agree that the collateral proceeding need not necessarily be a civil action, to be true to that objective, it must be one (in the language of *Winters supra*) that involves the enforcement, redress, or protection of private rights. The subsection is clearly not designed to protect the privacy interest of a participant from exposure in a collateral proceeding since no such protection is offered in the complaints process itself where hearings are presumptively public. This reading of the purpose of s. 36(3) accords with that of Laskin JA speaking on behalf of the Court of Appeal for Ontario in *F.(M.) v. S.(N.)* (2000), 188 D.L.R. (4th) 296.

Given this legislative intent, the prohibition against admissibility in a civil proceeding cannot be read to extend to a public inquiry. A public inquiry does not decide upon private rights. Indeed the Order in Council establishing this Commission expressly

prohibits it from expressing any conclusion regarding the civil or criminal liability of any person or organization. The role of a public inquiry is quite different, as described in *Canada (Attorney General) v. Canada (Commission of the Inquiry on the Blood System)*, [1997] 3 S.C.R. 440 at paragraph 34:

> A commission of inquiry is neither a criminal trial nor a civil action for the determination of liability. It cannot establish either criminal culpability or civil responsibility for damages. Rather, an inquiry is an investigation into an issue, event or series of events. The findings of a commissioner relating to that investigation are simply findings of fact and statements of opinion reached by the commissioner at the end of the inquiry. They are unconnected to normal legal criteria. They are based upon and flow from a procedure which is not bound by the evidentiary or procedural rules of a courtroom. There are no legal consequences attached to the determinations of a commissioner. They are not enforceable and do not bind courts considering the same subject matter.

My conclusion that a public inquiry is not a civil proceeding for the purposes of s. 36 of the *RHPA* is also consistent with the way the legislature used the two terms in the *PIA*. In s. 9(1) of that Act, the legislature clearly refers to civil proceedings as those in which liability is established, and explicitly distinguishes such proceedings from an inquiry established under the Act.

I would, therefore conclude that neither s. 36(1) nor s. 36(3) of the *RHPA* prevent the Registrar from complying with the summons issued by the Commission.

The final argument raised to justify non-compliance with the summons is that the documents it seeks in paragraphs 1 to 4 are all protected by a privilege. Only Dr. Smith raises this point. He does not argue that there is an applicable class privilege (such as solicitor-client communications) but rather that all of the documents sought in paragraphs 1 to 4 of the summons meet the four common law criteria that the Supreme Court of Canada has set out to determine whether an individual communication is privileged. In *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157 at para. 20, they are set out as follows:

> The applicable principles are derived from those set forth in *Wigmore on Evidence*, vol. 8 (McNaughton rev., 1961), sec. 2285. First, the communication must originate in confidence. Second, the confidence must be essential to the relationship in which the communication arises. Third, the relationship must be one which should be "sedulously fostered" in the public good. Finally, if all these requirements are met, the court must consider whether the interests served by protecting the communications from disclosure outweigh the interest in getting at the truth and disposing correctly of the litigation.

In my view, this argument must fail. To begin with, it has not been shown that if a privilege exists, Dr. Smith can assert it as one for whose benefit the privilege exists. It is at least possible that only CPSO holds any privilege, and while it reserves the right to assert privilege over specific documents, it claims no privilege over the documents as a whole. In addition, paragraphs 2 and 3 of the summons seek documents related to the Gagnon and Waudby complaints. If these complainants are the holders of any privilege

over any of these documents, such as the complaints themselves, past experience would suggest that the privilege would be waived.

Where privilege is asserted not on a class basis, but on a case by case basis, the presumption is that the communications are not privileged but are admissible unless the common law criteria are met. See *R. v. Gruenke* (1991), 67 C.C.C. (3d) 289 at 303. Dr. Smith has provided no record upon which it could be concluded that the criteria are met for all the documents sought in paragraphs 1 to 4 of the summons. That is especially true for the fourth criterion. Indeed, it would seem unlikely that this criterion could be met for all the documents. The same is true of the other criteria. For example, since the complaints process may culminate in a hearing which is presumptively public, it is hard to imagine that all documents originated in a confidence that they would not be disclosed as is required by the first criterion.

I would, therefore, conclude that Dr. Smith's argument fails. If, as individual documents are produced, a party wishes to advance a claim of privilege, it should proceed as contemplated by the Commission's Rules of Procedure.

In summary, none of the arguments advanced in support of the Registrar declining to comply with the summons issued by the Commissioner succeed. I find that he is obliged to comply, and direct that he do so.

RELEASED: October 10, 2007

Stephen Goudge
Commissioner

1995 CarswellOnt 1461
Ontario Court of Justice (General Division)

Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.

1995 CarswellOnt 1461, [1995] O.J. No. 3886, 27 O.R. (3d) 291,
46 C.P.C. (3d) 110, 59 A.C.W.S. (3d) 864, 7 W.D.C.P. (2d) 48

TRANSAMERICA LIFE INSURANCE COMPANY OF CANADA v. CANADA LIFE ASSURANCE COMPANY and CANADA LIFE MORTGAGE SERVICES LTD.

Sharpe J.

Heard: December 4, 1995

Judgment: December 15, 1995 *

Docket: Doc. 92-CQ-275666

Counsel: *Paul J. Bates* and *Simon A. Clements* , for responding party (plaintiff).
Robert Rueter and *Stephanie N. Willson* , for moving party (defendants).
Peter Southey , for Attorney General of Canada.

Related Abridgment Classifications
Civil practice and procedure
XIV Practice on interlocutory motions and applications
XIV.7 Evidence on motions and applications
XIV.7.b Examination of witnesses
XIV.7.b.i Before hearing of pending motion or application
Evidence
V Documentary evidence
V.2 Public documents
V.2.b Government documents
Evidence
XIV Privilege
XIV.1 Solicitor and client privilege
XIV.1.b Waiver
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XIV.8.a Crown privilege
Table of Authorities
Cases considered:

Biscotti v. Ontario (Securities Commission) (1990), 13 O.S.C.B. 3137, 72 D.L.R. (4th) 385, 74 O.R. (2d) 119, 40 O.A.C. 129 (Div. Ct.) , affirmed in part (1991), 76 D.L.R. (4th) 762, 1 O.R. (3d) 409, 45 O.A.C. 293 (C.A.) [leave to appeal to S.C.C. refused (1991), 3 O.R. (3d) xii (note), 50 O.A.C. 160 (note), 136 N.R. 407 (note), 136 N.R. 408 (note)]*considered*

Biscotti v. Ontario (Securities Commission) (1991), 76 D.L.R. (4th) 762, 1 O.R. (3d) 409, 45 O.A.C. 293 (C.A.) [leave to appeal to S.C.C. refused (1991), 3 O.R. (3d) xii (note), 50 O.A.C. 160 (note), 136 N.R. 407 (note), 136 N.R. 408 (note)] — *considered*

Canada Metal Co. v. Heap (1975), 7 O.R. (2d) 185, 54 D.L.R. (3d) 641 (C.A.) — *followed*

Nova Aqua Salmon Ltd. Partnership (Receiver of) v. Non-Marine Underwriters, Lloyd's London (1994), 28 C.P.C. (3d) 269, (sub nom. *Nova Aqua Salmon Ltd. Partnership (Receivership) v. Non-Marine Underwriters, Lloyd's London)* 135 N.S.R. (2d) 71, 386 A.P.R. 71 (S.C.) — *applied*

S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd., 35 C.P.C. 146, [1983] 4 W.W.R. 762, 45 B.C.L.R. 218 (S.C.) — *referred to*

Slavutych v. Baker, [1976] 1 S.C.R. 254, [1975] 4 W.W.R. 620, 38 C.R.N.S. 306, 75 C.L.L.C. 14,263, 55 D.L.R. (3d) 224 — *followed*

Statutes considered:

Canada Evidence Act, R.S.C. 1985, c. C-5 —

s. 37

s. 37(1)

s. 37(2)

Canadian and British Insurance Companies Act, R.S.C. 1985, c. I-12.

Insurance Companies Act, S.C. 1991, c. 47 —

s. 672(1)

Loan Companies Act, R.S.C. 1985, c. L-12.

Office of the Superintendent of Financial Institutions Act, R.S.C. 1985, c. 18 (3rd Supp.) —

s. 22 [am. 1991, S.C. c. 46, s. 601(2)]

s. 22(1)

s. 22(1)(a)

Securities Act, R.S.O. 1980, c. 466 —

s. 14

Rules considered:

Ontario, Rules of Civil Procedure —

r. 37.15

r. 39.03

r. 39.03(1)

Ontario, Rules of Practice —

R. 230

Words and phrases considered:

Slavutych v. Baker test — "However, as already noted, disclosure of confidential information may be compelled by summons unless the Slavutych v. Baker test is met ...

. . . . .

In Slavutych v. Baker, Spence J., adopting the approach advocated by Wigmore on Evidence (McNaughton Revision, 1961) vol. 8 para 2285, described the test as follows: (at 260)

(1) The communications must originate in a *confidence* that they will not be disclosed.

(2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.

(3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered* .

(4) The injury that would enure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

(emphasis in original)"

***Sharpe J.*:**

1 The defendants move to set aside a Summons to Witness to Henry Heft of the Office of the Superintendent of Financial Institutions (OSFI). That summons was served by the plaintiff pursuant to Rule 39.03(1) to examine Mr. Heft in connection with a pending motion for summary judgment brought by the defendant The Canada Life Assurance Company (CLAC) to have the action against it dismissed. The summons requires the production of certain documents as well as an attendance to answer questions.

2 The defendants take the position that the summons should be set aside on the grounds that the information sought is not relevant to the issues to be decided on the motion for summary judgment and that the summons represents an attempt to obtain discovery from a third party. The defendants further submit that the documents and information sought are subject to both statutory and common law confidentiality. The defendants are supported by the Attorney General of Canada who also moves to quash the summons on grounds of confidentiality, public interest immunity and, if necessary, on the basis of certification pursuant to the *Canada Evidence Act* , R.S.C. 1985, c. C-5, s. 37, that the information sought should not be disclosed on the grounds of public interest.

3 There is also before me a motion by the plaintiff for the production of certain documents by the defendants which is resisted on grounds of solicitor client privilege.

I Background

4 For the purposes of the motions before me, the issues in this complex action may be described as follows. The plaintiff's claim arises from a March, 1981 "Mortgage Correspondent Agreement" between it and the defendant Canadian Life Mortgage Services Ltd. (CLMS), a wholly owned subsidiary of CLAC. The plaintiff alleges that pursuant to this agreement, between 1983 and 1989, the plaintiff invested in over 50 commercial real estate properties in the total principal amount of approximately $120,000,000. A significant number of these mortgages went into default and the plaintiff claims losses in excess of $54,000,000. The plaintiff's position is that CLMS undertook to act on the plaintiff's behalf in arranging these mortgage investments and that CLMS owed it both contractual and fiduciary duties which CLMS breached. The plaintiff seeks to attach liability to CLAC on the basis of CLAC's knowledge and control of CLMS.

5 The defendants dispute the plaintiff's characterization of the capacity in which CLMS acted in relation to the investments made by the plaintiff. It is their position that CLMS acted at all times as agent for the borrower and that there is no basis upon which the plaintiff can establish the alleged breach of fiduciary duty.

6 For the purposes of this motion, the crucial issue is the relationship between the defendants and OSFI. CLMS was incorporated as a wholly owned subsidiary of CLAC in 1974 to carry on business as a mortgage correspondent and general financial agent. Because CLMS is a wholly owned subsidiary of CLAC, regulatory approval for its activities of was required

pursuant to the *Canadian and British Insurance Companies Act* , R.S.C. 1985, c. I-12. OSFI and its predecessor, the Department of Insurance, bore regulatory responsibility during the relevant period.

7 The plaintiff specifically pleads in paragraph 7 of the Statement of Claim that an undertaking was provided to the Superintendent of Insurance in February, 1975 when CLMS began the business of acquiring and servicing mortgage investments.

> 7. By an Undertaking in writing to the Superintendent of Insurance dated on or about February 18, 1975, CLMS undertook, pursuant to section 8 of the Life Companies Investment (Special Shares) Regulations, to:
>
> (i) provide the Superintendent of Insurance with copies of its financial statements and such other information concerning its affairs as he may from time to time request,
>
> (ii) not carry on any business
>
> (A) referred to in paragraphs 65(1)(a) and 65(1)(c) to (f) of the Act,
>
> (B) referred to in paragraph 65(1)(b) of the Act, except with the approval of the Superintendent, or
>
> (C) that is not reasonably ancillary to the business of insurance, ...
>
> . . . . .
>
> (viii) not provide, except with the approval of he Superintendent, any service ordinarily required by The Canada Life Assurance Company unless it also provides them to that company.
>
> By these provisions, CLMS was to continue the business of acquiring and servicing mortgage investments which was formerly carried on by Canada Life for its own account.

8 The plaintiff's position is that the terms of that undertaking and the terms on which CLMS was permitted by OSFI to act represent an important element which will assist it in establishing the capacity in which CLMS was acting. The plaintiff further alleges that as officers of CLAC were involved in establishing the terms of the undertaking and had knowledge of terms on which CLMS was permitted to carry on business, the undertaking represents an element linking CLAC to CLMS and the alleged breaches of duty committed by CLMS for purposes of liability.

9 The defendants take the position that there is no foundation for the argument that the terms of the undertaking to the Superintendent of Financial Institutions has the meaning or effect claimed by the plaintiff. The defendants submit that the undertaking is a "red herring" and irrelevant to the issue of the liability of CLAC. Moreover, the defendants contend, with the support of the Attorney General of Canada who appears on behalf of OSFI, that the information provided to OSFI and its predecessor was confidential and not the proper subject of a summons.

II Analysis

1. Scope of the Summons

10 The summons requires production of the following documents and information:

> 1. All correspondence, reports, filings, and documents of any nature whatsoever provided by The Canada Life Assurance Company, the incorporators of Canada Life Mortgage Services Ltd., Canada Life Mortgage Services Ltd., and any of their respective representatives (including, without limitation, legal counsel), to the Office of the Superintendent of Financial Institutions and all of its predecessors (including the Department of Insurance) pertaining to the incorporation, organization and continuing existence of Canada Life Mortgage Services Ltd. at any time up to the present.
>
> 2. All correspondence, memoranda, reports, guidelines, instructions, policies, and any other documents whatsoever provided by the Office of the Superintendent of Financial Institutions, and all of its predecessors (including the Department of Insurance), to The Canada Life Assurance Company, incorporators of Canada life Mortgage Services Ltd., Canada

Life Mortgage Services Ltd., and to all of their respective representatives (including, without limitation, legal counsel) pertaining to the incorporation, organization and continuing existence of Canada Life Mortgage Services Ltd., at any time up to the present.

3. Without in any way limiting the generality of the items described in paragraphs 1 and 2, a copy of all documents of any nature whatsoever, of the Office of the Superintendent of Financial Institutions and all of its predecessors (including the Department of Insurance) with respect to the objects of incorporation and business plan (narrative and financial) of Canada Life Mortgage Services Ltd.

4. Without in any way limiting the generality of the items described in paragraphs 1 and 2, a copy of any documents of any nature whatsoever of the Office of the Superintendent of Financial Institutions and all of its predecessors (including the Department of Insurance) with respect to an Undertaking by the directors of Canada Life Mortgage Services Ltd., to the Office of the Superintendent of Financial Institutions and all of its predecessors (including the Department of Insurance) concerning the permissible business activity of Canada Life Mortgage Services Ltd.

5. All memoranda, reports, guidelines, instructions, policies, manuals, and other documents of any kind or nature whatsoever of the Office of the Superintendent of Financial Institutions and all of its predecessors (including the Department of Insurance) pertaining to policies, procedures and guidelines for:

(a) the incorporation, organization, and continuing existence of a subsidiary of a Canadian life insurance company generally; and

(b) undertakings, guarantees, and any other agreements or undertakings whatsoever necessary or desirable in respect of a subsidiary of a Canadian life insurance company.

6. Without in any way limiting the generality of the foregoing, all memoranda, reports, guidelines, instructions, policies, manuals and other documents of any kind or nature whatsoever of the Office of the Superintendent of Financial Institutions and any of its predecessors (including the Department of Insurance) pertaining to policies, procedures and guidelines for:

(a) section 8 of the Life Companies Investment (Special Shares) Regulation as it existed and may have been amended from 1974 to the present;

(b) the meaning, definition, or description of "a business ancillary to the business of life insurance" or "reasonably ancillary to the business of life insurance" from 1974 to the present; and

(c) the permissible business activity of a subsidiary of a Canadian life insurance company.

11 The scope of the summons is very broad. It would require production and disclosure of virtually every communication between the defendants and the Office of the Superintendent of Financial Institutions relating to CLMS from the time of its incorporation to the present.

12 Mr. Heft has reviewed the OSFI files and prepared a list of documents which fall within the subject areas set out in the summons. The original list included 57 documents. OSFI has now waived privilege with respect to 3 documents which have been produced. OSFI now states that 6 of the documents on its original list are not relevant and claims solicitor client privilege with respect to 3 documents. The plaintiff does not challenge OSFI's claims with respect to these two classes of documents. The remaining documents fall into two categories. First are communications or documents provided by the defendants to OSFI. The defendants have already produced 17 of the documents in this category. The defendants say the balance are irrelevant to the issues in this action. The second category is comprised of internal OSFI documents. These have not been seen by the defendants. Accordingly, were are left with two categories of documents which remain at issue: (1) communications from the defendants not yet produced by the defendants which the defendants say are irrelevant and which both the defendants and OSFI say are confidential; and (2) internal OSFI documents which OSFI claims are confidential or subject to public interest immunity

and which the defendants have not seen, but to the extent that such documents contain information provided to OSFI by the defendants, the defendants claim confidentiality.

13 In argument before me, Mr. Bates made no serious attempt to justify the extraordinary sweep of the summons as it now stands. He did submit, however, that it would be appropriate for me to narrow its terms to those matters which are relevant to the issue on the summary judgment motion.

14 While the defendants' position is that the summons should be set aside in its entirety, they did not resist the suggestion that it is open to me to narrow its scope to what is relevant.

2. Summary Judgment Motion and Relevance

15 As indicated, the plaintiff has pleaded that the undertaking given to OSFI upon the incorporation of CLMS and the terms insisted upon by OSFI in that regard provided a basis for attaching liability to CLAC in respect of the plaintiff's claim. It is not disputed that Mr. Heft is in a position to provide information as to the nature of the undertaking insisted upon and as to the manner in which the undertaking was interpreted by the regulatory authority to which CLAC and CLMS were subject.

16 The defendants contend that the undertaking and the terms of regulatory approval are irrelevant to the issue on the summary judgment motion. In my view, in light of the pleadings and the stage these proceedings have reached, it would be wrong for me to accept this argument and, in effect, decide now that the undertaking has no bearing on the liability of CLAC. In making this argument the defendants are, in effect, anticipating the summary judgment motion and asking me now to decide the substantive issue of what the undertaking means and whether it provides any basis for attaching liability to CLAC. The issue of the nature and meaning of the undertaking is put squarely in issue by the pleadings and the plaintiff clearly asserts the undertaking as one element in its claim against CLAC. The summons is intended to permit the plaintiff to obtain evidence relevant to that issue. The time to decide the legal and factual issues pertaining to the undertaking and liability of CLAC is the motion for summary judgment proper, not this preliminary procedural motion. I hardly need add that in reaching the conclusion that on the pleadings as they stand, the inquiry proposed by the plaintiff is permissible on grounds of relevance, I express absolutely no view as to the ultimate issue of whether the undertaking provides a basis in fact or law to attach liability to CLAC. That is matter to be dealt with on the summary judgment motion proper.

17 The defendants further submit that the plaintiff has failed to establish a reasonable factual basis for the proposed examination. They say that on the evidence before me, it is clear that the undertaking does not have the meaning the plaintiff attributes to it, nor is there any reason to suspect that the regulatory authority required or imposed any prohibition upon the activities of CLMS which could assist the plaintiff in fixing liability on CLAC. They contend that the proposed examination of Mr. Heft is nothing more that an attempt to obtain discovery of a third party and a "fishing expedition" not permitted by the rules.

18 While I accept the proposition that Rule 39.03 cannot be used to conduct third party discovery or "fishing expeditions", I do not accept the argument that that is what is involved here. In effect, the defen dants are saying that a party seeking to conduct a Rule 39.03 examination must show some likelihood that the examination will yield evidence helpful to that party. In my view, this places too heavy an onus on the party seeking to examine a witness. A party resorting to a Rule 39.03 examination is required to show that the proposed examination will be on an issue relevant to the pending motion and that the party to be examined is in a position to offer relevant evidence. I am aware of no authority which requires the party to go one step further and show that the proposed examination will yield evidence helpful to that party's cause. In *Canada Metal Co. v. Heap* (1975), 7 O.R. (2d) 185 (C.A.) , the leading case interpreting the Rule 230, the provision corresponding to rule 39.03 at the time the case was decided, Arnup J.A. stated: (at 192) "The evidence sought to be elicited must be relevant to the issue on the motion. If it is, there is a *prima facie* right to resort to Rule 230." It may well be that the plaintiff will not elicit helpful information from Mr. Heft, but in my view that possibility does not defeat their right to conduct the examination as the proposed area of inquiry is relevant to the plaintiff's theory of liability on the part of CLAC.

19 It is equally clear, however, that in light of the present state of the pleadings and the allegations made by the plaintiff, the summons cannot stand in its present form. Paragraphs 1 and 2 would require the production of all information provided

by the defendants to OSFI from approximately 1974 to the present. This would almost certainly include matters not relevant to the summary judgment. However, it is also my view that the plaintiffs have established a basis for sustaining the summons with respect to the terms of the undertaking and regulatory approval accorded to CLMS. If restricted to those issues, it is my view that the documents to be produced and the proposed examination of Mr. Heft does fall within what is permitted by Rule 39.03. This subject area may be defined by narrowing the language of the summons as follows. Paragraphs 1, 2, 3 and 4 should be read down to include only material pertaining to:

> (a) the objects of incorporation and business plan (narrative and financial) of Canada Life Mortgage Services Ltd.
>
> and
>
> (b) an Undertaking by the directors of Canada Life Mortgage Services Ltd., to the Office of the Superintendent of Financial Institutions and all of its predecessors (including the Department of Insurance) concerning the permissible business activity of Canada Life Mortgage Services Ltd.

20 Paragraphs 5 and 6 relate to relevant material and may remain in their original form.

21 Accordingly, with respect to the first area of attack on the summons, that of relevance and abuse of process, I conclude that the summons should be limited in the manner I have described. What remains is subject to the other grounds relied on by the defendants and OSFI to defeat or limit the summons, confidentiality and public interest immunity, to which I now turn.

3. Confidentiality

(a) Statutory Confidentiality

22 The defendants and OSFI rely on the *Office of the Superintendent of Financial Institutions Act* , R.S.C. 1985, c. 18 (3rd Supp), s. 22 which provides as follows:

> 22(1) All information
>
> (*a*) regarding the business or affairs of a financial institution or persons dealing therewith that is obtained by the Superintendent, or by any person acting under the direction of the Superintendent, as a result of the administration or enforcement of any Act of Parliament ... is confidential and shall be treated accordingly.

A similar provision in the *Insurance Companies Act* , S.C. 1991, c. 47, s. 672(1) is also relied on:

> 672(1) Subject to section 673, all information regarding the business or affairs of a company, society, foreign company or provincial company or persons dealing therewith that is obtained by the Superintendent or by any person acting under the direction of the Superintendent, as a result of the administration or enforcement of any Act of Parliament is confidential and shall be treated accordingly.

23 Neither provision had been enacted at the time CLMS was incorporated and regulatory approval given for its activities. Section 22 of the *Office of the Superintendent of Financial Institutions Act* came into force in July, 1987 and the *Insurance Companies Act* provision came into force in June, 1992: To the extent these statutory provisions do not afford protection, OSFI and the defendants also rely upon common law confidentiality, a subject I will deal with below.

24 In my view, these statutory provisions do not advance the case of the defendants or OSFI for two reasons. First is the question of whether the statutes apply to pre-enactment communications. The plaintiff relies on the rule of interpretation against retrospective application. It was argued by the defendants and the Crown that it is not necessary to give the statutes retrospective application for them to apply. They contend that the statutory guarantee of confidentiality applies to any documents which come into the possession of OSFI after the enactment of the statute. I do not agree with this argument. It suffers from proving too much. It would mean that, however acquired, every bit of information in the possession of OSFI with respect to a financial institution subject to regulation becomes confidential. Such an extraordinary scope cannot, in my view, have been intended.

The essence of confidentiality lies in the terms on which the information was provided, and if the statute is to apply to the information in question here, it would have to be given retrospective application.

25 Second, and perhaps more fundamental, even if these statutory promises of confidentiality do apply to the information sought here, in my view, a statutory promise of confidentiality does not constitute an absolute bar to compelling production of the documents and information in the possession and control of OSFI. I see no reason to give statutory confidentiality a higher degree of protection than any other form of confidentiality. There is no reason why Parliament should be taken to have adopted the legal category of confidentiality without intending that category to have in its ordinary legal meaning and effect. It is well established that confidential information may be subpoenaed and introduced in evidence if ordered by a court. The general rule is that although information is confidential, it must be produced unless the test laid down in *Slavutych v. Baker*, [1976] 1 S.C.R. 254 is met. Parliament could have provided that the information and documents at issue here could not be compelled by summons, but in my view, to accomplish this end, specific language to that effect would be required. (For discussion of statutes having this effect, see Bushnell, "Crown Privilege" (1973), 51 C.B.R. 551 at 552 -555.) I see no reason to impute an intention to accomplish that end where Parliament has adopted a recognized and established legal category which does not have that effect: see Hogg, *Liability of the Crown* (2nd ed 1989) at p. 76:

> Many statutes contain provisions that expressly make information confidential ... The scope of these provisions is a matter of interpretation in each case. Those provisions that specifically prohibit the introduction of evidence in court will obviously be effective to withhold the protected material from litigation. More commonly, however, such provisions prescribe confidentiality but say nothing specific about the introduction of evidence in court. Such provisions have been interpreted as not barring either the production of documents in court or oral testimony in court. (footnotes omitted)

26 Counsel for the Attorney General of Canada submitted that *Biscotti v. Ontario (Securities Commission)* (1990), 74 O.R. (2d) 119 (Div. Ct.) aff'd. in part (1991), 1 O.R. (3d) 409 (C.A.) stands for the proposition that where information is made confidential by statute, disclosure cannot be compelled in any circumstance. In my view, the case stands for no such proposition. The case concerned the *Securities Act* , R.S.O. 1980, c. 466, s. 14:

> *14.* No person, without the consent of the Commission, shall disclose, except to his counsel, any information or evidence obtained or the name of any witness examined or sought to be examined under section 11 or 13.

The court concluded that the Commission had failed to consider the interests of the applicants in exercising the discretion conferred by the section and sent the matter back for further consideration. The court quite naturally focused on the discretion of the Securities Commission given the language of the statute. I am asked to infer from the fact that the decision turned on the specific discretion conferred that absent such language, statutory confidentiality is absolute. In my view, this is a strained reading of the case. The issue before me obviously did not arise as it was clear that the statute was intended to provide for a balancing of interests rather than an absolute rule precluding disclosure in any circumstances. I can find nothing in this case to suggest that the law is other than as described in the passage from Prof. Hogg's book, quoted above.

(b) Common Law Confidentiality

27 The affidavit evidence filed on behalf of both the defendants and OSFI to establish the terms upon which information was provided to OSFI and its predecessor by the defendants. That evidence clearly establishes that the information the defendants provided to the regulatory authorities in connection with the establishment of CLMS was given and received on the understanding that it would be treated as confidential. The assertion that this gives rise to a claim of common law confidentiality was not seriously questioned. However, as already noted, disclosure of confidential information may be compelled by summons unless the *Slavutych v. Baker* test is met, a matter to which I will turn in due course.

3. Public Interest Immunity

(a) Common Law

28 A claim of public interest immunity is also advanced. The affidavit of Mr. Heft was offered in support of this claim. Mr. Heft indicates that access to full and reliable information from financial institutions is essential to the regulatory work of OSFI and that such information will be forthcoming from financial institutions only if they are assured of confidentiality. Mr. Heft asserts further that the public interest in the effective regulation of financial institutions requires that a relationship of confidentiality with those institutions be fostered.

29 This evidence does appear to me sufficient to support a claim of public interest immunity. In light of the other grounds which provide the same level of protection to this material, namely confidentiality and statutory public interest immunity, it is unnecessary to engage in a detailed analysis of this ground. Assuming the information is covered by common law public interest immunity, counsel for the Attorney General of Canada submitted that the same test is applied on the issue of whether production can be compelled on the basis that the interest in correct disposal of the litigation outweighs the public interest in maintaining confidentiality, namely the fourth step of the test laid down by the Supreme Court of Canada in *Slavutych v. Baker, supra* , a matter to which I will return below.

(b) Canada Evidence Act, R.S.C. c. c-5, s. 37

30 The *Canada Evidence Act* , R.S.C. 1985, c. C-5, s. 37(1) and (2) provides as follows:

> *37.* (1) A minister of the Crown in right of Canada or other person interested may object to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying orally or in writing to the court, person or body that the information should not be disclosed on the grounds of a specified public interest.
>
> (2) Subject to sections 38 and 39 [not relevant here], where an objection to the disclosure of information is made under subsection (1) before a superior court, the court may examine or hear the information and order its disclosure, subject to such restrictions or conditions as it deems appropriate, if it concludes that, in the circumstances of the case, the public interest in disclosure outweighs in importance the specified public interest.

31 Counsel for the Attorney General of Canada indicated that if the court was not satisfied that the information in issue is privileged from disclosure by virtue of any of the above grounds, then pursuant s. 37 he certified orally on behalf of the Attorney General that the information should not be disclosed on the grounds of the public interest in maintaining confidentiality between OSFI and financial institutions. It is clear from the language of s. 37 that this claim must be assessed by the court in light of the interest in having the material disclosed. It was counsel's position that the balancing test to be applied is the same as the fourth and crucial step in the test mandated by *Slavutych v. Baker, supra* to which I turn below in relation to the other claims of confidentiality. I note that have not yet reviewed the documents in question, a possibility contemplated by s. 37(2).

32 As noted above, the disputed documents include internal OSFI memoranda. With reference to the claims of confidentiality and public interest immunity, Counsel for the Attorney General of Canada indicated in response to a question I posed in argument that what was resisted by OSFI was disclosure of information provided to it by regulated financial institutions. Counsel indicated that information as to the position taken by OSFI or its predecessors as to the terms of regulatory approval or the interpretation of the undertaking would not be regarded as confidential and hence, production of such information was not resisted.

4. Application of the Balancing Test

33 With reference to the claims of confidentiality, the next step in the analysis is to apply the four step balancing test mandated by the Supreme Court of Canada in *Slavutych v. Baker, supra* , to determine whether the documents and information sought should be compelled here. As I have already indicated, the fourth step of this test is also applicable to the claims of public interest immunity. In *Slavutych v. Baker* , Spence J., adopting the approach advocated by *Wigmore on Evidence* , (McNaughton Revision, 1961) vol. 8 para 2285, described the test as follows: (at 260)

> (1) The communications must originate in a *confidence* that they will not be disclosed.

(2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.

(3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered* .

(4) The *injury* that would enure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

(emphasis in original)

34 In my view, the evidence establishes that the communications did originate in a confidence that they will not be disclosed and the first step is satisfied. I also find that the evidence establishes that the element of confidentiality is essential to the full and satisfactory maintenance of the relation between the parties. I further find that given the obvious importance of the regulated institutions and the regulation thereof, the relation is one which in the opinion of the community ought to be sedulously fostered.

35 This brings me to the fourth condition which requires me to weigh the injury that would enure to the relation by the disclosure of the communication against the benefit thereby gained for the correct disposal of the litigation. As noted above, this same test is applicable to the claims of public interest immunity, whether at common law or by virtue of statute.

36 It is my view that while as originally framed, the summons would require disclosure that could not be justified on this test, disclosure of information within the narrowed area of inquiry described above as relevant to the motion for summary judgment can be justified.

37 I will deal first with information provided by the defendants to OSFI. It is significant that the defendants have not taken the position that they refuse production of all the documents prepared for OSFI on the ground of confidentiality. As indicated, they have already produced 17 of the documents in the OSFI file and resists production of the other documents primarily on the ground that they are not relevant. In light if the pleadings, this is an entirely fair and proper position for the defendants to have taken in light of the issues arising in this action. However, this position is highly relevant to the fourth step of the balancing test. By producing 17 of the OSFI documents, the defendants have, in effect, admitted that they do not regard the confidentiality as absolute and that they are prepared to reveal information provided to OSFI where relevant to this action. It may well be that the defendants have already produced all of the documents from the OSFI file relevant to the issues on this motion. That was certainly the position taken by Mr. Rueter in argument before me. Having taken that position, I fail to see how the defendants can now resist on grounds of confidentiality further production if indeed there are further OSFI documents which are relevant as defined by these reasons.

38 While OSFI also has an interest in asserting confidentiality, the weight of such claim must be assessed in light of the position of the party who is the principal beneficiary of the promise of confidence. In my view, provided protection is accorded to disclosures to OSFI by third parties and disclosures by the defendants not relevant to the issue on the summary judgment motion, the interest asserted by OSFI is adequately protected.

39 Paragraphs 5 and 6 of the Summons concern internal OSFI documents. The thrust of the confidentiality claim relates to the importance of ensuring that regulated financial institutions will provide full and accurate information to OSFI. As noted above, there is no claim of confidentiality or public interest immunity with respect to the terms of regulatory approval and the policies of OSFI. Indeed, it is difficult to see how the public interest could favour shielding these matters as the public is surely entitled to know the rules under which these institutions operate. Accordingly, the material referred to in paragraphs 5 and 6 of the summons should be produced subject to this: confidential information from third parties or from the defendants which is not relevant to the summary judgment motion is to be excluded from production. Where part of a document is producible without revealing confidential information excluded by these reasons, it should be produced in edited form.

5. Solicitor Client Privilege and Waiver

40 The plaintiff seeks production of a number of documents for which the defendants claim solicitor client privilege on the ground that privilege has been waived. On the examination for discovery of the CLMS representative, an undertaking was given to produce documents relating to the incorporation of CLMS and the objects for which it was incorporated. A number of documents were produced and solicitor client privilege was claimed with respect to 18 additional documents. Among the documents produced was a letter from the solicitors of CLMS to CLAC offering the opinion that the proposed objects of CLMS would not bring it within the definition of a "loan company" in the *Loan Companies Act (Canada)* . It would appear that this opinion was required by the Superintendent of Financial Institutions in relation to the incorporation of CLMS. CLMS has also produced a memorandum from a member of the CLAC legal department relating to the purposes for which CLMS was being incorporated. It is the plaintiff's position that these documents form part of a course of communications relating to the incorporation of CLMS, and that having produced these two items, the defendants have waived privilege with respect to the rest.

41 It is not suggested that there was an intention to waive privilege. However, the plaintiff relies on the principle that a party is not entitled to disclose only those parts of a privileged document which are to the party's advantage as fairness and consistency may require full disclosure: see *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 35 C.P.C. 146 (B.C. S.C.) at 148-9; Manes, *Solicitor-Client Privilege* , para. 1.04. In my view, the plaintiffs have failed to establish waiver and the defendants are entitled to maintain their claim of privilege with respect to these documents. It is plainly not the law that production of one document from a file waives the privilege attaching to other documents in the same file. It must be shown that without the additional documents, the document produced is somehow misleading: *Nova Aqua Salmon Ltd. Partnership (Receiver of) v. Non-Marine Underwriters, Lloyd's London* (1994), 28 C.P.C. (3d) 269 . There is nothing before me to suggest that the disclosed documents are misleading without production of all documents in the CLMS incorporation file. It is understandable that the opinion latter provided to satisfied the regulatory requirements of the Superintendent of Financial Institutions would have been produced and it certainly stands on its own. The memorandum from the internal legal department is self-contained and readily understood and precedes the next document in the file for which privilege is claimed by 5 months. There is, in my view, no basis for saying that this document presents a misleading or incomplete picture unless it is the case that any time one document is produced, all the others relating to the same subject must also be produced.

42 The waiver rule must be applied if there is an indication that a party is attempting to take unfair advantage or present a misleading picture by selective disclosure. However, a party should not be penalized or inhibited from making the fullest possible disclosure. In my view, too ready application of the waiver rule will only serve to inhibit parties to litigation from making the fullest possible disclosure.

III Conclusion

43 In my view, the most appropriate and expeditious way to proceed is as follows. OSFI and the defendants should review the documents which have not yet been disclosed in light of these reasons to reassess their claims of confidentiality and public interest immunity. Any additional documents which are not protected in light of these reasons should be produced to the plaintiff prior to the examination of Mr. Heft. In light of the terms of the *Canada Evidence Act* , s. 37(2), it is open to the parties to ask me to review documents for which a claim of public interest immunity is maintained. The examination should then proceed. If so advised, the plaintiffs may move for further relief following the examination. As the judge hearing this motion pursuant to a direction to deal with motions in this action pursuant to Rule 37.15, I will remain seized of the matter should further directions be required with respect to production of documents and the examination of Mr. Heft. If there remain disputed documents following the examination, a review of the documents by me with a view to assessing the claim of privilege remains a possibility.

44 The costs of this motion shall be dealt with in conjunction with the summary judgment motion unless a party indicates within ten days of the release of these reasons an intention to make submissions to me that the matter or costs should be dealt with in some other fashion, in which case an attendance before me for submissions will be arranged.

Motion granted in part.

Footnotes

*	On January 24, 1996, the court issued an amendment to paragraph 11. The amendment has been incorporated herein.

In the matter of the Public Inquiries Act, 2009, S.O. 2009, c 33, Sch 6

And in the matter of the Resolution of the Council of the City of Hamilton dated April 24, 2019, establishing the Red Hill Valley Parkway Inquiry pursuant to section 274 of the Municipal Act, 2001, S.O. 2001, c 25

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