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Court File No. A-407-14

FEDERAL COURT OF APPEAL

BETWEEEN:

ATTORNEY GENERAL OF CANADA and MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellants

-and-

CANADIAN DOCTORS FOR REFUGEE CARE, THE CANADIAN ASSOCIATION OF REFUGEE LAWYERS, DANIEL GARCIA RODRIGUES, HANIF AYUBI, and JUSTICE FOR CHILDREN AND YOUTH

Respondents

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Respondents

NOTICE OF MOTION

Motion for Leave to Intervene brought by Amnesty International and ESCR-Net

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TAKE NOTICE THAT the Coalition of Amnesty International (AI) and the International Network for Economic, Social and Cultural Rights (ESCR-Net) (together, "the Coalition") will make a motion to the Court in writing under Rules 109 and 369 of the *Federal Courts Rules*.

THE MOTION IS FOR an Order that:

1. The Coalition is granted leave to intervene in this appeal pursuant to Rule 109 of the *Federal Courts Rules*;

2. The Coalition is entitled to receive all materials filed in this appeal;

3. The Coalition may serve a memorandum of fact and law, in accordance with the prescriptions as to font and format set out in the *Federal Courts Rules*;

4. The Coalition's memorandum of fact and law shall be limited to the application of international human rights law and principles to the issues raised in this appeal;

5. The Coalition shall accept the record in its current state, and not seek to file any additional evidence;

6. The Coalition shall be allowed to present oral argument at the hearing of the appeal, with the time for oral argument by counsel to the Coalition to be determined by the panel hearing the appeal;

7. The Coalition shall seek no costs in respect of the appeal, and shall have no costs ordered against it; and

8. The style of cause shall be changed to add the Coalition of Amnesty International and ESCR-Net as an intervener, and hereafter all documents shall be filed under the amended style of cause.

THE GROUNDS FOR THE MOTION ARE:

9. AI's and ESCR-Net's background and expertise in matters of human rights;

10. The Coalition has a genuine interest in this case;

11. The Coalition can make a unique, important, and useful contribution to this case;

12. The Coalition's participation in this case is in the interests of justice; and

13. The Coalition will not delay the application or duplicate materials.

14. If granted leave to intervene, the Coalition will abide by any schedule set by this Court for the delivery of materials and for oral argument.

15. If granted leave to intervene, the Coalition will seek no costs and would ask that no costs be awarded against it.

AND TAKE FURTHER NOTICE that in support of this motion, the Coalition will rely upon:

16. The Affidavit of Alex Neve, sworn 12 February 2015;
17. The Affidavit of Daniela Ikawa, sworn 13 February 2015;

18. Such further and other material as counsel may advise and this Honourable Court may allow

18 February 2015

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Respondents

NOTICE OF MOTION OF THE PROPOSED INTERVENERS AMNESTY INTERNATIONAL AND ESCR-NET

Motion for Leave to Intervene brought by Amnesty International and ESCR-Net

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Court File No. A-407-14

FEDERAL COURT OF APPEAL

BETWEEEN:

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Respondents

AFFIDAVIT OF ALEX NEVE

I, **ALEX NEVE**, of the City of Ottawa, in the Province of Ontario, make oath and state as follows:

1. I am the Secretary General of Amnesty International (AI), Canadian Section, English Branch, and as such have knowledge of the matters hereinafter deposed, except for information that arises from sources other than my own personal knowledge, the sources of which are stated and which I verily believe.

2. I was hired as Secretary General of AI Canada in January 2000. Prior to assuming this position, I have been an active member of AI for 15 years, during which time I was employed by AI Canada and by AI's International Secretariat in London, England, for three years. My activities with AI have included numerous research missions to monitor and report on human rights abuses, the preparation of international and national reports on issues of concern to AI, and participation in AI national and international meetings.

3. In addition to my experience with AI, I hold a Master of Laws degree in International Human Rights Law, with distinction, from the University of Essex in the United Kingdom.

4. For my human rights work in Canada and abroad, I was appointed an Officer of the Order of Canada in 2007.

5. As Secretary General of AI Canada, I am responsible for overseeing the implementation of AI's mission in Canada. This includes supervising staff and ensuring there is a national network of volunteers to carry out AI's work in Canada. My responsibilities also include ensuring that AI's expertise is available to decision-making bodies and the general public, communicating and cooperating with others who are interested in working to advance international human rights issues, and educating the public on human rights.

6. Amnesty International: The Organization

7. AI is a worldwide voluntary movement founded in 1961 that works to prevent some of the gravest violations of fundamental human rights.

8. AI is impartial and independent of any government, political persuasion, or religious creed. AI is financed by subscriptions and donations from its worldwide membership, and receives no government funding.

9. AI Canada is one of the two membership bodies for AI members and supporters in Canada. The other is AI Canada's Francophone Branch. AI Canada is a corporation incorporated under the *Canada Not-For-Profit Corporations Act*, SC 2009, c 23.

10. The organizational structure of AI Canada includes a board of 10 directors. AI Canada has approximately 60,000 members and supporters across the country.

11. There are currently more than three million AI members in over 162 countries. There are more than 7,500 AI groups, including local groups, youth or student groups, and professional groups, in more than 90 countries and territories throughout the world. In 55 countries and territories, the work of these groups is coordinated by national sections like AI Canada. AI's policies and priorities are determined democratically by its members at the national and international levels.

The Vision of Amnesty International

12. AI's vision is a world in which all people can freely enjoy all the human rights enshrined in the *Universal Declaration of Human Rights* and other international human rights instruments.

13. In pursuit of this vision, AI's mission is to conduct research and take action to prevent and end grave abuses of all human rights – civil, political, social, cultural, and economic.

14. In 1977, AI was awarded the Nobel Peace Prize for its work in promoting international human rights.

Promoting and Advancing International Human Rights

15. AI seeks to advance and promote international human rights at both the international and national levels. As part of its work to achieve this end, AI monitors and reports on human rights abuses, participates in international committee hearings, intervenes in domestic judicial proceedings, and prepares briefs for and participates in national legislative processes and hearings. AI also prepares international and national reports for the purpose of educating the public on international human rights.

Monitoring and Reporting on Human Rights Abuses

16. AI's investigative work is carried out by human rights researchers who receive, cross-check, and corroborate information from many sources, including prisoners and their families, lawyers, journalists, refugees, diplomats, religious groups, Indigenous communities, and humanitarian and other human rights organizations. Researchers also obtain information through newspapers, websites, and other media outlets. AI also sends approximately 130 fact-finding missions to some 70 countries each year to assess what is happening on the ground.

17. AI uses its research to prepare reports, briefing papers, newsletters, and campaigning materials. Among its publications is the annual Amnesty International Report on human rights in countries around the world. AI Canada has participated in preparing these reports and has assisted in distributing them in Canada. AI's research is recognized around the

world as accurate, unbiased, and credible, which is why AI reports are widely consulted by governments, intergovernmental organizations, journalists, and scholars.

18. Canadian courts, including the Supreme Court, have recognized AI's research as credible. The following judgments have emphasized the important evidentiary role of AI reports: *Thavachchelvam v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 601, 242 ACWS (3d) 166; *Mahjoub (Re)*, 2010 FC 787, 373 FTR 36; *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1503, [2007] 4 FCR 247; *Thang v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 457, 35 Imm LR (3d) 241; *Shabbir v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 480, 250 FTR 299; *Ertuk v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1118, 250 FTR 299; and *Suresh v. Canada (Minister of Citizenship and Immigration et al)*, 2002 SCC 1, [2002] 1 SCR 3.

Participation in Judicial and Administrative Proceedings

19. AI Canada has appeared before the Supreme Court of Canada as an intervener in the following cases involving Canada's obligations towards refugees:

(a) *Jesus Rodriguez Hernandes, B306, J.P. et al and Appullonappa et al v. Canada (Minister of Public Safety and Emergency Preparedness and the Queen)* (SCC Court File Nos. 35677, 35685, 35688, 35388, and 35958, judgment reserved): arguing that the definition of "people smuggling" and "human smuggling" in the *Immigration and Refugee Protection Act* must be construed in accordance with Canada's international human rights obligations;

(b) *Febles v. Canada*, 2014 SCC 68: presented submissions with respect to the interpretation of Article 1F(b) exclusion provision of the *Convention Relating to the Status of Refugees*;

(c) *Rachidi Ekanza Ezokola v. Minister of Citizenship and Immigration*, 2013 SCC 40, [2014] 2 SCR 678: proposed guiding principles to help ensure that Canadian decision-makers' application of Article 1F(a) of the *Convention Relating to the Status of Refugees* is consistent with international law;

(d) *Gavrila v. Canada (Justice)*, 2010 SCC 57, [2010] 3 SCR 342: presented submissions with respect to the interplay between extradition and refugee protection; and

(e) *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3: presented submissions regarding the nature and scope of the international prohibitions against torture, and the mechanisms designed to prevent and prohibit its use, to which the Court referred.

20. AI Canada has also intervened before this Honourable Court, the Superior Court of Ontario, the Ontario Court of Appeal, and the Canadian Human Rights Tribunal in a number of cases involving the economic, social, and cultural rights of vulnerable members of Canadian society:

(a) *Tanudjaja et al v. Attorney General of Canada and Attorney General of Ontario*, 2014 ONCA 852, 236 ACWS (3d) 610; *Tanudjaja et al v. Attorney General of Canada and Attorney General of Ontario*, 2013 ONSC 1878, 281 CRR (2d) 220: together with ESCR-Net, presented submissions regarding the nature of Canada's international human rights obligations and the justiciability of social and economic rights;

(b) *First Nations Child and Family Caring Society of Canada et al v. Canada* (Canadian Human Rights Tribunal File No. T1340/7008, judgment reserved): submitted that Canada's international obligations must be respected in the interpretation of the *Canadian Human Rights Act* in determining whether Canada has discriminated against First Nations children living on reserves by underfunding child welfare services available to them;

(c) *The Attorney General of Canada v. Pictou Landing Band Council and Maurina Beadle*, Court File No. A-158-13 (leave to intervene before the Federal Court of Appeal granted, but the government discontinued the appeal): prepared submissions as to Canada's international human rights obligations to ensure that the level of health care services and funding available to a First Nations child living on reserve is equal to that received by a child living off reserve; and

(d) *Canadian Human Rights Commission v. Attorney General of Canada*, 2013 FCA 75, 444 NR 120: argued that Canada's obligations under international human rights law were inconsistent with a narrow reading of section 5(b) of the *Canadian Human Rights Act*, which would have precluded a comparison between the child welfare services received by First Nations children living on reserves and children living off reserves.

21. AI Canada has also intervened before the Supreme Court of Canada regarding other international human rights issues in the following cases:

(a) *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, 220 ACWS (3d) 313: presented submissions regarding the non-applicability of jurisdictional immunity under the *State Immunity Act* to state-sanctioned acts of torture;

(b) *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, 241 ACWS (3d) 2: submitted that the test for aboriginal title must be developed in a manner that is consistent with international human rights law, and not arbitrarily or narrowly construed;

(c) *Minister of Citizenship and Immigration and Minister of Public Safety and Emergency Preparedness v. Harkat*, 2014 SCC 37, 24 Imm LR (4th) 1: regarding the revised security certificate system's violations of international human rights norms;

(d) *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 SCR 572: presented submissions with respect to the forum of necessity doctrine and international standards of jurisdiction and access to justice;

(e) *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 SCR 44: intervened with respect to what triggers a Canadian's section 7 life, liberty, and security of the person interests, and the content of the principles of fundamental justice;

(f) *Charkaoui v. Canada (Minister of Citizenship and Immigration) No. 2*, 2008 SCC 38, [2008] 2 SCR 326: intervened on whether the systematic destruction of interview notes and other information by the Canadian Security Intelligence Service in the context of security certificate proceedings violates international law and the constitutional principles of procedural fairness;

(g) *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350: presented submissions on the constitutionality of the procedural protections in the *Immigration and Refugee Protection Act*'s security certificate regime and on the arbitrary detention of foreign nationals under that regime;

(h) *Schreiber v. Canada (Attorney General)*, 2002 SCC 62, [2002] 3 SCR 269: argued the right to protection of mental integrity and to compensation for its violation has risen to the level of a peremptory norm of international law, which prevails over the doctrine of sovereign immunity;

(i) *United States v. Burns*, 2001 SCC 7, [2001] 1 SCR 283: presented submissions regarding the international movement towards the abolition of capital punishment; and

(j) *Kindler v. Canada (Minister of Justice)*, [1991] 2 SCR 779, 84 DLR (4th) 438: presented submissions regarding the international movement towards the abolition of capital punishment.

22. In addition to advocacy before the Supreme Court of Canada, AI Canada has appeared before other Canadian courts as an intervener or applicant in the following cases:

(a) *France v. Diab*, 2014 ONCA 374, 120 OR (3d) 174: submitted that Canada's obligations under international human rights law compel Canada to refuse extradition for anyone for whom there is a real risk of admission of evidence derived from torture at the trial following extradition;

(b) *Choch et al v. Hudbay et al*, 2013 ONSC 1414, 116 OR (3d) 674: made arguments regarding corporate accountability for human rights abuses overseas;

(c) *Canadian Council for Refugees, Canadian Council of Churches, Amnesty International and John Doe v. Canada*, 2008 FCA 229, [2009] 3 FCR 136: intervened with respect to the validity of the US-Canada Safe Third Country Agreement, considering the United States' failure to comply with its international human rights obligations, particularly the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*;

(d) *Amnesty International Canada and British Columbia Civil Liberties Association v. Chief of the Defence Staff for the Canadian Forces, Minister of National Defence and Attorney General of Canada*, 2008 FCA 401, [2009] 4 FCR 149: submitted that Canada breached its obligations under the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* when it transferred Afghan detainees into the custody of Afghan officials, where they were at serious risk of torture or cruel, inhuman or degrading treatment;

(e) *Bouzari v. Islamic Republic of Iran*, (2004) 71 OR (3d) 675, 243 DLR (4th) 406: intervened regarding the right of a torture victim to sue for compensation from the offending government; and

(f) *Ahani v. Canada (Minister of Citizenship and Immigration)*, (2002) 58 OR (3d) 107, 208 DLR (4th) 66: presented submissions regarding Canada's international obligations in response to the UN Human Rights Committee's request that Canada not deport the appellant pending consideration of his complaint to the Committee.

23. Further, AI Canada was granted intervener status at *The Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar* ("Arar Inquiry") and *The Internal Inquiry into the Actions of Canadian officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nurredin* ("Iacobucci Inquiry"). In those inquiries, AI Canada made submissions on the subject of security and human rights, including the prohibition against torture, prohibition against the use of information obtain through torture, and the presumption of innocence of Canadians detained abroad.

24. In other national and international judicial contexts, AI and its national sections have made submissions on a variety of matters. For example:

(a) *Hirsi Jamaa and others v. Italy*, [2012] ECHR 27765/09 (European Court of Human Rights): presented submissions regarding Italy's violation of its refugee protection and human rights obligations under the *European Convention on Human Rights* when it intercepted a boat of smuggled refugees seeking asylum and diverted them to Libya;

(b) *Graham v. Florida*, 982 So. 2d 43 (2010) (United States Supreme Court): argued the relevance of international law to the question of whether a juvenile offender can be sentenced to life in prison without parole for a non-homicide crime;

(c) *Boumediene v. Bush*; *Al Odah v. United States*, 128 S. Ct. 2229 (2008) (United States Supreme Court): argued that that the *Military Commission Act* of 2006 is an unconstitutional suspension of *habeas corpus* under United States law and in violation of the United States' international obligations;

(d) *Al-Skeini and others v. the Secretary of State*, [2007] UKHL 26 (British House of Lords), and appeal concerning the applicability of the *European Convention on Human Rights* and the UK's *Human Rights Act 1998*, to the actions of British armed forces in Iraq;

(e) *A and others v. Secretary of State for the Home Department (No. 2)*, [2005] 2 AC 68 (British House of Lords): made submissions regarding the indefinite detention of suspected terrorists under the *Anti-Terrorism, Crime and Security Act 2001*;

(f) *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3)*, [2000] 1 AC 147 (UKHL) (British House of Lords): intervened with respect to exceptions for state immunity for international crimes; and

(g) *Chahal v. United Kingdom*, (1997) 23 EHRR 413 (European Court of Human Rights): presented arguments regarding the absolute prohibition against returning an individual to face a risk of torture.

Participation in Legislative Proceedings

25. AI Canada has also sought to advance international human rights through the Canadian legislative process. On many occasions, the organization has provided written and oral submissions to government officials, legislators, and House and Senate committees. Submissions include:

(a) *Brief in Support of Bill C-279* (brief to the Standing Senate Committee on Legal and Constitutional Affairs, supporting the inclusion of "gender identity" as a prohibited ground of discrimination under the *Canadian Human Rights Act*), October 2014;

(b) *Accountability, Protection and Access to Justice: Amnesty International's Concerns with respect to Bill C-43* (brief to the House of Commons' Standing Committee on Citizenship and Immigration, outlining the ways in which Bill C-43 would lead to violations of Canada's international obligations and the *Canadian Charter of Rights and Freedoms*), 31 October 2012;

(c) *Unbalanced Reforms: Recommendations with respect to Bill C-31* (brief to the House of Commons' Standing Committee on Citizenship and Immigration, outlining the ways in which Bill C-31 violates Canada's international obligations towards refugees and refugee claimants), 7 May 2012;

(d) *Fast and Efficient but not Fair: Recommendations with respect to Bill C-11* (brief to the House of Commons' Standing Committee on Citizenship and Immigration, regarding recommendations with respect to changes brought to the refugee determination process by Bill C-11) 11 May 2010;

(e) Submissions to the Subcommittee on International Human Rights of the Standing Committee on Foreign Affairs and International Development, regarding the Universal Period Review and the need to strengthen Canada's implementation of its international human rights obligations, April 2010;

(f) Submissions to the House of Commons Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities in support of Bill C-304, *An Act to Ensure Secure, Adequate, Accessible and Affordable Housing for Canadians*, November 2009;

(g) Submissions to the Subcommittee on International Human Rights of the Standing Committee on Foreign Affairs and International Development, regarding the Universal Periodic Review and the need to strengthen Canada's implementation of its international human rights obligations, May 2009;

(h) Oral submissions before the Subcommittee on International Human Rights of the Standing Committee on Foreign Affairs and International Development (regarding the repatriation of Omar Khadr), May 2008;

(i) Oral submissions before the House of Commons' Public Safety Committee in December 2007 and the Senate Special Committee on Anti-Terrorism (regarding Bill C-3, the proposed amendment to the security certificate regime), February 2008;

(j) Oral submissions before the House Defence Committee (regarding the transfer by Canadian troops of Afghan detainees in Afghanistan), December 2006;

(k) Oral submissions before the House Committee on Citizenship and Immigration (regarding security certificates), November 2006;

(l) Oral submissions before the Senate and House of Commons' *Anti-Terrorism Act* Review Committees, May and September 2006 (regarding security certificates);

(m)*Security through Human Rights* (submissions regarding security certificates to the Special Senate Committee on the *Anti-Terrorism Act* and the House of Commons' Sub-Committee on Public Safety and National Security, as part of the review of Canada's *Anti-Terrorism Act*), 16 May 2005;

(n) Brief on Bill C-31 (*Immigration and Refugee Protection Act*) (expressed concern that the proposed legislation provided insufficient protection to persons seeking asylum in Canada interdicted by immigration control officers while *en route* to the country), March 2001; and

(o) Oral submissions before the House of Commons' Standing Committee on Foreign Affairs and International Trade with respect to Bill C-19 (a bill to implement Canada's obligations under the *Rome Statute* of the International Criminal Court).

Participation with International Organizations

26. AI has consultative status with the United Nations Economic and Social Council, the United Nations Educational, Scientific and Cultural Organization, and the Council of Europe; has working relations with the Organization of American States and the

Organization of African Unity; and is registered as a civil society organization with the Inter-Parliamentary Union.

27. AI has made submissions to various international organizations regarding Canada's compliance with its international human rights obligations, including:

(a) *Canada: Submission to the United Nations Human Rights Committee* (July 2014): AI's submissions to the UN Human Rights Committee regarding matters to raise in the List of Issues it adopted in November 2014 as a first step in the review of Canada's compliance under the *International Covenant on Civil and Political Rights*;

(b) *Canada: Human rights abuses prevalent among vulnerable groups*, (April-May 2013): AI Submissions to the Universal Periodic Review;

(c) *Canada: Submission to the UN Universal Periodic Review* (October 2012): AI's submission to the second review of Canada's human rights record by the UN Human Rights Council;

(d) *Amnesty International Submission to the UN Committee on the Rights of the Child* (September 2012): detailing concerns over the widespread removal of First Nations children from their families, communities, and cultures due to the systemic underfunding of child and family services for First Nations children living on reserves;

(e) *Canada: Briefing to the UN Committee against Torture* (May 2012): AI's submission to the Committee's review of Canada, which highlighted, among other things, the failure to establish a comprehensive national action plan to address high rates of violence facing Indigenous women and girls and outstanding recommendations of the Ontario Ipperwash Inquiry with respect to police use of force during Indigenous land rights protests;

(f) *Canada: Briefing to the UN Committee on the Elimination of Racial Discrimination* (February 2012): AI's submission to the Committee's review of Canada;

(g) AI submission to the Inter-American Commission on Human Rights (acting as *amicus curiae* in the case of the *Hul'qumi'num Treaty Group v. Canada*, August 2011), detailing the nature of state obligations under international human rights standards to remedy the breach of Indigenous people's rights to lands, and applicable principles for the resolution of competing claims;

(h) *Canada: Submission to the UN Universal Periodic Review* (February 2009): AI's submission to the first review of Canada's human rights record by the UN Human Rights Council;

(i) *Human Rights for All: No Exceptions* (February 2007): AI's submission to the UN Committee on the Elimination of Racial Discrimination on the occasion of the examination of the 17th and 18th Periodic Reports submitted by Canada;

(j) *It Is a Matter of Rights: Improving the Protection of Economic, Social and Cultural Rights in Canada* (March 2006): AI's submission to the UN Human Rights Committee on the occasion of the consideration of the Fifth Periodic Report of Canada, 2005;

(k) *Redoubling the Fight Against Torture: Amnesty International Canada's Brief to the UN Committee against Torture with respect to the Committee's Consideration of the Fourth Periodic Report for Canada* (8 October 2004); and

(l) *It's Time: Amnesty International's Briefing to the United Nations Committee against Torture with respect to the Third Report of Canada* (November 2000).

28. These international bodies recognize and trust AI's experience, objectivity, and distinct perspective. As Jean-Pierre Hocke (former United Nations High Commissioner for Refugees) noted, "It's a worn cliché, but if Amnesty did not exist, it would have to be invested. It is simply unique."

AI's interest in this application

29. AI has a strong record as a credible, trustworthy, and objective organization that possesses unique expertise on international human rights law. AI Canada has commented

extensively on international human rights before numerous courts, various international bodies, and numerous legislatures.

30. AI has a strong interest in this case as it pertains directly and centrally to an area of high priority in the organization's work – namely the protection of *all* human rights – civil, political, economic, social, and cultural – of refugees and refugee claimants who seek protection in Canada in accordance with international human rights norms and standards, and in particular, the right to life and security of the person, which includes the right to health, and freedom from discrimination and ill-treatment.

31. AI Canada also has extensive knowledge of the relevant international human rights instruments, such as the *UDHR*, the *International Covenant on Social, Economic and Cultural Rights*, the *International Covenant on Civil and Political Rights*, the *Refugee Convention*, and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. As the Canadian section of an international non-governmental organization, it is uniquely positioned to undertake an international analysis of Canada's human rights obligations towards refugees and refugee claimants in the context of the cuts to the Interim Federal Healthcare Program.

32. AI Canada's interest in the issues raised in this appeal is legitimate and longstanding, as they engage core international principles relating to the human rights of migrants and refugees, and the welfare rights of vulnerable members of society in general – issues that have long formed an integral part of AI's work. As set out in paragraphs 19-20, AI Canada has intervened in several cases involving the rights of refugees and refugee claimants and several where the scope of economic, social and cultural rights of vulnerable individuals were at issue. Further, AI Canada has commented on Canada's obligations towards refugees and refugee claimants and to uphold the economic, social, and cultural rights of marginalized individuals before several parliamentary committees, participated as an intervener or applicant in numerous cases related to fundamental human rights, and regularly takes part in international review processes that monitor Canada's compliance with its international obligations.

Overview of AI and ESCR-Net's Proposed Submissions

33. If granted leave to intervene, AI, together with ESCR-Net (the Coalition), will submit that the principle of indivisibility and interdependence of all human rights supports an interpretation of sections 7, 12, and 15 of the *Charter* that ensures vulnerable groups, including refugees and refugee claimants, the full benefit of the *Charter*'s protections such that the right to life, security of the person, equality, and freedom from torture or ill-treatment *all* encompass the right to mental and physical health. In particular, the Coalition will submit that:

a. The scope of *Charter* rights must be interpreted in light of, and in a way that is consistent with Canada's international human rights obligations;

b. The failure to protect an individual's human rights, including access to health care, on the basis that such protection requires positive measures reinforces a false dichotomy between positive and negative rights and is a breach of Canada's international human rights obligations; and

c. Retrogressive measures that deliberately target vulnerable groups, such as the removal of health care benefits to refugees and refugee claimants, are discriminatory and constitute a violation of Canada's international human rights obligations.

AI's Perspective is Important, Useful, and Unique

34. AI brings an important, useful, and unique perspective and approach to the issues raised in this judicial review. AI will make a useful contribution to the issues raised in this appeal by highlighting the international human rights considerations that they engage. AI has extensive knowledge of the international norms, standards, and instruments that are relevant in this case, as well as the decisions, comments, and reports issued by the treaty bodies responsible for monitoring the implementation of these instruments, by UN special rapporteurs, and by other international institutions dealing with the human rights of refugees and refugee claimants. Indeed, AI has actively participated in the processes leading up to the adoption of many of these instruments, and has made submissions and/or participated in proceedings before many of the treaty bodies. AI's experience and knowledge in these matters will provide the Court with a relevant and ultimately helpful perspective in adjudicating the important issues raised by this appeal.

35. If granted leave to intervene, AI will be mindful of submissions made by the parties and other interveners and will not duplicate arguments and materials before the Court.

36. The Coalition, has made efforts to move expeditiously to serve and file these motion materials and will not delay the progress of the proceedings. The *Federal Courts Rules* do not stipulate a deadline for motions for leave to intervene, nor is there any order requiring proposed interveners to submit leave applications by a particular date. The Coalition is filing this motion record contiguously with the Respondents' memorandum of fact and law. The Coalition did not file immediately after the notice of appeal was filed in order to ensure that it tailored its proposed submissions to the issues tabled by both the Appellants and Respondents. Further, in an effort to avoid duplicating arguments in two separate intervention applications, AI and ESCR-Net agreed to form a Coalition in order to present its submissions to this Court in the most expeditious and least expensive manner possible. However, forming such a Coalition also required additional time to craft arguments which reflect the visions and mandates of both AI and ESCR-Net.

37. AI will abide by any schedule set out by this Court for the delivery of written materials and for oral submissions at the hearing.

38. I make this affidavit in support of AI and ESCR-Net's motion for leave to intervene in this appeal and for no other or improper purpose.

SWORN BEFORE ME at the City of Ottawa in the Province of Ontario this 11 day of February, 2015

A Commissioner for Taking Affidavits

S. ANANDASANGARE

ALEX NEVE, O.C.

Court File No. A-407-14

FEDERAL COURT OF APPEAL

BETWEEEN:

ATTORNEY GENERAL OF CANADA and MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellants

-and-

CANADIAN DOCTORS FOR REFUGEE CARE, THE CANADIAN ASSOCIATION OF REFUGEE LAWYERS, DANIEL GARCIA RODRIGUES, HANIF AYUBI, and JUSTICE FOR CHILDREN AND YOUTH

Respondents

AFFIDAVIT OF DANIELA IKAWA

I, **DANIELA IKAWA**, of the City of New York, in the State of New York, MAKE OATH AND SAY:

1. I am the Program Officer and Co-coordinator of the Strategic Litigation Working Group of the International Network for Economic, Social and Cultural Rights (ESCR-Net), located at 370 Lexington Av., 7th Fl, #700, New York – N.Y., USA, and, as such, have knowledge of the matters contained in this affidavit. I am duly authorized to depose to this affidavit on behalf of ESCR-Net.

2. I hold a Law Degree from the University of Brasilia (Brazil), a Master of Laws from Columbia University in New York (USA), and a PhD on Legal Philosophy from the University of Sao Paulo (Brazil). I have been working for ESCR-Net since 2011. At ESCR-Net, I coordinate transnational projects on strategic litigation and enforcement of judicial decisions, and also prepare the content available on our Caselaw Database. I am also Adjunct Professor at Columbia University, teaching at a Master's Program on Human Rights.

3. ESCR-Net seeks leave to intervene jointly with Amnesty International Canada (AI Canada) in the appeal of the Federal Court of Canada's decision in *Canadian Doctors for Refugee Care v. Canada (Attorney General)*, 2014 FC 651 before the Federal Court of Appeal. ESCR-Net and AI Canada seek to present joint written and oral submissions on this appeal. The focus of our proposed joint intervention and the submissions to be advanced are outlined separately in the affidavit of Alex Neve, Secretary General of AI Canada.

Overview of ESCR-Net

4. ESCR-Net is a collaborative initiative of groups and individuals from around the world working to secure human rights for all, including refugees and asylum-seekers. Its inaugural conference was held in Chiang Mai, Thailand, in 2003 with the participation of over 250 human rights advocates from 50 countries. ESCR-Net's second General Assembly was held in Nairobi, Kenya, in December of 2008. ESCR-Net has over 250 members from 68 countries, including Canada.

5. ESCR-Net has worked extensively on the indivisibility of civil and political rights, on the one hand, from economic, social and cultural (ESC) rights, on the other, including the right to life as it is related to the right to physical and mental health. ESCR-Net emphasizes the importance of advancing and adopting interpretations of domestic law that are consistent with international human rights norms, including ESC rights such as the right to physical and mental health.

The Working Group on Strategic Litigation

6. ESCR-Net has an active Working Group on Strategic Litigation, composed of human rights law experts from around the world, focused on providing research and other strategic support for important national and international cases engaging issues of ESC rights and of the indivisibility of all human rights. The Strategic Litigation Working Group provides advice and assistance to organizations and governments attempting to develop effective strategies for the implementation of the right to life as it is related to ESC rights, such as the right to physical and mental health, and helps to establish links between human rights and governmental programs and policies.

7. Under the guidance of the Working Group on Strategic Litigation, ESCR-Net has promoted improved adjudication and access to effective domestic remedies through a number of research, training, and advocacy initiatives.

8. Through research and other collaborative work overseen by the Strategic Litigation Working Group, ESCR-Net plays a leadership role in advancing the substantive legal interpretation of the interconnections between social rights such as the right to physical and mental health, the right to equality and non-discrimination, and the right to life and security of the person. These and other issues related to the adjudication and enforcement of ESC rights are addressed in a forthcoming publication with Pretoria University Law Press which has been initiated and coordinated by ESCR-Net's Working Group on Strategic Litigation.

ESCR-Net's Caselaw Database

9. ESCR-Net has produced and maintains the largest international bilingual (English and Spanish) Caselaw Database on ESC rights cases. Through its members and with the assistance of a number of universities, human rights centres, and law schools, ESCR-Net conducts ongoing research into the adjudication of cases linked to ESC rights in a wide range of countries. From this research, ESCR-Net has developed and continues to expand an online Database of important cases related to ESC rights, including cases taking up the issue of the indivisibility of ESC rights from civil and political rights. The Database provides access not only to important jurisprudence, but also to pleadings and legal argument, background research, academic literature, information on claimants, and assessments of longer-term outcomes.

10. Many of the cases researched and included in the ESCR-Net Caselaw Database are those in which ESC rights claims are brought forward under the rubric of the rights to life, to security of the person, or to equality and non-discrimination, as in the present case. The Database includes a number of Canadian cases brought, like in the present appeal, under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* (*Charter*). The Canadian cases are seen as important internationally in establishing the interdependence between substantive rights to life, security of the person, and equality – rights which are explicitly protected in

most domestic constitutions – and rights recognized under international law such as the right to physical and mental health.

11. Canadian cases in ESCR-Net's Caselaw Database include: *Victoria (City) v. Adams*, 2009 BCCA 563, 313 DLR (4th) 29 (*Charter* section7); *Sparks v. Dartmouth/Halifax Country Regional Housing Authority*, (1993) 101 DLR (4th) 224, 38 ACWS (3d) 903 (*Charter* section 15); *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624, 151 DLR (4th) 577 (*Charter* section 15); *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 SCR 46, 177 DLR (4th) 124 (*Charter* section 7); *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 SCR 1016 (*Charter* sections 3 and 15); among others.

Promoting Adjudication of ESC Rights Claims Internationally

12. ESCR-Net has conducted extensive research and advocacy on the issue of the justiciability of ESC rights such as the right to physical and mental health in a range of legal and domestic contexts, including in contexts where civil and political rights such as the right to life cannot be universally implemented without the implementation of ESC rights. This work was particularly important to ESCR-Net's research and advocacy in support of the work of a global NGO Coalition formed to promote the adoption of a complaints procedure for ESC rights – the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (*Optional Protocol*). With the support of ESCR-Net, the NGO Coalition for an *Optional Protocol* advocated for an equivalent optional complaints procedure to provide access to international adjudication for rights under the *ICESCR* as had existed since 1976 for rights under the *International Covenant on Civil and Political Rights*. This campaign was ultimately successful, with the historic adoption of the *Optional Protocol* on 10 December 2008 by the United Nations (UN) General Assembly.

13. As part of the NGO Coalition, ESCR-Net participated in the UN Working Group mandated to draft the *Optional Protocol*. Much of the research, consultation, and public education conducted with respect to the drafting of the new complaints procedure for ESC rights engaged issues of the interdependence of ESC rights with civil and political rights and the

jusiciability of ESC rights claims in different domestic legal systems, including in the majority of states which do not have explicit constitutional protections for ESC rights.

14. In the context of ongoing discussions of these issues within the UN and in the international community, members of ESCR-Net have frequently engaged with delegates of member states of the UN and attended expert meetings to consider and address concerns about the proper role of courts in relation to legislatures in the adjudication, remedy, and enforcement of ESC rights within different legal systems. ESCR-Net has conducted research into issues related to judicial competence, separation of powers, and judicial deference, and engaged in extensive consultations on these issues.

15. In discussions on how rights to equality, life, and security of the person may be protected universally through their connection to ESC rights, ESCR-Net has frequently studied Canadian jurisprudence. The approach taken by Canadian courts to interpret "reasonable limits" under section 1 of the *Charter* has been widely discussed. During the discussions on the standard of review to be applied under the new complaints procedure created by the *Optional Protocol*, the Canadian delegation supported a standard of "reasonableness" derived from standards applied by courts in Canada, South Africa, and other common law jurisdictions. The standard of reasonableness was eventually incorporated into the *Optional Protocol*. ESCR-Net has conducted extensive research into how this standard should be interpreted and applied under the *Optional Protocol* and how this relates to standards applied in the interpretation of domestic constitutions. ESCR-Net is also overseeing the publication of an authoritative commentary on the *Optional Protocol*, which includes contributions from leading academic authorities and practitioners in the field of ESC rights.

16. Subsequent to the adoption of the *Optional Protocol* in 2008, ESCR-Net has assisted the NGO Coalition in promoting the Protocol's ratification, convening meetings, and conducting training programs in many countries on the importance of ensuring access to hearings and adjudication for ESC rights. Through this work, ESCR-Net demonstrates that even states which do not explicitly guarantee the justiciability of ESC rights in their domestic law may nevertheless ensure access to hearings and effective remedies as required under international human rights law, particularly through ensuring broad constitutional protection of the rights to equality, dignity, life, and security of the person.

ESCR-Net's Strategic Litigation Initiative

17. At ESCR-Net's Second General Assembly in Nairobi, providing support for strategic litigation of ESC rights was identified as a key priority. A follow-up meeting of ESCR-Net members involved in litigating cases in a range of countries was subsequently held in New York in 2010. At that meeting, ESCR-Net considered how to promote strategic litigation and improved adjudication of ESC rights claims around the world. On the basis of this meeting, ESCR-Net's launched the "Strategic Litigation Initiative" to provide research, advice, and support to advocates and stakeholders engaged in bringing forward important social rights claims.

18. ESCR-Net's Strategic Litigation Initiative has been incorporated as one of the main projects of the Strategic Litigation Working Group. Advancing strategic cases related to economic and social rights under domestic, regional, and international law has become a goal for the Strategic Litigation Working Group as a whole. ESCR-Net has convened meetings of advocates and researchers in a number of regions. Members of the judiciary, academic researchers, and practitioners have all presented research papers on how ESC rights can be better claimed, adjudicated, and enforced in a variety of legal settings. By facilitating exchanges of information among ESCR-Net members about important cases in different jurisdictions, and documenting successes and failures, ESCR-Net has sought to ensure that this rapidly developing area is informed by high quality collaborative research, and creative thinking.

Participation in Domestic Cases

19. Where appropriate, ESCR-Net seeks to intervene directly in important cases under the direction of the Strategic Litigation Working Group.

20. ESCR-Net Strategic Litigation Working Group members from various countries, such as Canada, Ecuador, India, Nepal, and Spain, have participated in proceedings involving the right to physical or mental health.

21. In Canada, ESCR-Net intervened jointly with AI Canada before the Ontario Superior Court and the Court of Appeal for Ontario in the case of *Tanudjaja v. Canada* (2014 ONCA 852;

2013 ONSC 1878). In that case, ESCR-Net and AI Canada presented submission regarding the justiciability of the right to adequate housing, stressing the indivisibility and interdependence of all human rights to ensure that the homeless and those living in poverty are ensured access to adjudication and effective remedies in Canadian courts.

ESCR-Net's Interest and Relevant Expertise in this Appeal

22. ESCR-Net has followed the development of the present case in Canada with significant interest. The case is critical to advancing ESCR-Net's promotion of an integrated approach to ensure that the equality and security issues of those who are homeless or living in poverty are ensured access to adjudication and effective remedies. A cornerstone of ESCR-Net's support for domestic litigation is the principle enunciated by the Committee on Economic, Social and Cultural rights in its General Comment No. 9, that "the Covenant norms must be recognized in appropriate ways within the domestic legal order" and that "[g]uarantees of equality and non-discrimination should be interpreted, to the greatest extent possible, in ways which facilitate the full protection of economic, social and cultural rights."

23. ESCR-Net affirms the interdependence of all human rights, noting that "Economic, social and cultural rights concern essential values for a life of dignity and freedom – work, health, education, food, housing, and social security." Moreover, ESCR-Net "works to ensure accountability for violations of [ESC rights] ... by strengthening the access to competent adjudication and effective remedies to [ESC rights]." This appeal engages both of these overriding interests – recognition of the interdependence of all human rights and the obligation to ensure access to hearings and adjudication under relevant domestic law.

24. ESCR-Net believes this appeal raises issues of critical importance to the recognition of human rights and the development of effective remedies for vulnerable and marginalized groups like refugees and asylum seekers in Canada. The treatment of refugees and asylum seekers has been the subject of increasing concern among international human rights bodies reviewing Canada. Indeed, in support of the view that the right to physical and mental health is indivisible from the right to life and security of the person, the UN Human Rights Committee recently signaled that it will take up the 2012 cuts to the Interim Federal Health Program (IFHP) as an issue during its review of Canada's compliance with the *International*

Covenant on Civil and Political Rights in July 2015. The decision to cut funding to the IFHP denied vulnerable refugees and asylum seekers access to life-saving essential healthcare required in order to protect their right to life, security of the person, and equality. This appeal is of central importance to ESCR-Net's strategic domestic litigation initiative.

25. Canadian courts also play an important role internationally in promoting the principle that domestic law should be interpreted in light of international human rights. Recognizing the indivisibility and interdependence of all human rights such that Canada's most vulnerable and marginalized groups, including refugees and asylum-seekers, are protected under the *Charter*, is important for the international development of human rights and the rule of law. Canada's reputation is at stake in this appeal – a decision to deny refugees and asylum seekers access to necessities of life including healthcare would set a dangerous negative precedent to the rest of the international community that using access to healthcare as a punitive tool is acceptable.

26. For these reasons, ESCR-Net believes that in considering the issues raised by the Appellant and Respondents on this appeal, the Court will benefit from the expertise and perspective of ESCR-Net, to be presented through joint written and oral submissions with AI Canada.

SWORN BEFORE ME at the City of New York in the State of New York this 13 day of February, 2015

Kathryn DeVito
A Commissioner for Taking Affidavits

KATHRYN DEVITO
Notary Public, State of New York
Qualified in Queens County
No. 01DE6305958
My Commission Expires 06/16/2018

DANIELA IKAWA

Court File No. A-407-14

FEDERAL COURT OF APPEAL

BETWEEEN:

ATTORNEY GENERAL OF CANADA and MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellants

-and-

CANADIAN DOCTORS FOR REFUGEE CARE, THE CANADIAN ASSOCIATION OF REFUGEE LAWYERS, DANIEL GARCIA RODRIGUES, HANIF AYUBI, and JUSTICE FOR CHILDREN AND YOUTH

Respondents

WRITTEN REPRESENTATIONS OF THE PROPOSED INTERVENERS AMNESTY INTERNATIONAL AND ESCR-NET

Motion for Leave to Intervene brought by Amnesty International and ESCR-Net

OVERVIEW

1. This case raises important questions of public interest regarding the interpretation of rights enshrined in the *Canadian Charter of Rights and Freedoms* (*Charter*), particularly as they relate to refugees and refugee claimants.[1] This Court's decision will have a profound – indeed, a life or death – impact on refugees and refugee claimants, women, and children – individuals who form one of Canada's most vulnerable and marginalized groups.

2. The Amnesty International (AI)/International Network for Economic, Social and Cultural Rights (ESCR-Net) Coalition (the Coalition) seeks leave to intervene in this appeal. This appeal concerns the nature and scope of the rights protected by sections 7, 12 and 15 of the *Charter*. The Coalition brings an important, useful, and unique perspective and approach to the issues raised in this appeal. The Coalition has considerable expertise in international human rights law and its relevance in interpreting domestic law such as the *Charter*.

[1] When referring to refugee claimants, AI includes individuals who are awaiting a determination on their refugee claims and those who remain in Canada but whose claims have failed.

3. The Coalition's interest in the issues raised in this appeal is legitimate and longstanding, as they engage core international principles relating to the human rights of refugees and refugee claimants, and the social and economic and cultural (ESC) rights of vulnerable members of society in general – issues that have long formed an integral part of AI's and ESCR-Net's work.

4. If granted leave to intervene, the Coalition will submit that the principle of indivisibility and interdependence of all human rights supports an interpretation of sections 7, 12, and 15 of the *Charter* that ensures vulnerable groups, including refugees and refugee claimants, the full benefit of the *Charter*'s protections. The scope of *Charter* rights must be interpreted in light of, and in a way that is consistent with Canada's international human rights obligations. Denying protection of human rights on the basis that such protection requires positive measures is premised on a dichotomy between economic, social and cultural rights and civil and political rights, particularly with regard to positive and negative obligations. Such a dichotomy has long been rejected in international law. Retrogressive measures which have a discriminatory impact and deny vulnerable groups access to the necessities of life, including access to health care, constitute a violation of Canada's international human rights obligations.

PART I – FACTS

A. Amnesty International's Human Rights Expertise

5. AI is an international non-governmental organization dedicated to protecting and promoting the rights enshrined in the *Universal Declaration of Human Rights* and other international instruments. AI has over 3 million members in over 150 countries, including approximately 60,000 members in Canada.[2]

6. AI conducts research and leads efforts to advance international human rights at both the international and national levels. AI Canada works to further Canada's compliance with its domestic and international human rights obligations and the implementation of recommendations issued by international, governmental, and judicial bodies in the area of

[2] Affidavit of Alex Neve, O.C., sworn 11 February 2015 at paras 7, 10-12 [Neve Affidavit].

human rights. AI is recognized as an accurate, unbiased, and credible source of research and analysis of human rights conditions around the world.[3]

7. Because of its human rights work in Canada and internationally, AI has both expertise and a special interest in the protection of fundamental *Charter* rights – including the rights to life, security of the person, freedom from torture and ill-treatment, and equality – and the progressive realization of all human rights guaranteed by international law.[4] In so doing, AI has consistently promoted and sought to advance the indivisibility and interdependence of all rights.

8. AI has played a pivotal role in the development of the jurisprudence that mandates the consideration of international human rights norms when interpreting the *Charter*. Courts at all levels (including this Court) have recognized AI's expertise in this area and have repeatedly granted the organization leave to intervene in *Charter* cases.[5]

9. In this case, AI can provide the Court with a valuable and independent analysis of how international human rights instruments and principles should be used to interpret *Charter* rights. This analysis is grounded in its extensive expertise in international human rights and their realization through the implementation of domestic laws.

ESCR-Net's International Human Rights Expertise

10. ESCR-Net has over 250 members from 68 countries including Canada working to advance ESC rights as interdependent with and indivisible from civil and political rights. The network draws on its members' significant expertise in the nature and scope of internationally recognized ESC rights, including the right to health, across a wide range of domestic contexts.[6]

11. ESCR-Net has worked extensively to ensure that fundamental entitlements in international law such as the right to life and security of the person – including the right to health – the right to equality, and the right to be free from torture or other ill-treatment, are

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[3] Neve Affidavit at paras 16-18.
[4] Neve Affidavit at paras 19-26.
[5] Neve Affidavit at paras 19-23.
[6] Affidavit of Daniela Ikawa, sworn 13 February 2015 at paras 4-5 [Ikawa Affidavit].

enforced by domestic courts and international human rights bodies in a manner that affords full protection to all members of society, including its most vulnerable and marginalized members. It hosts a Discussion Group on the Right to Health for members of ESCR-Net to discuss emerging issues and has conducted extensive research and consultation on the appropriate role of domestic courts in adjudicating claims related to access to health care in a variety of legal and constitutional contexts.[7]

12. ESCR-Net's Working Group on Strategic Litigation includes leading human rights organizations and lawyers from around the world. It organizes meetings about key issues in the adjudication of ESC rights by domestic courts and international bodies and works with organizations and governments to develop effective strategies to ensure access to fair hearings and effective remedies for ESC rights in a wide range of legal contexts and in a manner consistent with international human rights norms. The Working Group on Strategic Litigation is currently overseeing the publication of two peer-reviewed books on issues related to the adjudication of ESC rights. One is on the issue of enforcement of judicial remedies and the other is a commentary on the new complaints procedure under the *International Covenant on Economic, Social and Cultural Rights* (*ICESCR*).[8]

13. ESCR-Net collects cases from around the world in which courts have adjudicated claims related to ESC rights, and has made these available online in a comprehensive database. ESCR-Net plays a leadership role in advancing the substantive legal interpretation of the interconnections between ESC rights, such as the right to health, and rights contained in the *International Covenant on Civil and Political Rights* (*ICCPR*), as well as in most domestic constitutions, such as the right to life, security of the person, the right to freedom from cruel and inhuman treatment and the right to equality and non-discrimination.[9]

PART II – ISSUES

14. The issues raised on this motion are whether the Coalition should be granted leave to intervene in this appeal and, if leave should be granted, the terms governing the Coalition's intervention.

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[7] Ikawa Affidavit at paras 6-8, 12-14, 19-21
[8] Ikawa Affidavit at paras 6-8.
[9] Ikawa Affidavit at paras 9-11.

PART III – SUBMISSIONS

A. The test for determining whether leave to intervene should be granted

15. Rule 109 of the *Federal Courts Rules* provides that a proposed intervener must describe (a) how the proposed intervener wishes to participate in the proceeding, and (b) how that participation will assist the determination of a factual or legal issue related to the proceeding.[10] Rule 109 also provides that the Court shall give direction on the service of documents and the role of the intervener should leave be granted.

16. In determining whether to grant leave to intervene, the "overriding consideration requires, in every case, that the proposed intervener demonstrate that its intervention will assist the determination of an issue" by "add[ing] to the debate an element which is absent from what the parties before the Court will bring."[11] Ultimately, this Court has the inherent authority to allow an intervention on terms and conditions which are appropriate in the circumstances.[12]

17. Recently, Justice Stratas of this Court proposed a modified list of factors to better reflect the real issues at stake on motions to intervene.[13] Specifically, Stratas J.A. outlined the following test to determine whether a motion for leave to intervene should be granted:

(a) Has the proposed intervener complied with the specific procedural requirements in Rule 109(2)? Is the evidence offered in support detailed and well-particularized? If the answer to either of these questions is no, the Court cannot adequately assess the remaining considerations and so it must deny intervener status. If the answer to both of these questions is yes, the Court can adequately assess the remaining considerations and assess whether, on balance, intervener status should be granted.

(b) Does the proposed intervener have a genuine interest in the matter before the Court, such that the Court can be assured that the proposed intervener has the necessary

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[10] SOR/98-106

[11] *Canada (Attorney General) v Sasvari*, 2004 FC 1650 at para 11, 135 ACWS (3d) 691 (**Amnesty International Book of Authorities [hereinafter "AI BoA"], Tab 5-3**).

[12] *Canadian Pacific Railway Company v Boutique Jacob Inc*, 2006 FCA 426 at para 21, 357 NR 384 (**AI BoA, Tab 5-6**).

[13] *Canada (Attorney General) v Pictou Landing First Nations*, 2014 FCA 21 at para 11, 237 ACWS (3d) 570 [*Pictou Landing*] (**AI BoA, Tab 5-2**).

knowledge, skills, and resources and will dedicate them to the matter before the Court?

(c) In participating in this appeal in the way it proposes, will the proposed intervener advance different and valuable insights and perspectives that will actually further the Court's determination of the matter?

(d) Is it in the interests of justice that intervention be permitted? For example, has the matter assumed such a public, important, and complex dimension that the Court needs to be exposed to perspectives beyond those offered by the particular parties before the Court? Has the proposed intervener been involved in earlier proceedings in the matter?

(e) Is the proposed intervention inconsistent with the imperatives in Rule 3, namely securing "the just, most expeditious and least expensive determination of every proceeding on its merits"? Are there terms that should be attached to the intervention that would advance the imperatives in Rule 3?

18. Similarly, the Coalition has a genuine interest and valuable contribution to make in helping this Court assess the issues in this case, which raises matters of public importance regarding Canada's treatment of refugees and refugee claimants, who comprise some of the most vulnerable members of our society. For the reasons set out below, the Coalition respectfully submits that it meets the relevant test and should be granted intervener status.

B. The Coalition has a genuine interest in this case

19. The Coalition's interest in the issues raised in this appeal is legitimate and longstanding, as they engage core international principles relating to the human rights of refugees and refugee claimants, and the ESC rights of vulnerable members of society in general. These issues have long formed an integral part of AI's and ESCR-Net's work.

20. AI Canada has intervened in several cases, including before the Supreme Court of Canada, involving the rights of refugees and migrants.[14] Further, AI Canada has intervened

[14] Neve Affidavit at paras 19, 22.

in several cases at various levels of court – including this Court[15] – in which the scope of ESC rights, including the right to mental and physical health, was at issue.[16] Further, AI Canada has commented on Canada's obligations towards refugees, as well as its responsibility to uphold the ESC rights of marginalized individuals before several parliamentary committees; participated as an intervener or applicant in numerous cases related to fundamental human rights; and regularly takes part in international review processes that monitor Canada's compliance with its international obligations.[17]

21. ESCR-Net has worked extensively on the indivisibility of civil and political rights from ESC rights, including the right to life as it relates to the right to mental and physical health. It does so through the research, public education, and the advocacy initiatives of its Working Group on Strategic Litigation; and by working with a global NGO Coalition as well as UN bodies to promote the adoption of a complaints procedure for ESC rights. ESCR-Net Strategic Litigation Group members participate in a considerable number of adjudicative proceedings worldwide involving the right to mental and physical health as a component of the right to life and security of the person.[18]

22. In Canada, the Coalition has intervened before the Ontario Superior Court and the Ontario Court of Appeal in a case involving similar questions of whether the right to life, security of the person, and equality under the *Charter* should be interpreted to include positive obligations as recognized under international human rights law. In *Tanudjaja*,[19] the Coalition proposed an integrated approach to human rights to ensure that those who are homeless or living in poverty are ensured access to adjudication and effective remedies. The Coalition stressed that international human rights law has evolved to recognize the indivisibility and interdependence of all human rights, whether categorized as civil, political, economic, social or cultural.[20]

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[15] *Canada (Human Rights Commission) v Canada (Attorney General)*, 2012 FC 445, 215 ACWS (3d) 439 [*First Nations Child and Family Caring Society*] **(AI BoA, Tab 5-4)**.
[16] Neve Affidavit at para 20.
[17] Neve Affidavit at paras 19-26.
[18] Ikawa Affidavit at paras 4-8, 12-21.
[19] 2014 ONCA 852; 2013 ONSC 1878. Leave to appeal the Ontario Court of Appeal currently being sought.
[20] Ikawa Affidavit at para 21.

C. The Coalition can make a unique, important, and useful contribution to this case

23. The Coalition brings an important, useful, and unique perspective and approach to the issues raised in this appeal. The Coalition brings a combined expertise and knowledge in matters related to international human rights law, both generally and in the particular context of the interdependence and indivisibility of all human rights and how they apply in domestic legal contexts. The international human rights perspective the Coalition seeks to bring will assist this Court in determining the scope of Canada's *Charter* rights as they relate to the mental and physical health of refugees and refugee claimants.

24. The Appellants argue that the Federal Court erred in finding the 2012 Order in Council violates the *Charter*'s equality protections because the individuals affected do not fall within one of the prohibited grounds of discrimination set out in section 15.[21] The Coalition's knowledge and expertise in international human rights can assist this Court in determining whether refugees and refugee claimants affected by the changes are protected by the *Charter*'s section 15 guarantee.

25. In their cross-appeal, the Respondents argue that the Federal Court erred in finding the 2012 Order in Council does not engage section 7 of the *Charter* because the *Charter* does not provide a "free-standing right to state-funded health care[,]" nor confer positive rights. Rather, the Respondents submit that the denial of access to health care to a vulnerable group of individuals under the administrative control of the state constitutes a deprivation that engages section 7. The Coalition will shed light on whether such deprivations constitute retrogressive measures which are presumptively prohibited in international law. Further, an international law perspective requires that all human rights be conceptualized as interdependent and indivisible such that section 7 (and all other rights enshrined in the *Charter*) carry both positive and negative obligations, and that section 7 of the *Charter*, interpreted consistently with Canada's international obligations, encompasses access to the necessities of life, including essential health care.[22]

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[21] Appellants' Memorandum of Fact and Law at paras 86-90.
[22] Respondents' Memorandum of Fact and Law at paras 80-88.

26. If granted leave to intervene, the Coalition will submit that the principle of indivisibility and interdependence of all human rights supports an interpretation of sections 7, 12, and 15 of the *Charter* that ensures vulnerable groups, including refugees, the full benefit of the *Charter*'s protections such that the right to life, security of the person, equality, and freedom from torture or ill-treatment *all* encompass the right to mental and physical health. In particular, the Coalition will submit that:

(a) The scope of *Charter* rights must be interpreted in light of, and in a way that is consistent with Canada's international human rights obligations;

(b) The failure to protect an individual's human rights, including access to health care, on the basis that such protection requires positive measures is based on a false dichotomy between positive and negative rights and is a breach of Canada's international human rights obligations; and

(c) Retrogressive measures that deliberately target vulnerable groups, such as the removal of health care benefits to refugees and refugee claimants, are discriminatory and constitute a violation of Canada's international human rights obligations.

I. *Charter* rights must be interpreted consistently with Canada's international human rights obligations

27. Canada's international obligations are set out in binding treaties, including the *ICESCR*, the *ICCPR*, the *Convention Relating to the Status of Refugees* (*Refugee Convention*), and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. They are also found in the principles of customary international law, which form part of the Canadian common law.[23] Also persuasive are the views of the UN treaty bodies and agencies charged with promoting and reviewing the implementation of treaties, such as the UN Committee on Economic, Social and Cultural Rights (CESCR).[24]

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[23] *R v Hape*, 2007 SCC 26 at para 39, [2007] 2 SCR 292 [*Hape*] (**AI BoA, Tab 5-12**).

[24] *Republic of Guinea v Democratic Republic of the Congo*, [2010] ICJ Rep 2010 at paras 66-68 (**AI BoA, Tab 5-21**). The views of the CESCR have assisted Canadian courts in several cases, e.g. *Lovelace v Ontario*, 2000 SCC 37 at para 69, [2000] 1 SCR 950 (**AI BoA, Tab 5-10**); *Gosselin v Quebec (Attorney General)*, 2002 SCC 84 at para 147, [2002] 4 SCR 429 [*Gosselin*] (**AI BoA, Tab 5-9**).

28. Canadian courts have long recognized that the values and principles set out in international law are "relevant and persuasive" sources for the interpretation of the human rights enshrined in Canada's *Charter*.[25] Recently, the Supreme Court of Canada re-affirmed that "the *Charter* should be presumed to provide at least as great a level of protection as if found in the international human rights documents that Canada has ratified[,]" including the *ICESCR*.[26] This Court has also recognized that "Charter jurisprudence, international instruments, wider human rights understandings and jurisprudence, and other contextual matters" may inform the interpretation of domestic legal principles.[27]

II. The failure to protect human rights on the basis that such protection requires positive measures is a breach of Canada's international human rights obligations

29. The Coalition submits that an interpretation of the rights to life and security of the person that is consistent with international human rights law encompasses access to the necessities of life, including essential health care. The claim that the denial of access to publicly funded health care violates section 7 of the *Charter* is not premised on section 7 conferring a "free-standing constitutional right to state-funded health care."[28] The Supreme Court of Canada has affirmed that a right does not necessarily need to be explicitly pronounced in the text of the *Charter* in order to attract constitutional protection, and that rights under the *ICESCR* inform the scope and content of *Charter* rights.[29]

30. The failure to protect *Charter* rights on the basis that such protection requires positive measures would re-enforce a false dichotomy between positive and negative human rights and between civil and political and ESC rights which the international community has now long rejected. As stated by the Special Rapporteur on the right of everyone to the enjoyment

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[25] *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313 at 348-350, 38 DLR (4th) 161, Dickson CJ, dissenting on other grounds (**AI BoA, Tab 5-14**); *Hape*, *supra* note 23 at paras 35-39, 53-56 (**AI BoA, Tab 5-12**); *Divito v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 47 at paras 22-28, [2013] 3 SCR 157 (**AI BoA, Tab 5-7**); *R v Sharpe*, 2001 SCC 2 at paras 175, 178, [2001] 1 SCR 45 (**AI BoA, Tab 5-13**); *First Nations Child and Family Caring Society*, *supra* note 15 at para 155 (**AI BoA, Tab 5-4**).

[26] *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 at paras 64-65 (available on CanLii) [*Saskatchewan Federation of Labour*] (**AI BoA, Tab 5-15**).

[27] *Pictou Landing*, *supra* note 13 at para 23 (**AI BoA, Tab 5-2**).

[28] *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651 at para 741, 244 ACWS (3d) 73 [*Canadian Doctors for Refugee Care*] (**AI BoA, Tab 5-5**).

[29] The right to strike was recognized as protected under section 2(d) of the *Charter* in *Saskatchewan Federation of Labour*, *supra* note 26 (**AI BoA, Tab 5-15**).

of the highest attainable standard of physical and mental health, "[t]he division between both sets of rights is artificial, given that there is no intrinsic difference between them. Both may require positive actions, are resource-dependent and are justiciable."[30] The CESCR has warned that to adopt a rigid and arbitrary classification rights would "drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society."[31] Moreover, even the Supreme Court of Canada has recognized that in "special circumstances" section 7 of the *Charter* may impose positive obligations on Canada "to sustain life, liberty, or security of the person."[32]

31. Under international human rights law, states have an obligation to take positive measures to protect a wide range of internationally and constitutionally protected rights, including the rights to life, security of the person, health, non-discrimination, and to be free from ill-treatment.[33] The UN Human Rights Committee and the CESCR have established that the right to life requires positive measures[34] to extend to vulnerable members of society access to health facilities, goods, and services.[35] And the Special Rapporteur on Torture has stated that failure to provide access to essential medicines may constitute cruel, inhuman or degrading treatment.[36] Foreign and international courts around the world have interpreted

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[30] United Nations General Assembly, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, 69th Sess, UN Doc A/69/299 (11 August 2014) at para 7 [Special Rapporteur on Health] **(AI BoA, Tab 5-27)**.

[31] United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 9: The domestic application of the Covenant*, 19th Sess, UN Doc E/C.12/1998 (3 December 1998) at para 10 **(AI BoA, Tab 5-23)**.

[32] *Gosselin, supra* note 24 at para 83 **(AI BoA, Tab 5-9)**.

[33] World Conference on Human Rights, *Vienna Declaration and Programme of Action*, A/CONF/157/2 (12 July 1993) art 5. See also United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 10: The Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights*, 19th Sess, UN Doc E/C.12/1998/26 (10 December 1998) **(AI BoA, Tab 5-24)**; United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 2: International Technical Assistance Measures*, 4th Sess, UN Doc E/1990/23 (2 February 1990) at para 6 **(AI BoA, Tab 5-22)**.

[34] United Nations Human Rights Committee, *General Comment No. 6: Article 6 (Right to Life)*, 16th Sess (30 April 1982) at para 5 **(AI BoA, Tab 5-28)**.

[35] United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, 22nd Sess, UN Doc E/C.12/2000/4 (11 August 2000) at para 12(b) [*General Comment 14*] **(AI BoA, Tab 5-25)**.

[36] United Nations Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E Mendez*, 22nd Sess, UN Doc A/HRC/22/53 (1 February 2013) at para 56 [Special Rapporteur on Torture] **(AI BoA, Tab 5-30)**.

the right to life as including both positive and negative State obligations, and the duty to ensure to all the necessities of life, including health care.[37]

32. A failure to interpret the *Charter* rights to life, security of the person, equality, and freedom from ill-treatment to include the obligation to take such positive results in violations of Canada's international human rights obligations.

III. Deliberate retrogressive measures that target vulnerable groups are discriminatory and constitute a violation of Canada's international human rights obligations

33. International human rights law prohibits retrogressive measures, such as the removal of health care benefits to refugees and refugee claimants, that deny vulnerable groups the equal enjoyment of fundamental human rights, including the right to life, the right to physical and mental health, and the right to be free from ill-treatment. As in Canada,[38] international human rights law recognizes that deliberate measures to set back the enjoyment of rights, particularly among vulnerable groups, are presumptively prohibited. States bear a very burden to rebut that presumption and demonstrate that their actions did not breach their obligations.[39]

34. A State Party that is unable to demonstrate that its deliberate retrogressive measures were undertaken without discrimination, after a "careful consideration of all alternatives" and that such measures are "duly justified be reference to the totality of the rights provided for in the Covenant in the context of the full use of the State party's maximum available resources[,]"[40] is in breach of its international obligations.

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[37] The Inter-American Court of Human Rights: *Case of the "Juvenile Reeducation Institute" v Paraguay* (2004), Inter-Am Ct HR (Ser C) No 112 at paras 149, 159, 168, 172 **(AI BoA, Tab 5-17)**; *Case of the Yakye Axa Indigenous Community v Paraguay* (2005) Inter-Am Ct HR (Ser C) No 125 at paras 161-167 **(AI BoA, Tab 5-18)**; El Salvador, Colombia, Costa Rica: See Hans V Hogerzeil, Melanie Samson and Jaume Vidal Casanova, *Ruling for Access: Leading court cases in developing countries on access to essential medicines as part of the fulfilment of the right to health* (Geneva: World Health Organization Department of Essential Drugs and Medicines Policy, November 2004) **(AI BoA, Tab 5-31)**; European Court of Human Rights: *Osman v The United Kingdom*, [1998] ECHR 101 at para 115 **(AI BoA, Tab 5-20)**; United Kingdom: *Burke, R (on the application of) v General Medical Council and Ors*, [2005] EWCA Civ 1003 at paras 39, 53, [2006] QB 273 **(AI BoA, Tab 5-16)**; Argentina: See Special Rapporteur on Health, *supra* note 30 at para 15 **(AI BoA, Tab 5-27)**; India: *Francis Coralie Mullin v The Administrator, Union*, (1981) 1981AIR 746 at para 6, 1981 SCR (2) 516 **(AI BoA, Tab 5-19)**.

[38] *Newfoundland (Treasury Board) v N.A.P.E*, [2004] 3 SCR 381 at paras 42-51, 244 LDR (4th) 294 **(AI BoA, Tab 5-11)**; *Dunmore v Ontario (Attorney General)*, 2001 SCC 94 at paras 2, 22, [2004] 3 SCR 1016 **(AI BoA, Tab 5-8)**.

[39] *General Comment 14, supra* note 35 at para 32 **(AI BoA, Tab 5-25)**.

[40] *Ibid.*

35. When it ratified the *Refugee Convention*, Canada committed to the principle of non-discrimination in relation to its treatment of refugees, agreeing to "accord to refugees lawfully staying in [its] territory the same treatment with respect to public relief and assistance as is accorded to [its] nationals."[41] Non-discrimination is "a basic and general principle relating to the protection of human rights."[42] Canada's obligations to respect, protect, and fulfill all human rights without discrimination are laid out in every human rights instrument it has signed or ratified: the *Charter of the United Nations*,[43] the *UDHR*,[44] the *ICESCR*,[45] the *ICCPR*,[46] the *International Convention on the Elimination of All Forms of Racial Discrimination*,[47] the *Convention on the Rights of the Child*,[48] and the *Convention on the Elimination of All Forms of Discrimination against Women*,[49] among others.

36. The CESCR has established that the right of access to affordable health care and other rights under the *ICESCR* "apply to everyone including non-nationals, such as refugees, refugee claimants, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation."[50] The Supreme Court of Canada has similarly found that individuals cannot be discriminated against on the basis that they are non-citizens. [51] Refugees and refugee claimants are recognized in international law to fall under the prohibited ground of discrimination of "other status."[52] Groups are recognized to fall under this "other status" category "when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalization."[53]

37. The CESCR has stated that "health facilities, goods and services must be accessible to all, especially the most vulnerable or marginalized sections of the population, in law and in fact,

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[41] *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137, art 23, Can TS 1969 No 6.
[42] United Nations Human Rights Committee, *General Comment 18: Non-discrimination*, 37th Sess, UN Doc HRI/GEN/1/Rev.1 (10 November 1989) at para 1.
[43] 24 October 1946, 1 UNTS XVI, arts 1(3), 55, Can TS 1945 No 7.
[44] 10 December 1948, 217 A (III), art 2(1).
[45] 16 December 1966, 993 UNTS 3, art 2(2), Can TS 1982 No 46.
[46] 16 December 1966, 999 UNTS 171, arts 2(1), 4(1), 20(2), 24(1), 26, Can TS 1976 No 47.
[47] 21 December 1965, 660 UNTS 195, 5 ILM 352.
[48] 20 November 1989, 1577 UNTS 3, art 2, Can TS 1992 No 3.
[49] 18 December 1979, 1249 UNTS 13, Can TS 1982 No 31
[50] United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights*, 42nd Sess, UN Doc E/C.12/GC/20 (2 July 2009) at para 30 [*General Comment 20*] **(AI BoA, Tab 5-26)**.
[51] *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143, 56 DLR (4th) 1 **(AI BoA, Tab 5-1)**.
[52] *General Comment 20*, *supra* note 50 at para 30 **(AI BoA, Tab 5-26)**.
[53] *Ibid* at para 27.

without discrimination."[54] The obligation to not discriminate is "immediate and cross-cutting[.]"[55] Under international law, discrimination constitutes

> "any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights."[56]

38. By "[intentionally targeting] an admittedly poor, vulnerable and disadvantaged group for adverse treatment"[57] through the cuts to the IFHP, Canada implemented an unjustifiable and discriminatory retrogressive measure that violated its international human rights obligations towards refugees and refugee claimants.

D. The Coalition's participation in this case is in the interests of justice

39. This case raises important questions of public interest regarding the interpretation of critical rights under the *Charter*. This Court's decision will have a profound – indeed, in some cases, a life or death – impact on individuals who form one of Canada's most vulnerable and marginalized groups, including refugees and refugee claimants. McTavish J. recognized the significance of this case noting that "the 2012 changes to the IFHP are causing illness, disability, and death."[58] Children and women are among those who are most seriously affected by the cuts.[59]

40. Given the rights and interests at stake, it is important that the issues before this Court are determined in a way that complies with Canada's international human rights obligations. These obligations shed light on whether this case presents those "special circumstances" acknowledged by the Supreme Court of Canada to attract a positive obligation upon Canada to "sustain life, liberty, or security of the person."[60] In re-affirming the recognition that all human rights under the *Charter* – as in international law – are indivisible and interdependent such that they all contain both negative obligations and positive duties,[61] this Court's

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[54] *General Comment 14, supra* note 35 at para 12 (**AI BoA, Tab 5-25**).
[55] *General Comment 20, supra* note 50 at para 7 (**AI BoA, Tab 5-26**).
[56] *Ibid.*
[57] *Canadian Doctors for Refugee Care, supra* note 28 at para 9 (**AI BoA, Tab 5-5**).
[58] *Ibid* at para1049.
[59] *Ibid* at paras 3, 11.
[60] *Gosselin, supra* note 24 at para 83 (**AI BoA, Tab 5-9**).
[61] *Ibid.*

determination on this appeal will have a major impact in ensuring that everyone in Canada, including refugees and refugee claimants, are afforded access to justice and the full benefit of the *Charter*'s protections.

E. The Coalition will not delay this appeal or duplicate materials

41. The Coalition's intervention would be consistent with securing a just, expeditious, and least expensive determination of this proceeding on its merits, and is therefore not inconsistent with the imperatives of Rule 3 of the *Federal Courts Rules*.[62]

42. If granted leave to intervene, the Coalition will be mindful of submissions made by the parties and any other interveners, and will not duplicate argument and materials before the Court. The Coalition will not make arguments with respect to the findings of fact or the characterization of the evidence in this case, nor will the Coalition seek to supplement the factual record.[63]

43. The Coalition has made efforts to move expeditiously to serve and file these motion materials and will not delay the progress of the proceedings. The Coalition is filing its motion record contiguously with the Respondents' memorandum of fact and law. The Coalition did not file immediately after the notice of appeal was filed in order to ensure that it tailored its proposed submissions to the issues tabled by both the Appellants and Respondents. Further, in an effort to avoid duplicating arguments in two separate intervention applications, AI and ESCR-Net formed a Coalition in order to present their submissions to this Court in the most expeditious manner possible.[64]

44. If granted leave to intervene, the Coalition will abide by the schedule set by this Court for the delivery of materials and for oral argument.[65]

45. If granted leave to intervene, the Coalition will seek no costs and would ask that no costs be awarded against it.

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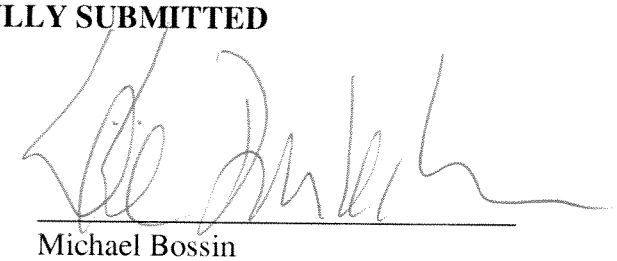
[62] *Supra*, note 10.
[63] Neve Affidavit at para 35.
[64] Neve Affidavit at para 36.
[65] Neve Affidavit at para 37.

PART IV – ORDER SOUGHT

46. The Coalition respectfully requests an order granting it leave to intervene in this appeal, pursuant to Rule 109 of the *Federal Courts Rules*.

47. If this Honourable Court determines that leave should be granted, the Coalition respectfully requests permission to file a written factum and the right to present oral argument at the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



18 February 2015

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SCHEDULE "A" - AUTHORITIES

	CANADIAN CASE LAW
1.	*Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, 56 DLR (4th) 1.
2.	*Canada (Attorney General) v Pictou Landing First Nations*, 2014 FCA 21, 237 ACWS (3d) 570.
3.	*Canada (Attorney General) v Sasvari*, 2004 FC 1650, 135 ACWS (3d) 691.
4.	*Canada (Human Rights Commission) v Canada (Attorney General)*, 2012 FC 445, 215 ACWS (3d) 439.
5.	*Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651 at para 741, 244 ACSW (3d) 73.
6.	*Canadian Pacific Railway Company v Boutique Jacob Inc*, 2006 FCA 426, 357 NR 384
7.	*Divito v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 47, [2013] 3 SCR 157.
8.	*Dunmore v Ontario (Attorney General)*, 2001 SCC 94, [2004] 3 SCR 1016.
9.	*Gosselin v Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 SCR 429.
10.	*Lovelace v Ontario*, 2000 SCC 37, [2000] 1 SCR 950.
11.	*Newfoundland (Treasury Board) v N.A.P.E*, [2004] 3 SCR 381, 244 DLR (4th) 294.
12.	*R v Hape*, 2007 SCC 26, [2007] 2 SCR 292.
13.	*R v Sharpe*, 2001 SCC 2, [2001] 1 SCR 45.
14.	*Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313, 38 DLR (4th) 161.
15.	*Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 (available on CanLii).
	INTERNATIONAL CASE LAW
16.	*Burke, R (on the application of) v General Medical Council and Ors*, [2005] EWCA Civ 1003, [2006] QB 273.
17.	*Case of the "Juvenile Reeducation Institution" v Paraguay* (2004) Inter-Am Ct HR (Ser C) No 112.
18.	*Case of the Yakye Axa Indigenous Community v Paraguay* (2005) Inter-Am Ct HR (Ser C) No 125.
19.	*Francis Coralie Mullin v The Administrator, Union*, (1981) 1981AIR 746, 1981 SCR (2) 516.
20.	*Osman v The United Kingdom*, [1998] ECHR 101.
21.	*Republic of Guinea v Democratic Republic of the Congo*, [2010] ICJ Rep 2010.
	INTERNATIONAL INSTRUMENTS AND REPORTS
22.	United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 2: International Technical Assistance Measures*, 4th Sess, UN Doc E/1990/23 (2 February 1990).
23.	United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 9: The domestic application of the Covenant*, 19th Sess, UN Doc E/C.12/1998 (3 December 1998).
24.	United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 10: The Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights*, 19th Sess, UN Doc E/C.12/1998/26 (10

	December 1998).
25.	United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, 22nd Sess, UN Doc E/C.12/2000/4 (11 August 2000).
26.	United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights*, 42nd Sess, UN Doc E/C.12/GC/20 (2 July 2009).
27.	United Nations General Assembly, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, 69th Sess, UN Doc A/69/299 (11 August 2014).
28.	United Nations Human Rights Committee, *General Comment No. 6: Article 6 (Right to Life)*, 16th Sess (30 April 1982).
29.	United Nations Human Rights Committee, *General Comment No 18: Non-discrimination*, 37th Sess, UN Doc HRI/GEN/1/Rev.1 (10 November 1989).
30.	United Nations Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Mendez*, 22nd Sess, UN Doc A/HRC/22/53 (1 February 2013).
	TEXTS
31.	Hogerzeil, Hans V, Samson, Melanie and Casanova, Jaume Vidal, *Ruling for Access: Leading court cases in developing countries on access to essential medicines as part of the fulfilment of the right to health* (Geneva: World Health Organization Department of essential Drugs and Medicines Policy, November 2004).

SHEDULE "B" – STATUTES, DECLARATIONS, AND CONVENTIONS

STATUTES

Federal Courts Rules, SOR/98-106

3. These Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits.

3. 3. Les présentes règles sont interprétées et appliquées de façon à permettre d'apporter une solution au litige qui soit juste et la plus expéditive et économique possible.

109. (1) The Court may, on motion, grant leave to any person to intervene in a proceeding.

109. (1) La Cour peut, sur requete, autoriser toute personne a intervenir Bans une instance.

(2) Notice of a motion under subsection (1) shall

(2) L'avis dune requete presentee pour obtenir 1'autorisation d'intervenir:

(a) set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and

a) precise les nom et adresse de la personne qui désire intervenir et ceux de son avocat, le cas échéant;

(b) describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.

b) explique de quelle manière la personne désire participer à l'instance et en quoi sa participation aidera à la prise d'une décision sur toute question de fait et de droit se rapportant à l'instance.

(3) In granting a motion under subsection (1), the Court shall give directions regarding

(3) La Cour assortit l'autorisationd'intervenir de directives concernant:

(a) the service of documents; and

a) la signification de documents;

(b) the role of the intervener, including costs, rights of appeal and any other matters relating to the procedure to be followed by the intervener.

b) le rôle de l'intervenant, notamment en ce qui concerne les dépens, les droits d'appel et toute autre question relative à la procédure à suivre.

369. (1) A party may, in a notice of motion, request that the motion be decided on the basis of written representations.

369. (1) Le requérant peut, dans l'avis de requête, demander que la décision à l'égard de la requête soit prise uniquement sur la base de ses prétentions écrites.

(2) A respondent to a motion brought in accordance with subsection (1) shall serve and file a respondent's record within 10 days after being served under rule 364 and, if the respondent objects to disposition of the motion in writing, indicate in its written

(2) L'intimé signifie et dépose son dossier de réponse dans les 10 jours suivant la signification visée à la règle 364 et, s'il demande l'audition de la requête, inclut une mention à cet effet, accompagnée des raisons justifiant l'audition, dans ses prétentions

representations or memorandum of fact and law the reasons why the motion should not be disposed of in writing.

écrites ou son mémoire des faits et du droit.

(3) A moving party may serve and file written representations in reply within four days after being served with a respondent's record under subsection (2).

(3) Le requérant peut signifier et déposer des prétentions écrites en réponse au dossier de réponse dans les quatre jours après en avoir reçu signification.

(4) On the filing of a reply under subsection (3) or on the expiration of the period allowed for a reply, the Court may dispose of a motion in writing or fix a time and place for an oral hearing of the motion.

(4) Dès le dépôt de la réponse visée au paragraphe (3) ou dès l'expiration du délai prévu à cette fin, la Cour peut statuer sur la requête par écrit ou fixer les date, heure et lieu de l'audition de la requête.

DECLARATIONS

Universal Declaration of Human Rights, 10 December 1948, 217 A (III),

Article 2	Article 2
(1) Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.	1. Chacun peut se prévaloir de tous les droits et de toutes les libertés proclamés dans la présente Déclaration, sans distinction aucune, notamment de race, de couleur, de sexe, de langue, de religion, d'opinion politique ou de toute autre opinion, d'origine nationale ou sociale, de fortune, de naissance ou de toute autre situation.
(2) Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.	2. De plus, il ne sera fait aucune distinction fondée sur le statut politique, juridique ou international du pays ou du territoire dont une personne est ressortissante, que ce pays ou territoire soit indépendant, sous tutelle, non autonome ou soumis à une limitation quelconque de souveraineté.

Vienna Declaration and Programme of Action, A/CONF/157/2 (12 July 1993)

Article 5	Article 5
5. All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.	5. Tous les droits de l'homme sont universels, indissociables, interdépendants et intimement liés. La communauté internationale doit traiter des droits de l'homme globalement, de manière équitable et équilibrée, sur un pied d'égalité et en leur accordant la même importance. S'il convient de ne pas perdre de vue l'importance des particularismes nationaux et régionaux et la diversité historique, culturelle et religieuse, il est du devoir des États, quel qu'en soit le système politique, économique et culturel, de promouvoir et de protéger tous les droits de l'homme et toutes les libertés fondamentales.

CONVENTIONS

Charter of the United Nations, 24 October 1946, 1 UNTS XVI, Can TS 1945 No 7.

Article 1

The Purposes of the United Nations are:

...

3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

Article 55

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

a. higher standards of living, full employment, and conditions of economic and social progress and development;

b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 1

Les buts des Nations Unies sont les suivants :

...

3. Réaliser la coopération internationale en résolvant les problèmes internationaux d'ordre économique, social, intellectuel ou humanitaire, en développant et en encourageant le respect des droits de l'homme et des libertés fondamentales pour tous, sans distinction de race, de sexe, de langue ou de religion;

Article 55

Article 55 En vue de créer les conditions de stabilité et de bien-être nécessaires pour assurer entre les nations des relations pacifiques et amicales fondées sur le respect du principe de l'égalité des droits des peuples et de leur droit à disposer d'eux-mêmes, les Nations Unies favoriseront :

a) le relèvement des niveaux de vie, le plein emploi et des conditions de progrès et de développement dans l'ordre économique et social;

b) la solution des problèmes internationaux dans les domaines économique, social, de la santé publique et autres problèmes connexes, et la coopération internationale dans les domaines de la culture intellectuelle et de l'éducation;

c) le respect universel et effectif des droits de l'homme et des libertés fondamentales pour tous, sans distinction de race, de sexe, de langue ou de religion.

***Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137, Can TS 1969 No 6.**

Article 23 - Public relief

The Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.

Article 23 – Assistance Publique

Les Etats Contractants accorderont aux réfugiés résidant régulièrement sur leur territoire le même traitement en matière d'assistance et de secours publics qu'à leurs nationaux.

***International Covenant on Civil and Political Rights*, 16 December 1966. 999 UNTS 171, Can TS 1976 No 47**

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 2

1. Les Etats parties au présent Pacte s'engagent à respecter et à garantir à tous les individus se trouvant sur leur territoire et relevant de leur compétence les droits reconnus dans le présent Pacte, sans distinction aucune, notamment de race, de couleur, de sexe, de langue, de religion, d'opinion politique ou de toute autre opinion, d'origine nationale ou sociale, de fortune, de naissance ou de toute autre situation.

Article 4

1 . In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Article 4

1. Dans le cas où un danger public exceptionnel menace l'existence de la nation et est proclamé par un acte officiel, les Etats parties au présent Pacte peuvent prendre, dans la stricte mesure où la situation l'exige, des mesures dérogeant aux obligations prévues dans le présent Pacte, sous réserve que ces mesures ne soient pas incompatibles avec les autres obligations que leur impose le droit international et qu'elles n'entraînent pas une discrimination fondée uniquement sur la race, la couleur, le sexe, la langue, la religion ou l'origine sociale.

Article 20

...

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 24

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 20

...

2. Tout appel à la haine nationale, raciale ou religieuse qui constitue une incitation à la discrimination, à l'hostilité ou à la violence est interdit par la loi.

Article 24

1. Tout enfant, sans discrimination aucune fondée sur la race, la couleur, le sexe, la langue, la religion, l'origine nationale ou sociale, la fortune ou la naissance, a droit, de la part de sa famille, de la société et de l'Etat, aux mesures de protection qu'exige sa condition de mineur.

Article 26

Toutes les personnes sont égales devant la loi et ont droit sans discrimination à une égale protection de la loi. A cet égard, la loi doit interdire toute discrimination et garantir à toutes les personnes une protection égale et efficace contre toute discrimination, notamment de race, de couleur, de sexe, de langue, de religion, d'opinion politique et de toute autre opinion, d'origine nationale ou sociale, de fortune, de naissance ou de toute autre situation.

***International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, Can TS 1982 No 46.**

Article 2

...

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(b) The improvement of all aspects of environmental and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

Article 2

...

2. Pour atteindre leurs fins, tous les peuples peuvent disposer librement de leurs richesses et de leurs ressources naturelles, sans préjudice des obligations qui découlent de la coopération économique internationale, fondée sur le principe de l'intérêt mutuel, et du droit international. En aucun cas, un peuple ne pourra être privé de ses propres moyens de subsistance.

Article 12

1. Les Etats parties au présent Pacte reconnaissent le droit qu'a toute personne de jouir du meilleur état de santé physique et mentale qu'elle soit capable d'atteindre.

2. Les mesures que les Etats parties au présent Pacte prendront en vue d'assurer le plein exercice de ce droit devront comprendre les mesures nécessaires pour assurer:

a) La diminution de la mortinatalité et de la mortalité infantile, ainsi que le développement sain de l'enfant;

b) L'amélioration de tous les aspects de l'hygiène du milieu et de l'hygiène industrielle;

c) La prophylaxie et le traitement des maladies épidémiques, endémiques, professionnelles et autres, ainsi que la lutte contre ces maladies;

d) La création de conditions propres à assurer à tous des services médicaux et une aide médicale en cas de maladie.

Court File No. A-407-14

FEDERAL COURT OF APPEAL

BETWEEEN:

ATTORNEY GENERAL OF CANADA and MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellants

-and-

CANADIAN DOCTORS FOR REFUGEE CARE, THE CANADIAN ASSOCIATION OF REFUGEE LAWYERS, DANIEL GARCIA RODRIGUES, HANIF AYUBI, and JUSTICE FOR CHILDREN AND YOUTH

Respondents

NOTICE OF MOTION OF THE PROPOSED INTERVENERS AMNESTY INTERNATIONAL AND ESCR-NET

Motion for Leave to Intervene brought by Amnesty International and ESCR-Net

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BOOK OF AUTHORITIES OF THE PROPOSED INTERVENERS AMNESTY INTERNATIONAL AND ESCR-NET

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5-30	United Nations Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Mendez*, 22nd Sess, UN Doc A/HRC/22/53 (1 February 2013).
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The Law Society of British Columbia

and

The Attorney General of British Columbia *Appellants*

and

The Attorney General for Ontario, the Attorney General of Quebec, the Attorney General of Nova Scotia, the Attorney General for Saskatchewan, the Attorney General for Alberta and the Federation of Law Societies of Canada *Interveners*

v.

Mark David Andrews

and

Gorel Elizabeth Kinersly *Respondents*

and

The Women's Legal Education and Action Fund, the Coalition of Provincial Organizations of the Handicapped, the Canadian Association of University Teachers and the Ontario Confederation of University Faculty Associations *Interveners*

INDEXED AS: ANDREWS *v.* LAW SOCIETY OF BRITISH COLUMBIA

File Nos.: 19955, 19956.

1987: October 5, 6; 1989: February 2.

Present: Dickson C.J. and McIntyre, Lamer, Wilson, Le Dain*, La Forest and L'Heureux-Dubé JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Charter of Rights — Equality before and under the law and equal protection and benefit of law — Citizenship required for call to bar — Whether or not requirement discriminatory with respect to qualified Canadian residents who are not citizens — Whether or not requirement justified under s. 1 — Canadian Charter of Rights and Freedoms, ss. 1, 15(1)

* Le Dain J. took no part in the judgment.

The Law Society of British Columbia

et

Le procureur général de la Colombie-Britannique *Appelants*

et

Le procureur général de l'Ontario, le procureur général du Québec, le procureur général de la Nouvelle-Écosse, le procureur général de la Saskatchewan, le procureur général de l'Alberta et la Fédération des professions juridiques du Canada *Intervenants*

c.

Mark David Andrews

et

Gorel Elizabeth Kinersly *Intimés*

et

Le Fonds d'action et d'éducation juridiques pour les femmes, la Coalition des organisations provinciales, ombudsman des handicapés, l'Association canadienne des professeurs d'université et l'Union des associations des professeurs des universités de l'Ontario *Intervenants*

RÉPERTORIÉ: ANDREWS *c.* LAW SOCIETY OF BRITISH COLUMBIA

N^os^ du greffe: 19955, 19956.

1987: 5, 6 octobre; 1989: 2 février.

Présents: Le juge en chef Dickson et les juges McIntyre, Lamer, Wilson, Le Dain *, La Forest et L'Heureux-Dubé.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit constitutionnel — Charte des droits — Égalité devant la loi, égalité dans la loi et égalité de protection et de bénéfice de la loi — Citoyenneté exigée pour l'inscription au barreau — L'obligation d'être citoyen est-elle discriminatoire à l'égard des résidents canadiens qualifiés qui n'ont pas la citoyenneté? — L'obligation est-elle justifiée en vertu de l'article premier —

* Le juge Le Dain n'a pas pris part au jugement.

— Barristers and Solicitors Act, R.S.B.C. 1979, c. 26, s. 42.

The respondent Andrews, a British subject permanently resident in Canada met all the requirements for admission to the British Columbia bar except that of Canadian citizenship. His action for a declaration that that requirement violated s. 15(1) of the *Canadian Charter of Rights and Freedoms* was dismissed at trial but allowed on appeal. Kinersly, an American citizen who was at the time a permanent resident of Canada articling in the Province of British Columbia, was added as a co-respondent by order of this Court. The constitutional questions before this Court dealt with: (1) whether the Canadian citizenship requirement for admission to the British Columbia bar infringed or denied the equality rights guaranteed by s. 15(1) of the *Charter*; (2) if so, whether that infringement was justified by s. 1.

Held:

Section 15(1) of the *Charter*

Per Dickson C.J. and McIntyre, Lamer, Wilson and L'Heureux-Dubé JJ.: Section 15(1) of the *Charter* provides for every individual a guarantee of equality before and under the law, as well as the equal protection and equal benefit of the law without discrimination. This is not a general guarantee of equality; its focus is on the application of the law. No problem regarding the scope of the word "law" arose in this case because legislation was under attack.

The "similarly situated should be similarly treated" approach will not necessarily result in equality nor will every distinction or differentiation in treatment necessarily result in inequality. The words "without discrimination" in s. 15 are crucial.

Discrimination is a distinction which, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, has an effect which imposes disadvantages not imposed upon others or which withholds or limits access to advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an

Charte canadienne des droits et libertés, art. 1, 15(1) — Barristers and Solicitors Act, R.S.B.C. 1979, chap. 26, art. 42.

L'intimé Andrews, un sujet britannique qui était résident permanent du Canada, remplissait toutes les conditions d'admission au barreau de la Colombie-Britannique à l'exception de celle relative à la citoyenneté canadienne. Son action visant à obtenir un jugement déclaratoire portant que cette condition violait le par. 15(1) de la *Charte canadienne des droits et libertés* a été rejetée en première instance, mais accueillie en appel. Kinersly, une citoyenne américaine qui, à l'époque, était une résidente permanente du Canada qui faisait son stage dans la province de la Colombie-Britannique, a été ajoutée à titre de coïntimée suite à une ordonnance de cette Cour. Les questions constitutionnelles auxquelles doit répondre la Cour sont de savoir (1) si l'obligation d'être citoyen canadien pour être admis au barreau de la Colombie-Britannique porte atteinte aux droits à l'égalité garantis par le par. 15(1) de la *Charte*, et (2) dans l'affirmative, si cette atteinte est justifiée par l'article premier.

Arrêt:

Le paragraphe 15(1) de la *Charte*

Le juge en chef Dickson et les juges McIntyre, Lamer, Wilson et L'Heureux-Dubé: Le paragraphe 15(1) de la *Charte* prévoit que la loi ne fait acception de personne et s'applique également à tous, et que tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination. Il ne s'agit pas d'une garantie générale d'égalité; la disposition porte sur l'application de la loi. La portée du terme «loi» ne soulève aucun problème en l'espèce puisque c'est une mesure législative qui est attaquée.

Le point de vue selon lequel «les personnes qui se trouvent dans une situation analogue doivent être traitées de façon analogue» n'entraînera pas nécessairement l'égalité, pas plus que toute distinction ou différence de traitement ne produira forcément une inégalité. L'expression «indépendamment de toute discrimination» que l'on trouve à l'art. 15 a une importance cruciale.

La discrimination est une distinction, intentionnelle ou non, mais fondée sur des motifs relatifs à des caractéristiques personnelles d'un individu ou d'un groupe d'individus, qui a pour effet d'imposer des désavantages non imposés à d'autres, ou d'empêcher ou de restreindre l'accès aux avantages offerts à d'autres membres de la société. Les distinctions fondées sur des caractéristiques personnelles attribuées à un seul individu en raison de son association avec un groupe sont presque toujours

individual's merits and capacities will rarely be so classed.

Generally, the principles applied under the Human Rights Acts are equally applicable to questions of discrimination under s. 15(1). However, the *Charter* requires a two-step approach to s. 15(1). The first step is to determine whether or not an infringement of a guaranteed right has occurred. The second step is to determine whether, if there has been an infringement, it can be justified under s. 1. The two steps must be kept analytically distinct because of the different attribution of the burden of proof; the citizen must establish the infringement of his or her *Charter* right and the state must justify the infringement.

The grounds of discrimination enumerated in s. 15(1) are not exhaustive. Grounds analogous to those enumerated are also covered and the section may be even broader than that although it is not necessary to answer that question in this case since the ground advanced in this case falls into the analogous category.

The words "without discrimination" require more than a mere finding of distinction between the treatment of groups or individuals. These words are a form of qualifier built into s. 15 itself and limit those distinctions which are forbidden by the section to those which involve prejudice or disadvantage. The effect of the impugned distinction or classification on the complainant must be considered. Given that not all distinctions and differentiations created by law are discriminatory, a complainant under s. 15(1) must show not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection or benefit of the law but must show in addition that the law is discriminatory.

A rule which bars an entire class of persons from certain forms of employment, solely on the grounds of a lack of citizenship status and without consideration of educational and professional qualifications or the other attributes or merits of individuals in the group, infringes s. 15 equality rights. Section 42 of the *Barristers and Solicitors Act* is such a rule.

Per La Forest J.: The views of McIntyre J. as to the meaning of s. 15(1) were substantially agreed with in so far as relevant to the question of whether or not the impugned provision amounted to discrimination based on "irrelevant personal differences" such as those listed

taxées de discriminatoires, alors que celles fondées sur les mérites et capacités d'un individu le sont rarement.

De façon générale, les principes appliqués en vertu des lois sur les droits de la personne s'appliquent également aux questions de discrimination au sens du par. 15(1). Cependant, la *Charte* exige que l'examen fondé sur le par. 15(1) se fasse en deux étapes. La première étape consiste à déterminer s'il y a eu atteinte à un droit garanti. La deuxième étape consiste à déterminer, le cas échéant, si cette atteinte peut être justifiée en vertu de l'article premier. Les deux étapes doivent être maintenues analytiquement distinctes en raison de la différente attribution du fardeau de la preuve: le citoyen doit prouver qu'il y a eu violation du droit que lui garantit la *Charte* et l'État doit justifier cette violation.

Les motifs de discrimination énumérés au par. 15(1) ne sont pas exhaustifs. Les motifs analogues à ceux énumérés sont également visés et il se peut même que la disposition soit plus générale que cela, bien qu'il ne soit pas nécessaire, en l'espèce, de répondre à cette question étant donné que le motif invoqué tombe dans la catégorie des motifs analogues.

L'expression «indépendamment de toute discrimination» exige davantage qu'une simple constatation de distinction dans le traitement de groupes ou d'individus. Cette expression est une forme de réserve incorporée dans l'art. 15 lui-même qui limite les distinctions prohibées par la disposition à celles qui entraînent un préjudice ou un désavantage. L'examen doit également porter sur l'effet de la distinction ou de la classification attaquée sur le plaignant. Puisque ce ne sont pas toutes les distinctions et différenciations créées par la loi qui sont discriminatoires, un plaignant en vertu du par. 15(1) doit démontrer non seulement qu'il ne bénéficie pas d'un traitement égal devant la loi et dans la loi, ou encore que la loi a un effet particulier sur lui en ce qui concerne la protection ou le bénéfice qu'elle offre, mais encore que la loi est discriminatoire.

Une règle qui exclut toute une catégorie de personnes de certains types d'emplois pour le seul motif qu'elles n'ont pas la citoyenneté et sans égard à leur diplômes et à leurs compétences professionnelles ou sans égard aux autres qualités ou mérites d'individus faisant partie du groupe, porte atteinte aux droits à l'égalité de l'art. 15. L'article 42 de la *Barristers and Solicitors Act* constitue une règle de ce genre.

Le juge La Forest: L'opinion du juge McIntyre quant à la signification du par. 15(1) est essentiellement retenue dans la mesure où elle est pertinente à la question de savoir si la disposition contestée constitue de la discrimination fondée sur des «différences personnelles non perti-

in s. 15 and, traditionally, in human rights legislation. The opening words of s. 15 referring more generally to equality, however, may have a significance that extends beyond protection from discrimination through the application of law. Nevertheless, all legislative classifications need not be rationally supportable before the courts; s. 15 was not intended to be a tool for the wholesale subjection of legislation to judicial scrutiny.

The impugned legislation distinguished the respondents from other persons on the basis of a personal characteristic which shares many similarities with those enumerated in s. 15. Citizenship is typically not within the control of the individual and is, at least temporarily, a characteristic of personhood which is not alterable by conscious action and which in some cases is not alterable except on the basis of unacceptable costs. Non-citizens are a group of persons who are relatively powerless politically and whose interests are likely to be compromised by legislative decisions.

Citizenship, while properly required for certain types of legitimate governmental objectives, is generally irrelevant to the legitimate work of government in all but a limited number of areas. Legislating citizenship as a basis for distinguishing between persons, here for conditioning access to the practice of a profession, harbours the potential for undermining the essential or underlying values of a free and democratic society embodied in s. 15. Legislative conditioning on the basis of citizenship may, in certain circumstances, be acceptable in the free and democratic society that is Canada, but that legislation must be justified by the government under s. 1 of the *Charter*.

Section 1 of the *Charter*

Per Dickson C.J. and Wilson and L'Heureux-Dubé JJ.: The legislation at issue was not justified under s. 1.

The objective of the legislation was not sufficiently pressing and substantial to warrant overcoming the rights protected by s. 15. Given that s. 15 is designed to protect those groups who suffer social, political and legal disadvantage in our society, the burden resting on government to justify the type of discrimination against such groups is appropriately an onerous one.

nentes» comme celles qui sont énumérées à l'art. 15 et qui se retrouvent traditionnellement dans les lois sur les droits de la personne. Les termes préliminaires de l'art. 15 qui se rapportent plus généralement à l'égalité peuvent cependant avoir un sens qui va au-delà de la protection contre la discrimination résultant de l'application de la loi. Néanmoins, ce ne sont pas toutes les classifications législatives qui doivent être rationnellement défendables devant les tribunaux; on n'a pas voulu que l'art. 15 serve à assujettir systématiquement les lois à l'examen judiciaire.

La mesure législative attaquée distingue les intimés d'autres personnes en fonction d'une caractéristique personnelle qui comporte plusieurs traits communs avec celles énumérées à l'art. 15. La citoyenneté est une caractéristique qui, normalement, ne relève pas du contrôle de l'individu et est, temporairement du moins, une caractéristique personnelle qu'on ne peut modifier par un acte volontaire et qu'on ne peut, dans certains cas, modifier qu'à un prix inacceptable. Les gens qui n'ont pas la citoyenneté constituent un groupe de personnes qui sont relativement dépourvues de pouvoir politique et dont les intérêts risquent d'être compromis par des décisions législatives.

Bien que la citoyenneté puisse être exigée à bon droit relativement à certains types d'objectifs légitimes du gouvernement, elle n'a généralement rien à voir avec les activités légitimes d'un gouvernement, si ce n'est dans un nombre restreint de domaines. L'emploi dans une mesure législative de la citoyenneté comme motif de distinction entre individus, en l'espèce pour conditionner l'accès à l'exercice d'une profession, comporte le risque de miner les valeurs essentielles ou fondamentales d'une société libre et démocratique qui sont enchâssées à l'art. 15. Une mesure législative qui pose la citoyenneté comme condition peut, dans certains cas, être acceptable dans la société libre et démocratique qu'est le Canada, mais le gouvernement doit justifier une telle mesure en vertu de l'article premier de la *Charte*.

L'article premier de la *Charte*

Le juge en chef Dickson et les juges Wilson et L'Heureux-Dubé: La mesure législative en cause n'est pas justifiée en vertu de l'article premier.

L'objectif de la loi ne se rapporte pas à des préoccupations suffisamment urgentes et réelles pour justifier la suppression des droits protégés par l'art. 15. Étant donné que l'art. 15 est conçu pour protéger les groupes défavorisés sur les plans social, politique et juridique dans notre société, la responsabilité qui incombe au gouvernement de justifier le type de discrimination dont sont victimes ces groupes est à juste titre lourde.

The proportionality test was not met. The requirement of citizenship is not carefully tailored to achieve the objective that lawyers be familiar with Canadian institutions and customs and may not even be rationally connected to it. Most citizens, natural-born or otherwise, are committed to Canadian society but that commitment is not ensured by citizenship. Conversely, non-citizens may be deeply committed to our country. Even if lawyers do perform a governmental function, citizenship does not guarantee that they will honourably and conscientiously carry out their public duties: that is a function of their being good lawyers, not of citizenship.

Per La Forest J.: While in general agreement with McIntyre J. about how the legislation must be approached under s. 1 in balancing the right infringed by the legislation against its objectives, the legislation fails to meet the test of proportionality.

Citizenship neither ensures the objectives of familiarity with Canadian institutions and customs nor of commitment to Canadian society. Restriction of access to the profession to citizens is over-inclusive. Less drastic methods for achieving the desired objectives are available.

While certain state activities may, for both symbolic and practical reasons, be confined to those who are full members of our political society, such restriction should not apply to the legal profession as a whole. The practice of law is primarily a private profession. A lawyer working for a private client does not play a role in the administration of justice requiring citizenship. Ordinary lawyers are not privy to government information and there are rules to restrict lawyers from obtaining confidential governmental information. Their situation differs from those involved in government policy-making or administration.

Per McIntyre and Lamer JJ. (dissenting): The citizenship requirement is reasonable and sustainable under s. 1 given the importance of the legal profession in the government of the country. The measure was not disproportionate to the object to be attained. Non-citizens are encouraged to become citizens and the maximum delay imposed upon the non-citizen from the date of acquisition of permanent resident status is three years. It is reasonable to expect that the newcomer who seeks to

Le critère de proportionnalité n'est pas respecté. L'obligation d'être citoyen n'est pas bien adaptée pour atteindre l'objectif que les avocats connaissent les institutions et coutumes canadiennes et peut même être sans lien rationnel avec celui-ci. La plupart des citoyens, originaires ou non du Canada, sont engagés envers la société canadienne, mais la citoyenneté ne garantit pas cet engagement. Inversement, ceux qui n'ont pas la citoyenneté peuvent être profondément engagés envers notre pays. Même si les avocats exécutent une fonction gouvernementale, la citoyenneté ne garantit pas qu'ils vont s'acquitter de leurs fonctions publiques honorablement et consciencieusement; ils vont le faire parce qu'ils sont des avocats compétents et non parce qu'ils sont citoyens canadiens.

Le juge La Forest: Bien que le juge partage, d'une manière générale, l'opinion du juge McIntyre quant à la manière dont il faut aborder la mesure législative en vertu de l'article premier, en soupesant le droit violé par cette mesure en fonction des objectifs qu'elle vise, la mesure législative en cause ne respecte pas le critère de proportionnalité.

La citoyenneté ne garantit pas la réalisation des objectifs de familiarité avec les institutions et les coutumes canadiennes, ou d'engagement envers la société canadienne. La restriction aux citoyens canadiens de l'accès à la profession d'avocat est excessive. Il existe des moyens moins draconiens de réaliser ces objectifs.

Même si l'exercice de certaines activités de l'État devrait, pour des raisons à la fois symboliques et pratiques, être limité aux membres à part entière de notre société politique, une telle restriction ne devrait pas s'appliquer à l'ensemble de la profession juridique. La pratique du droit est d'abord et avant tout une profession de nature privée. Un avocat qui représente un particulier ne joue dans l'administration de la justice aucun rôle qui l'oblige à avoir la citoyenneté. Les avocats ordinaires ne sont pas au courant de renseignements gouvernementaux et il existe des règles visant à les empêcher d'obtenir des renseignements gouvernementaux confidentiels. Leur situation diffère de celle des avocats qui prennent part à la formulation ou à la mise en œuvre de politiques.

Les juges McIntyre et Lamer (dissidents): L'obligation d'être citoyen est raisonnable et défendable en vertu de l'article premier étant donné l'importance de la profession juridique dans le gouvernement du pays. La mesure n'est pas disproportionnée à l'objectif à atteindre. Ceux qui n'ont pas la citoyenneté sont encouragés à l'obtenir et le délai maximal imparti à celui qui n'a pas la citoyenneté pour devenir citoyen canadien est de trois ans à compter de la date où il acquiert son statut de

gain the privileges and status within the land and the right to exercise the great powers that admission to the practice of law will give should accept citizenship and its obligations as well as its advantages and benefits.

Cases Cited

By Wilson J.

Referred to: *United States v. Carolene Products Co.*, 304 U.S. 144 (1938); *R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Re Dickenson and Law Society of Alberta* (1978), 84 D.L.R. (3d) 189.

By La Forest J.

Referred to: *Buck v. Bell*, 274 U.S. 200 (1927); *Union Colliery Company of British Columbia v. Bryden*, [1899] A.C. 580; *Kask v. Shimizu*, [1986] 4 W.W.R. 154; *Fontiero v. Richardson*, 411 U.S. 677 (1973); *Re Howard*, [1976] 1 N.S.W.L.R. 641; *In re Griffiths*, 413 U.S. 717 (1973); *Reyners v. The Belgian State*, [1974] 2 Common Market Law R. 305.

By McIntyre J. (dissenting as to the application of s. 1)

Referred to: *Dennis v. United States*, 339 U.S. 162 (1950); *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Reference Re Family Benefits Act* (1986), 75 N.S.R. (2d) 338; *Reference Re Use of French in Criminal Proceedings in Saskatchewan* (1987), 44 D.L.R. (4th) 16; *Smith, Kline & French Laboratories Ltd. v. Canada (Attorney General)*, [1987] 2 F.C. 359; *R. v. Ertel* (1987), 35 C.C.C. (3d) 398; *Plessy v. Ferguson*, 163 U.S. 537 (1896); *R. v. Gonzales* (1962), 132 C.C.C. 237; *R. v. Drybones*, [1970] S.C.R. 282; *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183; *Mahe v. Alta. (Gov't)* (1987), 54 Alta. L.R. (2d) 212; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *Attorney General of Canada v. Lavell*, [1974] S.C.R. 1349; *Reference re an Act to Amend the Education Act* (1986), 53 O.R. (2d) 513; *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536; *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *Bhinder v. Canadian National Railway Co.*, [1985] 2 S.C.R. 561; *MacKay v. The Queen*, [1980] 2 S.C.R. 370; *Belgian Linguistic Case (No. 2)* (1968), 1 E.H.R.R. 252; *R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *United States v. Caro-*

résident permanent. Il est raisonnable de s'attendre à ce que les nouveaux arrivants, qui cherchent à obtenir les privilèges et le statut propres au pays et le droit d'exercer les vastes pouvoirs que confère l'admission à la pratique du droit, acceptent la citoyenneté et ses obligations au même titre que ses avantages et bénéfices.

Jurisprudence

Citée par le juge Wilson

Arrêts mentionnés: *United States v. Carolene Products Co.*, 304 U.S. 144 (1938); *R. c. Oakes*, [1986] 1 R.C.S. 103; *R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713; *Re Dickenson and Law Society of Alberta* (1978), 84 D.L.R. (3d) 189.

Citée par le juge La Forest

Arrêts mentionnés: *Buck v. Bell*, 274 U.S. 200 (1927); *Union Colliery Company of British Columbia v. Bryden*, [1899] A.C. 580; *Kask v. Shimizu*, [1986] 4 W.W.R. 154; *Fontiero v. Richardson*, 411 U.S. 677 (1973); *Re Howard*, [1976] 1 N.S.W.L.R. 641; *In re Griffiths*, 413 U.S. 717 (1973); *Reyners v. The Belgian State*, [1974] 2 Common Market Law R. 305.

Citée par le juge McIntyre (dissident quant à l'application de l'article premier)

Arrêts mentionnés: *Dennis v. United States*, 339 U.S. 162 (1950); *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295; *Reference Re Family Benefits Act* (1986), 75 N.S.R. (2d) 338; *Reference Re Use of French in Criminal Proceedings in Saskatchewan* (1987), 44 D.L.R. (4th) 16; *Smith, Kline & French Laboratories Ltd. c. Canada (procureur général)*, [1987] 2 C.F. 359; *R. v. Ertel* (1987), 35 C.C.C. (3d) 398; *Plessy v. Ferguson*, 163 U.S. 537 (1896); *R. v. Gonzales* (1962), 132 C.C.C. 237; *R. c. Drybones*, [1970] R.C.S. 282; *Bliss c. Procureur général du Canada*, [1979] 1 R.C.S. 183; *Mahe v. Alta. (Gov't)* (1987), 54 Alta. L.R. (2d) 212; *Renvoi relatif à la Public Service Employee Relations Act (Alb.)*, [1987] 1 R.C.S. 313; *Procureur général du Canada c. Lavell*, [1974] R.C.S. 1349; *Reference re an Act to Amend the Education Act* (1986), 53 O.R. (2d) 513; *Commission ontarienne des droits de la personne et O'Malley c. Simpsons-Sears Ltd.*, [1985] 2 R.C.S. 536; *Compagnie des chemins de fer nationaux du Canada c. Canada (Commission canadienne des droits de la personne)*, [1987] 1 R.C.S. 1114; *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145; *Bhinder c. Compagnie des chemins de fer nationaux du Canada*, [1985] 2 R.C.S. 561; *MacKay c. La Reine*, [1980] 2 R.C.S. 370; *Affaire relative à certains aspects du régime linguistique de l'enseignement en Belgique* (1968), 11 *Annuaire de la convention européenne des droits de l'homme* 833; *R. c. Oakes*, [1986] 1 R.C.S. 103; *R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713; *United States v.*

Ontario Confederation of University Faculty Associations.

The judgment of Dickson C.J. and Wilson and L'Heureux-Dubé JJ. was delivered by

WILSON J.—I have had the benefit of the reasons of my colleague, Justice McIntyre, and I am in complete agreement with him as to the way in which s. 15(1) of the *Canadian Charter of Rights and Freedoms* should be interpreted and applied. I also agree with my colleague as to the way in which s. 15(1) and s. 1 of the *Charter* interact. I differ from him, however, on the application of s. 1 to this particular case.

As my colleague points out, s. 42 of the *Barristers and Solicitors Act*, R.S.B.C. 1979, c. 26, differentiates between citizens and non-citizens with respect to admission to the practice of law. The distinction denies admission to non-citizens who are in all other respects qualified. While the citizenship requirement applies only to those non-citizens who are permanent residents, it has the effect of requiring those permanent residents to wait for a minimum of three years from the date of establishing their permanent residence before they can be considered for admission to the Bar. It imposes a burden, in the form of some delay in obtaining admission, on permanent residents who have acquired all or some of their legal training abroad.

I agree with my colleague that a rule which bars an entire class of persons from certain forms of employment solely on the ground that they are not Canadian citizens violates the equality rights of that class. I agree with him also that it discriminates against them on the ground of their personal characteristics, i.e., their non-citizen status. I believe, therefore, that they are entitled to the protection of s. 15.

Before turning to s. 1, I would like to add a brief comment to what my colleague has said concern-

l'Union des associations des professeurs des universités de l'Ontario.

Version française du jugement du juge en chef Dickson et des juges Wilson et L'Heureux-Dubé rendu par

LE JUGE WILSON—J'ai eu l'avantage de prendre connaissance des motifs de mon collègue le juge McIntyre et je partage entièrement son avis quant à la façon dont le par. 15(1) de la *Charte canadienne des droits et libertés* devrait être interprété et appliqué. Je partage également son avis quant à la façon dont le par. 15(1) et l'article premier de la *Charte* interagissent. Je diverge cependant d'opinion quant à l'application de l'article premier en l'espèce.

Comme le souligne mon collègue, l'art. 42 de la *Barristers and Solicitors Act*, R.S.B.C. 1979, chap. 26, établit une distinction entre ceux qui ont la citoyenneté canadienne et ceux qui ne l'ont pas en ce qui concerne l'admission à la pratique du droit. Cette distinction empêche ceux qui n'ont pas la citoyenneté d'être admis à la pratique du droit bien qu'ils se qualifient à tous autres égards. Bien que l'obligation d'être citoyen s'applique seulement à ceux qui n'ont pas la citoyenneté et qui sont résidents permanents, elle a pour effet de les obliger à attendre un minimum de trois ans à compter de la date où ils établissent leur résidence permanente avant que leur admission au barreau puisse être considérée. La distinction impose un fardeau, sous la forme d'un délai d'admission, aux résidents permanents qui ont reçu, en totalité ou en partie, leur formation juridique à l'étranger.

Je suis d'accord avec mon collègue pour dire qu'une règle qui exclut toute une catégorie de personnes de certains types d'emplois pour le seul motif qu'elles n'ont pas la citoyenneté canadienne viole les droits à l'égalité de cette catégorie. Je partage également son avis qu'une telle règle établit à leur détriment une distinction fondée sur leurs caractéristiques personnelles, c'est-à-dire leur statut de personnes qui n'ont pas la citoyenneté. Je crois donc qu'elles ont droit à la protection de l'art. 15.

Avant de passer à l'article premier, j'aimerais ajouter quelques mots à ce que mon collègue a dit

Robert Lovelace, on his own behalf and on behalf of the Ardoch Algonquin First Nation and Allies, the Ardoch Algonquin First Nation and Allies, Chief Kris Nahrgang, on behalf of the Kawartha Nishnawbe First Nation, the Kawartha Nishnawbe First Nation, Chief Roy Meaniss, on his own behalf and on behalf of the Beaverhouse First Nation, the Beaverhouse First Nation, Chief Theron McCrady, on his own behalf and on behalf of the Poplar Point Ojibway First Nation, the Poplar Point Ojibway First Nation, and the Bonnechere Métis Association *Appellants*

and

Be-Wab-Bon Métis and Non-Status Indian Association and the Ontario Métis Aboriginal Association *Appellants*

v.

Her Majesty The Queen in right of Ontario and the Chiefs of Ontario *Respondents*

and

The Attorney General of Canada, the Attorney General of Quebec, the Attorney General for Saskatchewan, the Council of Canadians with Disabilities, the Mnjikaning First Nation, the Charter Committee on Poverty Issues, the Congress of Aboriginal Peoples, the Native Women's Association of Canada and the Métis National Council of Women *Interveners*

INDEXED AS: LOVELACE *v.* ONTARIO

Neutral citation: 2000 SCC 37.

File No.: 26165.

1999: December 7; 2000: July 20.

Robert Lovelace, en son nom et au nom de la Première nation algonquine d'Ardoch et ses alliés, la Première nation algonquine d'Ardoch et ses alliés, le chef Kris Nahrgang, au nom de la Première nation Kawartha Nishnawbe, la Première nation Kawartha Nishnawbe, le chef Roy Meaniss, en son nom et au nom de la Première nation de Beaverhouse, la Première nation de Beaverhouse, le chef Theron McCrady, en son nom et au nom de la Première nation ojibway de Poplar Point, la Première nation ojibway de Poplar Point et l'Association des Métis de Bonnechere *Appelants*

et

La Be-Wab-Bon Métis and Non-Status Indian Association et l'Association des Métis autochtones de l'Ontario *Appelantes*

c.

Sa Majesté la Reine du chef de l'Ontario et les Chefs de l'Ontario *Intimés*

et

Le procureur général du Canada, le procureur général du Québec, le procureur général de la Saskatchewan, le Conseil des Canadiens avec déficiences, la Première nation de Mnjikaning, le Comité de la Charte et des questions de pauvreté, le Congrès des peuples autochtones, l'Association des femmes autochtones du Canada et le Métis National Council of Women *Intervenants*

RÉPERTORIÉ: LOVELACE *c.* ONTARIO

Référence neutre: 2000 CSC 37.

N° du greffe: 26165.

1999: 7 décembre; 2000: 20 juillet.

Present: L'Heureux-Dubé, Gonthier, McLachlin, Iacobucci, Major, Bastarache and Arbour JJ.

Présents: Les juges L'Heureux-Dubé, Gonthier, McLachlin, Iacobucci, Major, Bastarache et Arbour.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

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

Constitutional law — Charter of Rights — Equality rights — Indians — Proceeds of province's first reserve-based commercial casino to be distributed only to Ontario First Nations communities registered as bands under Indian Act — Whether province's decision to exclude non-band aboriginal communities from casino proceeds and from participating in the negotiations infringing s. 15(1) of Canadian Charter of Rights and Freedoms.

Droit constitutionnel — Charte des droits — Droits à l'égalité — Indiens — Recettes du premier casino commercial situé dans une réserve de l'Ontario devant être distribuées seulement aux Premières nations de cette province inscrites comme bandes en vertu de la Loi sur les Indiens — Est-ce que la décision de la province d'exclure les communautés autochtones non constituées en bandes du partage des recettes et de la participation aux négociations contrevient à l'art. 15(1) de la Charte canadienne des droits et libertés?

Constitutional law — Charter of Rights — Equality rights — Relationship between ss. 15(1) and 15(2) of Canadian Charter of Rights and Freedoms.

Droit constitutionnel — Charte des droits — Droits à l'égalité — Corrélation entre les art. 15(1) et 15(2) de la Charte canadienne des droits et libertés.

Constitutional law — Division of powers — Indians — Proceeds of province's first reserve-based commercial casino to be distributed only to Ontario First Nations communities registered as bands under Indian Act — Whether province's decision to exclude non-band aboriginal communities ultra vires — Whether province exercising its spending power — Constitution Act, 1867, s. 91(24).

Droit constitutionnel — Partage des compétences — Indiens — Recettes du premier casino commercial situé dans une réserve de l'Ontario devant être distribuées seulement aux Premières nations de cette province inscrites comme bandes en vertu de la Loi sur les Indiens — Est-ce que la décision de la province d'exclure les communautés autochtones non constituées en bandes est ultra vires? — La province exerçait-elle son pouvoir de dépenser? — Loi constitutionnelle de 1867, art. 91(24).

In the early 1990s, First Nations bands approached the Ontario government for the right to control reserve-based gaming activities. The profits from these activities were to be used to strengthen band economic, cultural, and social development. As a result, Ontario and representatives from Ontario's First Nations entered into a process of negotiations with the goal of partnering in the development of the province's first reserve-based commercial casino. In 1996, the appellants were informed by the province that the casino's proceeds ("First Nations Fund") were to be distributed only to Ontario First Nations communities registered as bands under the *Indian Act*. At the individual level, all of the appellate groups have members who have, or are entitled to, registration as individual "Indians" pursuant to the *Indian Act*; however, as communities, the appellant groups are non-status since they are not registered as *Indian Act* "bands", and do not have reserve lands. At motions court, the appellants successfully sought a declaration that Ontario's refusal to include them in the casino project was unconstitutional and that they should

Au début des années 90, les Premières nations constituées en bandes ont fait des démarches auprès du gouvernement de l'Ontario pour obtenir le droit de régir les activités de jeu dans les réserves. Les profits tirés de ces activités devaient être utilisés pour favoriser le développement économique, culturel et social des bandes. Par conséquent, l'Ontario et les représentants des Premières nations de l'Ontario ont entamé des négociations en vue d'établir, en partenariat, le premier casino commercial dans une réserve indienne. En 1996, les parties appelantes ont été informées par la province que les recettes du casino (le «Fonds des Premières nations») seraient distribuées uniquement aux Premières nations de l'Ontario inscrites comme bandes en vertu de la *Loi sur les Indiens*. Sur le plan individuel, tous les groupes appelants comptent des membres qui sont inscrits à titre d'«Indiens» en vertu de la *Loi sur les Indiens* ou qui ont le droit de l'être; toutefois, en tant que communautés, les groupes appelants n'ont aucun statut car ils ne sont pas inscrits en tant que «bandes» au sens de la *Loi sur les Indiens* et ils n'ont pas de terres de réserve. Devant

be allowed to participate in the distribution negotiations. The judge held that (1) the exclusion of the appellants from the First Nations Fund violated their equality rights under s. 15(1) of the *Canadian Charter of Rights and Freedoms* and was not justified under s. 1; (2) s. 15(2) of the *Charter* could not be invoked as a defence to the s. 15(1) violation; and (3) Ontario's actions were *ultra vires* because of s. 91(24) of the *Constitution Act, 1867*. The Court of Appeal set aside the decision, finding that the motions judge had misapprehended the facts and made errors in law. On the basis that the main object of the casino project was to ameliorate the social and economic conditions of bands, the court held that the casino project was authorized by s. 15(2) of the *Charter* and could not therefore constitute discrimination under s. 15(1). The Court of Appeal held also that the province did not act *ultra vires* the *Constitution Act, 1867* as the province simply exercised its spending power.

la cour des requêtes, les parties appelantes ont obtenu un jugement déclarant que le refus de l'Ontario de les considérer comme parties au projet de casino était inconstitutionnel et qu'elles devaient être autorisées à participer aux négociations relatives à la distribution des recettes. Le juge a estimé (1) que l'exclusion des parties appelantes du Fonds des Premières nations portait atteinte aux droits à l'égalité que leur garantit le par. 15(1) de la *Charte canadienne des droits et libertés* et n'était pas justifiée au regard de l'article premier; (2) que le par. 15(2) de la *Charte* ne pouvait pas être invoqué comme moyen de défense relativement à la violation du par. 15(1); (3) que les actes de l'Ontario étaient *ultra vires* au regard du par. 91(24) de la *Loi constitutionnelle de 1867*. La Cour d'appel a infirmé la décision du juge des requêtes, estimant que celui-ci avait mal saisi les faits et avait commis des erreurs de droit. La cour a conclu que, puisque l'objectif principal du projet de casino était l'amélioration de la situation sociale et économique des bandes, le projet de casino était autorisé par le par. 15(2) et qu'il ne pouvait être source de discrimination au sens du par. 15(1) de la *Charte*. La Cour d'appel a également estimé que la province n'avait pas outrepassé les pouvoirs qui lui sont conférés par la *Loi constitutionnelle de 1867* puisqu'elle avait simplement exercé son pouvoir de dépenser.

Held: The appeal should be dismissed.

This appeal should be decided on the basis of s. 15(1) of the *Charter*. Although the Court of Appeal's decision was based on the application of s. 15(2), it was rendered without the benefit of this Court's decision in *Law*. *Law* requires that the determination of a discrimination claim be grounded in three broad inquiries: (1) whether the law, program or activity imposes differential treatment between the claimant and others; (2) whether this differential treatment is based on one or more enumerated or analogous grounds; and (3) whether the impugned law, program or activity has a purpose or effect that is substantively discriminatory. Each of these inquiries proceeds on the basis of a comparative analysis which takes into consideration the surrounding context of the claim and the claimant.

Section 15(1) is to be interpreted in a purposive and contextual manner. The main focus of the inquiry is to establish whether a conflict exists between the purpose or effect of an impugned law and the purpose of s. 15(1), which is to protect against the violation of essential human dignity. The contextual analysis is a directed inquiry; it is focused through the application of contextual factors which have been identified as being

Arrêt: Le pourvoi est rejeté.

Le présent pourvoi doit être décidé au moyen de l'application du par. 15(1) de la *Charte*. La décision de la Cour d'appel était fondée sur l'application du par. 15(2), mais elle a été rendue sans que la Cour d'appel n'ait l'avantage de disposer de l'arrêt *Law* de notre Cour. Suivant cet arrêt, il faut, pour statuer sur une allégation de discrimination, répondre à trois grandes questions: (1) Est-ce que la loi, le programme ou l'activité traite le demandeur différemment d'autres personnes? (2) Est-ce que cette différence de traitement est fondée sur un ou plusieurs motifs énumérés ou analogues? (3) Est-ce que la loi, le programme ou l'activité contesté a un objet ou un effet qui est source de discrimination réelle? Chacune de ces étapes prend la forme d'une analyse comparative qui prend en considération le contexte entourant l'allégation et le demandeur.

Il faut interpréter le par. 15(1) au moyen d'une démarche fondée sur l'objet et sur le contexte. L'analyse vise principalement à déterminer s'il existe un conflit entre l'objet ou l'effet de la disposition législative contestée et l'objet du par. 15(1), qui est la protection des individus contre les atteintes à la dignité humaine essentielle. L'analyse contextuelle est balisée; elle s'attache à l'application de facteurs contextuels qui ont été consi-

particularly sensitive to the potential existence of substantive discrimination. Further, the determination of the appropriate comparator and the evaluation of the context must be examined from the reasonable perspective of the claimant. The question to be asked is whether, taking the perspective of a "reasonable person, in circumstances similar to those of the claimant, who takes into account the contextual factors relevant to the claim", the law has the effect of demeaning a claimant's human dignity. The s. 15(1) scrutiny, which applies to comprehensive benefit schemes as well as targeted ameliorative programs, is not limited to distinctions set out only in legislation. The activities relating to the First Nations Fund undertaken by the provincial government are open to *Charter* scrutiny as actions taken under the statutory authority of s. 15(1) of the *Ontario Casino Corporation Act, 1993*.

dérés particulièrement susceptibles de révéler l'existence potentielle de discrimination réelle. En outre, la détermination de l'élément de comparaison approprié et l'évaluation du contexte doivent être réalisées à partir du point de vue raisonnable du demandeur. La question qu'il faut se poser est de savoir si, du point de vue d'une «personne raisonnable qui se trouve dans une situation semblable à celle du demandeur et qui tient compte des facteurs contextuels pertinents», la loi a pour effet de porter atteinte à la dignité humaine du demandeur. L'examen fondé sur le par. 15(1), qui s'applique aux régimes d'avantages généralement accessibles de même qu'aux programmes améliorateurs ciblés, ne se limite pas aux seules distinctions établies par un texte de loi. Les activités du gouvernement provincial relatives au Fonds des Premières nations peuvent être examinées au regard de la *Charte* en tant qu'actes accomplis en vertu des pouvoirs conférés par la loi, c'est-à-dire par le par. 15(1) de la *Loi de 1993 sur la Société des casinos de l'Ontario*.

The s. 15(1) inquiry must proceed in this case on the basis of comparing band and non-band aboriginal communities. It is clear that the appellants have been subjected to differential treatment since the province confirmed that they were excluded from a share in the First Nations Fund and any related negotiation process. However, it is not necessary to decide whether the differential treatment was based on an enumerated or analogous ground in view of the finding at the third stage of the inquiry that even if these grounds are present there is no discrimination in the circumstances of this case.

En l'espèce, l'analyse fondée sur le par. 15(1) doit être faite en comparant les communautés autochtones constituées en bandes et celles qui ne le sont pas. Les parties appelantes font manifestement l'objet d'un traitement différent depuis que la province a confirmé qu'elles étaient exclues de la participation aux recettes du Fonds des Premières nations et de toute négociation à cet égard. Il n'est toutefois pas nécessaire de déterminer si cette différence de traitement était fondée sur un motif énuméré ou analogue compte tenu de la conclusion, à la troisième étape de l'analyse, que, même si ces motifs sont présents, il n'y a pas de discrimination dans les circonstances de la présente affaire.

Four contextual factors provide the basis for organizing the third stage of the discrimination analysis: (i) preexisting disadvantage, stereotyping, prejudice, or vulnerability; (ii) the correspondence, or lack thereof, between the ground(s) on which the claim is based and the actual need, capacity, or circumstances of the claimant or others; (iii) the ameliorative purpose or effects of the impugned law, program or activity upon a more disadvantaged person or group in society; and (iv) the nature and scope of the interest affected by the impugned government activity. The relative disadvantage of the claimant, as assessed in relation to the comparator group, does not stand alone as constituting a fifth contextual factor. The broad and fully contextual s. 15(1) analysis transcends the superficiality of a simple balancing of relative disadvantage. The inappropriateness of a relative disadvantage approach is highlighted

Quatre facteurs constituent les assises de la troisième étape de l'analyse relative à la discrimination: (i) la préexistence d'un désavantage, de stéréotypes, de préjugés ou d'une situation de vulnérabilité; (ii) la correspondance, ou l'absence de correspondance, entre les motifs sur lesquels l'allégation est fondée et les besoins, les capacités ou la situation véritables du demandeur ou d'autres personnes; (iii) l'objet ou l'effet améliorateur de la loi, du programme ou de l'activité contesté eu égard à une personne ou un groupe défavorisés dans la société; (iv) la nature et l'étendue du droit touché par l'activité gouvernementale contestée. Le désavantage relatif du demandeur, apprécié par rapport au groupe de comparaison, n'est pas considéré en soi comme un cinquième facteur contextuel. L'analyse — large et entièrement contextuelle — fondée sur le par. 15(1) transcende le caractère superficiel de la simple mise en balance des

by the unique circumstances of this case, where the disadvantages suffered both by the claimants and the comparator group must be acknowledged.

An analysis of the four contextual factors leads to the conclusion that the First Nations Fund does not conflict with the purpose of s. 15(1) and does not engage the remedial function of the equality right. While the appellants have established pre-existing disadvantage, stereotyping, and vulnerability, they have failed to establish that the First Nations Fund functioned by device of stereotype. Instead, the distinction corresponded to the actual situation of individuals it affects, and the exclusion did not undermine the ameliorative purpose of the targeted program. Second, while the appellants' needs correspond to the needs addressed by the casino program, for both the appellant and respondent aboriginal communities face these same social problems, the correspondence consideration requires more than establishing a common need. A consideration of the correspondence between the actual needs, capacities, and circumstances on the one hand, and the program on the other, indicates that the appellant aboriginal communities have very different relations with respect to land, government, and gaming from those anticipated by the casino program. Third, the focus of the ameliorative purpose analysis is not the fact that the appellant and respondent groups are equally disadvantaged, but that the program was targeted at ameliorating the conditions of a specific disadvantaged group rather than a disadvantage potentially experienced by any member of society. Although the targeted ameliorative program is alleged to be underinclusive, one must recognize that exclusion from a targeted or partnership program is less likely to be associated with stereotyping or stigmatization or conveying the message that the excluded group is less worthy of recognition and participation in the larger society. Here, the ameliorative purpose of the overall casino project and the related First Nations Fund has clearly been established. The First Nations Fund will provide bands with resources in order to ameliorate specifically social, health, cultural, education, and economic disadvantages, thereby increasing the fiscal autonomy of the bands and supporting the bands in achieving self-government and self-reliance. The First Nations Fund has a purpose that is consistent with s. 15(1) of the *Charter* and the exclusion of the appellants does not undermine this purpose since it is not associated with a misconception as to their actual needs, capacities and circumstances. Lastly, with respect to the nature of the interest affected, the targeted

désavantages relatifs. Le caractère inapproprié de la démarche fondée sur le désavantage relatif ressort des faits particuliers de la présente affaire, où il faut reconnaître les désavantages subis tant par les demandeurs que par le groupe de comparaison.

L'analyse des quatre facteurs contextuels mène à la conclusion que le Fonds des Premières nations n'est pas incompatible avec l'objet du par. 15(1) et ne fait pas entrer au jeu la fonction réparatrice du droit à l'égalité. Quoique les parties appelantes aient établi la préexistence d'un désavantage, de stéréotypes et d'une situation de vulnérabilité, elles n'ont pas réussi à démontrer que l'application du Fonds des Premières nations fonctionnait par l'application de stéréotypes. Au contraire, la distinction correspondait à la situation véritable des individus qu'elle touche, et l'exclusion n'a pas compromis l'objet améliorateur du programme ciblé. Deuxièmement, bien que les besoins des parties appelantes correspondent aux besoins visés par l'établissement du casino, les communautés autochtones appelantes et les communautés autochtones intimées étant aux prises avec les mêmes problèmes sociaux, il faut prouver davantage que l'existence d'un besoin commun pour satisfaire au critère de la correspondance. L'examen de la correspondance entre les besoins, les capacités et la situation véritables d'une part, et le programme d'autre part, indique que les communautés autochtones appelantes ont, à l'égard du territoire, du gouvernement et du jeu, des rapports très différents de ceux envisagés par le programme. Troisièmement, l'aspect central de l'analyse relative à l'objet améliorateur n'est pas le fait que les groupes appelants et intimés sont également défavorisés, mais que le programme vise à améliorer la situation d'un groupe défavorisé précis plutôt qu'à remédier à un désavantage dont pourrait souffrir tout membre de la société. Quoique l'on reproche au programme améliorateur ciblé d'avoir un caractère trop limitatif, il faut reconnaître qu'il est peu probable que le fait d'exclure un groupe d'un programme ciblé ou établi en partenariat ait pour effet d'associer à ce groupe des stéréotypes ou des stigmates ou encore de communiquer le message qu'il est moins digne de reconnaissance et d'intégration au sein de la société dans son ensemble. En l'espèce, l'objet améliorateur du projet de casino dans son ensemble et du Fonds des Premières nations a clairement été établi. Le Fonds fournira aux bandes des ressources en vue de remédier aux désavantages sur les plans sociaux, culturels et économiques ainsi qu'en matière de santé et d'éducation, accroissant ainsi leur autonomie financière et les aidant à réaliser l'autonomie gouvernementale et l'autosuffisance. Le Fonds des

arrangement and circumstances surrounding the First Nations Fund do not result in any lack of recognition of the appellants as self-governing communities. To the extent that there is any such effect in this respect, it is remote.

Therefore, the appellants have failed to demonstrate that, viewed from the perspective of the reasonable individual, in circumstances similar to those of the appellants, the exclusion from the First Nations Fund has the effect of demeaning the appellants' human dignity. This conclusion was reached despite a recognition that the appellant and respondent aboriginal communities have overlapping and largely shared histories of discrimination, poverty, and systemic disadvantage that cry out for improvement. The contextual analysis reveals an almost precise correspondence between the casino project and the needs and circumstances of the First Nations bands. The casino project was undertaken by Ontario in order to further develop a partnership or a "government-to-government" relationship with Ontario's First Nation band communities. It is a project that is aimed at supporting the journey of these aboriginal groups towards empowerment, dignity, and self-reliance. While it is not designed to meet similar needs in the appellant aboriginal communities, its failure to do so does not amount to discrimination under s. 15.

At this stage of the s. 15 jurisprudence, s. 15(2) of the *Charter* should be understood as confirmatory of s. 15(1). In that respect, claimants arguing equality claims in the future should first be directed to s. 15(1) since that subsection can embrace ameliorative programs of the kind that are contemplated by s. 15(2). By doing that one can ensure that the program is subject to the full scrutiny of the discrimination analysis, as well as the possibility of a s. 1 review. However, in view of emerging equality jurisprudence, the possibility is not foreclosed that s. 15(2) may be independently applicable to a case in the future.

Premières nations a un objet compatible avec le par. 15(1) de la *Charte*, et l'exclusion des parties appelantes ne compromet pas la réalisation de cet objet puisqu'elle n'est pas liée à une conception erronée de leurs besoins, capacités et situation véritables. Enfin, relativement à la nature du droit touché, les mesures ciblées et les circonstances entourant le Fonds des Premières nations n'ont pas pour effet d'empêcher les parties appelantes d'être reconnues comme des communautés titulaires de l'autonomie gouvernementale. Dans la mesure où un tel effet existe, il est ténu.

Par conséquent, les parties appelantes n'ont pas démontré que, considérée du point de vue de la personne raisonnable qui serait dans une situation analogue à la leur, leur exclusion du Fonds des Premières nations a pour effet de porter atteinte à leur dignité humaine. Cette conclusion a été tirée malgré la reconnaissance du fait que les communautés autochtones appelantes et intimées partagent, dans une large mesure, un vécu de discrimination, de pauvreté et de désavantage systémique qui appelle à l'amélioration de leur sort. L'analyse contextuelle révèle une correspondance presque parfaite entre le projet de casino d'une part, ainsi que les besoins et la situation des Premières nations constituées en bandes d'autre part. Le projet de casino a été entrepris par l'Ontario afin de développer un partenariat ou des rapports de «gouvernement à gouvernement» avec les Premières nations constituées en bandes. Il s'agit d'un projet visant à appuyer la marche de ces groupes autochtones vers la prise en charge de leur destinée, la dignité et l'autosuffisance. Quoique ce projet ne soit pas conçu pour répondre aux besoins similaires des communautés autochtones appelantes, ce fait n'équivaut pas à de la discrimination au sens de l'art. 15.

Dans l'état actuel de la jurisprudence relative à l'art. 15, le par. 15(2) de la *Charte* doit être considéré comme ayant pour effet de confirmer la portée du par. 15(1). À cet égard, les demandeurs qui présenteront dans le futur des demandes fondées sur le droit à l'égalité devraient d'abord invoquer le par. 15(1), puisque cette disposition vise les programmes améliorateurs du genre de ceux envisagés au par. 15(2). En agissant ainsi, ils s'assureront que le programme fera l'objet de l'examen approfondi effectué dans le cadre de l'analyse relative à la discrimination, en plus d'ouvrir la possibilité d'un examen fondé sur l'article premier. Toutefois, à la lumière de la jurisprudence récente en matière d'égalité, il demeure possible que le par. 15(2) puisse s'appliquer de façon indépendante dans une éventuelle affaire.

Finally, the province did not act *ultra vires* in partnering the casino initiative with *Indian Act* registered aboriginal communities. The exclusion of non-registered aboriginal communities did not act to define or impair the "Indianness" of the appellants since the province simply exercised its constitutional spending power in making the casino arrangements. There is nothing in the casino program affecting the core of the s. 91(24) federal jurisdiction. Consequently, this casino program cannot have the effect of violating the rights affirmed by s. 35(1) of the *Constitution Act, 1982* and does not approach the core of aboriginality.

Enfin, la province n'a pas outrepassé ses pouvoirs en mettant de l'avant le projet de casino en partenariat avec les communautés autochtones inscrites en vertu de la *Loi sur les Indiens*. L'exclusion des communautés autochtones non inscrites n'a pas eu pour effet de définir l'«indianité» des parties appelantes ou d'y porter atteinte, puisque la province n'a fait qu'exercer son pouvoir constitutionnel de dépenser en prenant les arrangements relatifs au casino. Aucun aspect du programme relatif au casino ne touche à l'essentiel de la compétence conférée au fédéral par le par. 91(24). En conséquence, ce programme ne peut avoir pour effet de porter atteinte aux droits confirmés par le par. 35(1) de la *Loi constitutionnelle de 1982*, et il ne touche pas à l'essentiel de l'autochtonité.

Cases Cited

Applied: *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; **referred to:** *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. Powley*, [1999] 1 C.N.L.R. 153, varied (2000), 47 O.R. (3d) 30, leave to appeal granted, [2000] O.J. No. 1063 (QL); *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203; *R. v. Pamajewon*, [1996] 2 S.C.R. 821; *R. v. Perry*, [1996] 2 C.N.L.R. 167, rev'd (1997), 148 D.L.R. (4th) 96, leave to appeal dismissed, [1997] 3 S.C.R. xii; *Ontario Human Rights Commission v. Ontario* (1994), 19 O.R. (3d) 387; *R. v. Willocks* (1995), 22 O.R. (3d) 552; *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 S.C.R. 566; *M. v. H.*, [1999] 2 S.C.R. 3; *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625; *Egan v. Canada*, [1995] 2 S.C.R. 513; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241; *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703, 2000 SCC 28; *Collins v. Canada*, [2000] 2 F.C. 3; *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358; *Miron v. Trudel*, [1995] 2 S.C.R. 418; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *R. v. Swain*, [1991] 1 S.C.R. 933; *Weatherall v. Canada (Attorney General)*, [1993] 2 S.C.R. 872; *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451; *Manitoba Rice Farmers Association v. Human Rights Commission (Manitoba)* (1987), 50 Man. R. (2d) 92; *Silano v. The Queen in Right of British*

Jurisprudence

Arrêt suivi: *Law c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1999] 1 R.C.S. 497; **arrêts mentionnés:** *R. c. Van der Peet*, [1996] 2 R.C.S. 507; *R. c. Powley*, [1999] 1 C.N.L.R. 153, modifié par (2000), 47 O.R. (3d) 30, autorisation d'appel accordée, [2000] O.J. No. 1063 (QL); *Corbiere c. Canada (Ministre des Affaires indiennes et du Nord canadien)*, [1999] 2 R.C.S. 203; *R. c. Pamajewon*, [1996] 2 R.C.S. 821; *R. c. Perry*, [1996] 2 C.N.L.R. 167, inf. par (1997), 148 D.L.R. (4th) 96, autorisation de pourvoi refusée, [1997] 3 R.C.S. xii; *Ontario Human Rights Commission c. Ontario* (1994), 19 O.R. (3d) 387; *R. c. Willocks* (1995), 22 O.R. (3d) 552; *Battlefords and District Co-operative Ltd. c. Gibbs*, [1996] 3 R.C.S. 566; *M. c. H.*, [1999] 2 R.C.S. 3; *Winko c. Colombie-Britannique (Forensic Psychiatric Institute)*, [1999] 2 R.C.S. 625; *Egan c. Canada*, [1995] 2 R.C.S. 513; *Douglas/Kwantlen Faculty Assn. c. Douglas College*, [1990] 3 R.C.S. 570; *McKinney c. Université de Guelph*, [1990] 3 R.C.S. 229; *Eldridge c. Colombie-Britannique (Procureur général)*, [1997] 3 R.C.S. 624; *Eaton c. Conseil scolaire du comté de Brant*, [1997] 1 R.C.S. 241; *Brooks c. Canada Safeway Ltd.*, [1989] 1 R.C.S. 1219; *Vriend c. Alberta*, [1998] 1 R.C.S. 493; *Granovsky c. Canada (Ministre de l'Emploi et de l'Immigration)*, [2000] 1 R.C.S. 703, 2000 CSC 28; *Collins c. Canada*, [2000] 2 C.F. 3; *Benner c. Canada (Secrétaire d'État)*, [1997] 1 R.C.S. 358; *Miron c. Trudel*, [1995] 2 R.C.S. 418; *Andrews c. Law Society of British Columbia*, [1989] 1 R.C.S. 143; *R. c. Swain*, [1991] 1 R.C.S. 933; *Weatherall c. Canada (Procureur général)*, [1993] 2 R.C.S. 872; *Harrison c. Université de la Colombie-Britannique*, [1990] 3 R.C.S. 451; *Manitoba Rice Farmers Association c. Human Rights Commission (Manitoba)* (1987), 50 Man. R. (2d)

the claim is based and the actual need, capacity, or circumstances of the claimant or others, (iii) the ameliorative purpose or effects of the impugned law, program or activity upon a more disadvantaged person or group in society, and (iv) the nature and scope of the interest affected by the impugned government activity. As the following discussion of those contextual factors will reveal, I conclude that no discrimination exists through the operation of the casino program.

(a) *Pre-Existing Disadvantage, Stereotyping, Prejudice or Vulnerability*

As I have already pointed out, this enquiry does not direct the appellants and respondents to a "race to the bottom", i.e., the claimants are not required to establish that they are more disadvantaged than the comparator group. However, it is important to acknowledge that all aboriginal peoples have been affected "by the legacy of stereotyping and prejudice against Aboriginal peoples" (*Corbiere*, *supra*, at para. 66). Aboriginal peoples experience high rates of unemployment and poverty, and face serious disadvantages in the areas of education, health, and housing (*Report of the Royal Commission on Aboriginal Peoples*, vol. 3, *Gathering Strength* (1996), at pp. 108-114, 166-75, 366-69, 438-44; see also U.N. Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights* (Canada), E/C. 12/1/Add.31, 4 Dec. 1998, at paras. 17 and 43; and Carol Agocs and Monica Boyd, "The Canadian Ethnic Mosaic Recast for the 1990s" in *Social Inequality in Canada: Patterns, Problems, Policies* (2nd ed. 1993), 330, at pp. 333-36).

Apart from this background, the two appellant groups face a unique set of disadvantages. Although the two appellant groups emphasize their respective cultural and historical distinctness as Métis and First Nations peoples, both appellant groups submit that these particular disadvantages can be traced to their non-participation in, or

de correspondance, entre les motifs sur lesquels l'allégation est fondée et les besoins, les capacités ou la situation véritables du demandeur ou d'autres personnes; (iii) l'objet ou l'effet améliorateur de la loi, du programme ou de l'activité contesté eu égard à une personne ou un groupe défavorisés dans la société; (iv) la nature et l'étendue du droit touché par l'activité gouvernementale contestée. Comme le révélera l'examen de ces facteurs contextuels, j'estime que l'exploitation du programme relatif au casino ne crée pas de discrimination.

a) *La préexistence d'un désavantage, de stéréotypes, de préjugés ou d'une situation de vulnérabilité*

69 Comme je l'ai déjà souligné, cet examen n'engage pas les parties appelantes et les intimés dans une «course vers le bas», en d'autres mots les demandeurs ne sont pas tenus de démontrer qu'ils sont plus défavorisés que le groupe de comparaison. Il est toutefois important de reconnaître que tous les peuples autochtones subissent les effets «de l'héritage de stéréotypes et préjugés visant les peuples autochtones» (*Corbiere*, précité, au par. 66). Les peuples autochtones sont aux prises avec des taux élevés de chômage et de pauvreté, et ils font face à d'importants désavantages dans les domaines de l'éducation, de la santé et du logement (*Rapport de la Commission royale sur les peuples autochtones*, vol. 3, *Vers un ressourcement* (1996), aux pp. 120 à 128, 186 à 197, 414 à 417, et 494 à 501; voir également Comité des droits économiques, sociaux et culturels des Nations Unies, *Observations finales du Comité des droits économiques, sociaux et culturels* (Canada), E/C. 12/1/Add. 31, 10 déc. 1998, aux par. 17 et 43; ainsi que Carol Agocs et Monica Boyd, «The Canadian Ethnic Mosaic Recast for the 1990s» dans *Social Inequality in Canada: Patterns, Problems, Policies* (2e éd. 1993), 330, aux pp. 333 à 336).

70 Indépendamment de ce contexte, les deux groupes appelants font face à un ensemble unique de désavantages. Bien que les deux groupes appelants fassent valoir le caractère distinctif de leur héritage culturel et historique respectif en tant que Métis et Premières nations, chaque groupe affirme que ces désavantages particuliers sont imputables à

Newfoundland and Labrador Association of Public and Private Employees *Appellant*

v.

Her Majesty The Queen in Right of Newfoundland as represented by the Treasury Board and the Minister of Justice *Respondent*

and

Attorney General of Quebec, Attorney General of New Brunswick, Attorney General of British Columbia, Attorney General of Alberta, Canadian Association for Community Living, Canadian Hearing Society, Council of Canadians with Disabilities, Hospital Employees' Union, British Columbia Government and Service Employees' Union, Health Sciences Association, Women's Legal Education and Action Fund, and Canadian Labour Congress *Interveners*

Newfoundland and Labrador Association of Public and Private Employees *Appelante*

c.

Sa Majesté la Reine du chef de Terre-Neuve, représentée par le Conseil du Trésor et le ministre de la Justice *Intimée*

et

Procureur général du Québec, procureur général du Nouveau-Brunswick, procureur général de la Colombie-Britannique, procureur général de l'Alberta, Association canadienne pour l'intégration communautaire, Société canadienne de l'ouïe, Conseil des Canadiens avec déficiences, Syndicat des employés d'hôpitaux, Syndicat des fonctionnaires provinciaux et de service de la Colombie-Britannique, Association des sciences de la santé, Fonds d'action et d'éducation juridiques pour les femmes, et Congrès du travail du Canada *Intervenants*

INDEXED AS: NEWFOUNDLAND (TREASURY BOARD) *v.* N.A.P.E.

Neutral citation: 2004 SCC 66.

File No.: 29597.

2004: May 12; 2004: October 28.

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps and Fish JJ.

RÉPERTORIÉ : TERRE-NEUVE (CONSEIL DU TRÉSOR) *c.* N.A.P.E.

Référence neutre : 2004 CSC 66.

N° du greffe : 29597.

2004 : 12 mai; 2004 : 28 octobre.

Présents : La juge en chef McLachlin et les juges Major, Bastarache, Binnie, LeBel, Deschamps et Fish.

ON APPEAL FROM THE COURT OF APPEAL FOR NEWFOUNDLAND AND LABRADOR

Constitutional law — Charter of Rights — Equality rights — Gender discrimination — Pay equity — Pay equity agreement signed in favour of female employees in health care sector — Whether s. 9 of Public Sector Restraint Act deferring commencement of wage adjustment payments infringes right to equality — If so, whether infringement justifiable — Canadian Charter of Rights

EN APPEL DE LA COUR D'APPEL DE TERRE-NEUVE-ET-LABRADOR

Droit constitutionnel — Charte des droits — Droits à l'égalité — Discrimination fondée sur le sexe — Équité salariale — Entente accordant l'équité salariale aux employées du secteur des soins de santé — L'article 9 de la Public Sector Restraint Act, qui reporte les réajustements salariaux, porte-t-il atteinte au droit à l'égalité? — Dans l'affirmative, cette atteinte est-elle justifiable? — Charte

and Freedoms, ss. 1, 15(1) — Public Sector Restraint Act, S.N. 1991, c. 3, s. 9.

Constitutional law — Charter of Rights — Reasonable limits — Oakes test — Separation of powers — Whether explicit recognition of separation of powers doctrine should be added to Oakes test — Canadian Charter of Rights and Freedoms, s. 1.

In 1988, the government of Newfoundland and Labrador signed a Pay Equity Agreement in favour of female employees in the health care sector including those represented in collective bargaining by the appellant union. In 1991, the same government introduced the *Public Sector Restraint Act*, which deferred from 1988 to 1991 the commencement of the promised pay equity increase (s. 9) and extinguished the 1988-91 arrears. The effect of s. 9 was to erase an obligation the Province had for approximately $24 million. The justification was that the government was experiencing a financial crisis unprecedented in the Province's history. The government adopted other severe measures to reduce the Province's deficit, including a freeze on wage scales for public sector employees, a closure of hospital beds, and a freeze on per capita student grants and equalization grants to school boards. It also laid off almost two thousand employees and terminated medicare coverage for certain items. Grievances were filed on behalf of some female employees affected by the cut to pay equity. The Arbitration Board ordered the government to comply with the original terms of the Pay Equity Agreement, holding that s. 9 of the Act infringed s. 15(1) of the *Canadian Charter of Rights and Freedoms* and that the infringement could not be saved under s. 1. On judicial review, the motions judge quashed the Board's decision and dismissed the grievances. He agreed that s. 9 infringed s. 15(1) but found the infringement justifiable under s. 1. The Court of Appeal upheld the motions judge's decision. In so doing, one appeal judge suggested that explicit recognition of the separation of powers doctrine should be added to the s. 1 test.

Held: The appeal should be dismissed. Section 9 of the *Public Sector Restraint Act* is constitutional.

When the provincial government signed the Pay Equity Agreement in 1988, it changed the legal landscape

canadienne des droits et libertés, art. 1, 15(1) — Public Sector Restraint Act, S.N. 1991, ch. 3, art. 9.

Droit constitutionnel — Charte des droits — Limites raisonnables — Critère de l'arrêt Oakes — Séparation des pouvoirs — Y a-t-il lieu d'ajouter la reconnaissance explicite du principe de la séparation des pouvoirs au critère de l'arrêt Oakes? — Charte canadienne des droits et libertés, art. 1.

En 1988, le gouvernement de Terre-Neuve-et-Labrador a signé une entente accordant l'équité salariale aux employées du secteur des soins de santé, y compris celles que le syndicat appelant représente dans le cadre des négociations collectives. En 1991, le même gouvernement a déposé la *Public Sector Restraint Act*, qui reportait de 1988 à 1991 l'augmentation promise au titre de l'équité salariale (art. 9) et annulait les arriérés pour les années 1988 à 1991. L'article 9 avait pour effet d'effacer l'obligation d'environ 24 millions de dollars que la province avait alors. Le gouvernement a justifié cette mesure par le fait qu'il traversait une crise financière sans précédent dans l'histoire de la province. Le gouvernement a adopté d'autres mesures draconiennes destinées à réduire le déficit de la province, dont le gel des échelles salariales des employés du secteur public, la fermeture de lits d'hôpitaux et le gel des prêts et bourses d'études *per capita* et des subventions de péréquation destinées aux conseils scolaires. Il a également mis à pied presque deux mille employés et mis fin à l'application du régime d'assurance-maladie à certains services. Des griefs ont été déposés au nom de certaines employées touchées par la réduction des dépenses au titre de l'équité salariale. Le conseil d'arbitrage a ordonné au gouvernement de respecter les conditions initiales de l'entente sur l'équité salariale, en concluant que l'art. 9 de la Loi violait le par. 15(1) de la *Charte canadienne des droits et libertés* et que cette violation ne pouvait pas être sauvegardée par application de l'article premier. Lors du contrôle judiciaire, le juge des requêtes a annulé la décision du conseil d'arbitrage et rejeté les griefs. Il a reconnu que l'art. 9 de la Loi violait le par. 15(1), mais il a estimé que cette violation était justifiable au sens de l'article premier. La Cour d'appel a confirmé la décision du juge des requêtes. Ce faisant, l'un des juges d'appel a proposé que la reconnaissance explicite du principe de la séparation des pouvoirs soit ajoutée au critère relatif à l'article premier.

Arrêt : Le pourvoi est rejeté. L'article 9 de la *Public Sector Restraint Act* est constitutionnel.

Le gouvernement provincial a signé, en 1988, une entente sur l'équité salariale qui a changé le paysage

by creating enforceable contractual rights to end pay discrimination by a procedure contractually binding on all of the parties. This process converted pay equity from a policy argument into an existing legal obligation for the benefit of the female hospital workers. The purpose of the *Public Sector Restraint Act* was to reduce the women's pay below this contractual entitlement and its intended effect was to continue to pay women less than was paid to men for work of equal value. Passage of the Act on April 18, 1991 put women hospital workers in a worse position than they were on April 17, 1991.

The contextual factors listed in *Law* lead to the conclusion that the targeting of an acquired right to pay equity amounted to discrimination within the meaning of s. 15(1) of the *Charter*. First, a pre-existing disadvantage is shown since "women's jobs" are chronically underpaid and the Act perpetuated and reinforced the idea that women could be paid less for no reason other than the fact that they were women. Second, the postponement of pay equity did not correspond to the actual needs, capacity or circumstances of the claimants. Indeed, it did just the opposite. Third, the Act did not have an ameliorative purpose in relation to the workforce. Fourth, since work is an important part of life, the interest affected by the Act was of great importance. In sum, s. 9 of the Act affirmed a policy of gender discrimination which the provincial government had itself denounced three years previously.

Section 9 of the *Public Sector Restraint Act* is justifiable under s. 1 of the *Charter*. The need to address the fiscal crisis was a pressing and substantial legislative objective in the spring of 1991. The crisis was severe. The cost of putting pay equity into effect according to the original timetable was a major expenditure. A lower credit rating, and its impact on the government's ability to borrow, and the added cost of borrowing to finance the provincial debt, were matters of great importance. Moreover, the government was debating not just rights versus dollars, but rights versus hospital beds, layoffs, jobs, education and social welfare.

Courts will continue to look with strong scepticism at attempts to justify infringements of *Charter* rights on the basis of budgetary constraints. To do otherwise

juridique en créant des droits contractuels exécutoires destinés à mettre fin à la discrimination salariale au moyen d'un processus contractuel liant toutes les parties. Ce processus a fait de l'équité salariale, argument de politique générale, une obligation juridique réelle profitant aux employées d'hôpitaux. La *Public Sector Restraint Act* avait pour but de réduire le salaire auquel les femmes avaient droit en vertu de leur contrat de travail et l'effet recherché était de continuer à leur verser un salaire inférieur à celui des hommes exerçant des fonctions équivalentes. L'adoption de la Loi, le 18 avril 1991, a fait en sorte que les employées d'hôpitaux se sont retrouvées dans une situation pire que celle dans laquelle elles étaient le 17 avril 1991.

Les facteurs contextuels énumérés dans l'arrêt *Law* amènent à conclure que cibler un droit acquis à l'équité salariale constitue de la discrimination au sens du par. 15(1) de la *Charte*. Premièrement, il y a désavantage préexistant étant donné que les « emplois occupés par des femmes » sont chroniquement sous-payés et que la Loi perpétuait et renforçait l'idée que les femmes peuvent être moins bien rémunérées simplement parce qu'elles sont des femmes. Deuxièmement, le report de l'équité salariale ne correspondait donc pas aux besoins, aux capacités ou à la situation propres aux demanderesses. En fait, c'était plutôt le contraire. Troisièmement, la Loi n'avait aucun objet d'amélioration en ce qui concernait la population active. Quatrièmement, étant donné que le travail est un aspect important de la vie, le droit touché par la Loi revêtait une grande importance. Somme toute, l'art. 9 de la Loi confirmait une politique de discrimination fondée sur le sexe que le gouvernement provincial avait lui-même dénoncée trois ans auparavant.

L'article 9 de la *Public Sector Restraint Act* est justifiable au sens de l'article premier de la *Charte*. La nécessité de remédier à la crise financière était un objectif législatif urgent et réel au printemps de 1991. La crise était grave. Les coûts nécessaires pour réaliser l'équité salariale selon l'échéancier initial représentaient une dépense importante. La baisse de la cote de crédit et son incidence sur la capacité d'emprunt du gouvernement ainsi que les coûts supplémentaires liés aux emprunts nécessaires pour financer la dette de la province étaient des questions très importantes. En outre, le gouvernement ne discutait pas seulement de droits par opposition à des dollars, mais également de droits par opposition à des lits d'hôpitaux, à des mises à pied, à des emplois, à l'éducation et à l'aide sociale.

Les tribunaux continueront de faire montre d'un grand scepticisme à l'égard des tentatives de justifier, par des restrictions budgétaires, des atteintes à des droits

would devalue the *Charter* because there are always budgetary constraints and there are always other pressing government priorities. Nevertheless, the courts cannot close their eyes to the periodic occurrence of financial emergencies when measures must be taken to juggle priorities to see a government through the crisis.

The government's response to its fiscal crisis was also proportional to its objective. First, as the pay equity payout represented a significant portion of the budget, its postponement was rationally connected to averting a serious financial crisis. Second, the government's response was tailored to minimally impair rights in the context of the problem it confronted. Despite the scale of the fiscal crisis, the government proceeded to implement the pay equity plan, albeit at a slower pace. In addition, the government initiated a consultation process with the union to find alternative measures. There were broad cuts to jobs and services. The exceptional financial crisis called for an exceptional response. In such cases, a legislature must be given reasonable room to manoeuvre. Third, on a balance of probabilities the detrimental impact of a delay in achieving pay equity did not outweigh the importance of preserving the fiscal health of a provincial government through a temporary but serious financial crisis. The seriousness of the crisis, combined with the relative size of the $24 million required to bring pay equity in line with the original schedule, are the compelling factors in that respect. The fiscal measures adopted by the government did more good than harm, despite the adverse effects on the women hospital workers.

While the separation of powers is a defining feature of our constitutional order, it cannot be invoked to undermine the operation of a specific written provision of the Constitution like s. 1 of the *Charter*. Section 1 itself reflects an important aspect of the separation of powers by defining certain express limits on legislative sovereignty. Judicial review of governmental action long predates the adoption of the *Charter*. Since Confederation, courts have been required by the Constitution to ensure that legislatures comply with the division of legislative powers. The *Charter* has placed new limits on government power in the area of human rights, but judicial review of those limits involves the courts in the same role in relation to the separation of powers as they have occupied from the

garantis par la *Charte*. Agir autrement aurait pour effet de déprécier la *Charte* étant donné qu'il y a toujours des restrictions budgétaires et que le gouvernement a toujours d'autres priorités urgentes. Cependant, les tribunaux ne peuvent pas fermer les yeux sur les crises financières périodiques qui, pour être surmontées, forcent le gouvernement à prendre des mesures pour gérer ses priorités.

La réaction du gouvernement à la crise financière qu'il traversait était proportionnelle à son objectif. Premièrement, comme les versements au titre de l'équité salariale représentaient une partie importante du budget, il existait un lien rationnel entre leur report et la possibilité d'éviter une crise financière grave. Deuxièmement, les mesures prises par le gouvernement afin de régler le problème auquel il faisait face étaient conçues de manière à ne porter qu'une atteinte minimale à des droits. Malgré l'ampleur de la crise financière, le gouvernement a mis en œuvre le programme d'équité salariale, mais à un rythme plus lent. En outre, le gouvernement a entrepris de consulter le syndicat afin de trouver d'autres mesures possibles. Les emplois et les services ont subi des réductions majeures. La crise financière qui était exceptionnelle commandait des mesures exceptionnelles. En pareils cas, le législateur doit disposer d'une marge de manœuvre raisonnable. Troisièmement, selon la prépondérance des probabilités, l'effet préjudiciable d'un report de la réalisation de l'équité salariale ne l'emportait pas sur l'importance de préserver la santé financière d'un gouvernement provincial aux prises avec une crise financière temporaire mais grave. Les facteurs déterminants à cet égard sont la gravité de cette crise, conjuguée à l'importance relative de la somme de 24 millions de dollars requise pour réaliser l'équité salariale conformément à l'échéancier initial. Les mesures financières prises par la province ont été plus bénéfiques que pernicieuses malgré les effets préjudiciables qu'elles ont eus sur les employées d'hôpitaux.

Bien qu'elle soit l'une des caractéristiques déterminantes de notre régime constitutionnel, la séparation des pouvoirs ne peut pas être invoquée pour nuire à l'application d'une disposition écrite particulière de la Constitution comme l'article premier de la *Charte*. L'article premier lui-même manifeste un aspect important de la séparation des pouvoirs en définissant certaines limites explicites de la souveraineté législative. Le contrôle judiciaire des mesures gouvernementales remonte à une époque bien antérieure à l'adoption de la *Charte*. Depuis la Confédération, les tribunaux sont tenus par la Constitution de s'assurer que le Parlement et les législatures respectent le partage des pouvoirs législatifs. La *Charte* a assujetti à de nouvelles limites

beginning, that of the constitutionally mandated referee. It is not the courts which limit the legislatures. It is the Constitution.

The doctrine of separation of powers is an important concern, but the *Oakes* test, which is itself based on the text of s. 1, provides the proper framework in which to consider what the doctrine requires in situations where legislative action is alleged to come into conflict with entrenched constitutional rights. The suggestions that the onus be transferred to an applicant to show that the exercise of the claimed *Charter* right is reasonable, that the Court exempt legislation embodying "policy initiatives" from *Charter* review, and that the Court decline to consider what, if any, less infringing measures were available to the legislature to achieve its policy objectives, must all be rejected.

Cases Cited

Referred to: *R. v. Oakes*, [1986] 1 S.C.R. 103; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525; *Ferrel v. Ontario (Attorney General)* (1998), 42 O.R. (3d) 97; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Find*, [2001] 1 S.C.R. 863, 2001 SCC 32; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *R. v. Heywood*, [1994] 3 S.C.R. 761; *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54; *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177; *R. v. Lee*, [1989] 2 S.C.R. 1384; *Schachter v. Canada*, [1992] 2 S.C.R. 679; *Figueroa v. Canada (Attorney General)*, [2003] 1 S.C.R. 912, 2003 SCC 37; *PSAC v. Canada*, [1987] 1 S.C.R. 424; *M. v. H.*, [1999] 2 S.C.R. 3; *Egan v. Canada*, [1995] 2 S.C.R. 513; *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R.

le pouvoir du gouvernement dans le domaine des droits de la personne, mais le contrôle judiciaire de ces limites amène les tribunaux à jouer, à l'égard de la séparation des pouvoirs, le même rôle qu'ils ont joué dès le début, c'est-à-dire celui d'arbitre mandaté par la Constitution. Ce ne sont pas les tribunaux qui imposent des limites au législateur, mais bien la Constitution.

La séparation des pouvoirs est un principe constitutionnel important, mais le critère de l'arrêt *Oakes*, qui repose lui-même sur le texte de l'article premier, fournit déjà le cadre approprié pour l'examen des exigences du principe de la séparation des pouvoirs dans des situations où on allègue qu'une mesure législative est incompatible avec des droits consacrés par la Constitution. Il y a lieu de rejeter au complet les propositions voulant qu'il appartienne plutôt au demandeur de prouver que l'exercice du droit garanti par la *Charte* invoqué est raisonnable, que la Cour soustraie à tout examen fondé sur la *Charte* les mesures législatives qui comportent des « stratégies » et que la Cour refuse de se demander quelles étaient, le cas échéant, les mesures moins attentatoires dont le législateur disposait pour réaliser ses objectifs de politique générale.

Jurisprudence

Arrêts mentionnés : *R. c. Oakes*, [1986] 1 R.C.S. 103; *Renvoi relatif au Régime d'assistance publique du Canada (C.-B.)*, [1991] 2 R.C.S. 525; *Ferrel c. Ontario (Attorney General)* (1998), 42 O.R. (3d) 97; *Renvoi relatif à la Public Service Employee Relations Act (Alb.)*, [1987] 1 R.C.S. 313; *Law c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1999] 1 R.C.S. 497; *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295; *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835; *R. c. Find*, [2001] 1 R.C.S. 863, 2001 CSC 32; *McKinney c. Université de Guelph*, [1990] 3 R.C.S. 229; *Renvoi relatif à l'art. 193 et à l'al. 195.1(1)c) du Code criminel (Man.)*, [1990] 1 R.C.S. 1123; *R. c. Heywood*, [1994] 3 R.C.S. 761; *Canada (Vérificateur général) c. Canada (Ministre de l'Énergie, des Mines et des Ressources)*, [1989] 2 R.C.S. 49; *Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, [1997] 3 R.C.S. 3; *Nouvelle-Écosse (Workers' Compensation Board) c. Martin*, [2003] 2 R.C.S. 504, 2003 CSC 54; *Singh c. Ministre de l'Emploi et de l'Immigration*, [1985] 1 R.C.S. 177; *R. c. Lee*, [1989] 2 R.C.S. 1384; *Schachter c. Canada*, [1992] 2 R.C.S. 679; *Figueroa c. Canada (Procureur général)*, [2003] 1 R.C.S. 912, 2003 CSC 37; *AFPC c. Canada*, [1987] 1 R.C.S. 424; *M. c. H.*, [1999] 2 R.C.S. 3; *Egan c. Canada*, [1995] 2 R.C.S. 513; *Operation Dismantle Inc. c. La Reine*, [1985] 1 R.C.S. 441; *Eldridge c. Colombie-Britannique (Procureur général)*, [1997] 3 R.C.S. 624; *R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713;

1991) which, at that point, had been ascertained and agreed to by the government and the union. The debt was payable on April 1, 1991. It was this entitlement, due to an historically disadvantaged minority in the workforce, that was targeted by the Act.

37 I do not wish to be taken as agreeing with counsel for the respondent that there is no direct infringement of s. 15(1) when a government employer discriminates in the payment of wages for work of equal value on the basis of the sex of the employee. We do not get to that issue in this case. For present purposes, it is sufficient to hold that the question whether the targeting of acquired rights of women hospital workers in this case was discriminatory is clearly within the ambit of s. 15(1) scrutiny.

B. *Does Section 9 of the Public Sector Restraint Act Breach Section 15(1) of the Charter?*

38 Counsel for the appellant concisely summarized her s. 15(1) argument against the *Public Service Restraint Act*:

> It repudiates recognition by the state of the undervaluation of work done by women, it identifies pay inequity for women as acceptable and it repudiates state responsibility [as employer] for redressing systemic discrimination for women.

While this description necessarily sacrifices nuance in the interest of brevity, it certainly captures the essence of the debate.

39 The provincial government has an uphill battle contesting an infringement of s. 15(1) in light of the opening clauses of the Pay Equity Agreement it signed on June 24, 1988:

> PURPOSE
>
> 1.1 To achieve pay equity by redressing systemic gender discrimination in compensation for work performed by employees in female dominated classes within the bargaining units represented by AAHP, IBEW, CUPE, NAPE and NLNU, and whose members are

salariale (1988, 1989, 1990 et 1991) déjà convenues par le gouvernement et le syndicat. La dette était payable le 1er avril 1991. C'est ce droit, revenant à une minorité historiquement défavorisée de la population active, qui était ciblé par la Loi.

Je ne veux pas que l'on pense que je conviens avec l'avocat de l'intimée qu'il n'y a aucune violation directe du par. 15(1) dans le cas où, en matière de rémunération versée pour des fonctions équivalentes, un gouvernement employeur fait preuve de discrimination fondée sur le sexe du salarié. Nous n'examinons pas cette question en l'espèce. Pour les besoins de la présente affaire, il suffit d'affirmer que la question de savoir s'il était discriminatoire de cibler les droits acquis des employées d'hôpitaux en l'espèce peut clairement faire l'objet d'un examen fondé sur le par. 15(1).

B. *L'article 9 de la Public Sector Restraint Act viole-t-il le par. 15(1) de la Charte?*

L'avocate de l'appelant a résumé succinctement l'argument fondé sur le par. 15(1) qu'elle invoque à l'encontre de la *Public Sector Restraint Act* :

> [TRADUCTION] Elle annule la reconnaissance par l'État de la sous-évaluation du travail des femmes, elle établit que l'iniquité salariale à l'égard des femmes est acceptable et elle rejette l'obligation de l'État [en tant qu'employeur] de remédier à la discrimination systémique dont les femmes sont victimes.

Bien qu'elle sacrifie les nuances au nom de la concision, cette description permet sûrement de saisir l'essence du débat.

Le gouvernement provincial peut difficilement nier qu'il y a violation du par. 15(1), compte tenu de la clause liminaire de l'entente sur l'équité salariale qu'il a signée le 24 juin 1988 :

> [TRADUCTION]
>
> OBJET
>
> 1.1 Réaliser l'équité salariale en remédiant à la discrimination salariale systémique fondée sur le sexe dont sont victimes les membres des catégories d'emplois à prédominance féminine qui font partie des unités de négociation représentées par l'AAHP, la FIOE,

employees covered by *The Public Service (Collective Bargaining) Act, 1973*. [Emphasis added.]

The value placed on a person's work is more than just a matter of dollars and cents. The female hospital workers were being told that they did not deserve equal pay despite making a contribution of equal value. As Dickson C.J. observed in *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, dissenting, at p. 368:

> Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person's dignity and self-respect. [Emphasis added.]

This case thus fits easily within the framework established in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, which identified the affirmation of human dignity and self-worth as a central purpose of s. 15(1) of the *Charter*.

The effect of the *Public Sector Restraint Act* in 1991 was to affirm a policy of gender discrimination which the provincial government had itself denounced three years previously. The Act draws a clear formal distinction between those who were entitled to benefit from pay equity, and everyone else. The appropriate comparator group consists of men in male-dominated classifications performing work of equal value. That group was not similarly targeted. They were paid according to their contractual entitlement. The adverse impact of the legislation therefore fell disproportionately on women, who were already at a disadvantage relative to male-dominated jobs as they earned less money. It is true that the Act targeted an advantage secured to "female dominated classes", and thus presumably included some males, but such inclusion does not change the result. The category of "female dominated classes" was established in the original Pay

le SCFP, la NAPE et le NLNU, et dont les membres sont des salariés visés par la *Public Service (Collective Bargaining) Act, 1973*. [Je souligne.]

40 La valeur du travail effectué par une personne est plus qu'une simple question d'argent. Les employées d'hôpitaux se faisaient dire qu'elles ne méritaient pas un salaire égal malgré leur contribution égale. Comme l'a fait remarquer le juge en chef Dickson, dissident, dans le *Renvoi relatif à la Public Service Employee Relations Act (Alb.)*, [1987] 1 R.C.S. 313, p. 368 :

> Le travail est l'un des aspects les plus fondamentaux de la vie d'une personne, un moyen de subvenir à ses besoins financiers et, ce qui est tout aussi important, de jouer un rôle utile dans la société. L'emploi est une composante essentielle du sens de l'identité d'une personne, de sa valorisation et de son bien-être sur le plan émotionnel. C'est pourquoi, les conditions dans lesquelles une personne travaille sont très importantes pour ce qui est de façonner l'ensemble des aspects psychologiques, émotionnels et physiques de sa dignité et du respect qu'elle a d'elle-même. [Je souligne.]

41 Le présent pourvoi s'inscrit donc facilement dans le cadre établi par l'arrêt *Law c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1999] 1 R.C.S. 497, où la Cour a indiqué que l'affirmation de la dignité humaine et de l'estime de soi constitue l'objet central du par. 15(1) de la *Charte*.

42 La *Public Sector Restraint Act* de 1991 avait pour effet de confirmer une politique de discrimination fondée sur le sexe que le gouvernement provincial avait lui-même dénoncée trois ans auparavant. La Loi établissait une distinction formelle claire entre les personnes ayant droit à l'équité salariale et les autres. Le groupe de comparaison à utiliser est celui des hommes qui exercent des fonctions équivalentes dans des catégories d'emplois à prédominance masculine. Ce groupe n'était pas ciblé de façon similaire. Les membres de ce groupe étaient rémunérés conformément à leur contrat de travail. Les répercussions préjudiciables de la mesure législative étaient donc ressenties de façon disproportionnée par les femmes qui étaient déjà défavorisées par rapport aux catégories d'emplois à prédominance masculine du fait qu'elles touchaient un salaire inférieur. Il est vrai que la Loi visait un avantage conféré aux [TRADUCTION] « catégories d'emplois à

Equity Agreement, wherein the government formally acknowledged that in relation to workers thus defined the pay differential constituted "systemic gender discrimination".

prédominance féminine » qui, peut-on le présumer, incluaient des hommes, mais une telle inclusion ne change rien au résultat. La catégorie des « catégories d'emplois à prédominance féminine » était établie dans l'entente initiale sur l'équité salariale où le gouvernement reconnaissait formellement que, pour les travailleurs ainsi définis, la disparité salariale constituait de la [TRADUCTION] « discrimination systémique fondée sur le sexe ».

43 The differential treatment did not arise merely because of the type of job but rather because the job is one that is generally held by women. Sex is a prohibited ground of discrimination.

La différence de traitement résultait non pas simplement du type d'emploi, mais plutôt du fait que l'emploi en question était généralement occupé par des femmes. Le sexe est un motif de discrimination illicite.

44 As to the government's argument that the targeting of an acquired right to pay equity did not amount to discrimination within the meaning of s. 15(1), the contextual factors listed in *Law*, *supra*, provide a useful (though not exhaustive) checklist.

En ce qui concerne l'argument du gouvernement selon lequel le fait de cibler un droit acquis à l'équité salariale ne constituait pas de la discrimination au sens du par. 15(1), les facteurs contextuels énumérés dans l'arrêt *Law*, précité, constituent une liste de contrôle utile (quoique non exhaustive).

(1) Pre-Existing Disadvantage

(1) Le désavantage préexistant

45 "Womens' jobs" are chronically underpaid. As Abella J.A. wrote in a 1987 law journal article:

Les « emplois occupés par des femmes » sont chroniquement sous-payés. Comme l'écrivait la juge Abella dans une revue juridique en 1987 :

> The existence of a gap between the earnings of men and women is one of the few facts not in dispute in the "equality" debate. There are certainly open questions about it, the two main ones being the width of the gap and the right way to go about closing it. But no one seriously challenges the reality that women are paid less than men, sometimes for the same work, sometimes for comparable work.
>
> (R. S. Abella, "Employment Equity" (1987), 16 *Man. L.J.* 185, at p. 185)

> L'écart salarial entre les hommes et les femmes est l'un des rares points qui n'est pas remis en cause dans le débat sur l'égalité. Certes, il nous faut encore répondre à certaines questions, les deux principales étant l'étendue de l'écart et comment le réduire. Mais personne ne doute du fait que les femmes sont moins rémunérées que les hommes, parfois pour le même travail et parfois pour un travail comparable.
>
> (R. S. Abella, « Employment Equity » (1987), 16 *Man. L.J.* 185, p. 185; reprenant un extrait de la p. 258 du *Rapport de la Commission sur l'égalité en matière d'emploi* (1984).)

46 Postponement of pay equity and extinguishment of the 1988-91 arrears could reasonably be taken by the women, already underpaid, as confirmation that their work was valued less highly than the work of those in male-dominated jobs. The *Public Sector Restraint Act* reinforced an inferior status by taking away the remedial benefits their unions had negotiated on their behalf. This perpetuated and reinforced

Les femmes, qui étaient déjà sous-payées, pouvaient raisonnablement considérer que le report de l'équité salariale et l'annulation des arriérés pour les années 1988 à 1991 confirmaient que leur travail était moins bien considéré que celui des titulaires d'emplois à prédominance masculine. La *Public Sector Restraint Act* renforçait leur statut inférieur en supprimant les mesures correctives avantageuses

the idea that women could be paid less for no reason other than the fact they are women: *Law*, *supra*, at para. 64.

(2) Correspondence, or Lack Thereof, Between the Ground or Grounds on Which the Claim Is Based and the Actual Need, Capacity, or Circumstances of the Claimant

The government conceded in the 1988 Pay Equity Agreement that the women's existing pay did not do justice to their contribution. The postponement of pay equity in 1991 therefore did not correspond to the actual needs, capacity or circumstances of the claimants. Indeed, it did just the opposite. This is not a situation where the Province can be said to treat employees differently on the basis of actual personal difference between individuals.

(3) Ameliorative Purpose or Effect

This Act did not have an ameliorative purpose in relation to the workforce. On the contrary, it rolled back the ameliorative effects of the collective agreements that required pay equity adjustments beginning in 1988. It "erased" a debt of $24 million to female hospital workers that fell due on April 1, 1991, *prior* to passage of the Act.

(4) The Nature and Scope of the Interest Affected by the Impugned Law

Work is an important part of life. For many people what they do for a living, and the respect (or lack of it) with which their work is regarded by the community, is a large part of who they are. Low pay often denotes low status jobs, exacting a price in dignity as well as dollars. As such, the interest affected by the Act was of great importance.

The Act froze wage scales in the male-dominated jobs as well as in the female-dominated jobs, but the

que leurs syndicats avaient négociées en leur nom. Cela perpétuait et renforçait l'idée que les femmes peuvent être moins bien rémunérées simplement parce qu'elles sont des femmes : *Law*, précité, par. 64.

(2) La correspondance, ou l'absence de correspondance, entre le ou les motifs sur lesquels l'allégation est fondée et les besoins, les capacités ou la situation propres au demandeur

47 Le gouvernement a admis, dans l'entente sur l'équité salariale de 1988, que le salaire versé aux femmes ne rendait pas justice à leur contribution. Le report de l'équité salariale en 1991 ne correspondait donc pas aux besoins, aux capacités ou à la situation propres aux demanderesses. En fait, c'était plutôt le contraire. Il ne s'agit pas d'un cas où l'on peut affirmer que la province traitait des salariés différemment en raison d'une caractéristique personnelle différenciant des individus.

(3) L'objet ou l'effet d'amélioration

48 La Loi n'avait aucun objet d'amélioration en ce qui concernait la population active. Bien au contraire, elle réduisait à néant les effets d'amélioration des conventions collectives qui prescrivaient des réajustements au titre de l'équité salariale à compter de 1988. Elle « effaçait » une dette de 24 millions de dollars qui devenait payable aux employées d'hôpitaux le 1er avril 1991, *avant* l'adoption de la Loi.

(4) La nature et la portée du droit touché par la loi contestée

49 Le travail est un aspect important de la vie. Pour bien des gens, leur gagne-pain et le respect (ou l'absence de respect) de la collectivité pour leur travail représentent une grande partie de leur identité. Le salaire peu élevé est souvent le signe d'un emploi moins reconnu, ce qui n'est pas sans conséquence tant sur le plan de la dignité que sur celui de la situation financière. C'est pourquoi le droit touché par la Loi revêtait une grande importance.

50 La Loi gelait les échelles salariales tant des emplois à prédominance masculine que des emplois

men were already paid money for value whereas the women were not.

51 I therefore conclude that both the trial judge and the Court of Appeal were correct to affirm the Board's unanimous finding of a breach of s. 15(1).

C. *Is Section 9 of the Public Sector Restraint Act Saved by Section 1?*

52 It should be stated at the outset that legislation aimed at perpetuating pay inequity is a very serious matter. Counsel for the respondent acknowledged at the hearing that this is so, but argued that this is one of those "exceedingly rare cases" where the issue is not about "administrative convenience or cost *simpliciter* or majorit[arian] [p]reference". It is, he says, about "the province's ability to deliver on some of its most basic social programs, such as education, health and welfare".

53 *Oakes* itself cautioned that "rights and freedoms guaranteed by the *Charter* are not, however, absolute" (p. 136). Section 1 permits a law to limit a *Charter* right provided it is a "reasonable" measure that "can be demonstrably justified in a free and democratic society". Demonstration of a reasonable limit involves consideration of five related questions with close attention to the factual context:

1. Does the law address a sufficiently important legislative objective? "It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial." (*Oakes*, at pp. 138-39)

2. Is the substance of the law "rationally connected to the objective"? (*Oakes*, at p. 139)

3. Does the law impair the right no more than is reasonably necessary to accomplish the legislative objective, i.e., impair "as little as possible the right or freedom in question"? (*R. v.*

à prédominance féminine, mais les hommes touchaient déjà le salaire qu'ils méritaient pour leur travail alors que ce n'était pas le cas des femmes.

J'estime donc que le juge de première instance et la Cour d'appel ont tous deux eu raison de confirmer la conclusion unanime du conseil d'arbitrage à l'existence d'une violation du par. 15(1).

C. *L'article 9 de la Public Sector Restraint Act est-il sauvegardé par application de l'article premier?*

Il faut dire, au départ, qu'une mesure législative destinée à perpétuer l'iniquité salariale est quelque chose de très grave. L'avocat de l'intimée a reconnu cela à l'audience, mais il a soutenu qu'il s'agit de l'un de ces [TRADUCTION] « cas extrêmement rares » où il n'est pas question de « commodité administrative, de simples coûts ou de préférence exprimée par la majorité ». Il y va, selon lui, de « la capacité de la province de mettre en œuvre certains de ses programmes sociaux les plus fondamentaux, comme l'éducation, la santé et l'aide sociale ».

L'arrêt *Oakes* même précise que « [t]outefois, les droits et libertés garantis par la *Charte* ne sont pas absolus » (p. 136). L'article premier permet qu'une règle de droit restreigne un droit garanti par la *Charte* pourvu qu'il s'agisse d'une mesure « raisonnable » « dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique ». Pour déterminer si une restriction est raisonnable, il convient d'examiner cinq questions connexes en s'attachant étroitement au contexte factuel :

1. La règle de droit vise-t-elle un objectif législatif suffisamment important? « Il faut à tout le moins qu'un objectif se rapporte à des préoccupations urgentes et réelles. » (*Oakes*, p. 139)

2. Le contenu de la règle de droit a-t-il « un lien rationnel avec l'objectif en question »? (*Oakes*, p. 139)

3. La règle de droit ne porte-t-elle atteinte au droit que dans la mesure raisonnablement nécessaire pour réaliser l'objectif législatif, c'est-à-dire porte-t-elle atteinte « le moins possible au droit

social benefits, has to choose between disadvantaged groups . . . .

It is therefore recognized that in such cases governments have a large "margin of appreciation" within which to make choices. It seems evident that the scope of that "margin" will be influenced, amongst other things, by the scale of the financial challenge confronting a government and the size of the expenditure required to avoid a *Charter* infringement in relation to that financial challenge. Thus, in *Eldridge*, *supra*, it will be recalled, the cost of providing sign language interpretation in hospitals was tiny, i.e., "only $150,000, or approximately 0.0025 percent of the provincial health care budget" (para. 87). It was held that the denial of the rights of the deaf could have no financial justification in that case.

In the present case, I believe the government's response to its fiscal crisis was proportional to its objective, and therefore saved under s. 1. I do so for a number of reasons, none of which taken in isolation would necessarily be sufficient, but when added to each other cumulatively signal a quite exceptional situation.

(a) *The Scale of the Fiscal Crisis*

The only comparable financial justification asserted in the jurisprudence of this Court was the level of inflation at issue in *PSAC*, *supra*. I will not repeat what has already been quoted from the judgment of Dickson C.J. at para. 73 of these reasons. Judicial statements made in less drastic circumstances about the inadequacy of budgetary concerns must be read in context.

(b) *The Cost of Implementing the Remedial Plan*

The arrears owing under the Pay Equity Agreement as of April 18, 1991 was $24 million, representing a significant percentage of the

particulièrement vrai dans les cas où le Parlement, lorsqu'il accorde des avantages sociaux déterminés, doit privilégier certains groupes défavorisés . . .

84 Il est donc reconnu qu'en pareils cas les gouvernements disposent d'une grande « marge de manœuvre » pour faire leurs choix. Il semble évident que cette « marge de manœuvre » dépend notamment de l'ampleur du défi financier qu'est appelé à relever le gouvernement et de l'importance des dépenses requises pour éviter de violer la *Charte* en relevant ce défi financier. Ainsi, on se rappellera que, dans l'affaire *Eldridge*, précitée, le coût des services d'interprétation gestuelle dans les hôpitaux était peu élevé, en ce sens qu'il était « seulement [de] 150 000 $, soit environ 0,0025 pour 100 du budget des soins de santé de la province » (par. 87). La Cour a jugé que la violation des droits des personnes atteintes de surdité ne pouvait avoir aucune justification financière dans cette affaire.

85 En l'espèce, je crois que la réaction du gouvernement à la crise financière qu'il traversait était proportionnelle à son objectif et qu'elle était, par conséquent, sauvegardée par application de l'article premier. Je tire cette conclusion pour un certain nombre de raisons qui, prises individuellement, ne seraient pas nécessairement suffisantes, mais qui, considérées ensemble, dénotent une situation très exceptionnelle.

a) *L'ampleur de la crise financière*

86 La seule autre justification financière comparable que l'on constate dans la jurisprudence de notre Cour est le niveau d'inflation en cause dans l'arrêt *AFPC*, précité. Je ne reproduirai pas l'extrait des motifs du juge en chef Dickson que j'ai déjà cités au par. 73 des présents motifs. Il faut interpréter dans leur contexte les déclarations judiciaires faites, dans des circonstances moins dramatiques, au sujet du caractère insuffisant des préoccupations budgétaires.

b) *Le coût de la mise en œuvre du plan de redressement*

87 Les arriérés dûs, dès le 18 avril 1991, en vertu de l'entente sur l'équité salariale s'élevaient à 24 millions de dollars, ce qui représentait un pourcentage

Lawrence Richard Hape *Appellant*

v.

Her Majesty The Queen *Respondent*

and

Attorney General of Ontario *Intervener*

Indexed as: R. *v.* Hape

Neutral citation: 2007 SCC 26.

File No.: 31125.

2006: October 12; 2007: June 7.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Application — Searches and seizures outside Canada — Whether Canadian Charter of Rights and Freedoms applies to extraterritorial searches and seizures conducted by Canadian police officers — If not, whether evidence obtained abroad ought to be excluded because its admission would render trial unfair — Canadian Charter of Rights and Freedoms, ss. 7, 8, 11(d), 24(2), 32.

Legislation — Interpretation — Canadian Charter of Rights and Freedoms — Scope of extraterritorial application of Charter — Presumption of conformity with international law.

RCMP officers commenced an investigation of the accused, a Canadian businessman, for suspected money laundering activities. They sought permission from the Turks and Caicos Islands authorities to conduct parts of their investigation on the Islands where the accused's investment company is located. Detective Superintendent L of the Turks and Caicos Police Force, who was in charge of criminal investigations on the Islands, agreed to allow the RCMP to continue the investigation on Turks and Caicos territory, but warned the officers that he would be in charge and that the RCMP would be working under his authority. During a one-year period, the RCMP officers conducted searches of the accused's office on the Islands and on each occasion L was with them. At trial, the

Lawrence Richard Hape *Appelant*

c.

Sa Majesté la Reine *Intimée*

et

Procureur général de l'Ontario *Intervenant*

Répertorié : R. *c.* Hape

Référence neutre : 2007 CSC 26.

N^o^ du greffe : 31125.

2006 : 12 octobre; 2007 : 7 juin.

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

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

Droit constitutionnel — Charte des droits — Application — Fouilles, perquisitions et saisies effectuées à l'étranger par des policiers canadiens — La Charte canadienne des droits et libertés s'applique-t-elle à ces mesures? — Dans la négative, la preuve obtenue à l'étranger doit-elle être écartée au motif que son admission rendrait le procès inéquitable? — Charte canadienne des droits et libertés, art. 7, 8, 11d), 24(2), 32.

Législation — Interprétation — Charte canadienne des droits et libertés — Portée de l'application extraterritoriale de la Charte — Présomption de conformité au droit international.

Soupçonnant un homme d'affaires canadien de blanchiment d'argent, des agents de la GRC ont entrepris une enquête à son sujet. Ils ont demandé aux autorités des îles Turks et Caicos la permission de mener une partie de leur enquête dans l'archipel, la société d'investissement de l'accusé y étant établie. Responsable des enquêtes criminelles, le commissaire L du service de police de l'endroit a autorisé la GRC à poursuivre son enquête sur le territoire, mais il a précisé aux agents qu'il en conserverait la responsabilité et que la GRC serait soumise à son autorité. Sur une période d'un an, les agents de la GRC ont fouillé et perquisitionné les locaux de l'accusé dans l'archipel, toujours en présence de L. Au procès, le ministère public a déposé les éléments

Crown adduced documentary evidence that the police had gathered from the records of the accused's office. The RCMP officers testified that they were aware there were no warrants authorizing the perimeter searches of the accused's office but that they had relied on L's expertise and advice regarding the legalities of investigations conducted on the Islands. They also testified that they had understood warrants to be in place for the covert entries and had read a document they understood to be a warrant authorizing the overt entries. However, no warrant was entered into evidence at trial. The accused sought to have the documentary evidence excluded, pursuant to s. 24(2) of the *Canadian Charter of Rights and Freedoms*, on the basis that the evidence was obtained in violation of his right under s. 8 of the *Charter* to be secure against unreasonable search and seizure. He submitted that the *Charter* applies to the actions of the RCMP officers in the course of their searches and seizures at his office, notwithstanding that those actions took place outside Canada. The trial judge held that the *Charter* did not apply, dismissed the application and convicted the accused of two counts of money laundering. The Court of Appeal upheld the convictions.

Held: The appeal should be dismissed.

Per McLachlin C.J. and LeBel, Deschamps, Fish and Charron JJ.: The *Charter* does not generally apply to searches and seizures in other countries. Rather, the only reasonable approach is to apply the law of the state in which the activities occur, subject to the *Charter*'s fair trial safeguards and to the limits on comity that may prevent Canadian officers from participating in activities that, though authorized by the laws of another state, would cause Canada to be in violation of its international obligations in respect of human rights. [88] [90]

While Parliament has clear constitutional authority to pass legislation governing conduct by Canadians or non-Canadians outside Canada, its ability to pass extraterritorial legislation is informed by the binding customary principles of territorial sovereign equality and non-intervention, by the comity of nations, and by the limits of international law to the extent that they are not incompatible with domestic law. By virtue of parliamentary sovereignty, it is open to Parliament to enact legislation that is inconsistent with those principles, but in so doing it would violate international law and offend the comity of nations. Since it is a well-established principle of statutory interpretation that legislation will be presumed to conform to international law, in interpreting the scope of application of

de preuve documentaire alors recueillis. Les agents de la GRC ont témoigné qu'ils avaient été conscients qu'aucun mandat n'autorisait la perquisition périphérique des locaux de l'accusé, mais qu'ils s'étaient fiés à l'expertise et au dire de L quant aux exigences juridiques applicables à une enquête dans l'archipel. Ils ont ajouté avoir cru que des mandats avaient été décernés pour les entrées clandestines et avoir pris connaissance d'un document qu'ils ont cru être un mandat autorisant les entrées à découvert. Cependant, aucun mandat n'a été mis en preuve au procès. L'accusé a demandé que la preuve documentaire soit écartée en application du par. 24(2) de la *Charte canadienne des droits et libertés* au motif qu'elle avait été obtenue au mépris de son droit à la protection contre les fouilles, les perquisitions et les saisies abusives garanti à l'art. 8 de la *Charte*. Il a soutenu que la *Charte* s'appliquait aux agents de la GRC lorsqu'ils avaient soumis ses locaux à la fouille, la perquisition et la saisie, même si l'opération s'était déroulée à l'étranger. Le juge du procès a conclu que la *Charte* ne s'appliquait pas, il a rejeté la requête et il a reconnu l'accusé coupable des deux chefs de blanchiment d'argent. La Cour d'appel a confirmé les déclarations de culpabilité.

Arrêt : Le pourvoi est rejeté.

La juge en chef McLachlin et les juges LeBel, Deschamps, Fish et Charron : La *Charte* ne s'applique généralement pas aux fouilles, aux perquisitions et aux saisies hors frontières. En fait, la seule solution raisonnable consiste à appliquer le droit de l'État où ont eu lieu les actes, sous réserve du droit constitutionnel à un procès équitable et des limites de la courtoisie susceptibles d'empêcher un policier canadien de prendre part à une mesure qui, même si elle est autorisée par le droit de l'autre État, ferait en sorte que le Canada manque à ses obligations internationales quant au respect des droits de la personne. [88] [90]

La Constitution autorise clairement le Parlement à adopter des lois régissant la conduite de Canadiens ou de non-Canadiens à l'étranger, mais les principes coutumiers contraignants de l'égalité souveraine et de la non-intervention, la courtoisie entre les nations et les règles du droit international compatibles avec le droit interne éclairent l'application de ce pouvoir. Le principe de la souveraineté du Parlement lui permet d'adopter des lois contraires à ces principes mais s'il le fait, il contrevient au droit international et manque à la courtoisie entre les nations. Selon un principe d'interprétation législative bien établi, une loi est réputée conforme au droit international, de sorte que lorsque le libellé exprès de la *Charte* le permet, la détermination de la portée de celle-ci doit tendre à assurer le respect des

the *Charter*, a court should seek to ensure compliance with Canada's binding obligations under international law where the express words are capable of supporting such a construction. [53] [56] [68]

Canadian law, including the *Charter*, cannot be enforced in another state's territory without the other state's consent. This conclusion is consistent with international law and is also dictated by the words of the *Charter* itself. Section 32(1) puts the burden of complying with the *Charter* on Parliament, the government of Canada, the provincial legislatures and the provincial governments. The provision defines not only to whom the *Charter* applies, but also in what circumstances it applies to those actors. The fact that a state actor is involved is not in itself sufficient. The activity in question must also fall within the "matters within the authority of" Parliament or the legislature of each province. A criminal investigation in the territory of another state cannot be a matter within the authority of Parliament or the provincial legislatures because they have no jurisdiction to authorize enforcement abroad. Under international law, each state's exercise of sovereignty within its territory is dependent on the right to be free from intrusion by other states in its affairs and the duty of every other state to refrain from interference. In some cases, the evidence may establish that the foreign state consented to the exercise of Canadian enforcement jurisdiction within its territory. Where the host state consents, the *Charter* can apply to the activities of Canadian officers in foreign investigations. In such a case, the investigation would be a matter within the authority of Parliament and would fall within the scope of s. 32(1). [45] [69] [94] [106]

While *Charter* standards cannot be applied to an investigation in another country involving Canadian officers, there is no impediment to extraterritorial adjudicative jurisdiction pursuant to which evidence gathered abroad may be excluded from a Canadian trial, as this jurisdiction simply attaches domestic consequences to foreign events. Individuals in Canada who choose to engage in criminal activities that cross Canada's territorial limits should expect to be governed by the laws of the state in which they find themselves and in which they conduct financial affairs, but individual rights cannot be completely disregarded in the interests of transborder co-operation. Where the Crown seeks at trial to adduce evidence gathered abroad, the *Charter* provisions governing trial processes in Canada ensure that the appropriate balance is struck and that due consideration is shown for the rights of an accused being investigated abroad. Moreover, in an era characterized by transnational criminal activity, the principle of comity cannot be invoked to allow Canadian authorities to participate

obligations du Canada en droit international. [53] [56] [68]

Le droit canadien, y compris la *Charte*, ne peut être appliqué à l'étranger sans le consentement de l'État en cause. Cette conclusion découle non seulement du droit international, mais aussi du texte même de la *Charte*. Le paragraphe 32(1) oblige le Parlement, le gouvernement du Canada ainsi que les législatures et les gouvernements des provinces à se conformer à la *Charte*. Il détermine non seulement les acteurs auxquels s'applique la *Charte*, mais précise les circonstances dans lesquelles elle s'applique à ces acteurs. Leur participation ne suffit pas. L'acte considéré doit aussi appartenir à l'un des « domaines relevant » du Parlement ou des législatures provinciales, ce qui ne saurait être le cas de l'enquête criminelle menée à l'étranger, car ceux-ci n'ont pas le pouvoir d'autoriser l'application de la loi dans un autre pays. En droit international, l'exercice de la souveraineté tient au droit d'un État d'échapper à toute ingérence étrangère et à l'obligation des autres États de s'abstenir de s'ingérer dans ses affaires. Il peut arriver que la preuve établisse le consentement de l'État étranger à l'exercice, sur son territoire, de la compétence d'exécution du Canada. La *Charte* peut s'appliquer aux actes d'agents canadiens lors d'une enquête à l'étranger si l'État d'accueil y consent. L'enquête appartient alors à un domaine relevant du Parlement et tombe sous le coup du par. 32(1). [45] [69] [94] [106]

Les exigences de la *Charte* ne peuvent s'appliquer à une enquête menée dans un autre pays par des policiers canadiens et étrangers, mais il n'y a pas d'obstacle à la compétence juridictionnelle extraterritoriale suivant laquelle un élément de preuve alors obtenu peut être écarté par un tribunal canadien, car l'exercice de cette compétence ne fait qu'attacher des conséquences intérieures à des événements survenus à l'étranger. L'individu qui, au Canada, se livre à une activité criminelle non confinée au territoire canadien doit s'attendre à être régi par les lois du pays où il se trouve et dans lequel il effectue des opérations financières, mais on ne peut écarter complètement les droits individuels au nom de la collaboration transfrontalière. Lorsque, au procès, le ministère public dépose en preuve un élément recueilli à l'étranger, les droits constitutionnels régissant la procédure judiciaire au Canada font en sorte qu'un juste équilibre soit établi et que les droits d'un accusé ayant fait l'objet d'une enquête à l'étranger soient dûment pris en considération. De plus, à une époque où l'activité

in investigative activities sanctioned by foreign law that would place Canada in violation of its international obligations in respect of human rights. Deference to the foreign law ends where clear violations of international law and fundamental human rights begin. [52] [96] [99-101]

The methodology for determining whether the *Charter* applies to a foreign investigation can be summarized as follows. The first stage is to determine whether the activity in question falls under s. 32(1) such that the *Charter* applies to it. At this stage, two questions reflecting the two components of s. 32(1) must be asked. First, is the conduct at issue that of a Canadian state actor? Second, if the answer is yes, it may be necessary, depending on the facts of the case, to determine whether there is an exception to the principle of sovereignty that would justify the application of the *Charter* to the extraterritorial activities of the state actor. In most cases, there will be no such exception and the *Charter* will not apply. The inquiry would then move to the second stage, at which the court must determine whether evidence obtained through the foreign investigation ought to be excluded at trial because its admission would render the trial unfair. [113]

In the instant case, the police officers were clearly government actors to whom, *prima facie*, the *Charter* would apply, but the searches carried out in Turks and Caicos were not a matter within the authority of Parliament. It is not reasonable to suggest that Turks and Caicos consented to Canadian extraterritorial enforcement jurisdiction. The trial judge's findings clearly indicate that Turks and Caicos controlled the investigation at all times, repeatedly making it known to the RCMP officers that, at each step, the activities were being carried out pursuant to their authority alone. [103] [115-116]

The circumstances do not demonstrate that this is a case where admission of the evidence would violate the accused's right to a fair trial. The documents obtained from the accused's office were not conscriptive evidence, and the actions of the RCMP officers were not unreasonable or unfair as they were acting under the authority of the Turks and Caicos police and they had a genuine and reasonable belief that they were complying with Turks and Caicos law. The RCMP officers acted in good faith at all times and their actions were not improper. The way in which the evidence was obtained in no way undermines its reliability. Moreover, since the accused had chosen to conduct business in Turks and

criminelle revêt souvent un caractère transnational, la courtoisie ne saurait justifier les autorités canadiennes de participer à une activité d'enquête permise par le droit étranger lorsque cette participation emporterait le manquement du Canada à ses obligations internationales en matière de droits de la personne. Le respect envers le droit étranger cesse dès la violation manifeste du droit international et des droits fondamentaux de la personne. [52] [96] [99-101]

La méthode grâce à laquelle on peut déterminer si la *Charte* s'applique à une enquête à l'étranger peut être résumée comme suit. La première étape consiste à se demander si l'acte considéré tombe sous le coup du par. 32(1) et est soumis à la *Charte*. Vu les deux alinéas du par. 32(1), deux sous-questions se posent alors. Premièrement, l'acte a-t-il été accompli par un acteur étatique canadien? Deuxièmement, dans l'affirmative, il peut se révéler nécessaire, selon les faits de l'espèce, de déterminer si une exception au principe de souveraineté justifie l'application de la *Charte* aux activités extraterritoriales de l'acteur étatique. Dans la plupart des cas, aucune ne vaudra, et la *Charte* n'aura pas d'effet. Le tribunal passe alors à la seconde étape — déterminer si la preuve obtenue à l'issue de l'enquête à l'étranger doit être écartée au motif qu'elle est de nature à compromettre l'équité du procès. [113]

Dans la présente affaire, les policiers étaient clairement des acteurs étatiques auxquels s'appliquait à première vue la *Charte*, mais les mesures prises aux îles Turks et Caicos n'appartenaient pas à un domaine relevant du Parlement. On ne saurait prétendre que les îles Turks et Caicos ont consenti en l'espèce à l'exercice extraterritorial de la compétence d'exécution du Canada. Il ressort des conclusions du juge du procès que cet État a conservé la responsabilité de l'enquête du début à la fin, rappelant maintes fois aux agents de la GRC qu'à chacune des étapes, les mesures étaient prises sous sa seule autorité. [103] [115-116]

Il ne s'agit pas d'un cas où l'admission des éléments de preuve porterait atteinte au droit de l'accusé à un procès équitable. Les documents saisis dans les locaux de l'accusé ne constituent pas une preuve obtenue par mobilisation contre soi-même. Les agents de la GRC n'ont pas agi de manière abusive ou inéquitable : ils sont demeurés sous l'autorité du service de police des îles Turks et Caicos et ont véritablement et raisonnablement cru respecter le droit applicable dans l'archipel. Ils ont toujours agi de bonne foi. Leurs actes n'ont pas été abusifs. Le mode d'obtention de la preuve ne diminue en rien sa valeur. De plus, en choisissant d'exercer ses activités aux îles Turks et Caicos, l'accusé devait

Caicos, his reasonable expectation should have been that Turks and Caicos law would apply to the investigation. Although no search warrants were admitted at trial, no evidence was adduced indicating that the searches and seizures were conducted in a manner inconsistent with the requirements of Turks and Caicos law. There is no basis for concluding that the procedural requirements for a lawful search and seizure under Turks and Caicos law fail to meet basic standards commonly accepted by free and democratic societies. [120-121]

Per Bastarache, Abella and Rothstein JJ.: While the terms of s. 32(1) do not extend the application of the *Charter* to the actions of foreign officials, they do not imply that the *Charter* cannot apply to Canadian police officials acting abroad. Section 32(1) defines who acts, not where they act. Since s. 32(1) does not distinguish between actions taken on Canadian soil and actions taken abroad, it includes all actions of Canadian police officers. Canadian officers conducting an investigation in another country must abide by standards set for actions taken in Canada where the foreign state takes no part in the action and does not subject the action to its laws. Where the host state takes part in the action by subjecting Canadian authorities to its laws, the *Charter* still applies to Canadian officers and there will be no *Charter* violation where the Canadian officers abide by the laws of the host state if those laws and procedures are consistent with the fundamental principles emanating from the *Charter.* The *Charter* thus applies extraterritorially, but the obligations it creates in the circumstances will depend on the nature of the right at risk, the nature of the action of the police, the involvement of foreign authorities and the application of foreign laws. Since there is obviously consent by a foreign authority to the participation of Canadian officers in all cases where they operate in another country, consent is not a useful criterion to determine *Charter* application. [159-161] [176] [178]

In any challenge to the conduct of Canadian officials investigating abroad, the onus will be on the claimant to demonstrate that the difference between fundamental human rights protection given by the local law and that afforded under the *Charter* is inconsistent with basic Canadian values; the onus will then shift to the government to justify its involvement in the activity. In many cases, differences between protections guaranteed by *Charter* principles and the protections offered by foreign procedures will simply be justified by the need for Canada to be involved in fighting transnational crime and the need to respect the sovereign authority of foreign states. On account of this, courts are permitted to apply a rebuttable presumption of *Charter* compliance where the Canadian officials were acting pursuant to valid foreign

raisonnablement s'attendre à ce que le droit de l'archipel régisse l'enquête. Même si aucun mandat n'a été admis en preuve au procès, il n'a pas été établi que les fouilles, les perquisitions et les saisies ont été effectuées sans que les exigences du droit étranger ne soient respectées. Rien ne permet de conclure que les exigences procédurales applicables à ces mesures dans l'archipel ne sont pas équivalentes à celles qui s'appliquent généralement à leur égard dans les sociétés libres et démocratiques. [120-121]

Les juges Bastarache, Abella et Rothstein : Le libellé du par. 32(1) n'étend pas l'application de la *Charte* aux actes des fonctionnaires étrangers, mais il n'écarte pas son application aux policiers canadiens en mission à l'étranger. Le paragraphe 32(1) précise l'identité de l'acteur et non le lieu où il agit. Comme il ne distingue pas entre les mesures prises au Canada et celles prises à l'étranger, il vise tous les actes des policiers canadiens. Ceux qui enquêtent à l'étranger doivent satisfaire aux exigences applicables au Canada lorsque l'État étranger ne participe aucunement à l'opération ni ne l'assujettit à ses lois. Lorsque l'État d'accueil participe à l'opération et soumet les autorités canadiennes à ses lois, la *Charte* continue de s'appliquer aux policiers canadiens, qui n'y portent pas atteinte s'ils se conforment aux règles de droit et de procédure de l'État d'accueil et que celles-ci sont en adéquation avec les principes fondamentaux issus de la *Charte*. Même si elle a une application extraterritoriale, la *Charte* crée des obligations qui dépendent de la nature du droit en jeu et de la mesure policière, de la participation des autorités étrangères et de l'application des lois étrangères. Étant donné que la participation de policiers canadiens à une opération à l'étranger suppose nécessairement le consentement de l'État d'accueil, le critère du consentement ne permet pas vraiment de déterminer si la *Charte* s'applique. [159-161] [176] [178]

La personne qui conteste un acte d'un fonctionnaire canadien enquêtant à l'étranger devra démontrer que l'écart entre la protection des droits fondamentaux de la personne par le droit étranger et celle prévue par la *Charte* est incompatible avec les valeurs fondamentales canadiennes. Il incombera alors au gouvernement de justifier sa participation à l'acte en cause. Dans biens des cas, l'écart entre la protection assurée par les principes qui sous-tendent la *Charte* et celle offerte par la procédure étrangère sera simplement justifié par la nécessité que le Canada participe à la lutte contre la criminalité transnationale et respecte l'autorité souveraine des États étrangers. C'est pourquoi le tribunal peut appliquer la présomption réfutable du respect de la *Charte* lorsque le fonctionnaire canadien a agi conformément aux règles

laws and procedures. Unless it is shown that those laws or procedures are substantially inconsistent with the fundamental principles emanating from the *Charter*, they will not give rise to a breach of a *Charter* right. This is the most principled and practical way to strike an appropriate balance between effective participation by Canadian officers in fighting transnational crime and respect for fundamental human rights. [174]

In this case, the *Charter* applied to the search and seizures conducted by the RCMP in the Turks and Caicos Islands, but the accused has not established a breach of s. 8 of the *Charter*. The Canadian authorities were operating under L's authority and the local laws applied to the investigation. The accused led no evidence to suggest there were any differences between the fundamental human rights protections available under Turks and Caicos search and seizure laws and the *Charter* protections guaranteed under Canadian law that would raise serious concerns. The seizure of documents was thus reasonable in the context. [126] [179]

Per Binnie J.: This appeal must fail because the accused cannot bring his case within the requirements from *Cook*, namely (1) that the impugned act falls within s. 32(1) of the *Charter* and (2) that the application of the *Charter* to the actions of the Canadian police in the Turks and Caicos Islands does not, in this particular case, interfere with the sovereign authority of the foreign state and thereby generate an objectionable extraterritorial effect. The searches and seizures of the accused's bank records in the Islands were carried out under the authority of the local police in conformity with local powers of search and seizure. No prejudice to the accused's right to a fair trial in Canada has been demonstrated. The accused, having chosen to do his banking in the Islands, can be taken to have accepted the degree of privacy afforded by the law of that jurisdiction. It is clear from the record that superimposing the Canadian law of search and seizure on top of that of Turks and Caicos would be unworkable. [181]

To hold that any extraterritorial effect of the *Charter* is objectionable would effectively overrule *Cook* and would further limit the potential extraterritorial application of the *Charter*. Premature pronouncements that restrict the application of the *Charter* to Canadian officials operating abroad in relation to Canadian citizens should be avoided. *Cook*'s "objectionable extraterritorial effect" principle should be retained, while leaving

de droit et de procédure étrangères. Il n'y aura atteinte à un droit garanti par la *Charte* que si une incompatibilité importante entre les règles de droit et de procédure étrangères et les principes fondamentaux de la *Charte* est établie. C'est le moyen le plus rationnel et le plus pratique d'établir un juste équilibre entre la participation efficace des policiers canadiens à la répression de la criminalité transnationale et le respect des droits fondamentaux de la personne. [174]

En l'espèce, la *Charte* s'appliquait aux fouilles, aux perquisitions et aux saisies de la GRC aux îles Turks et Caicos, mais l'accusé n'a pas prouvé la violation de l'art. 8 de la *Charte*. Les autorités canadiennes ont agi sous l'autorité de L, et l'enquête était assujettie aux lois de l'État étranger. L'accusé n'a présenté aucune preuve de différences préoccupantes entre, d'une part, la protection des droits fondamentaux de la personne et les dispositions régissant les fouilles, les perquisitions et les saisies aux îles Turks et Caicos et, d'autre part, les garanties prévues par la *Charte*. La saisie des documents n'était donc pas abusive dans le contexte. [126] [179]

Le juge Binnie : Le pourvoi doit être rejeté parce que l'accusé n'a pu prouver le respect en l'espèce des exigences établies dans l'arrêt *Cook*, à savoir, premièrement, que l'acte reproché tombe sous le coup du par. 32(1) de la *Charte* et, deuxièmement, que l'application de la *Charte* aux actes des policiers canadiens aux îles Turks et Caicos ne constitue pas, dans ce cas particulier, une atteinte à l'autorité souveraine de l'État étranger et ne produit donc pas d'effet extraterritorial inacceptable. La fouille, la perquisition et la saisie des documents bancaires de l'accusé a eu lieu sous l'autorité du service de police de l'archipel conformément aux pouvoirs conférés par le droit étranger en la matière. Nulle atteinte au droit de l'accusé à un procès équitable au Canada n'a été établie. En choisissant d'exercer ses activités financières aux îles Turks et Caicos, l'accusé est présumé avoir accepté le degré de protection assuré par le droit de l'archipel en matière de vie privée. Il appert du dossier que la superposition du droit canadien et du droit des îles Turks et Caicos en matière de fouilles, de perquisitions et de saisies poserait des problèmes insurmontables. [181]

Conclure que tout effet extraterritorial est inacceptable revient à infirmer dans les faits l'arrêt *Cook* et à limiter davantage l'application extraterritoriale éventuelle de la *Charte*. Il faut s'abstenir de formuler prématurément des énoncés qui limitent l'application de la *Charte* à l'égard des fonctionnaires canadiens exerçant leurs activités à l'étranger relativement à des citoyens canadiens. Il convient de s'en tenir au principe de

the door open to future developments in assessing the extraterritorial application of the *Charter*. [182-183] [189]

Cases Cited

By LeBel J.

Distinguished: *R. v. Cook*, [1998] 2 S.C.R. 597; **considered:** *R. v. Harrer*, [1995] 3 S.C.R. 562; *R. v. Terry*, [1996] 2 S.C.R. 207; *Schreiber v. Canada (Attorney General)*, [1998] 1 S.C.R. 841; **referred to:** *Trendtex Trading Corp. v. Central Bank of Nigeria*, [1977] 1 Q.B. 529; *The Ship "North" v. The King* (1906), 37 S.C.R. 385; *Reference as to Whether Members of the Military or Naval Forces of the United States of America are Exempt from Criminal Proceedings in Canadian Criminal Courts*, [1943] S.C.R. 483; *Reference as to Powers to Levy Rates on Foreign Legations and High Commissioners' Residences*, [1943] S.C.R. 208; *Saint John (Municipality of) v. Fraser-Brace Overseas Corp.*, [1958] S.C.R. 263; *Bouzari v. Islamic Republic of Iran* (2004), 71 O.R. (3d) 675, leave to appeal refused, [2005] 1 S.C.R. vi; *Mack v. Canada (Attorney General)* (2002), 60 O.R. (3d) 737, leave to appeal refused, [2003] 1 S.C.R. xiii; *Gouvernement de la République démocratique du Congo v. Venne*, [1971] S.C.R. 997; *Reference re Newfoundland Continental Shelf*, [1984] 1 S.C.R. 86; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1; *Customs Régime between Germany and Austria* (1931), P.C.I.J. Ser. A/B, No. 41; *Island of Palmas Case (Netherlands v. United States)* (1928), 2 R.I.A.A. 829; *Case concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, [1986] I.C.J. Rep. 14; *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077; *The Parlement Belge* (1880), 5 P.D. 197; *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779; *United States of America v. Dynar*, [1997] 2 S.C.R. 462; *Zingre v. The Queen*, [1981] 2 S.C.R. 392; *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177; *Libman v. The Queen*, [1985] 2 S.C.R. 178; *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs*, [2002] E.W.J. No. 4947 (QL), [2002] EWCA Civ. 1598; *Daniels v. White*, [1968] S.C.R. 517; *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437; *Schreiber v. Canada (Attorney General)*, [2002] 3 S.C.R. 269, 2002 SCC 62; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7; *Canadian Foundation for*

l'« effet extraterritorial inacceptable » établi dans l'arrêt *Cook* et de laisser la voie libre à une évolution ultérieure quant à la question de l'application extraterritoriale de la *Charte*. [182-183] [189]

Jurisprudence

Citée par le juge LeBel

Distinction d'avec l'arrêt : *R. c. Cook*, [1998] 2 R.C.S. 597; **arrêts examinés :** *R. c. Harrer*, [1995] 3 R.C.S. 562; *R. c. Terry*, [1996] 2 R.C.S. 207; *Schreiber c. Canada (Procureur général)*, [1998] 1 R.C.S. 841; **arrêts mentionnés :** *Trendtex Trading Corp. c. Central Bank of Nigeria*, [1977] 1 Q.B. 529; *The Ship « North » c. The King* (1906), 37 R.C.S. 385; *Reference as to Whether Members of the Military or Naval Forces of the United States of America are Exempt from Criminal Proceedings in Canadian Criminal Courts*, [1943] R.C.S. 483; *Reference as to Powers to Levy Rates on Foreign Legations and High Commissioners' Residences*, [1943] R.C.S. 208; *Saint John (Municipality of) c. Fraser-Brace Overseas Corp.*, [1958] R.C.S. 263; *Bouzari c. Islamic Republic of Iran* (2004), 71 O.R. (3d) 675, autorisation de pourvoi refusée, [2005] 1 R.C.S. vi; *Mack c. Canada (Attorney General)* (2002), 60 O.R. (3d) 737, autorisation de pourvoi refusée, [2003] 1 R.C.S. xiii; *Gouvernement de la République démocratique du Congo c. Venne*, [1971] R.C.S. 997; *Renvoi relatif au plateau continental de Terre-Neuve*, [1984] 1 R.C.S. 86; *Renvoi relatif à la sécession du Québec*, [1998] 2 R.C.S. 217; *Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [2002] 1 R.C.S. 3, 2002 CSC 1; *Régime douanier entre l'Allemagne et l'Autriche* (1931), C.P.J.I. sér. A/B, n° 41; *Affaire de l'île de Palmas (Pays-Bas c. États-Unis)* (1928), 2 R.I.A.A. 829; *Affaire des activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. États-Unis d'Amérique)*, [1986] C.I.J. Rec. 14; *Morguard Investments Ltd. c. De Savoye*, [1990] 3 R.C.S. 1077; *The Parlement Belge* (1880), 5 P.D. 197; *Kindler c. Canada (Ministre de la Justice)*, [1991] 2 R.C.S. 779; *États-Unis d'Amérique c. Dynar*, [1997] 2 R.C.S. 462; *Zingre c. La Reine*, [1981] 2 R.C.S. 392; *Singh c. Ministre de l'Emploi et de l'Immigration*, [1985] 1 R.C.S. 177; *Libman c. La Reine*, [1985] 2 R.C.S. 178; *Abbasi c. Secretary of State for Foreign and Commonwealth Affairs*, [2002] E.W.J. No. 4947 (QL), [2002] EWCA Civ. 1598; *Daniels c. White*, [1968] R.C.S. 517; *Succession Ordon c. Grail*, [1998] 3 R.C.S. 437; *Schreiber c. Canada (Procureur général)*, [2002] 3 R.C.S. 269, 2002 CSC 62; *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038; *Renvoi relatif à la Public Service Employee Relations Act (Alb.)*, [1987] 1 R.C.S. 313; *Renvoi : Motor Vehicle Act de la C.-B.*, [1985] 2 R.C.S. 486; *États-Unis c. Burns*, [2001] 1 R.C.S. 283, 2001 CSC 7; *Canadian Foundation*

framers to establish the jurisdictional scope of the *Charter*. Had they done so, the courts of this country would have had to give effect to a clear expression of that scope. However, the framers chose to make no such statement. Consequently, as with the substantive provisions of the *Charter*, it falls upon the courts to interpret the jurisdictional reach and limits of the *Charter*. Where the question of application involves issues of extraterritoriality, and thereby necessarily implicates interstate relations, the tools that assist in the interpretation exercise include Canada's obligations under international law and the principle of the comity of nations. As I will explain, the issue of applying the *Charter* to activities that take place abroad implicates the extraterritorial enforcement of Canadian law. The principles of state jurisdiction are carefully spelled out under international law and must guide the inquiry in this appeal.

D. *Relationship Between Domestic Law and International Law*

In order to understand how international law assists in the interpretation of s. 32(1), it is necessary to consider the relationship between Canadian domestic law and international law, as well as the principles of international law pertaining to territorial sovereignty, non-intervention and extraterritorial assertions of jurisdiction.

(1) Relationship Between Customary International Law and the Common Law

As I will explain, certain fundamental rules of customary international law govern what actions a state may legitimately take outside its territory. Those rules are important interpretive aids for determining the jurisdictional scope of s. 32(1) of the *Charter*. The use of customary international law to assist in the interpretation of the *Charter* requires an examination of the Canadian approach to the domestic reception of international law.

The English tradition follows an adoptionist approach to the reception of customary international

portée de l'application de la *Charte*. S'ils l'avaient fait, les tribunaux du pays auraient été tenus de donner effet à cette volonté claire de définir la sphère d'application de la *Charte*. Or, ils n'ont pas exprimé cette volonté. Par conséquent, les tribunaux doivent non seulement interpréter les dispositions substantielles de la *Charte*, mais déterminer aussi la portée de son application. Lorsque la question de l'application soulève celle de l'extraterritorialité, ce qui suppose nécessairement un rapport entre États, les obligations du Canada suivant le droit international et le principe de la courtoisie entre les nations figurent au nombre des instruments qui assistent les tribunaux dans la solution de ce type de problème. Comme je l'explique ci-après, l'assujettissement à la *Charte* de mesures prises à l'étranger suppose l'application extraterritoriale du droit canadien. Le droit international énonce en détail les principes de la compétence de l'État, et c'est à partir de ces principes qu'il convient de statuer sur le présent pourvoi.

D. *La relation entre le droit interne et le droit international*

34 Pour comprendre la manière dont le droit international contribue à l'interprétation du par. 32(1), il faut considérer sa relation avec le droit interne canadien, de même que ses principes relatifs à la souveraineté territoriale, à la non-intervention et aux revendications d'une compétence extraterritoriale.

(1) La relation entre le droit international coutumier et la common law

35 Comme je l'explique plus loin, certaines règles de fond du droit international coutumier déterminent les actes qu'un État peut accomplir légitimement à l'étranger. Elles sont d'une grande utilité pour circonscrire l'application territoriale du par. 32(1) de la *Charte*. Le recours au droit international coutumier pour interpréter une telle disposition commande l'examen de la méthode que privilégie le Canada pour la réception du droit international en droit interne.

36 La tradition juridique britannique recourt à la méthode de l'adoption pour la réception du droit

law. Prohibitive rules of international custom may be incorporated directly into domestic law through the common law, without the need for legislative action. According to the doctrine of adoption, the courts may adopt rules of customary international law as common law rules in order to base their decisions upon them, provided there is no valid legislation that clearly conflicts with the customary rule: I. Brownlie, *Principles of Public International Law* (6th ed. 2003), at p. 41. Although it has long been recognized in English common law, the doctrine received its strongest endorsement in the landmark case of *Trendtex Trading Corp. v. Central Bank of Nigeria*, [1977] 1 Q.B. 529 (C.A.). Lord Denning considered both the doctrine of adoption and the doctrine of transformation, according to which international law rules must be implemented by Parliament before they can be applied by domestic courts. In his opinion, the doctrine of adoption represents the correct approach in English law. Rules of international law are incorporated automatically, as they evolve, unless they conflict with legislation. He wrote, at p. 554:

> It is certain that international law does change. I would use of international law the words which Galileo used of the earth: "But it does move." International law does change: and the courts have applied the changes without the aid of any Act of Parliament. . . .
>
> . . . Seeing that the rules of international law have changed — and do change — and that the courts have given effect to the changes without any Act of Parliament, it follows to my mind inexorably that the rules of international law, as existing from time to time, do form part of our English law. It follows, too, that a decision of this court — as to what was the ruling of international law 50 or 60 years ago — is not binding on this court today. International law knows no rule of stare decisis. If this court today is satisfied that the rule of international law on a subject has changed from what it was 50 or 60 years ago, it can give effect to that change — and apply the change in our English law — without waiting for the House of Lords to do it.

37 In Canada, this Court has implicitly or explicitly applied the doctrine of adoption in several

international coutumier. Les règles prohibitives du droit international coutumier peuvent être incorporées directement au droit interne en application de la common law, sans que le législateur n'ait à intervenir. Ce principe veut que les tribunaux puissent adopter les règles du droit international coutumier et les intégrer aux règles de common law sur lesquelles ils fondent leurs décisions, à condition qu'aucune disposition législative valide n'entre clairement en conflit avec elles : I. Brownlie, *Principles of Public International Law* (6e éd. 2003), p. 41. Reconnu depuis longtemps en common law anglaise, c'est dans l'arrêt de principe *Trendtex Trading Corp. c. Central Bank of Nigeria*, [1977] 1 Q.B. 529 (C.A.), que le principe a été confirmé le plus fermement. Lord Denning y a examiné la doctrine de l'adoption et celle de la transformation, suivant laquelle le Parlement doit mettre en œuvre une règle de droit international pour qu'un tribunal interne puisse l'appliquer. À son avis, la doctrine de l'adoption est celle qu'il convient d'appliquer en droit anglais. Les règles du droit international et leurs modifications sont automatiquement incorporées, à moins qu'elles n'entrent en conflit avec une loi. Je cite un extrait de ses motifs (p. 554) :

> [TRADUCTION] Il est certain que le droit international évolue. Tout comme la terre, selon l'expression employée par Galilée : « Et pourtant elle bouge ». Le droit international évolue et les tribunaux ont tenu compte de cette évolution sans que le Parlement n'ait à intervenir. . .
>
> . . . Constatant que les règles du droit international ont changé — et continuent d'évoluer — et que les tribunaux ont donné effet à ces changements sans qu'une seule loi du Parlement n'ait dû être adoptée, il s'ensuit inexorablement, selon moi, que les règles du droit international applicables à un moment donné font partie de notre droit anglais. Il s'ensuit aussi qu'une décision de notre cour sur la règle de droit international applicable il y a 50 ou 60 ans ne lie plus notre cour aujourd'hui. Il n'y a pas de stare decisis en droit international. Si elle est aujourd'hui convaincue qu'une règle de droit international n'est plus la même qu'il y a 50 ou 60 ans, la cour peut prendre acte de la nouvelle règle — et l'incorporer au droit anglais — sans attendre que la Chambre des lords ne le fasse.

Au Canada, notre Cour a appliqué implicitement ou explicitement cette doctrine dans plusieurs

cases. In *The Ship "North" v. The King* (1906), 37 S.C.R. 385, at p. 394, Davies J. wrote: "[T]he Admiralty Court when exercising its jurisdiction is bound to take notice of the law of nations . . . . The right of hot pursuit . . . being part of the law of nations was properly judicially taken notice of and acted upon by the learned judge in this prosecution." In *Reference as to Whether Members of the Military or Naval Forces of the United States of America are Exempt from Criminal Proceedings in Canadian Criminal Courts*, [1943] S.C.R. 483, at p. 502, Kerwin J. stated that the exemptions from territorial jurisdiction based on sovereign immunity "are grounded on reason and are recognized by civilized countries as being rules of international law which will be followed in the absence of any domestic law to the contrary". See also *Reference as to Powers to Levy Rates on Foreign Legations and High Commissioners' Residences*, [1943] S.C.R. 208 ("*Re Foreign Legations*"). In *Saint John (Municipality of) v. Fraser-Brace Overseas Corp.*, [1958] S.C.R. 263, Rand J. accepted the doctrine of adoption, applying international law principles to exempt foreign sovereigns and their property from municipal taxation in Canada. He wrote, at pp. 268-69:

arrêts, dont *The Ship « North » c. The King* (1906), 37 R.C.S. 385, p. 394, où le juge Davies a écrit : [TRADUCTION] « [L]orsqu'elle exerce sa compétence, la Cour de l'Amirauté se doit de prendre connaissance d'office du droit des nations [. . .] En l'espèce, le juge a à juste titre pris connaissance et tenu compte du droit de prise en chasse [. . .] qui fait partie du droit des nations. » Dans *Reference as to Whether Members of the Military or Naval Forces of the United States are Exempt from Criminal Proceedings in Canadian Criminal Courts*, [1943] R.C.S. 483, p. 502, le juge Kerwin a affirmé que les exceptions à la compétence territoriale fondées sur l'immunité de juridiction [TRADUCTION] « s'appuient sur la raison et sont considérées par les pays civilisés comme des règles de droit international applicables en l'absence d'une disposition contraire du droit interne ». Voir également *Reference as to Powers to Levy Rates on Foreign Legations and High Commissioners' Residences*, [1943] R.C.S. 208 (« *Affaire des légations étrangères* »). Dans l'arrêt *Saint John (Municipality of) c. Fraser-Brace Overseas Corp.*, [1958] R.C.S. 263, le juge Rand a reconnu la doctrine de l'adoption, appliquant les principes du droit international pour soustraire un État souverain étranger et ses biens au paiement des taxes municipales au Canada (p. 268-269) :

If in 1767 Lord Mansfield, as in *Heathfield v. Chilton* [(1767), 4 Burr. 2015, 98 E.R. 50], could say, "The law of nations will be carried as far in England, as any where", in this country, in the 20th century, in the presence of the United Nations and the multiplicity of impacts with which technical developments have entwined the entire globe, we cannot say any thing less.

The Court of Appeal for Ontario recently cited the doctrine of adoption in *Bouzari v. Islamic Republic of Iran* (2004), 71 O.R. (3d) 675, stating at para. 65 that "customary rules of international law are directly incorporated into Canadian domestic law unless explicitly ousted by contrary legislation" (leave to appeal refused, [2005] 1 S.C.R. vi). See also *Mack v. Canada (Attorney General)* (2002), 60 O.R. (3d) 737 (C.A.), at para. 32 (leave to appeal refused, [2003] 1 S.C.R. xiii).

[TRADUCTION] Si, en 1767, dans *Heathfield c. Chilton* [(1767), 4 Burr. 2015, 98 E.R. 50], lord Mansfield pouvait affirmer que « le droit des nations s'appliquera autant en Angleterre que partout ailleurs », vu l'existence des Nations Unies et l'incidence multiple des progrès techniques à l'échelle planétaire, force nous est d'en convenir à tout le moins au Canada en ce XX^{e} siècle.

Récemment, dans l'arrêt *Bouzari c. Islamic Republic of Iran* (2004), 71 O.R. (3d) 675, la Cour d'appel de l'Ontario a mentionné la doctrine de l'adoption et affirmé au par. 65 des ses motifs que [TRADUCTION] « les règles du droit international coutumier sont directement incorporées au droit interne canadien, sauf disposition législative expressément contraire » (autorisation d'appel refusée, [2005] 1 R.C.S. vi). Voir aussi l'arrêt *Mack c. Canada (Attorney General)* (2002), 60 O.R. (3d) 737 (C.A.), par. 32 (autorisation d'appel refusée, [2003] 1 R.C.S. xiii).

38 In other decisions, however, the Court has not applied or discussed the doctrine of adoption of customary international law when it had the opportunity to do so: see, for example, *Gouvernement de la République démocratique du Congo v. Venne*, [1971] S.C.R. 997; *Reference re Newfoundland Continental Shelf*, [1984] 1 S.C.R. 86; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1.

39 Despite the Court's silence in some recent cases, the doctrine of adoption has never been rejected in Canada. Indeed, there is a long line of cases in which the Court has either formally accepted it or at least applied it. In my view, following the common law tradition, it appears that the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation. The automatic incorporation of such rules is justified on the basis that international custom, as the law of nations, is also the law of Canada unless, in a valid exercise of its sovereignty, Canada declares that its law is to the contrary. Parliamentary sovereignty dictates that a legislature may violate international law, but that it must do so expressly. Absent an express derogation, the courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law.

(2) Principle of Respect for Sovereignty of Foreign States as a Part of Customary International Law and of Canadian Common Law

40 One of the key customary principles of international law, and one that is central to the legitimacy of claims to extraterritorial jurisdiction, is respect for the sovereignty of foreign states. That respect is dictated by the maxim, lying at the heart of the international legal structure, that all states are sovereign and equal. Article 2(1) of the *Charter of the United Nations*, Can. T.S. 1945 No. 7, recognizes as

Dans d'autres affaires qui s'y prêtaient, notre Cour n'a cependant ni appliqué ni examiné la doctrine de l'adoption du droit international coutumier : voir p. ex. les arrêts *Gouvernement de la République démocratique du Congo c. Venne*, [1971] R.C.S. 997; *Renvoi relatif au plateau continental de Terre-Neuve*, [1984] 1 R.C.S. 86; *Renvoi relatif à la sécession du Québec*, [1998] 2 R.C.S. 217; *Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [2002] 1 R.C.S. 3, 2002 CSC 1.

Malgré ce silence de notre Cour dans certaines affaires récentes, la doctrine de l'adoption n'a jamais été rejetée au Canada. En fait, un fort courant jurisprudentiel la reconnaît formellement ou, du moins, l'applique. À mon avis, conformément à la tradition de la common law, il appert que la doctrine de l'adoption s'applique au Canada et que les règles prohibitives du droit international coutumier devraient être incorporées au droit interne sauf disposition législative contraire. L'incorporation automatique des règles prohibitives du droit international coutumier se justifie par le fait que la coutume internationale, en tant que droit des nations, constitue également le droit du Canada à moins que, dans l'exercice légitime de sa souveraineté, celui-ci ne déclare son droit interne incompatible. La souveraineté du Parlement permet au législateur de contrevenir au droit international, mais seulement expressément. Si la dérogation n'est pas expresse, le tribunal peut alors tenir compte des règles prohibitives du droit international coutumier pour interpréter le droit canadien et élaborer la common law.

(2) Le respect de la souveraineté des États étrangers : un principe du droit international coutumier et de la common law canadienne

Le respect de la souveraineté des autres États représente l'un des principes fondateurs du droit international coutumier et il s'avère déterminant quant à la légitimité d'une revendication d'une compétence extraterritoriale. Il découle de la maxime qui fonde l'ordre juridique international : tous les États sont souverains et égaux. Le paragraphe 2(1) de la *Charte des Nations Unies*, R.T. Can. 1945

R. *v*. Sharpe, [2001] 1 S.C.R. 45, 2001 SCC 2

Her Majesty The Queen *Appellant*

v.

John Robin Sharpe *Respondent*

and

The Attorney General of Canada, the Attorney General for Ontario, the Attorney General of Quebec, the Attorney General of Nova Scotia, the Attorney General for New Brunswick, the Attorney General of Manitoba, the Attorney General for Alberta, the Canadian Police Association (CPA), the Canadian Association of Chiefs of Police (CACP), Canadians Against Violence (CAVEAT), the Criminal Lawyers' Association, the Evangelical Fellowship of Canada, Focus on the Family (Canada) Association, the British Columbia Civil Liberties Association, the Canadian Civil Liberties Association, Beyond Borders, Canadians Addressing Sexual Exploitation (CASE), End Child Prostitution, Child Pornography and Trafficking in Children for Sexual Purposes (ECPAT)

and the International Bureau for Children's Rights *Interveners*

Indexed as: R. *v*. Sharpe

Neutral citation: 2001 SCC 2.

File No.: 27376.

2000: January 18, 19; 2001: January 26.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

on appeal from the court of appeal for british columbia

Constitutional law – Charter of Rights – Freedom of expression – Child pornography – Whether possession of expressive material protected by right to freedom of expression – Canadian Charter of Rights and Freedoms, s. 2(b).

Constitutional law – Charter of Rights – Right to liberty – Whether Criminal Code prohibition of possession of child pornography infringing right to liberty – Canadian Charter of Rights and Freedoms, s. 7 – Criminal Code, R.S.C. 1985, c. C-46, s. 163.1(4).

Constitutional law – Charter of Rights – Freedom of expression – Child pornography – Crown conceding that Criminal Code prohibition of possession of child pornography infringing freedom of expression – Whether infringement justifiable – Canadian Charter of Rights and Freedoms, s. 1 – Criminal Code, R.S.C. 1985, c. C-46, s. 163.1(4).

Criminal law – Child pornography – Criminal Code prohibiting possession of child pornography – Scope of definition of "child pornography" – Defences available – Criminal Code, R.S.C. 1985, c. C-46, s. 163.1.

The accused was charged with two counts of possession of child pornography under s. 163.1(4) of the *Criminal Code* and two counts of possession of child pornography for the purposes of distribution or sale under s. 163.1(3). "Child pornography", as defined in s. 163.1(1) of the *Code*, includes visual representations that show a person who is or is depicted as under the age of 18 years and is engaged in or is depicted as engaged in explicit sexual activity and visual representations the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of 18 years. "Child pornography" also includes visual representations and written material that advocates or counsels sexual activity with a person under the age of 18 years that would be an offence under the *Code*. Prior to his trial, the accused brought a preliminary motion challenging the constitutionality of s. 163.1(4) of the *Code*, alleging a violation of his constitutional guarantee of freedom of expression. The Crown conceded that s. 163.1(4) infringed s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* but argued that the infringement was justifiable under s. 1 of the *Charter*. Both the trial judge and the majority of the British Columbia Court of Appeal ruled that the prohibition of the simple possession of child pornography as defined under s. 163.1 of the *Code* was not justifiable in a free and democratic society.

Held: The appeal should be allowed and the charges remitted for trial.

Per McLachlin C.J. and Iacobucci, Major, Binnie, Arbour and LeBel JJ.: In order to assess the constitutionality of s. 163.1(4), it is important to ascertain the nature and scope of any infringement. Until it is known what the law catches, it cannot be determined that the law catches too much. Consequently, the law must be construed, and interpretations that may minimize the alleged overbreadth must be

explored. In light of Parliament's purpose of criminalizing possession of material that poses a reasoned risk of harm to children, the word "person" in the definition of child pornography should be construed as including visual works of the imagination as well as depictions of actual people. The word "person" also includes the person possessing the expressive material. The term "depicted" refers to material that a reasonable observer would perceive as representing a person under the age of 18 years and engaged in explicit sexual activity. The expression "explicit sexual activity" refers to acts at the extreme end of the spectrum of sexual activity – acts involving nudity or intimate sexual activity represented in a graphic and unambiguous fashion. Thus, representations of casual intimacy, such as depictions of kissing or hugging, are not covered by the offence. An objective approach must be applied to the terms "dominant characteristic" and "for a sexual purpose". The question is whether a reasonable viewer, looking at the depiction objectively and in context, would see its "dominant characteristic" as the depiction of the child's sexual organ or anal region in a manner that is reasonably perceived as intended to cause sexual stimulation to some viewers. Innocent photographs of a baby in the bath and other representations of non-sexual nudity are not covered by the offence. As for written material or visual representations that advocate or counsel sexual activity with a person under the age of 18 years that would be an offence under the *Criminal Code*, the requirement that the material "advocates" or "counsels" signifies that, when viewed objectively, the material must be seen as actively inducing or encouraging the described offences with children.

Parliament has created a number of defences in ss. 163.1(6) and (7) of the *Code* which should be liberally construed as they further the values protected by the guarantee of free expression. These defences may be raised by the accused by

pointing to facts capable of supporting the defence, at which point the Crown must disprove the defence beyond a reasonable doubt. The defence of "artistic merit" provided for in s. 163.1(6) must be established objectively and should be interpreted as including any expression that may reasonably be viewed as art. Section 163.1(6) creates a further defence for material that serves an "educational, scientific or medical purpose". This refers to the purpose the material, viewed objectively, may serve, not the purpose for which the possessor actually holds it. Finally, Parliament has made available a "public good" defence. As with the medical, educational or scientific purpose defences, the defence of public good should be liberally construed.

The possession of child pornography is a form of expression protected by s. 2(*b*) of the *Charter*. The right to possess expressive material is integrally related to the development of thought, opinion, belief and expression as it allows us to understand the thought of others or consolidate our own thought. The possession of expressive material falls within the continuum of intellectual and expressive freedom protected by s. 2(*b*). The accused accepts that harm to children justifies criminalizing possession of some forms of child pornography. The fundamental question therefore is whether s. 163.1(4) of the *Code* goes too far and criminalizes possession of an unjustifiable range of material.

The accused also alleges that s. 163.1(4) violates his right to liberty under s. 7 of the *Charter*, arguing that exposure to potential imprisonment as a result of an excessively sweeping law is contrary to the principles of fundamental justice. It is not necessary to consider this argument separately as it wholly replicates the overbreadth concerns that are the central obstacle to the justification of the s. 2(*b*) breach. The s. 1

analysis generally, and the minimal impairment consideration in particular, is the appropriate forum for addressing over broad restrictions on free expression.

In adopting s. 163.1(4), Parliament was pursuing the pressing and substantial objective of criminalizing the possession of child pornography that poses a reasoned risk of harm to children. The means chosen by Parliament are rationally connected to this objective. Parliament is not required to adduce scientific proof based on concrete evidence that the possession of child pornography causes harm to children. Rather, a reasoned apprehension of harm will suffice. Applying this test, the evidence establishes several connections between the possession of child pornography and harm to children: (1) child pornography promotes cognitive distortions; (2) it fuels fantasies that incite offenders to offend; (3) it is used for grooming and seducing victims; and (4) children are abused in the production of child pornography involving real children. Criminalizing possession may reduce the market for child pornography and the abuse of children it often involves. With respect to minimal impairment, when properly interpreted, the law catches much less material unrelated to harm to children than has been suggested. However, the law does capture the possession of two categories of material that one would not normally think of as "child pornography" and that raise little or no risk of harm to children: (1) written materials or visual representations created and held by the accused alone, exclusively for personal use; and (2) visual recordings created by or depicting the accused that do not depict unlawful sexual activity and are held by the accused exclusively for private use. The bulk of the material falling within these two classes engages important values underlying the s. 2(*b*) guarantee while posing no reasoned risk of harm to children. In its main impact, s. 163.1(4) is proportionate and constitutional. Nonetheless, the law's application to materials in the two problematic classes, while

peripheral to its objective, poses significant problems at the final stage of the proportionality analysis. In these applications the restriction imposed by s. 163.1(4) regulates expression where it borders on thought. The cost of prohibiting such materials to the right of free expression outweighs any tenuous benefit it might confer in preventing harm to children. To this extent, the law cannot be considered proportionate in its effects, and the infringement of s. 2(*b*) contemplated by the legislation is not demonstrably justifiable under s. 1.

The appropriate remedy in this case is to read into the law an exclusion of the two problematic applications of s. 163.1. The applications of the law that pose constitutional problems are exactly those whose relation to the objective of the legislation is most remote. Carving out those applications by incorporating the proposed exceptions will not undermine the force of the law; rather, it will preserve the force of the statute while also recognizing the purposes of the *Charter*. The defects of the section are not so great that their exclusion amounts to impermissible redrafting and carving them out will not create an exception-riddled provision bearing little resemblance to the provision envisioned by Parliament. While excluding the offending applications will not subvert Parliament's object, striking down the statute altogether would most assuredly do so. Accordingly, s. 163.1(4) should be upheld on the basis that the definition of "child pornography" in s. 163.1 should be read as though it contained an exception for: (1) any written material or visual representation created by the accused alone, and held by the accused alone, exclusively for his or her own personal use; and (2) any visual recording, created by or depicting the accused, provided it does not depict unlawful sexual activity and is held by the accused exclusively for private use. These two exceptions apply as well to the offence of "making" child pornography under s. 163.1(2) (but not to printing, publishing or possessing child pornography for the purpose

of publication). The exceptions will not be available where a person harbours any intention other than mere private possession.

Per L'Heureux-Dubé, Gonthier and Bastarache JJ.: Under our society's democratic principles, individual freedoms such as expression are not absolute, but may be limited in consideration of a broader spectrum of rights, including equality and security of the person. The Crown conceded that the right to free expression was infringed in all respects, unfortunately depriving the Court of the opportunity to fully explore the content and scope of s. 2(*b*) of the *Charter* as it applies to this case. At the same time, it is recognized that, at this stage, our jurisprudence leads to the conclusion that, although harmful, the content of child pornography cannot be the basis for excluding it from the scope of the s. 2(*b*) guarantee. No separate analysis under s. 7 of the *Charter* is required. The s. 7 liberty interest is encompassed in the right of free expression and proportionality falls to be considered under s. 1 of the *Charter*. The only issue is whether the infringement of freedom of expression is justifiable under s. 1. Section 1 recognizes that in a democracy competing rights and values exist. The underlying values of a free and democratic society guarantee the rights in the *Charter* and, in appropriate circumstances, justify limitations upon those rights. A principled and contextual approach to s. 1 ensures that courts are sensitive to the other values which may compete with a particular right and allows them to achieve a proper balance among these values. At each stage of the s. 1 analysis close attention must be paid to the factual and social context in which an impugned provision exists.

An appraisal of the contextual factors in this case leads to the conclusion that Parliament's decision to prohibit child pornography is entitled to an increased level of deference. Child pornography, as defined by s. 163.1(1) of the *Criminal Code*, is

As a form of expression, child pornography warrants less protection since it is low value expression that is far removed from the core values underlying the protection of freedom of expression. Child pornography has a limited link to the value of self-fulfilment, but only in its most base aspect. Furthermore, in prohibiting the possession of child pornography, Parliament promulgated a law which seeks to foster and protect the equality rights of children, along with their security of the person and their privacy interests. The importance of these *Charter* rights cannot be ignored in the analysis of whether the law is demonstrably justified in a free and democratic society and warrants a more deferential application of the criteria set out in the *Oakes* test. Finally, Parliament has the right to make moral judgments in criminalizing certain forms of conduct. The Court should be particularly sensitive to the legitimate role of government in legislating with respect to our social values.

Section 163.1(4) of the *Code* constitutes a reasonable and justified limit upon freedom of expression. In proscribing the possession of child pornography, Parliament's overarching objective was to protect children. Any provision which protects both children and society by attempting to eradicate the sexual exploitation of children clearly has a pressing and substantial purpose. Section 163.1(4) is also proportionate to the objective. First, prohibiting the possession of child pornography is rationally connected to the aim of preventing harm to children and society. The possession of child pornography contributes to the cognitive distortions of paedophiles, reinforcing their erroneous belief that sexual activity with children is acceptable. Child pornography fuels paedophiles' fantasies, which constitute the motivating force behind their sexually deviant behaviour. Section 163.1(4) plays an important role in an integrated law enforcement scheme which protects children against the harms

associated with child pornography. Paedophiles use child pornography for seducing children and for grooming them to commit sexual acts. Lastly, children are abused in the production of child pornography. The prohibition of the possession of child pornography is intended to reduce the market for this material. If consumption of child pornography is reduced, presumably production and the abuse of children will also be reduced.

Second, the prohibition of the possession of child pornography minimally impairs the right to free expression. Although s. 163.1(4) is directed only to the private possession of child pornography, children are particularly vulnerable in the private sphere, since a large portion of child pornography is produced privately and used privately by those who possess it. The harmful effect on the attitudes of those who possess child pornography similarly occurs in private. Consequently, prohibiting the simple possession of child pornography has an additional reductive effect on the harm it causes. The prohibition of the possession of child pornography also captures visual and written works of the imagination which do not involve the participation of any actual children or youth in their production; in enacting s. 163.1(4), Parliament sought to prevent not only the harm that flows from the use of children in pornography, but also the harm that flows from the very existence of images and words which degrade and dehumanize children and to send the message that children are not appropriate sexual partners. The focus of the inquiry must be on the harm of the message of the representations and not on their manner of creation, or on the intent or identity of their creator. Given the low value of the speech at issue in this case and the fact that it undermines the *Charter* rights of children, Parliament was justified in concluding that visual works of the imagination would harm children.

The inclusion of written material in the offence of possession of child pornography does not amount to thought control. The legislation seeks to prohibit material that Parliament believed was harmful. The inclusion of written material which advocates and counsels the commission of offences against children is consistent with this aim, since, by its very nature, it is harmful, regardless of its authorship. Evidence suggests that the cognitive distortions of paedophiles are reinforced by such material and that written pornography fuels the sexual fantasies of paedophiles and could incite them to offend. Although the prohibition in s. 163.1(4) extends to teenagers between the ages of 14 and 17 who keep pornographic videotapes or pictures of themselves, this effect of the provision is a reasonable limit on teenagers' freedom of expression. A review of adolescent child pornography cases reveals that there is a great risk that they will be exploited in its creation. Hence, while adolescents between the ages of 14 and 17 may legally engage in sexual activity, Parliament had a strong basis for concluding that the age limit in the definition of child pornography should be set at 18. It is not necessary that the provision contain a defence to protect teenagers who are in possession of erotic videos or pictures of themselves. Such a defence would undermine Parliament's objective of protecting all children, since some adolescents under the age of 18 groom other children into engaging in sexual conduct. There is also no guarantee, even when a teenager is in possession of a pornographic picture or videotape depicting himself or herself, that it was created in a consensual environment. The creation of permanent records of teenagers' sexual activities has consequences which children of that age may not have sufficient maturity to understand. The Court should defer to Parliament's decision to restrict teenagers' freedom in this area. The provision does not amount to a total ban on the possession of child pornography. The provision reflects an attempt by Parliament to weigh the competing rights and values at stake and achieve a proper balance. The definitional

limits act as safeguards to ensure that only material that is antithetical to Parliament's objectives in proscribing child pornography will be targeted, and the legislation incorporates defences of artistic merit, educational, scientific or medical purpose, and a defence of the public good.

Third, when the effects of the provision are examined in their overall context, the benefits of the legislation far outweigh any deleterious effects on the right to freedom of expression and the interests of privacy. Section 163.1(4) helps to prevent the harm to children which results from the production of child pornography; deters the use of child pornography in the grooming of children; curbs the collection of child pornography by paedophiles; and helps to ensure that an effective law enforcement scheme can be implemented. In sum, the legislation benefits society as a whole as it sends a clear message that deters the development of antisocial attitudes. The law does not trench significantly on speech possessing social value since there is a very tenuous connection between the possession of child pornography and the right to free expression. At most, the law has a detrimental cost to those who find base fulfilment in the possession of child pornography. The privacy of those who possess child pornography is protected by the right against unreasonable search and seizure as guaranteed by s. 8 of the *Charter*. The law intrudes into the private sphere because doing so is necessary to achieve its salutary objectives. The privacy interest restricted by the law is closely related to the specific harmful effects of child pornography. Moreover, the provision's beneficial effects in protecting the privacy interests of children are proportional to the detrimental effects on the privacy of those who possess child pornography.

Cases Cited

inherently harmful to children and to society. This harm exists independently of dissemination or any risk of dissemination and flows from the existence of the pornographic representations, which on their own violate the dignity and equality rights of children. Although not empirically measurable, nor susceptible to proof in the traditional manner, the attitudinal harm inherent in child pornography can be inferred from degrading or dehumanizing representations or treatment. Expression that degrades or dehumanizes is harmful in and of itself as all members of society suffer when harmful attitudes are reinforced. The possibility that pornographic representations may be disseminated creates a heightened risk of attitudinal harm. The violation of the privacy rights of the persons depicted constitutes an additional risk of harm that flows from the possibility of dissemination. Child pornography is harmful whether it involves real children in its production or whether it is a product of the imagination. Section 163.1 was enacted to protect children, one of the most vulnerable groups in society. It is based on the clear evidence of direct harm caused by child pornography, as well as Parliament's reasoned apprehension that child pornography also causes attitudinal harm. The lack of scientific precision in the social science evidence relating to attitudinal harm is not a valid reason for attenuating the Court's deference to Parliament's decision.

The importance of the protection of children is recognized in both Canadian criminal and civil law. The protection of children from harm is a universally accepted goal. International law is rife with instruments that emphasize the protection of children and a number of international bodies have recognized that possession of child pornography must be targeted to effectively address the harms caused by this type of material. Moreover, domestic legislation in a number of democratic countries criminalizes the simple possession of child pornography.

(ii) Actions Taken Internationally to Protect Children

175 The protection of children from harm is a universally accepted goal. While this Court has recognized that, generally, international norms are not binding without legislative implementation, they are relevant sources for interpreting rights domestically; see *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at pp. 349-50; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. As stated in R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 330:

> . . . the legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred.

176 In *Slaight Communications, supra*, at pp. 1056-57, this Court explained that a balancing of competing interests must be informed by Canada's international obligations. The fact that a value has the status of an international human right is indicative of the high degree of importance with which it must be considered; see also *Keegstra, supra*, at p. 750.

177 Both legislators abroad and the international community have acknowledged the vulnerability of children and the resulting need to protect them. It is therefore not surprising that the *Convention on the Rights of the Child* has been ratified or acceded to by 191 states as of January 19, 2001, making it the most universally accepted human rights instrument in history.

178 Indeed, international law is rife with instruments that emphasize the protection of children. Article 25(2) of the *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc A/810, at p. 71 (1948), recognizes that "childhood [is] entitled to special care and assistance". The United Nations *Declaration of the Rights of the Child*, G.A. Res. 1386 (XIV) (1959), in its preamble, states that the child "needs special safeguards and care". In 1992, the United Nations Commission on Human Rights adopted the *Programme of Action for the Prevention of the Sale of Children, Child Prostitution and Child Pornography*, 55th Mtg., 1992/74. Additional instruments such as the *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3, art. 10(3), and the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, art. 24, also emphasize the protection of children. The recent *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, A/RES/54/263 (2000), which prohibits, *inter alia*, child pornography, has already been signed by 69 states; see <http://www.unhchr.ch/html/menu3/b/treaty18_asp.htm> (accessed January 23, 2001).

179 Section 163.1 of Canada's *Criminal Code* reflects a growing trend towards the criminalization of the possession of child pornography. A number of international bodies have recognized that possession must be targeted to effectively address the harms of child pornography; see *Sale of Children, Child Prostitution and Child Pornography: Note by the Secretary-General*, U.N. Doc. A/49/478 (1994), at paras. 196-97; *Programme of Action for the Prevention of the Sale of Children, Child Prostitution and Child Pornography*, *supra*, at para. 53; *Draft Joint Action to combat child pornography on the Internet*, [1999] O.J.C. 219/68, art. 1; *International traffic in child pornography*, ICPO-Interpol AGN/65/RES/9 (1996).

IN THE MATTER OF A REFERENCE under section 27(1) of the *Judicature Act*, being chapter J-1 of the Revised Statutes of Alberta, 1980;

AND IN THE MATTER OF the validity of compulsory arbitration provisions found in the *Public Service Employee Relations Act*, the *Labour Relations Act*, and the *Police Officers Collective Bargaining Act*, being chapters P-33, L-1.1 and P-12.05 of the Revised Statutes of Alberta, 1980 respectively;

AND IN THE MATTER OF the exclusion of certain employees from units for collective bargaining

between

Alberta Union of Provincial Employees, Canadian Union of Public Employees and Alberta International Fire Fighters Association *Appellants*

and

Attorney General of Manitoba *Intervener for the appellants*

v.

Attorney General for Alberta *Respondent*

and

Attorney General of Canada, Attorney General for Ontario, Attorney General of Quebec, Attorney General of Nova Scotia, Attorney General of British Columbia, Attorney General of Prince Edward Island, Attorney General for Saskatchewan and Attorney General of Newfoundland *Interveners for the respondent*

INDEXED AS: REFERENCE RE *PUBLIC SERVICE EMPLOYEE RELATIONS ACT* (ALTA.)

File No.: 19234.

1985: June 27, 28; 1987: April 9.

DANS L'AFFAIRE D'UN RENVOI fondé sur le paragraphe 27(1) de la *Judicature Act*, R.S.A. 1980, chap. J-1;

ET DANS L'AFFAIRE DE la validité des dispositions sur l'arbitrage obligatoire contenues dans la *Public Service Employee Relations Act*, la *Labour Relations Act* et la *Police Officers Collective Bargaining Act*, R.S.A. 1980, chap. P-33, L-1.1 et P-12.05, respectivement;

ET DANS L'AFFAIRE DE l'exclusion de certains salariés des unités de négociation collective

entre

Alberta Union of Provincial Employees, Syndicat canadien de la fonction publique et Alberta International Fire Fighters Association *Appelants*

et

Le procureur général du Manitoba *Intervenant pour les appelants*

c.

Le procureur général de l'Alberta *Intimé*

et

Le procureur général du Canada, le procureur général de l'Ontario, le procureur général du Québec, le procureur général de la Nouvelle-Écosse, le procureur général de la Colombie-Britannique, le procureur général de l'Île-du-Prince-Édouard, le procureur général de la Saskatchewan et le procureur général de Terre-Neuve *Intervenants pour l'intimé*

RÉPERTORIÉ: RENVOI RELATIF À LA *PUBLIC SERVICE EMPLOYEE RELATIONS ACT* (ALB.)

N° du greffe: 19234.

1985: 27, 28 juin; 1987: 9 avril.

Present: Dickson C.J. and Beetz, McIntyre, Chouinard *, Wilson, Le Dain and La Forest JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Constitutional law — Charter of Rights — Freedom of association — Scope of protection in labour relations context — Provincial legislation prohibiting strikes and lockouts — Legislation providing for arbitration — Whether provincial legislation violated s. 2(d) of the Charter — If so, whether such violation justifiable under s. 1 of the Charter — Public Service Employee Relations Act, R.S.A. 1980, c. P-33, ss. 48, 49, 50, 55, 93, 94 — Labour Relations Act, R.S.A. 1980 (Supp.), c. L-1.1, ss. 117.1, 117.2, 117.3, 117.8 — Police Officers Collective Bargaining Act, S.A. 1983, c. P-12.05, ss. 2(2), 3, 9, 10, 15.

The Lieutenant Governor in Council of Alberta, in accordance with s. 27(1) of the *Judicature Act* of that province, referred to the Alberta Court of Appeal several constitutional questions which raised two main issues: (1) whether the provisions of the *Public Service Employee Relations Act*, the *Labour Relations Act* and the *Police Officers Collective Bargaining Act* of Alberta, which prohibit strikes and impose compulsory arbitration to resolve impasses in collective bargaining, were inconsistent with the *Canadian Charter of Rights and Freedoms*; and (2) whether the provisions of the Acts relating to the conduct of the arbitration and which limit the arbitrability of certain items and require the arbitration board to consider certain factors in making the arbitration award were inconsistent with the *Charter*. The first Act applied to public service employees, the second to firefighters and hospital employees and the third to police officers. The majority of the Court of Appeal of Alberta answered the first issue in the negative and declined to answer the second issue. This appeal is to determine whether the Alberta legislation violates the guarantee of freedom of association in s. 2(*d*) of the *Charter* and, if so, whether such violation can be justified under s. 1.

Held (Dickson C.J. and Wilson J. dissenting): The appeal should be dismissed.

Per Beetz, Le Dain and La Forest JJ.: The challenged provisions of the *Public Service Employee Relations Act*, the *Labour Relations Act* and the *Police Officers Collective Bargaining Act* were not inconsistent with the *Charter*. The constitutional guarantee of freedom of association in s. 2(*d*) of the *Charter* does not include, in

* Chouinard J. took no part in the judgment.

Présents: Le juge en chef Dickson et les juges Beetz, McIntyre, Chouinard *, Wilson, Le Dain et La Forest.

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

Droit constitutionnel — Charte des droits — Liberté d'association — Portée de la protection dans le domaine des relations de travail — Législation provinciale interdisant les grèves et les lock-out — Recours à l'arbitrage prescrit par la législation — La législation provinciale viole-t-elle l'art. 2d) de la Charte? — Dans l'affirmative, cette violation est-elle justifiable en vertu de l'article premier de la Charte? — Public Service Employee Relations Act, R.S.A. 1980, chap. P-33, art. 48, 49, 50, 55, 93, 94 — Labour Relations Act, R.S.A. 1980 (Supp.), chap. L-1.1, art. 117.1, 117.2, 117.3, 117.8 — Police Officers Collective Bargaining Act, S.A. 1983, chap. P-12.05, art. 2(2), 3, 9, 10, 15.

Le lieutenant-gouverneur en conseil de l'Alberta, conformément au par. 27(1) de la *Judicature Act* de cette province, a soumis à la Cour d'appel de l'Alberta plusieurs questions constitutionnelles qui soulèvent deux points principaux: (1) Les dispositions de la *Public Service Employee Relations Act*, de la *Labour Relations Act* et de la *Police Officers Collective Bargaining Act* de l'Alberta, qui interdisent le recours aux grèves et imposent l'arbitrage obligatoire pour résoudre les impasses dans la négociation collective, sont-elles incompatibles avec la *Charte canadienne des droits et libertés*; et (2) les dispositions de ces lois se rapportant à l'arbitrage, qui limitent les points qui peuvent y être soumis et qui obligent le tribunal d'arbitrage à tenir compte de certains facteurs quand il rend sa sentence, sont-elles incompatibles avec la *Charte*. La première de ces lois s'applique aux employés de la fonction publique, la seconde aux pompiers et aux employés d'hôpitaux et la troisième aux agents de police. La Cour d'appel de l'Alberta à la majorité a répondu à la première question par la négative et a refusé de répondre à la seconde. Le présent pourvoi a pour objet de décider si la législation albertaine viole la liberté d'association garantie à l'al. 2*d*) de la *Charte* et, dans l'affirmative, si cette violation peut être justifiée en vertu de l'article premier.

Arrêt (le juge en chef Dickson et le juge Wilson sont dissidents): Le pourvoi est rejeté.

Les juges Beetz, Le Dain et La Forest: Les dispositions contestées de la *Public Service Employee Relations Act*, de la *Labour Relations Act* et de la *Police Officers Collective Bargaining Act* ne sont pas incompatibles avec la *Charte*. La garantie constitutionnelle de la liberté d'association que l'on trouve à l'al. 2*d*) de la

* Le juge Chouinard n'a pas pris part au jugement.

the case of a trade union, a guarantee of the right to bargain collectively and the right to strike. In considering the meaning that must be given to freedom of association in s. 2(*d*) of the *Charter*, it is essential to keep in mind that this concept must be applied to a wide range of associations or organizations of a political, religious, social or economic nature, with a wide variety of objects, as well as activity by which the objects may be pursued. It is in this larger perspective, and not simply with regard to the perceived requirements of a trade union, however important they may be, that one must consider the implications of extending a constitutional guarantee, under the concept of freedom of association, to the right to engage in particular activity on the ground that the activity is essential to give an association meaningful existence.

In considering whether it is reasonable to ascribe such a sweeping intention to the *Charter*, the premise that without such additional constitutional protection the guarantee of freedom of association would be a meaningless and empty one must be rejected. Freedom of association is particularly important for the exercise of other fundamental freedoms, such as freedom of expression and freedom of conscience and religion. These afford a wide scope for protected activity in association. Moreover, the freedom to work for the establishment of an association, to belong to an association, to maintain it, and to participate in its lawful activity without penalty or reprisal is not to be taken for granted. That is indicated by its express recognition and protection in labour relations legislation. It is a freedom that has been suppressed in varying degrees from time to time by totalitarian regimes.

What is in issue here is not the importance of freedom of association in this sense but whether particular activity of an association in pursuit of its objects is to be constitutionally protected or left to be regulated by legislative policy. The rights for which constitutional protection are sought—the modern rights to bargain collectively and to strike, involving correlative duties or obligations resting on an employer—are not fundamental rights or freedoms. They are the creation of legislation, involving a balance of competing interests in a field which has been recognized by the courts as requiring a specialized expertise. It is surprising that, in an area in which this Court has affirmed a principle of judicial restraint in the review of administrative action, this Court should be considering the substitution of its judgment for that of the Legislature by constitutionalizing in general and abstract terms rights which the Legislature

Charte ne comprend pas, dans le cas d'un syndicat, la garantie du droit de négocier collectivement et du droit de faire la grève. En examinant le sens qu'il faut donner à l'expression liberté d'association que l'on trouve à l'al. 2*d*) de la *Charte*, il est essentiel de garder à l'esprit que cette notion doit viser toute une gamme d'associations ou d'organisations de nature politique, religieuse, sociale ou économique, ayant des objectifs très variés, de même que les activités qui permettent de poursuivre ces objectifs. C'est dans cette perspective plus large et non simplement en fonction des prétendues exigences d'un syndicat, si importantes soient-elles, que l'on doit examiner l'incidence de l'extension d'une garantie constitutionnelle, qui se présente sous la forme du concept de la liberté d'association, au droit d'exercer une certaine activité pour le motif qu'elle est essentielle si l'on veut qu'une association ait une existence significative.

En se demandant s'il est raisonnable de prêter une intention aussi générale à la *Charte*, on doit rejeter la prémisse selon laquelle, sans cette protection constitutionnelle supplémentaire, la liberté d'association garantie serait vide de sens. La liberté d'association est particulièrement importante pour l'exercice d'autres libertés fondamentales comme la liberté d'expression et la liberté de conscience et de religion. Celles-ci présentent un large champ de protection d'activités collectives. De plus, la liberté de travailler à la constitution d'une association, d'appartenir à une association, de la maintenir et de participer à ses activités licites sans faire l'objet d'une peine ou de représailles ne doit pas être tenue pour acquise. Cela ressort de sa reconnaissance et de sa protection expresses dans la législation en matière de relations de travail. C'est une liberté qui a été plus ou moins supprimée à l'occasion par des régimes totalitaires.

Ce qui est en cause en l'espèce est non pas l'importance de la liberté d'association en ce sens, mais la question de savoir si une activité particulière qu'exerce une association en poursuivant ses objectifs, doit être protégée par la Constitution ou faire l'objet d'une réglementation par voie de politiques législatives. Les droits au sujet desquels on réclame la protection de la Constitution, savoir les droits contemporains de négocier collectivement et de faire la grève, qui comportent pour l'employeur des responsabilités et obligations corrélatives, ne sont pas des droits ou libertés fondamentaux. Ce sont des créations de la loi qui mettent en jeu un équilibre entre des intérêts opposés dans un domaine qui, les tribunaux l'ont reconnu, exige une compétence spéciale. Il est étonnant que, dans un domaine où cette Cour a affirmé un principe de retenue judiciaire pour ce qui est de contrôler des mesures administratives, celle-ci

has found it necessary to define and qualify in various ways according to the particular field of labour relations involved. The resulting necessity of applying s. 1 of the *Charter* to a review of particular legislation in this field demonstrates the extent to which the Court becomes involved in a review of legislative policy for which it is really not fitted.

Per McIntyre J.: The freedom of association in s. 2(*d*) of the *Charter* did not give constitutional protection to the right of a trade union to strike as an incident to collective bargaining. Freedom of association under the *Charter* means the freedom to engage collectively in those activities which are constitutionally protected for each individual. It means also the freedom to associate for the purposes of activities which are lawful when performed alone. Freedom of association, however, does not vest independent rights in the group. People cannot, by merely combining together, create an entity which has greater constitutional rights and freedoms than they, as individuals, possess. The group can exercise only the constitutional rights of its members on behalf of those members. It follows as well that the rights of the individual members of the group cannot be enlarged merely by the fact of association. Therefore, the association does not acquire a constitutionally guaranteed freedom to do what is unlawful for the individual. This definition fully realizes the purpose of freedom of association which is to ensure that various goals may be pursued in common as well as individually. When this definition of freedom of association is applied, it is clear that freedom of association does not guarantee the right to strike. Since the right to strike is not independently protected under the *Charter*, it can receive protection under freedom of association only if it is an activity which is permitted by law to an individual.

Further, read in the context of the whole *Charter*, s. 2(*d*) cannot support an interpretation of freedom of association which could include a right to strike. Although strikes are commonplace in Canada and have been for many years, the framers of the Constitution did not include a specific reference to the right to strike in the *Charter*. This omission, taken with the fact that the overwhelming preoccupation of the *Charter* is with individual, political, and democratic rights with conspicuous inattention to economic and property rights, speaks strongly against any implication of a right to strike.

doive examiner la possibilité de substituer son opinion à celle du législateur en constitutionnalisant, en termes généraux et abstraits, des droits que le législateur a jugé nécessaire de définir et d'édulcorer de diverses façons selon le domaine particulier des relations de travail en cause. La nécessité qui résulte d'appliquer l'article premier de la *Charte* à l'examen d'une mesure législative particulière dans ce domaine démontre jusqu'à quel point la Cour devient appelée à assumer une fonction de contrôle de politiques législatives qu'elle n'est vraiment pas faite pour assumer.

Le juge McIntyre: La liberté d'association à l'al. 2*d*) de la *Charte* ne confère pas une protection constitutionnelle au droit d'un syndicat de faire la grève à titre d'accessoire de la négociation collective. La liberté d'association au sens de la *Charte* signifie la liberté d'exercer collectivement des activités que la Constitution garantit à chaque individu. Elle s'entend aussi de la liberté de s'associer pour exercer les activités qui sont licites lorsqu'elles sont exercées par un seul individu. La liberté d'association ne saurait toutefois conférer des droits indépendants au groupe. Les gens ne peuvent pas, simplement en se joignant à d'autres, créer une entité qui a des droits et des libertés constitutionnels plus grands que ceux que possèdent les individus. Le groupe ne peut exercer, au nom de ses membres, que les droits constitutionnels dont ils jouissent individuellement. Il s'ensuit aussi que les droits dont jouissent individuellement les membres du groupe ne sauraient être élargis du simple fait de l'association. Donc, l'association n'acquiert aucune liberté garantie par la Constitution de faire ce qui est illicite pour l'individu de faire. Cette définition donne tout son sens à l'objet de l'association, qui est d'assurer que diverses fins puissent être poursuivies collectivement aussi bien qu'individuellement. Lorsqu'on applique cette définition de la liberté d'association, il devient manifeste qu'elle ne garantit pas le droit de faire la grève. Comme le droit de grève ne jouit d'aucune garantie indépendante en vertu de la *Charte*, la liberté d'association ne le protège que s'il s'agit d'une activité que la loi permet à l'individu d'exercer.

En outre, si l'al. 2*d*) est interprété en fonction de l'ensemble de la *Charte*, il ne saurait justifier une interprétation de la liberté d'association qui pourrait inclure le droit de grève. Même si les grèves sont fréquentes au Canada, et ce, depuis plusieurs années, les rédacteurs de la Constitution n'ont inclus aucune mention expresse du droit de grève dans la *Charte*. Cette omission, en plus du fait que la *Charte* se préoccupe d'abord et avant tout des droits individuels, politiques et démocratiques et qu'elle se désintéresse manifestement des droits économiques et des droits de propriété, joue fortement contre tout droit de grève implicite.

Finally, it must be recognized that the right to strike accorded by legislation throughout Canada is of relatively recent vintage. It cannot be said that at this time it has achieved status as a fundamental right which should be implied in the absence of specific reference in the *Charter*.

Consequently, the provisions of the *Public Service Employee Relations Act*, the *Labour Relations Act* and the *Police Officers Collective Bargaining Act* which prohibited the use of strikes and lockouts were not inconsistent with the provisions of the *Charter* since the *Charter* does not guarantee a right to strike. The provisions of the Acts which related to the conduct of arbitration were also not inconsistent with the *Charter*, since the *Charter* does not guarantee a specific form of dispute resolution as a substitute for the right to strike.

Per Dickson C.J. and Wilson J. (dissenting): The purpose of the constitutional guarantee of freedom of association in s. 2(*d*) of the *Charter* is to recognize the profoundly social nature of human endeavours and to protect the individual from state-enforced isolation in the pursuit of his or her ends. While s. 2(*d*), at a minimum, guarantees the liberty of persons to be in association or belong to an organization, it must extend beyond a concern for associational status in order to give effective protection to the interests to which the constitutional guarantee is directed and must protect the pursuit of the activities for which the association was formed. What freedom of association seeks to protect, however, is not associational activities *qua* particular activities, but the freedom of individuals to interact with, support and be supported by, their fellow humans in the varied activities in which they choose to engage. But this is not an unlimited constitutional licence for all group activity. The mere fact that an activity is capable of being carried out by several people together, as well as individually, does not mean that the activity acquires constitutional protection from legislative prohibition or regulation. The overarching consideration remains whether a legislative enactment or administrative action interferes with the freedom of persons to join and act with others in common pursuits. The legislative purpose which will render legislation invalid is the attempt to preclude associational conduct because of its concerted or associational nature.

In the context of labour relations, the guarantee of freedom of association in s. 2(*d*) of the *Charter* includes not only the freedom to form and join associations but also the freedom to bargain collectively and to strike.

Enfin, il faut reconnaître que le droit de grève conféré par la loi partout au Canada est une chose relativement récente. On ne peut dire actuellement qu'il a atteint le statut d'un droit fondamental qui doit être considéré comme implicite en l'absence de mention expresse dans la *Charte*.

Par conséquent, les dispositions de la *Public Service Employee Relations Act*, de la *Labour Relations Act* et de la *Police Officers Collective Bargaining Act* qui interdisent le recours aux lock-out et aux grèves ne sont pas incompatibles avec les dispositions de la *Charte* puisque la *Charte* ne garantit pas le droit de grève. Les dispositions de ces lois qui se rapportent à l'arbitrage ne sont pas incompatibles avec les dispositions de la *Charte*, puisque la *Charte* ne garantit aucune forme particulière de règlement des différends comme substitut au droit de grève.

Le juge en chef Dickson et le juge Wilson (dissidents): La garantie constitutionnelle de la liberté d'association, que l'on trouve à l'al. 2*d*) de la *Charte*, vise à reconnaître la nature sociale profonde des entreprises humaines et à protéger l'individu contre tout isolement imposé par l'État dans la poursuite de ses fins. L'alinéa 2*d*), à tout le moins, garantit aux personnes la liberté d'être associées ou d'appartenir à une organisation, néanmoins il doit, en plus de s'intéresser au statut d'associé, accorder une protection efficace aux intérêts que vise la garantie constitutionnelle et protéger l'exercice des activités mêmes pour lesquelles l'association a été formée. Ce que la liberté d'association vise à protéger, cependant, ce ne sont pas les activités de l'association en tant qu'activités particulières, mais la liberté des individus d'interagir avec d'autres êtres humains, de les aider et d'être aidés par eux dans les diverses activités qu'ils choisissent d'exercer. Mais ce n'est pas là une autorisation constitutionnelle illimitée pour toute action collective. Le simple fait qu'une activité puisse être exercée par plusieurs personnes ensemble, aussi bien qu'individuellement, ne signifie pas que l'activité se voit conférer une protection constitutionnelle contre toute interdiction ou réglementation législative. Le facteur primordial demeure la question de savoir si un texte législatif ou un acte administratif porte atteinte à la liberté des personnes de se joindre à d'autres et de poursuivre avec elles des objectifs communs. L'objectif d'une loi qui a pour effet de la rendre invalide est la tentative d'interdire un comportement collectif en raison de sa nature concertée ou collective.

Dans le domaine des relations de travail, la liberté d'association garantie à l'al. 2*d*) de la *Charte* comprend non seulement la liberté de former des associations et d'y adhérer, mais aussi celle de négocier collectivement

The role of association has always been vital as a means of protecting the essential needs and interests of working people. Throughout history, workers have associated to overcome their vulnerability as individuals to the strength of their employers, and the capacity to bargain collectively has long been recognized as one of the integral and primary functions of associations of working people. It remains vital to the capacity of individual employees to participate in ensuring equitable and humane working conditions. Under our existing system of industrial relations, the effective constitutional protection of the associational interests of employees in the collective bargaining process also requires concomitant protection of their freedom to withdraw collectively their services, subject to s. 1 of the *Charter*. Indeed, the right of workers to strike is an essential element in the principle of collective bargaining. This is not to say that s. 2(*d*) of the *Charter* entrenches for all time the existing system of labour relations. The area of industrial relations is subject to significant legislative regulation. The point is that this regulation cannot define the scope of the underlying freedom.

In the present case, the three statutes prohibited strikes and defined a strike as a cessation of work or refusal to work by two or more persons acting in combination or in concert or in accordance with a common understanding. There is no doubt that the Alberta legislation was aimed at foreclosing a particular collective activity because of its associational nature. The very nature of a strike is to influence an employer by joint action which would be ineffective if it were carried out by an individual. Therefore, s. 93 of the *Public Service Employee Relations Act*, s. 117.1(2) of the *Labour Relations Act* and s. 3(1) of the *Police Officers Collective Bargaining Act*, which directly abridged the freedom of employees to strike, infringed the guarantee of freedom of association in s. 2(*d*) of the *Charter*.

The limits on freedom of association imposed by these provisions were not justifiable under s. 1 of the *Charter*. The protection of the government from the political pressure of strike action from their employees was not an objective of sufficient importance for the purpose of s. 1 for limiting freedom of association through legislative prohibition of freedom to strike. It has not been shown that all public service employees have a substantial bargaining advantage on account of their employer's governmental status. Nor has it been shown that any political pressure exerted on the government during

et de faire la grève. L'association a toujours joué un rôle vital dans la protection des besoins et des intérêts essentiels des travailleurs. Au cours de l'histoire, les travailleurs se sont associés pour surmonter leur vulnérabilité individuelle face à l'employeur et la capacité de négocier collectivement a depuis longtemps été reconnue comme l'une des fonctions intégrantes et premières des associations de travailleurs. Elle demeure essentielle à la capacité de chaque salarié, à titre individuel, de participer au processus qui leur assurera des conditions de travail humaines et équitables. Dans notre régime actuel de relations de travail, la protection constitutionnelle efficace des intérêts des associations de travailleurs dans le processus de négociation collective requiert aussi la protection concomittante de leur liberté de cesser collectivement de fournir leurs services, sous réserve de l'article premier de la *Charte*. En fait, le droit des travailleurs de faire la grève constitue un élément essentiel du principe de la négociation collective. Cela ne revient pas à dire que l'al. 2*d*) de la *Charte* consacre pour toujours le régime existant des relations de travail. Le domaine des relations de travail est assujetti à une réglementation législative substantielle. Le fait est que cette réglementation ne peut pas définir la portée de la liberté sous-jacente.

En l'espèce, les trois lois interdisent la grève, qu'elles définissent comme un arrêt de travail ou un refus de travailler par deux ou plusieurs personnes qui agissent de concert ou d'un commun accord. Il ne fait aucun doute que la législation albertaine vise à interdire une activité collective particulière, à cause de sa nature collective. La nature même d'une grève est d'influencer l'employeur par une action commune qui serait inefficace si elle était exercée par une seule personne. Il s'ensuit que l'art. 93 de la *Public Service Employee Relations Act*, le par. 117.1(2) de la *Labour Relations Act* et le par. 3(1) de la *Police Officers Collective Bargaining Act*, qui portent directement atteinte à la liberté des salariés de faire la grève, enfreignent la liberté d'association garantie à l'al. 2*d*) de la *Charte*.

Les restrictions à la liberté d'association imposées par ces dispositions ne peuvent être justifiées en vertu de l'article premier de la *Charte*. La protection du gouvernement contre les pressions politiques que ses employés peuvent exercer sur lui par leurs grèves ne constitue pas un objectif suffisamment important, pour les fins de l'article premier, pour limiter la liberté d'association par une interdiction législative de la liberté de faire la grève. Il n'a pas été démontré que tous les employés de la fonction publique jouissent d'un avantage important sur le plan de la négociation en raison du statut gouverne-

strikes was of an unusual or peculiarly detrimental nature.

The protection of essential services is a government objective of sufficient importance for the purpose of s. 1, but the government did not demonstrate that this objective justified the limit on freedom of association imposed by the abrogation of the right to strike. The essential quality of police officers and firefighters was obvious and self-evident, and did not have to be proven by evidence. Thus, the Legislature's decision to prevent interruption in police protection and firefighting was rationally connected to the objective of protecting essential services. But the prohibition of the right to strike of all hospital workers and public service employees was too drastic a measure for achieving the object of protecting essential services. Indeed, without some evidentiary basis, it was neither obvious nor self-evident that all those employees performed services "whose interruption would endanger the life, personal safety or health of the whole or part of the population". Section 93 of the *Public Service Employee Relations Act* and s. 117.1(2) of the *Labour Relations Act*, in so far as it pertains to the hospital employees under s. 117.1(1)(b), were too wide to be justified by relating to essential services for the purpose of s. 1.

Further, to impair as little as possible the freedom of association of those affected by a legislative prohibition to strike, such prohibition must also be accompanied by a mechanism for dispute resolution by a third party which would adequately safeguard workers' interest. In the present reference, the arbitration system provided by the Acts was not an adequate replacement for the employees' freedom to strike. While the provisions which required the arbitrator to consider the fiscal policies of the government and the wages and benefits of private and public unionized and non-unionized employees did not compromise the adequacy of the arbitration procedure, the exclusion of certain subjects from the arbitration process in the *Police Officers Collective Bargaining Act* and the *Public Service Employee Relations Act* did compromise the effectiveness of the process as a means of ensuring equal bargaining power in the absence of freedom to strike. Serious doubt is cast upon the fairness and effectiveness of an arbitration scheme where matters which would normally be bargainable are excluded from arbitration. It may be necessary in some circumstances for a government employer

mental de leur employeur. Il n'a pas été non plus démontré que toute pression politique exercée sur le gouvernement au cours des grèves est d'une nature inhabituelle ou particulièrement préjudiciable.

La garantie des services essentiels est un objectif gouvernemental d'importance suffisante pour les fins de l'article premier, mais le gouvernement n'a pas démontré que cet objectif justifiait la limite apportée à la liberté d'association par l'abrogation du droit de grève. Le caractère essentiel des agents de police et des pompiers est manifeste et évident en soi, et n'a pas à être démontré au moyen d'une preuve. Ainsi, la décision du législateur d'empêcher l'interruption de la protection assurée par les policiers et les pompiers est rationnellement liée à son objectif de protéger les services essentiels. Mais l'interdiction du droit de grève faite à tous les employés d'hôpitaux et à tous les employés de la fonction publique est une mesure trop draconienne par rapport à l'objectif de protection des services essentiels. D'ailleurs, sans quelque fondement probatoire, il n'est ni manifeste ni évident en soi que tous ces employés fournissent des services «dont l'interruption pourrait mettre en péril la vie, la sécurité ou la santé de la personne dans une partie ou dans la totalité de la population». L'article 93 de la *Public Service Employee Relations Act* et le par. 117.1(2) de la *Labour Relations Act*, dans la mesure où il vise les employés d'hôpitaux en vertu de l'al. 117.1(1)b), sont trop larges pour être justifiés pour le motif qu'ils seraient liés aux services essentiels pour les fins de l'article premier.

En outre, pour être de nature à porter atteinte le moins possible à la liberté d'association de ceux touchés par l'interdiction législative de faire la grève, cette interdiction doit également s'accompagner d'un mécanisme de règlement des différends par un tiers, qui permette de sauvegarder adéquatement les intérêts des travailleurs. Dans le présent renvoi, le système d'arbitrage prescrit par les lois ne constitue pas un substitut adéquat au droit de grève des employés. Certes les dispositions qui obligent l'arbitre à tenir compte des politiques financières du gouvernement et des salaires et avantages offerts aux salariés syndiqués et non syndiqués des secteurs public et privé ne compromettent pas le caractère adéquat du système d'arbitrage, mais l'exclusion de certains sujets du processus d'arbitrage dans la *Police Officers Collective Bargaining Act* et la *Public Service Employee Relations Act*, compromet l'efficacité du processus comme moyen d'assurer un pouvoir égal de négociation en l'absence du droit de grève. L'équité et l'efficacité du régime d'arbitrage se trouvent sérieusement compromises lorsque des questions, qui normalement pourraient être négociées, sont exclues de l'arbitrage. Il

to maintain absolute control over aspects of employment through exclusion of certain subjects from arbitration, but the presumption must be against such exclusion to ensure that the effectiveness of an arbitration scheme as a substitute for freedom to strike is not compromised. Here, the government has not satisfied the onus upon it to demonstrate such necessity.

Finally, none of the arbitration schemes in the Acts provided a right to refer a dispute to arbitration. Rather, a discretionary power is placed in a Minister or an administrative board to establish an arbitration board if it is deemed appropriate. Such a discretionary power was an unjustified interference with the effectiveness of the arbitration procedure in promoting equality of bargaining power between the parties.

In sum, the provisions relating to the arbitration schemes did not themselves limit freedom of association. These provisions, however, with the exception of those requiring the arbitrator to consider certain factors in making the arbitration award, contributed to the inadequacy of the arbitration scheme as a replacement for the freedom to strike, and therefore to the failure of s. 93 of the *Public Service Employee Relations Act*, s. 117.1(2) of the *Labour Relations Act* and s. 3(1) of the *Police Officers Collective Bargaining Act* to be justified under s. 1.

Cases Cited

By McIntyre J.

Referred to: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Collymore v. Attorney-General*, [1970] A.C. 538; *Dolphin Delivery Ltd. v. Retail, Wholesale & Department Store Union, Local 580* (1984), 10 D.L.R. (4th) 198, aff'd on other grounds, [1986] 2 S.C.R. 573; *Public Service Alliance of Canada v. The Queen*, [1984] 2 F.C. 562, aff'd [1984] 2 F.C. 889; *Re Prime and Manitoba Labour Board* (1983), 3 D.L.R. (4th) 74 (Man. Q.B.), rev'd on other grounds (1984), 8 D.L.R. (4th) 641 (Man. C.A.); *Halifax Police Officers and NCO's Association v. City of Halifax* (1984), 11 C.R.R. 358; *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Re Retail, Wholesale & Department Store Union, Locals 544, 496, 635 and 955 and Government of Saskatchewan* (1985), 19 D.L.R. (4th) 609; *Black v. Law Society of Alberta*, [1986] 3 W.W.R. 590; *Re Service Employees' International Union, Local 204 and Broadway Manor Nursing Home* (1983), 44 O.R. (2d) 392; *Canadian Pacific Railway Co. v. Zambri*, [1962] S.C.R. 609; *Canadian Air Line Pilots' Ass'n and East-*

peut être nécessaire, dans certaines circonstances, pour l'État-patron, de conserver un contrôle absolu sur certains aspects des conditions de travail par l'exclusion de certaines questions de l'arbitrage, cependant la présomption doit jouer contre de telles exclusions si l'on veut que l'efficacité du régime d'arbitrage substitué à la liberté de grève ne soit pas compromise. En l'espèce, le gouvernement ne s'est pas acquitté de la charge qui lui incombait de faire la preuve de cette nécessité.

Enfin, aucun des régimes d'arbitrage établis dans les lois ne prévoit le droit de soumettre un différend à l'arbitrage. Au contraire, un ministre ou un organisme administratif se voit conférer le pouvoir discrétionnaire de constituer un tribunal d'arbitrage s'il le juge approprié. Un tel pouvoir discrétionnaire est une atteinte injustifiée à l'équité de la procédure d'arbitrage destinée à promouvoir l'égalité du pouvoir de négociation entre les parties.

En somme, les dispositions relatives aux régimes d'arbitrage ne restreignent pas en soi la liberté d'association. Ces dispositions toutefois, à l'exception de celles qui obligent l'arbitre à tenir compte de certains facteurs dans sa sentence arbitrale, ont pour effet de rendre le régime d'arbitrage inadéquat comme substitut à la liberté de grève et, par conséquent, contribuent à rendre l'art. 93 de la *Public Service Employee Relations Act*, le par. 117.1(2) de la *Labour Relations Act* et le par. 3(1) de la *Police Officers Collective Bargaining Act* injustifiés selon l'article premier.

Jurisprudence

Citée par le juge McIntyre

Arrêts mentionnés: *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145; *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295; *Collymore v. Attorney-General*, [1970] A.C. 538; *Dolphin Delivery Ltd. v. Retail, Wholesale & Department Store Union, Local 580* (1984), 10 D.L.R. (4th) 198, confirmé pour d'autres motifs, [1986] 2 R.C.S. 573; *Alliance de la Fonction publique du Canada c. La Reine*, [1984] 2 C.F. 562, confirmé [1984] 2 C.F. 889; *Re Prime and Manitoba Labour Board* (1983), 3 D.L.R. (4th) 74 (B.R. Man.), infirmé pour d'autres motifs (1984), 8 D.L.R. (4th) 641 (C.A. Man.); *Halifax Police Officers and NCO's Association v. City of Halifax* (1984), 11 C.R.R. 358; *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Re Retail, Wholesale & Department Store Union, Locals 544, 496, 635 and 955 and Government of Saskatchewan* (1985), 19 D.L.R. (4th) 609; *Black v. Law Society of Alberta*, [1986] 3 W.W.R. 590; *Re Service Employees' International Union, Local 204 and Broadway Manor Nursing Home* (1983), 44 O.R. (2d) 392; *Canadian Pacific Railway Co. v. Zambri*, [1962] R.C.S. 609; *Canadian*

assembly and petition; in the trade union context, the First Amendment's freedom of association protects the right to organize and select representatives for collective bargaining; it also protects the activities of trade unions in respect of securing legal representation for their members; nevertheless, freedom to strike in the public sector is not protected by the implied freedom of association in the First Amendment.

(iv) International Law

International law provides a fertile source of insight into the nature and scope of the freedom of association of workers. Since the close of the Second World War, the protection of the fundamental rights and freedoms of groups and individuals has become a matter of international concern. A body of treaties (or conventions) and customary norms now constitutes an international law of human rights under which the nations of the world have undertaken to adhere to the standards and principles necessary for ensuring freedom, dignity and social justice for their citizens. The *Charter* conforms to the spirit of this contemporary international human rights movement, and it incorporates many of the policies and prescriptions of the various international documents pertaining to human rights. The various sources of international human rights law—declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms—must, in my opinion, be relevant and persuasive sources for interpretation of the *Charter*'s provisions.

In particular, the similarity between the policies and provisions of the *Charter* and those of international human rights documents attaches considerable relevance to interpretations of those documents by adjudicative bodies, in much the same way that decisions of the United States courts under the Bill of Rights, or decisions of the courts of other jurisdictions are relevant and may be persuasive. The relevance of these documents in *Charter* interpretation extends beyond the stand-

de parole, d'assemblée et de pétition. Dans le cadre syndical, la liberté d'association du Premier amendement garantit le droit de s'organiser et de se choisir des représentants afin de procéder à des négociations collectives. Elle protège aussi les activités des syndicats qui cherchent à assurer une représentation par avocats à leurs membres. Néanmoins, la liberté de grève dans le secteur public n'est pas garantie par la liberté implicite d'association qu'on trouve dans le Premier amendement.

(iv) Le droit international

Le droit international nous donne un bon aperçu de la nature et de la portée de la liberté d'association des travailleurs. Depuis la fin de la Deuxième Guerre mondiale, la protection des droits et libertés fondamentaux collectifs et individuels est devenue une question d'intérêt international. Il existe maintenant un droit international des droits de la personne constitué d'un ensemble de traités (ou conventions) et de règles coutumières, en vertu duquel les nations du monde se sont engagées à adhérer aux normes et aux principes nécessaires pour assurer la liberté, la dignité et la justice sociale à leurs ressortissants. La *Charte* est conforme à l'esprit de ce mouvement international contemporain des droits de la personne et elle comporte un bon nombre des principes généraux et prescriptions des divers instruments internationaux concernant les droits de la personne. Les diverses sources du droit international des droits de la personne—les déclarations, les pactes, les conventions, les décisions judiciaires et quasi judiciaires des tribunaux internationaux, et les règles coutumières—doivent, à mon avis, être considérées comme des sources pertinentes et persuasives quant il s'agit d'interpréter les dispositions de la *Charte*.

En particulier, la similarité entre les principes généraux et les dispositions de la *Charte* et ceux des instruments internationaux concernant les droits de la personne confère une importance considérable aux interprétations de ces instruments par des organes décisionnels, tout comme les jugements des tribunaux américains portant sur le Bill of Rights ou ceux des tribunaux d'autres ressorts sont pertinents et peuvent être persuasifs. L'importance de ces instruments pour ce qui est d'interpré-

ards developed by adjudicative bodies under the documents to the documents themselves. As the Canadian judiciary approaches the often general and open textured language of the *Charter*, "the more detailed textual provisions of the treaties may aid in supplying content to such imprecise concepts as the right to life, freedom of association, and even the right to counsel". J. Claydon, "International Human Rights Law and the Interpretation of the Canadian Charter of Rights and Freedoms" (1982), 4 *Supreme Court L.R.* 287, at p. 293.

ter la *Charte* va au-delà des normes élaborées par des organes décisionnels en vertu de ces instruments et touche ces instruments mêmes. Lorsque les juges canadiens sont saisis du texte, souvent rédigé en termes généraux et d'acception fort large, de la *Charte* [TRADUCTION] «le texte souvent plus détaillé des dispositions des traités peut être utile pour donner un contenu à des concepts aussi imprécis que le droit à la vie, la liberté d'association et même le droit à l'assistance d'un avocat». J. Claydon, «International Human Rights Law and the Interpretation of the Canadian Charter of Rights and Freedoms» (1982), 4 *Supreme Court L.R.* 287, à la p. 293.

Furthermore, Canada is a party to a number of international human rights Conventions which contain provisions similar or identical to those in the *Charter*. Canada has thus obliged itself internationally to ensure within its borders the protection of certain fundamental rights and freedoms which are also contained in the *Charter*. The general principles of constitutional interpretation require that these international obligations be a relevant and persuasive factor in *Charter* interpretation. As this Court stated in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344, interpretation of the *Charter* must be "aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection". The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of "the full benefit of the *Charter*'s protection". I believe that the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.

En outre, le Canada est partie à plusieurs conventions internationales sur les droits de la personne qui comportent des dispositions analogues ou identiques à celles de la *Charte*. Le Canada s'est donc obligé internationalement à assurer à l'intérieur de ses frontières la protection de certains droits et libertés fondamentaux qui figurent aussi dans la *Charte*. Les principes généraux d'interprétation constitutionnelle requièrent que ces obligations internationales soient considérées comme un facteur pertinent et persuasif quand il s'agit d'interpréter la *Charte*. Comme cette Cour l'a déclaré dans l'arrêt *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, à la p. 344, l'interprétation de la *Charte* doit «viser à réaliser l'objet de la garantie et à assurer que les citoyens bénéficient pleinement de la protection accordée par la *Charte*». Le contenu des obligations internationales du Canada en matière de droits de la personne est, à mon avis, un indice important du sens de l'expression «bénéficient pleinement de la protection accordée par la *Charte*». Je crois qu'il faut présumer, en général, que la *Charte* accorde une protection à tout le moins aussi grande que celle qu'offrent les dispositions similaires des instruments internationaux que le Canada a ratifié en matière de droits de la personne.

In short, though I do not believe the judiciary is bound by the norms of international law in interpreting the *Charter*, these norms provide a relevant and persuasive source for interpretation of the provisions of the *Charter*, especially when they

En somme, bien que je ne croie pas que les juges soient liés par les normes du droit international quand ils interprètent la *Charte*, il reste que ces normes constituent une source pertinente et persuasive d'interprétation des dispositions de cette

arise out of Canada's international obligations under human rights conventions.

(a) *The United Nations Covenants on Human Rights*

In an effort to make more specific the broad principles agreed to under the United Nations *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), two human rights covenants were adopted unanimously by the United Nations General Assembly on December 16, 1966: the U.N. *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200 A (XXI), 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966), and the U.N. *International Covenant on Civil and Political Rights*, G.A. Res. 2200 A (XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966). Canada acceded to both Covenants on May 19, 1976 and they came into effect on August 19, 1976. Prior to accession the Federal Government obtained the agreement of the provinces, all of whom undertook to take measures for implementation of the Covenants in their respective jurisdictions. See generally, *International Covenant on Economic, Social and Cultural Rights: Report of Canada on Articles 10 to 12* (1982), at pp. 1-8.

Both of the Covenants contain explicit provisions relating to freedom of association and trade unions. Article 8 of the U.N. *International Covenant on Economic, Social and Cultural Rights* provides the following:

Article 8

1. The States Parties to the present Covenant undertake to ensure:

(*a*) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national

dernière, plus particulièrement lorsqu'elles découlent des obligations internationales contractées par le Canada sous le régime des conventions sur les droits de la personne.

a) *Les pactes des Nations unies sur les droits de la personne*

Dans le but de préciser les grands principes souscrits dans la *Déclaration universelle des droits de l'homme* des Nations unies, A.G. Rés. 217 A (III), Doc. A/810 N.U., à la p. 71 (1948), deux pactes sur les droits de la personne ont été adoptés à l'unanimité par l'Assemblée générale des Nations unies le 16 décembre 1966: le *Pacte international relatif aux droits économiques, sociaux et culturels* des Nations unies, A.G. Rés. 2200 A (XXI), 21 N.U. GAOR, Supp. (n° 16) 49, Doc. A/6316 N.U. (1966), et le *Pacte international relatif aux droits civils et politiques* des Nations unies, A.G. Rés. 2200 A (XXI), 21 N.U. GAOR, Supp. (n° 16) 52, Doc. A/6316 N.U. (1966). Le Canada a adhéré aux deux pactes le 19 mai 1976 et ceux-ci sont entrés en vigueur le 19 août 1976. Avant d'adhérer, le gouvernement fédéral a obtenu l'agrément des provinces qui se sont toutes engagées à prendre les mesures nécessaires à la mise en œuvre des pactes dans leurs ressorts respectifs. Voir en général: *Pacte international relatif aux droits économiques, sociaux et culturels: Rapport du Canada sur les articles 10 à 12* (1982), aux pp. 1 à 8.

Les deux pactes comportent des dispositions expresses concernant la liberté d'association et les syndicats. L'Article 8 du *Pacte international relatif aux droits économiques, sociaux et culturels* des Nations unies stipule:

Article 8

1. Les États parties au présent Pacte s'engagent à assurer:

a) Le droit qu'a toute personne de former avec d'autres des syndicats et de s'affilier au syndicat de son choix, sous la seule réserve des règles fixées par l'organisation intéressée, en vue de favoriser et de protéger ses intérêts économiques et sociaux. L'exercice de ce droit ne peut faire l'objet que des seules restrictions prévues par la loi et qui constituent des mesures nécessaires,

SUPREME COURT OF CANADA

CITATION: Saskatchewan Federation of Labour *v.* Saskatchewan, 2015 SCC 4

DATE: 20150130
DOCKET: 35423

BETWEEN:

Saskatchewan Federation of Labour (in its own right and on behalf of the unions and workers in the Province of Saskatchewan), Amalgamated Transit Union, Local 588, Canadian Office and Professional Employees' Union, Local 397, Canadian Union of Public Employees, Locals 7 and 4828, Communications, Energy and Paperworkers' Union of Canada and its Locals,

Health Sciences Association of Saskatchewan, International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of U.S., its Territories and Canada, Locals 295, 300 and 669, International Brotherhood of Electrical Workers, Locals 529, 2038 and 2067, Saskatchewan Government and General Employees' Union, Saskatchewan Joint Board Retail, Wholesale and Department Store Union, Saskatchewan Provincial Building & Construction Trades Council, Teamsters, Local 395, United Mine Workers of America, Local 7606, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union

and its Locals and University of Regina Faculty Association

Appellants

and

Her Majesty The Queen in Right of the Province of Saskatchewan

Respondent

- and -

Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of British Columbia, Attorney General of Alberta, Attorney General of Newfoundland and Labrador, Saskatchewan Union of Nurses, SEIU-West, United Nurses of Alberta, Alberta Federation of Labour, Professional Institute of the Public Service of Canada, Canadian Constitution Foundation, Air Canada Pilots' Association, British Columbia Civil Liberties Association, Conseil du patronat du Québec, Canadian Employers Council, Canadian Union of Postal Workers, International Association of Machinists and Aerospace Workers, British Columbia Teachers' Federation, Hospital Employees' Union, Canadian Labour Congress, Public Service Alliance of Canada, Alberta Union of Provincial Employees, Confédération des syndicats nationaux,

Regina Qu'Appelle Regional Health Authority, Cypress Regional Health Authority,
Five Hills Regional Health Authority, Heartland Regional Health Authority, Sunrise Regional Health Authority, Prince Albert Parkland Regional Health Authority, Saskatoon Regional Health Authority, National Union of Public and General Employees,
Canada Post Corporation and Air Canada
Interveners

CORAM: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Karakatsanis and Wagner JJ.

REASONS FOR JUDGMENT: (paras. 1 to 103)	Abella J. (McLachlin C.J. and LeBel, Cromwell and Karakatsanis JJ. concurring)
JOINT REASONS DISSENTING IN PART: (paras. 104 to 176)	Rothstein and Wagner JJ.

Saskatchewan Federation of Labour
(in its own right and on behalf of the unions and
workers in the Province of Saskatchewan),
Amalgamated Transit Union, Local 588,
Canadian Office and Professional Employees' Union, Local 397,
Canadian Union of Public Employees, Locals 7 and 4828,
Communications, Energy and Paperworkers'
Union of Canada and its Locals,
Health Sciences Association of Saskatchewan,
International Alliance of Theatrical Stage Employees,
Moving Picture Technicians, Artists and Allied Crafts of U.S.,
its Territories and Canada, Locals 295, 300 and 669,
International Brotherhood of Electrical Workers,
Locals 529, 2038 and 2067,
Saskatchewan Government and General Employees' Union,
Saskatchewan Joint Board Retail,
Wholesale and Department Store Union,
Saskatchewan Provincial Building & Construction Trades Council,
Teamsters, Local 395,
United Mine Workers of America, Local 7606,
United Steel, Paper and Forestry, Rubber,
Manufacturing, Energy, Allied Industrial
and Service Workers International Union and its Locals and
University of Regina Faculty Association *Appellants*

v.

Her Majesty The Queen in Right of the Province of Saskatchewan *Respondent*

and

Attorney General of Canada,
Attorney General of Ontario,
Attorney General of Quebec,
Attorney General of British Columbia,
Attorney General of Alberta,

Attorney General of Newfoundland and Labrador,
Saskatchewan Union of Nurses,
SEIU-West,
United Nurses of Alberta,
Alberta Federation of Labour,
Professional Institute of the Public Service of Canada,
Canadian Constitution Foundation,
Air Canada Pilots' Association,
British Columbia Civil Liberties Association,
Conseil du patronat du Québec,
Canadian Employers Council,
Canadian Union of Postal Workers,
International Association of Machinists and Aerospace Workers,
British Columbia Teachers' Federation,
Hospital Employees' Union,
Canadian Labour Congress,
Public Service Alliance of Canada,
Alberta Union of Provincial Employees,
Confédération des syndicats nationaux,
Regina Qu'Appelle Regional Health Authority,
Cypress Regional Health Authority,
Five Hills Regional Health Authority,
Heartland Regional Health Authority,
Sunrise Regional Health Authority,
Prince Albert Parkland Regional Health Authority,
Saskatoon Regional Health Authority,
National Union of Public and General Employees,
Canada Post Corporation and Air Canada *Interveners*

Indexed as: Saskatchewan Federation of Labour *v.* Saskatchewan

2015 SCC 4

File No.: 35423.

2014: May 16; 2015: January 30.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Karakatsanis and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Constitutional law — Charter of Rights — Freedom of Association — Right to strike — Public Service Employees — Stare Decisis – Whether right to strike is protected by s. 2(d) of Charter — Whether prohibition on essential services employees participating in strike action amounts to substantial interference with meaningful process of collective bargaining and therefore violates s. 2(d) of Charter — If so, whether such violation is justified under s. 1 of Charter — Canadian Charter of Rights and Freedoms, s. 2(d) — The Public Service Essential Services Act, S.S. 2008, c. P-42.2.

Constitutional law — Charter of Rights — Freedom of association — Provincial legislation changing certification process and provisions dealing with communications by employers with employees — Whether legislation violates s. 2(d) of Charter — Canadian Charter of Rights and Freedoms, s. 2(d) — The Trade Union Amendment Act, 2008, S.S. 2008, c. 26.

In December, 2007, the newly elected Government of Saskatchewan introduced two statutes: *The Public Service Essential Services Act*, S.S. 2008, c. P-42.2 (*PSESA*), and *The Trade Union Amendment Act, 2008*, S.S. 2008, c. 26, which became law in May, 2008. The *PSESA* is Saskatchewan's first statutory

scheme to limit the ability of public sector employees who perform essential services to strike. It prohibits unilaterally designated "essential service employees" from participating in any strike action against their employer. These employees are required to continue the duties of their employment in accordance with the terms and conditions of the last collective bargaining agreement. No meaningful mechanism for resolving bargaining impasses is provided.

The Trade Union Amendment Act, 2008 changes the union certification process by increasing the required level of written support and reducing the period for receiving written support from employees. It also changes the provisions dealing with communications between employers and their employees.

In July 2008, the Saskatchewan Federation of Labour and other unions challenged the constitutionality of both the *PSESA* and *The Trade Union Amendment Act, 2008*. The trial judge concluded that the right to strike was a fundamental freedom protected by s. 2(*d*) of the *Canadian Charter of Rights and Freedoms* and that the prohibition on the right to strike in the *PSESA* substantially interfered with the s. 2(*d*) rights of the affected public sector employees. He also found that the absolute ban on the right to strike in the *PSESA* was neither minimally impairing nor proportionate and therefore was not saved by s. 1 of the *Charter*. The declaration of invalidity was suspended for one year. On the other hand, the trial judge concluded that the changes to the certification process and permissible employer

communications set out in *The Trade Union Amendment Act, 2008* did not breach s. 2(*d*).

The Saskatchewan Court of Appeal unanimously allowed the Government of Saskatchewan's appeal with respect to the constitutionality of the *PSESA*. The appeal against the finding that *The Trade Union Amendment Act, 2008* did not violate s. 2(*d*) of the *Charter* was dismissed.

Held (Rothstein and Wagner JJ. dissenting in part): The appeal with respect to the *PSESA* should be allowed. The prohibition against strikes in the *PSESA* substantially interferes with a meaningful process of collective bargaining and therefore violates s. 2(*d*) of the *Charter*. The infringement is not justified under s. 1. The declaration of invalidity is suspended for one year. The appeal with respect to *The Trade Union Amendment Act, 2008* is dismissed.

Per McLachlin C.J. and LeBel, **Abella**, Cromwell and Karakatsanis JJ.: The right to strike is an essential part of a meaningful collective bargaining process in our system of labour relations. The right to strike is not merely derivative of collective bargaining, it is an indispensable component of that right. Where good faith negotiations break down, the ability to engage in the collective withdrawal of services is a necessary component of the process through which workers can continue to participate meaningfully in the pursuit of their collective workplace goals. This crucial role in collective bargaining is why the right to strike is constitutionally protected by s. 2(*d*).

In *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391, this Court recognized that the *Charter* values of "[h]uman dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy" supported protecting the right to a meaningful process of collective bargaining within the scope of s. 2(*d*). The right to strike is essential to realizing these values through a collective bargaining process because it permits workers to withdraw their labour in concert when collective bargaining reaches an impasse. Through a strike, workers come together to participate directly in the process of determining their wages, working conditions and the rules that will govern their working lives. The ability to strike thereby allows workers, through collective action, to refuse to work under imposed terms and conditions. This collective action at the moment of impasse is an affirmation of the dignity and autonomy of employees in their working lives.

The right to strike also promotes equality in the bargaining process. This Court has long recognized the deep inequalities that structure the relationship between employers and employees, and the vulnerability of employees in this context. While strike activity itself does not guarantee that a labour dispute will be resolved in any particular manner, or that it will be resolved at all, it is the possibility of a strike which enables workers to negotiate their employment terms on a more equal footing.

agreement. The ability to engage in the collective withdrawal of services in the process of the negotiation of a collective agreement is, and has historically been, the irreducible minimum of the freedom to associate in Canadian labour relations.

To determine whether there has been an infringement of s. 2(*d*) of the *Charter*, the test is whether the legislative interference with the right to strike in a particular case amounts to a substantial interference with a meaningful process of collective bargaining. The prohibition in the *PSESA* on designated employees participating in strike action for the purpose of negotiating the terms and conditions of their employment meets this threshold and therefore amounts to a violation of s. 2(*d*) of the *Charter*.

The breach of s. 2(*d*) of the *Charter* is not justified under s. 1. The maintenance of essential public services is self-evidently a pressing and substantial objective, but the determinative issue in this case is whether the means chosen by the government are minimally impairing, that is, carefully tailored so that rights are impaired no more than necessary.

The fact that a service is provided exclusively through the public sector does not inevitably lead to the conclusion that it is properly considered "essential". Under the *PSESA*, a public employer has the unilateral authority to dictate whether and how essential services will be maintained, including the authority to determine the classifications of employees who must continue to work during the work stoppage, the number and names of employees within each classification, and, for

public employers other than the Government of Saskatchewan, the essential services that are to be maintained. Only the number of employees required to work is subject to review by the Saskatchewan Labour Relations Board. And even where an employee has been prohibited from participating in strike activity, the *PSESA* does not tailor his or her responsibilities to the performance of essential services alone. The provisions of the *PSESA* therefore go beyond what is reasonably required to ensure the uninterrupted delivery of essential services during a strike.

Nor is there any access to a meaningful alternative mechanism for resolving bargaining impasses, such as arbitration. Where strike action is limited in a way that substantially interferes with a meaningful process of collective bargaining, it must be replaced by one of the meaningful dispute resolution mechanisms commonly used in labour relations. Those public sector employees who provide essential services have unique functions which may argue for a less disruptive mechanism when collective bargaining reaches an impasse, but they do not argue for no mechanism at all.

The unilateral authority of public employers to determine whether and how essential services are to be maintained during a work stoppage with no adequate review mechanism, and the absence of a meaningful dispute resolution mechanism to resolve bargaining impasses, justify the conclusion that the *PSESA* is not minimally impairing. It is therefore unconstitutional.

The Trade Union Amendment Act, 2008, on the other hand, does not violate s. 2(*d*). The changes it introduces to the process by which unions may obtain or lose the status of a bargaining representative, as well as the changes to the rules governing employer communication to employees, do not substantially interfere with freedom of association.

Per **Rothstein** and **Wagner** JJ. (dissenting in part): This Court should not intrude into the policy development role of elected legislators by constitutionalizing the right to strike under the freedom of association guarantee in s. 2(*d*) of the *Charter*. The statutory right to strike, along with other statutory protections for workers, reflects a complex balance struck by legislatures between the interests of employers, employees and the public. Providing for a constitutional right to strike not only upsets this delicate balance, but also restricts legislatures by denying them the flexibility needed to ensure the balance of interests can be maintained.

Democratically elected legislatures are responsible for determining the appropriate balance between competing economic and social interests in the area of labour relations. This Court has long recognized that it is the role of legislators and not judges to balance competing tensions in making policy decisions, particularly in the area of socio-economic policy. The legislative branch requires flexibility to deal with changing circumstances and social values. Canadian labour relations is a complex web of intersecting interests, rights and obligations, and has far-reaching implications for Canadian society. It is not the role of this Court to transform all

policy choices it deems worthy into constitutional imperatives. The exercise of judicial restraint is essential in ensuring that courts do not upset the balance by usurping the responsibilities of the legislative and executive branches.

Constitutionalizing a right to strike restricts governments' flexibility, impedes their ability to balance the interests of workers with the broader public interest, and interferes with the proper role and responsibility of governments. Constitutionalizing a right to strike introduces great uncertainty into labour relations: it will make all statutory limits on the right to strike presumptively unconstitutional. By constitutionalizing a broad conception of the right to strike, the majority binds the governments's hands and limits its ability to respond to changing needs and circumstances in the dynamic field of labour relations.

Constitutionalizing a right to strike enshrines a political understanding of the concept of "workplace justice" that favours the interests of employees over those of employers and even over those of the public. While employees are granted constitutional rights, constitutional obligations are imposed on employers. Employers and the public are equally entitled to justice: true workplace justice looks at the interests of all implicated parties. In the public sector, strikes are a political tool. The public expects that public services, and especially essential services, will be delivered. Thus unions attempt to pressure the government to agree to certain demands in order that these services be reinstated. Public sector labour disputes are

unique in that the government as employer must take into account that any additional expenditures incurred to meet employee demands will come from public funds.

It is incorrect to say that without the right to strike a constitutionalized right to bargain collectively is meaningless. The threat of work stoppage is not what motivates good faith bargaining. It is the statutory duty, and after *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, the constitutional duty, not the possibility of job action, that compels employers to bargain in good faith. The statutory right to strike allows both employers and employees to exercise economic and political power. Now by constitutionalizing only the ability of employees to exert such power, the majority disturbs the delicate balance of labour relations in Canada and impedes the achievement of true workplace justice.

The conclusion that the right to strike is an indispensable component of collective bargaining does not accord with recent jurisprudence. There is nothing in the concept of collective bargaining as it was defined by this Court in *Health Services, 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, that would imply that employees have a constitutional right to strike and that employers have a constitutional obligation to preserve the jobs of those employees. The threshold for overturning prior judgments is high. While the s. 2(d) jurisprudence has developed since the Labour Trilogy, neither this development, nor any change in

the circumstances of Canadian labour relations justifies a departure from precedent. If anything, developments in the law support a finding that the right to freedom of association does not require constitutionalizing the right to strike. This is because recent s. 2(*d*) jurisprudence has already established a right to meaningful, good faith collective bargaining.

International bodies disagree as to whether the right to strike is protected under international labour and human rights instruments. The current state of international law on the right to strike is unclear and provides no guidance in determining whether this right is an essential element of freedom of association.

A right to strike is not required to ensure the constitutional guarantee of freedom of association. Therefore, the *PSESA*, which restricts the ability of public sector workers who provide essential services to strike, does not violate the right to meaningful collective bargaining protected under s. 2(*d*) of the *Charter*. The *PSESA*'s controlled strike regime does not render effectively impossible, nor substantially interfere with, the ability of associations representing affected public sector employees to submit representations to employers and to have them considered and discussed in good faith. The *PSESA* facilitates consultation between employers and unions regarding the designation of essential services and the evidence in this case demonstrates that good faith collective bargaining took place. A violation of s. 2(*d*) of the *Charter* cannot be founded simply on allegations that the legislation does not provide an adequate dispute resolution process; s. 2(*d*) does not entail such a right.

Moreover, the goal of strikes is not to ensure meaningful collective bargaining, but instead to exert political pressure on employers. Finally, the statutory balance struck by the Government of Saskatchewan is eminently reasonable. Canadian federal and provincial governments have made a constitutional commitment "to provide essential public services of reasonable quality to all Canadians" (*Constitution Act, 1982*, s. 36(1)(*c*)). As a result, the Government of Saskatchewan cannot subject itself to arbitral awards that could make it unaffordable to deliver on its undertaking. It has devised a particular legislative framework in order to safeguard the continued delivery of essential services to the community during labour disputes. This Court should defer to the government's policy choices in balancing the interests of employers, employees, and the public.

The Trade Union Amendment Act, 2008 does not infringe the right to freedom of association.

Cases Cited

By Abella J.

Overruled: *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; **referred to:** *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3; *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1; *Canada*

In 1935, the *Wagner Act* was adopted in the United States, introducing a model of labour relations that came to inspire legislative schemes across Canada. This model was adopted in Canada because the federal and provincial governments recognized the fundamental need for workers to participate in the regulation of their work environment. One of the goals of the Wagner model was to reduce the frequency of strikes by ensuring a commitment to meaningful collective bargaining. The right to strike, however, is not a creature just of the Wagner model. Most labour relations models include it because the ability to collectively withdraw services for the purpose of negotiating the terms and conditions of employment — in other words, to strike — is an essential component of the process through which workers pursue collective workplace goals.

Canada's international human rights obligations also mandate protecting the right to strike as part of a meaningful process of collective bargaining. Canada is a party to international instruments which explicitly protect the right to strike. Besides these explicit commitments, other sources confirm the protection of a right to strike recognized in international law. And strikes are protected globally, existing in many of the countries with labour laws outside the *Wagner Act* model.

This historical, international, and jurisprudential landscape suggests compellingly that a meaningful process of collective bargaining requires the ability of employees to participate in the collective withdrawal of services for the purpose of pursuing the terms and conditions of their employment through a collective

been, the "irreducible minimum" of the freedom to associate in Canadian labour relations (Paul Weiler, *Reconcilable Differences: New Directions in Canadian Labour Law* (1980), at p. 69).

[62] Canada's international human rights obligations also mandate protecting the right to strike as part of a meaningful process of collective bargaining. These obligations led Dickson C.J. to observe that

> [T]here is a clear consensus amongst the [International Labour Organization] adjudicative bodies that [*Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize* (68 U.N.T.S. 17 (1948))] goes beyond merely protecting the formation of labour unions and provides protection of their essential activities — that is of collective bargaining and the freedom to strike. [*Alberta Reference*, at p. 359]

[63] At the time of the *Alberta Reference*, Dickson C.J.'s reliance on Canada's commitments under international law did not attract sufficient collegial support to lift his views out of their dissenting status, but his approach has more recently proven to be a magnetic guide.

[64] LeBel J. confirmed in *R. v. Hape*, [2007] 2 S.C.R. 292, that in interpreting the *Charter*, the Court "has sought to ensure consistency between its interpretation of the *Charter*, on the one hand, and Canada's international obligations and the relevant principles of international law, on the other": para. 55. And this Court reaffirmed in *Divito v. Canada (Public Safety and Emergency Preparedness)*,

[2013] 3 S.C.R. 157, at para. 23, "the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified".

[65] Given this presumption, Canada's international obligations clearly argue for the recognition of a right to strike within s. 2(*d*). Canada is a party to two instruments which explicitly protect the right to strike. Article 8(1) of the *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3 to which Canada acceded in May 1976, provides that the "States Parties to the present Covenant undertake to ensure. . . (*d*) *the right to strike, provided that it is exercised in conformity with the laws of the particular country*". (See also affidavit of Prof. Patrick Macklem (Expert Report), sworn December 21, 2010). In Dickson C.J.'s view, the qualification that the right had to be exercised in conformity with domestic law appeared to allow for the regulation of the right, but not its legislative abrogation (*Alberta Reference*, at p. 351, citing *Re Alberta Union of Provincial Employees and the Crown in Right of Alberta* (1980), 120 D.L.R. (3d) 590 (Alta. Q.B.), at p. 597; see also Hepple, at p. 138).

[66] In addition, in 1990, just over two years after the *Alberta Reference* was decided, Canada signed and ratified the *Charter of the Organization of American States*, Can. T.S. 1990 No. 23. Article 45(c) states:

> Employers and workers, both rural and urban, have the right to associate themselves freely for the defense and promotion of their interests, *including the right to collective bargaining and the workers' right to*

England and Wales Court of Appeal (Civil Division) Decisions

Neutral Citation Number: [2005] EWCA Civ 1003
Case No: C1/2004/2086

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT (ADMINISTRATIVE COURT)
THE HONOURABLE MR JUSTICE MUNBY
[2004] EWHC 1879 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL
28 July 2005

B e f o r e :

LORD PHILLIPS OF WORTH MATRAVERS, MR
LORD JUSTICE WALLER
and
LORD JUSTICE WALL

Between:

The Queen on the Application of OLIVER LESLIE BURKE **Respondent**

- and -

THE GENERAL MEDICAL COUNCIL

-and-

THE DISABILITY RIGHTS COMMISSION
THE OFFICIAL SOLICITOR TO THE SUPREME

COURT
CATHOLIC BISHOPS' CONFERENCE OF ENGLAND AND WALES
THE SECRETARY OF STATE FOR HEALTH
PATIENT CONCERN
MEDICAL ETHICS ALLIANCE
ALERT
BRITISH SECTION FOR THE WORLD FEDFRATION OF DOCTORS WHO RESPECT HUMAN LIFE — **Appellant**
INTENSIVE CARE SOCIETY — **Interveners**

(Transcript of the Handed Down Judgment of
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Eleanor Sharpston QC & Angela Patrick for the Intervener: the Catholic Bishops' Conference of England and Wales
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HTML VERSION OF JUDGMENT

Lord Phillips MR

This is the judgment of the court to which all members have contributed.

Introduction

1. With permission granted by the judge, the General Medical Council ('GMC') appeals against six declarations made by Munby J on 30 July 2004 in proceedings for judicial review instituted against it by Oliver Leslie Burke. Three of those declarations relate specifically to Mr Burke. The remaining three declare unlawful a number of paragraphs of a document of guidance published by the GMC in August 2002 entitled *Withholding and Withdrawing Life-prolonging Treatment: Good Practice and Decision Making ('the Guidance').* We have set out the relevant passages from the Guidance in an appendix to this judgment. The appeal raises, as its central issue, the circumstances in which artificial nutrition and hydration ('ANH') can be withdrawn from a patient.

Mr Burke's predicament

2. Mr Burke is 45 years of age. He suffers from a congenital degenerative brain condition known as spino-cerebellar ataxia, which currently confines him to a wheelchair. The judge described the course that his illness is likely to follow in these terms:

> "3. This is a progressively degenerative condition that follows a similar course to multiple sclerosis. He was diagnosed in 1982. He suffers very serious physical disabilities but has retained his mental competence and capacity. He has gradually lost the use of his legs and is now virtually wholly dependent on a wheelchair for mobility. He has uncoordinated movements and his condition also affects his speech, but his mental ability is not impaired. "
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> 4. By reason of his condition there will come a time when the claimant will be entirely dependent on others for his care and indeed for his very survival. In particular he will lose the ability to swallow and will require ANH by tube to survive.
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> 5. The medical evidence indicates that the claimant is likely to retain full cognitive faculties even during the end stage of this disease and that he will retain, almost until the end, insight and awareness of the pain, discomfort and extreme distress that would result from malnutrition and dehydration. (If food and water were to be withheld he would die of dehydration after some two to three weeks.) He is also likely to retain the capacity to experience the fear of choking which could result from attempts at oral feeding. The medical evidence also indicates that the claimant is unlikely to lose his capacity to make decisions for himself and to communicate his wishes until his death is imminent. An eminent consultant in neurology and rehabilitation medicine describes what he calls "the likely scenario during the final days of Mr Burke's life" as follows:
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> > "he will by then be bed bound and communicating via a computerised device. He would then become unwell with either a chest or urinary tract infection and within a few days would become increasingly obtunded and lose the ability to use his communication aid. If medical treatment for the underlying infection is unsuccessful he would become progressively weaker and semi-comatose and then succumb."

3. The judge elaborated on this picture a little later in his judgment

> "48. In the present case I am concerned with a patient who at present is manifestly competent and who, however distressing his condition and his symptoms, is likely to remain competent, with his senses and his awareness substantially unimpaired, long

> into the terminal stages of his illness, indeed in all probability until he is fairly close to death. The evidence makes clear that until his final days the claimant, although by then being kept alive by ANH, will retain both his capacity to make decisions for himself and an ability to communicate his wishes, albeit probably via a computerised device. During his final days he will lose the ability to communicate, although not at first an awareness and appreciation of his surroundings and predicament. He will then lapse into a semi-comatose condition before dying."

4. No one contemplating Mr Burke's predicament could fail to feel for him the greatest sympathy and, in our case, that sympathy was augmented by awareness of Mr Burke's dignified presence in court during the hearing of this appeal.

Mr Burke's concern

5. The judge described Mr Burke's concern as follows:

> "The claimant wants to be fed and provided with appropriate hydration until he dies of natural causes. He does not want ANH to be withdrawn. He does not want to die of thirst. He does not want a decision to be taken by doctors that his life is no longer worth living."

This reflected a passage in the annexe to Mr Burke's claim form, which stated:

> "He is concerned that doctors will determine for him whether or not he ought to continue to live and whether or not a decision should be taken to withhold or withdraw life-prolonging treatment in the form of artificial nutrition and hydration."

6. In a witness statement Mr Burke described how, at the Lancaster Disablement Information and Support Centre ('DISC'), he became aware of the Guidance. He went on to say:

> "6. I understand that the General Medical Council is a charity whose purpose is the protection by promotion of the health and safety of the community. The role of the GMC is to protect patients. I believe that the said guidance that has been issued fails to offer such protection. I am concerned that too much power is placed in the hands of the medical profession. Paragraph 32 of the said guidance materially provides:
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> > "If you are the consultant or general practitioner in charge of a patient's care, it is your responsibility to make the decision about whether to withhold or withdraw a life-prolonging treatment, taking account of the views of the patient or those close to the patient as set out in paragraphs 41-48 and 53-57."
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> 7. I wish to be involved in deciding the treatment I receive as much as possible. I am aware that as my condition deteriorates it is highly likely that I will eventually lose capacity. The guidance gives no advice on how the question of incapacity is to be determined.
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> 8. I am further concerned that even if my death is not imminent, a doctor may be able to withdraw artificial nutrition and hydration. Paragraph 81 materially provides:
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> > "Where death is not imminent, it usually will be appropriate to provide artificial nutrition or hydration. However, circumstances may arise where

> you judge that a patient's condition is so severe, the prognosis so poor, that providing artificial nutrition or hydration may cause suffering or to be too burdensome in relation to the possible benefits."
>
> 9. I anticipate that the progression of my condition will result in me having more suffering than I do at the present time. I am very worried that artificial nutrition and hydration could be withdrawn.
>
> 10. I am also concerned that there appears to be no legal forum within which my rights can ultimately be protected. There is no obligation upon a doctor to seek the advice of a Court as to whether and when my life should be ended."

7. Neither the judge's summary of Mr Burke's concern, nor his own statement, sets out with clarity the precise nature of his concern. In order to appreciate this it is necessary to identify with some nicety the different circumstances in which, in theory at least, ANH might be withdrawn from a patient.

8. The body requires food and water to live. The evidence was that, if deprived of food and water, a patient will die of the lack of these in approximately 14 days. A patient who cannot or will not swallow food and water may be kept alive by ANH. But the administering of ANH will not keep a patient alive for ever. Ultimately the patient will die, even if ANH continues to be administered. Where a patient is in the final stages of a terminal disease the administration of ANH will cease to prolong life, and in some cases may even hasten death.

9. It is important to distinguish between the withdrawal of ANH in circumstances where this will shorten life and the withdrawal of ANH where it will not have this effect because it is no longer sustaining life. This distinction is, in practice, not always easy to draw. For instance, the evidence showed that a patient may, as part of the process of dying, cease to eat or drink. In such circumstances the administration of ANH may delay, to some extent, the dying process.

10. It is also important to distinguish between (1) withdrawal of ANH from a patient who is competent, (2) withdrawal of ANH from a patient who is sentient but not competent and (3) withdrawal of ANH from a patient who is not sentient because, for instance, he is in a permanent vegetative state (PVS) or has lapsed into a coma at the end of a terminal illness. A patient is competent if he has the capacity to take logical decisions and the ability to communicate those decisions.

11. The evidence was that Mr Burke will remain competent until the final stage of his disease. Thus, so long as ANH was prolonging his life, he will be able, albeit with the aid of a computerised device, to communicate his wish, if such it remains, that those caring for him should continue to administer ANH. He will lose competence in the final stages of his disease, first losing the ability to communicate while remaining sentient, and shortly thereafter lapsing into a coma. During these final stages ANH will cease to be capable of prolonging his life.

12. If Mr Burke fears that ANH will be withdrawn before the final stages of his disease, it is implicit that he fears that those caring for him may decide that his life is not worth living and withdraw ANH to bring it to an end, notwithstanding that he is able to communicate to them that he wishes them to continue to keep him alive. Paragraphs 7, 8 and 9 of his statement suggest that this is his primary concern. He wishes "to be involved in deciding the treatment I receive as much as possible".

13. We must state at once that, if this is Mr Burke's fear, there is no reason for him to have it. There are no grounds for thinking that those caring for a patient would be entitled to or would take a decision to withdraw ANH in such circumstances. Nor, as we shall show, did the Guidance suggest to the contrary. Had Mr Burke been well advised he would and could have sought reassurance from the GMC as to the purport of their guidelines and from the doctors who were treating him as to the circumstances, if any, in which ANH might be discontinued.

14. Mr Burke did not take that course. The manner and circumstances in which these proceedings were commenced suggest that he was persuaded to advance a claim for judicial review by persons who wished to challenge aspects of the GMC Guidance which had no relevance to a man in Mr Burke's position. Thus his Claim Form sought the following declarations:

> "(1) A declaration that paragraphs 32, 38 and 81 of the Guidance issued by the General Medical Council entitled "Withholding and Withdrawing Life-Prolonging Treatment: Good Practice in Decision-Making" are unlawful as the advice contained in those paragraphs is incompatible with Articles 2, 3, 6, 8 and 14 of the European Convention on Human Rights.
>
> (2) A declaration that a patient is entitled to have the question of whether or not care in the form of artificial nutrition and hydration withdrawn resolved by a court or tribunal in accordance with Article 6(1) ECHR.
>
> (3) A declaration that, where death is not imminent, the withholding or withdrawal of artificial nutrition and hydration, leading to death by starvation or thirst, not through natural causes would necessarily be a breach of the Claimant's rights under Article 2, 3 and 8 of ECtHR and would be unlawful under domestic law.
>
> (4) A declaration that where death is imminent, the withholding or withdrawal of artificial nutrition or hydration with the result that he would die of starvation or thirst, not of natural causes, would necessarily:
>
> > (1) be a breach of his rights under Article 2, 3 and 8 and would be unlawful under domestic law or
> >
> > (2) alternatively would be a breach of his rights under Article 2, 3 and 8 and unlawful under domestic law unless there were some compelling interest that meant that it could not be in his interests for that treatment to be provided and that there was a compelling interest that he should be left to dies of starvation and thirst rather than natural causes."

15. In the course of the hearing before Munby J, Mr Gordon QC revised the relief that he sought on behalf of Mr Burke to the following declarations:

> "(1) the withholding or withdrawal of artificial nutrition and hydration, leading to death by starvation or thirst would be a breach of Mr Burke's rights under Articles 2, 3, and 8 and would be unlawful under domestic law;
>
> (2) where a competent patient requests or where an incompetent patient has, prior to becoming incompetent, made it clear that they would wish to receive artificial nutrition and hydration, the withholding or withdrawal of artificial nutrition and hydration, leading to death by starvation or thirst would be a breach of their rights under Articles 2, 3 or 8 and would be unlawful under domestic law;

(3) the refusal of artificial nutrition and hydration to an incompetent patient would be a breach of Article 2 unless providing such artificial nutrition and hydration would amount to degrading treatment contrary to Article 3;

(4) the Guidance … is unlawful in so far as it fails it safeguard the rights of patients under Articles 2, 3 and 8;

(5) paragraph 81 of Guidance … is unlawful as it is incompatible with Article 2, 3 and 8 and domestic law;

(6) withdrawal of artificial nutrition and hydration from a non-PVS patient without first seeking a court ruling in circumstances where artificial nutrition and hydration would not be withdrawn from a PVS patient is unlawful discrimination contrary to Article 14;

(7) paragraph 81 of Guidance … is unlawful as it is incompatible with Article 14;

(8) where there is disagreement between a competent patient, or relatives or carers of an incompetent patient, as to whether artificial nutrition should be withdrawn, the disagreement should be resolved by application to a court or, alternatively, that those proposing to withdraw artificial nutrition and hydration should inform the patient or relatives and carers and afford them sufficient time before withdrawal of artificial nutrition and hydration to enable them to take steps to secure their rights under Articles 2, 3 and 8."

16. Despite the revision the relief claimed still extended far beyond that necessary to allay any apprehensions that Mr Burke might have in relation to his personal predicament.

17. The reaction to Mr Burke's claim of the Official Solicitor, who intervened, is instructive. His skeleton argument began by observing that Mr Burke's anxieties related to "the withdrawal of ANH from adult patients who are unable to make their own decisions". He then went on to state:

"4(a) It is the wish of the Official Solicitor to assist the Court as much as possible in the resolution of this case. To this end he will offer submissions in relation to various issues potentially raised by it. However, he will offer only limited comments on the particular merits of the Claimant's case for a number of reasons:

(i) The Claimant is clearly mentally competent at the moment, is not receiving or in need of ANH. Therefore, as matters stand, the question does not arise as to whether a decision to withdraw ANH should be made with or without his consent;

(ii) The medical evidence adduced by Mr Burke does not suggest that he will lose the mental capacity to consent to or refuse treatment.

(iii) There is no evidence that any medical practitioner likely to treat the Claimant and to be in a position to administer, withhold or withdraw ANH intends to apply the GMC guidance in the manner feared by the Claimant.

(iv) On the evidence produced so far, the Official Solicitor is of the view that, were he to be called upon to express a view now on the matter, he

> would not consider it in the Claimant's best interests for ANH to be withdrawn if he continued to express a wish that it be continued. However, if the treatment required by the Claimant becomes a matter of dispute or concern at a time when he is mentally incapable of taking decisions for himself, the Official Solicitor may well become involved on behalf of the Claimant in declaratory or other proceedings. At such a time the Official Solicitor would be in the position to undertake the necessary inquiries with regard to the Claimant's best interests and his previously expressed wishes to an extent that is neither practicable nor desirable at this stage. The issues would have to be judged on the circumstances at the time.
>
> (v) In these circumstances there is some danger to the Claimant in seeking so to define the law in his case as to prevent or inhibit what might be thought to be highly desirable treatment or changes in treatment at a later stage."

18. We entirely agree with this analysis. However, the Official Solicitor (unfortunately) continued in paragraph 4(b) to say:

> "For these reasons the Official Solicitor, unless requested to do otherwise by the Court, intends to restrict himself to the consideration of the wider issues raised by the Claimant's application, which it is suggested, are of general public importance."

19. Mr Francis QC, instructed by the Official Solicitor, submitted to us that Mr Burke had performed a public service by enabling these wider issues to be debated. We do not agree. The judge himself observed that it was not the task of a judge when sitting judicially – even in the Administrative Court – to set out to write a text book or practice manual. Yet the judge appears to have done just that. There is perhaps no one who, as practitioner and judge, has had greater experience of this area of the law, and it is perhaps this experience that has led Munby J to produce a judgment 225 paragraphs long. Many of those paragraphs are extremely lengthy. In the specialist law reports it occupies the best part of 100 pages. It ranges widely over what the judge described at the start of his judgment as "fundamentally important questions of medical law and ethics".

20. Munby J's judgment has, understandably, been seen as extending well beyond the approach to patients in the position of Mr Burke, or the use of ANH. Indeed it has been understood as bearing on the right to treatment generally, and not merely life prolonging treatment. It has led to the intervention in the proceedings before us of the Secretary of State for Health, Patient Concern, Medical Ethics Alliance, Alert, the British Section of the World Federation of Doctors Who Respect Human Life, the Intensive Care Society and the Catholic Bishops Conference of England and Wales.

21. There are great dangers in a court grappling with issues such as those that Munby J has addressed when these are divorced from a factual context that requires their determination. The court should not be used as a general advice centre. The danger is that the court will enunciate propositions of principle without full appreciation of the implications that these will have in practice, throwing into confusion those who feel obliged to attempt to apply those principles in practice. This danger is particularly acute where the issues raised involve ethical questions that any court should be reluctant to address, unless driven to do so by the need to resolve a practical problem that requires the court's intervention. We would commend, in relation to the Guidance, the wise advice given by Lord Bridge of Harwich in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC

112 at 193-4:

> "… the occasions of a departmental non-statutory publication raising … a clearly defined issue of law, unclouded by political, social or moral overtones, will be rare. In cases where any proposition of law implicit in a departmental advisory document is interwoven with questions of social and ethical controversy, the court should, in my opinion, exercise its jurisdiction with the utmost restraint, confine itself to deciding whether the proposition of law is erroneous and avoid either expressing ex cathedra opinions in areas of social and ethical controversy in which it has no claim to speak with authority or proffering answers to hypothetical questions of law which do not strictly arise for decision."

The judge himself cited this passage with approval. Unfortunately he did not follow it.

22. The judge made the following declarations:

> "(1) Any decision by the claimant while competent, or contained in a valid advance directive, that he requires to be provided with artificial nutrition and hydration is determinative that such provision is in the best interests of the claimant at least in circumstances where death is not imminent and the claimant is not comatose;
>
> (2) Where the claimant has decided, or made a valid advance directive, that he wishes to be provided with artificial nutrition and hydration, any refusal by a hospital who has assumed the care of the claimant to arrange for the provision of such artificial nutrition and hydration at any time until the claimant's death is imminent and the claimant is comatose would be a breach of the claimant's rights under Article 3 and Article 8 of the European Convention on Human Rights;
>
> (3) Where the claimant has decided, or made a valid advance directive, that he wishes to be provided with artificial nutrition and hydration and where a doctor has assumed the care of the claimant, the doctor must either continue to arrange for the provision of artificial nutrition and hydration or arrange for the care of the claimant to be transferred to a doctor who will make such arrangements, in the period until the claimant's death is imminent and the claimant is comatose;
>
> (4) Paragraph 81 of the Guidance issued by the General Medical Council entitled "Withholding and Withdrawing Life-prolonging Treatment: Good Practice in Decision-making" is unlawful in that (a) it fails to recognise that the decision of a competent patient that artificial nutrition and hydration should be provided is determinative of the best interests of the patient (b) it fails to acknowledge the heavy presumption in favour of life-prolonging treatment and that such treatment will be in the best interests of a patient unless the life of the patient, viewed from that patient's perspective, would be intolerable and (c) provides that it is sufficient to withdraw artificial nutrition and hydration from a patient who is not dying because it may cause suffering or be too burdensome in relation to the possible benefits;
>
> (5) Paragraphs 13, 16, 32 and 42 of the Guidance issued by the General Medical Council entitled "Withholding and Withdrawing Life-prolonging Treatment: Good Practice in Decision-making" are unlawful as they fail to recognise that the decision of a competent patient on whether artificial nutrition and hydration is determinative in principle of whether or not such treatment is in the patient's best interest;

(6) Paragraphs 38 and 82 of the Guidance issued by the General Medical Council entitled " Withholding and Withdrawing Life-prolonging Treatment: Good Practice in Decision-making" are unlawful as they fail to reflect the legal requirement that in certain circumstances artificial nutrition and hydration may not be withdrawn without prior judicial authorisation but provide that it is sufficient to consult a clinician with relevant experience or to take legal advice.

The first three declarations were extraordinary in nature in that they did not purport to resolve any issues between the parties, but appeared to be intended to lay down propositions of law binding on the world.

The declarations as a whole go far beyond the current concerns of Mr Burke in that (1) they deal with the position of an incompetent patient, when, on the evidence, Mr Burke is likely to remain competent until the final stages of his illness and (2) they address the effect of an advance directive, sometimes referred to as 'a living will', when Mr Burke has made no such directive. We do not overlook the fact that there is likely to be, some years hence, a short period before Mr Burke lapses into his final coma when he will be sentient but unable to communicate his wishes. The implications of withdrawal of ANH at that stage may depend critically on the effect, if any, that this will have on easing his final conscious moments. The appropriate approach to Mr Burke's treatment at that final stage may depend upon any informed wishes that he may have expressed after explanation of these implications and of the options for therapeutic care that will be available. We do not understand Mr Burke's current concerns to relate to this stage and, if they do, we think that they are premature.

Our approach to this appeal

23. We have come to the clear view that this appeal must be allowed, and the declarations made by the judge set aside. It is our view that Mr. Burke's fears are addressed by the law as it currently stands and that declaratory relief, particularly in so far as it declares parts of the Guidance unlawful, is both unnecessary for Mr. Burke's protection and inappropriate as far as the Guidance itself is concerned.

24. This approach does, however, leave us with a difficulty in relation to Munby J's judgment. The judge's erudition and industry are self-evidently on display throughout its 225 paragraphs. A great deal of what is contained in the body of the judgment is uncontroversial. Having taken the view, however, that much of the judge's industry is misplaced, it would plainly be inappropriate for this court to respond with a judgment of equal length, or one which examined in detail issues which we deem irrelevant to the actual issues raised by the case. On the other hand, it is equally inappropriate to leave the judgment to be seized on and dissected by lawyers seeking supportive material for future cases. Although we have said that a great deal in the body of the judgment is uncontroversial, we counsel strongly against selective use of Munby J's judgment in future cases.

25. We propose first to address those passages of Munby J's judgment which deal with Mr Burke's concern that ANH may be withdrawn, despite the wishes that he expresses while he remains competent. We will then respond shortly to those parts of the judgment, and they are the major parts, which do not relate to this concern.

Concern at the possible withdrawal of ANH from Mr Burke while he is competent and expresses the wish to continue to receive ANH

26. The following parts of the declarations made by Munby J relate to this concern:

i) Mr Burke's decision that he requires ANH is determinative that this is in his best interests (Declaration 1).

ii) Withdrawal of ANH contrary to Mr Burke's expressed wish would breach his rights under Article 3 and 8 of the European Convention on Human Rights ('the Convention') (Declaration 2).

iii) Where Mr Burke expresses that he wishes to receive ANH a doctor who has assumed his care must either provide it or arrange for someone else to provide it (Declaration 3)

iv) Paragraphs 13, 16, 32 and 42 and 81 of the Guidance are unlawful in that they fail to recognise that a decision of a patient that he wishes to receive ANH is in his best interests (Declarations 4 and 5)

We will deal with each of these in turn.

Best interests and autonomy

27. A theme running through Munby J's judgment is that, provided that there are no resource implications, doctors who have assumed the care of a patient must administer such treatment as is in the patient's best interests and that, where a patient has expressed an informed wish for a particular treatment, receipt of such treatment will be in the patient's best interests. This theme thus equates best interests with the wishes of the competent patient. Paragraphs 88 to 115 of his judgment are devoted to developing this theme in terms which range over the position both where the patient is competent and where he is incompetent.

28. In this section of his judgment, Munby J draws a distinction between the *Bolam* [1997] 1 WLR 582 test, which on his analysis focuses simply on treatment that is in the interests of the patient from a clinical viewpoint, and the test of best interests which "involves a welfare appraisal in the widest sense, taking into account where appropriate, a wide range of ethical, social, moral, emotional and welfare considerations".

29. We do not find this lengthy passage of intense jurisprudential analysis, which owes much to cases involving compulsory sterilisation of incompetent patients, helpful in approaching the situation of a competent patient who needs ANH to remain alive and who communicates his wish to receive it. The concept of 'best interests' depends very much on the context in which it is used, as indeed does the *Bolam* test, but neither is of much relevance when considering the situation with which we are concerned. In *Airedale NHS Trust v Bland* [1993] AC 789 members of the House of Lords observed that the wishes of a patient might conflict with his best interests (see Lord Goff of Chievely at p. 864 C to E and Lord Mustill at p. 891H). It seems to us that it is best to confine the use of the phrase 'best interests' to an objective test, which is of most use when considering the duty owed to a patient who is not competent and is easiest to apply when confined to a situation where the relevant interests are medical.

30. Using 'best interests' in this way it is apparent that treating a patient in the manner that doctors consider to be in his best interests may be at odds with his wishes. To take an extreme example, a patient who is in desperate clinical need of a blood transfusion and who has no wish to die may, for religious reasons, not wish to receive one although the consequence is almost certain death. Where a competent patient makes it clear that he does not wish to receive treatment which is, objectively, in his medical best interests, it is unlawful for doctors to administer that treatment. Personal

autonomy or the right of self determination prevails.

31. The proposition that the patient has a paramount right to refuse treatment is amply demonstrated by the authorities cited by Munby J in paragraphs 54 to 56 of his judgment under the heading '*Autonomy and self-determination'*. The corollary does not, however, follow, at least as a general proposition. Autonomy and the right of self-determination do not entitle the patient to insist on receiving a particular medical treatment regardless of the nature of the treatment. Insofar as a doctor has a legal obligation to provide treatment this cannot be founded simply upon the fact that the patient demands it. The source of the duty lies elsewhere.

32. So far as ANH is concerned, there is no need to look far for the duty to provide this. Once a patient is accepted into a hospital, the medical staff come under a positive duty at common law to care for the patient. The authorities cited by Munby J at paragraphs 82 to 87 under the heading '*The duty to care*' establish this proposition, if authority is needed. A fundamental aspect of this positive duty of care is a duty to take such steps as are reasonable to keep the patient alive. Where ANH is necessary to keep the patient alive, the duty of care will normally require the doctors to supply ANH. This duty will not, however, override the competent patient's wish not to receive ANH. Where the competent patient makes it plain that he or she wishes to be kept alive by ANH, this will not be the source of the duty to provide it. The patient's wish will merely underscore that duty.

33. Insofar as the law has recognised that the duty to keep a patient alive by administering ANH or other life-prolonging treatment is not absolute, the exceptions have been restricted to the following situations: (1) where the competent patient refuses to receive ANH and (2) where the patient is not competent and it is not considered to be in the best interests of the patient to be artificially kept alive. It is with the second exception that the law has had most difficulty. The courts have accepted that where life involves an extreme degree of pain, discomfort or indignity to a patient, who is sentient but not competent and who has manifested no wish to be kept alive, these circumstances may absolve the doctors of the positive duty to keep the patient alive. Equally the courts have recognised that there may be no duty to keep alive a patient who is in a persistent vegetative state ('PVS'). In each of these examples the facts of the individual case may make it difficult to decide whether the duty to keep the patient alive persists.

34. No such difficulty arises, however, in the situation that has caused Mr Burke concern, that of the competent patient who, regardless of the pain, suffering or indignity of his condition, makes it plain that he wishes to be kept alive. No authority lends the slightest countenance to the suggestion that the duty on the doctors to take reasonable steps to keep the patient alive in such circumstances may not persist. Indeed, it seems to us that for a doctor deliberately to interrupt life-prolonging treatment in the face of a competent patient's expressed wish to be kept alive, with the intention of thereby terminating the patient's life, would leave the doctor with no answer to a charge of murder.

Would withdrawal of ANH contrary to the wishes of Mr Burke infringe Articles 3 and 8 of the Convention?

35. Munby J's consideration of the effect of the Convention spans paragraphs 117 to 214 - that is nearly half - of his judgment. His conclusion, as we understand it, was that Article 2 of the Convention would not be infringed if the doctors ceased to provide ANH to Mr Burke contrary to his expressed wishes, but that Article 3 would be infringed because the effect would be to subject Mr Burke to acute mental and physical suffering and Article 8 would be engaged because Mr Burke's dignity and autonomy would have been flouted.

36. In this section of his judgment Munby J ranged widely over a mass of jurisprudence, giving

consideration to the position of Mr Burke if ANH were withdrawn thereby causing him to die in a manner that involved acute mental and physical suffering. In doing so he considered the position of a patient who was both competent and incompetent. He identified three stages that Mr Burke might pass through: the first when he was competent and aware, the second when aware of his surroundings and predicament but unable to communicate, and the third after lapsing into a coma. He assumed that Mr Burke would, by the time he reached the second stage, have made an advance directive. He postulated that to withdraw ANH in the first or second stage would infringe Mr Burke's Article 3 and Article 8 rights. As to the final stage, he said:

> "175. Whether there will in fact be a breach either of Article 3 or of Article 8 if ANH is withdrawn from the claimant once he has entered into the third and final stage and has finally lapsed into a coma is not a matter capable of decision this far in advance of an event which, as I understand it, is unlikely to occur for many years yet. I decline therefore to express any conclusion on the point.
>
> 176. Much may turn upon the precise terms of the claimant's advance directive. More importantly, much will depend upon the claimant's condition once that stage is reached. It may be that by then – and on the evidence before me we are probably talking here only about the last few hours of life – ANH will be serving absolutely no purpose other than the very short prolongation of the life of a dying patient who has slipped into his final coma and who lacks all awareness of what is happening. In that event it might very well be said that the continuation of ANH would be bereft of any benefit at all to the claimant and that it would indeed be futile."

37. As to this reasoning, we would comment that it is not clear to us that ANH will prolong Mr Burke's life at stage 2 or 3, nor that if he decides to make an advance directive, this will necessarily require that he be given ANH on the chance that this will gain him a few more hours or days of life, provided that its cessation will not be likely adversely to affect his comfort before he lapses into coma. We do not consider that there was any justification for embarking on speculation as to what the position might be when Mr Burke reaches the final stages of his life.

38. Turning to Mr Burke's concern that ANH may be withdrawn, contrary to his expressed wishes, so as to cause him to die of hunger and thirst while he is still competent, we have been unable to follow Munby J's reasoning and fear that he may have lost the wood for the trees. In particular, we have not been able to follow his reason for concluding that Articles 3 and 8 of the Convention would be infringed, but not Article 2. Munby J considered a body of authority that establishes that Article 2 will not be violated when death follows withdrawal of treatment that has been rejected by the patient, in exercise of his right of self-determination, or because withdrawal of treatment was considered in the best interests of an incompetent patient for whom life offered intolerable suffering. He concluded:

> "162. … Article 2 does not entitle anyone to continue with life-prolonging treatment where to do so would expose the patient to "inhuman or degrading treatment" breaching Article 3. On the other hand, a withdrawal of life-prolonging treatment which satisfies the exacting requirements of the common law, including a proper application of the intolerability test, and in a manner which is in all other respects compatible with the patient's rights under Article 3 and Article 8 will not, in my judgment, give rise to any breach of Article 2."

39. We endorse this conclusion. It does not, however, lead to the further conclusion that if a National Health doctor were deliberately to bring about the death of a competent patient by withdrawing

life-prolonging treatment contrary to that patient's wishes, Article 2 would not be infringed. It seems to us that such conduct would plainly violate Article 2. Furthermore, if English law permitted such conduct, this would also violate this country's positive obligation to enforce Article 2. As we have already indicated, we do not consider that English criminal law would countenance such conduct. However, the fact that Articles 2, 3 and 8 of the Convention may be engaged does not, in our judgment, advance the argument or alter the common law. We return to this point in our consideration of Declaration 6, and the judge's reliance on the decision of Coleridge J in *D v NHS Trust (Medical Treatment: Consent: Termination)* [2003] EWHC (Fam) 2793; [2004] 1 LR and of the ECtHR in *Glass v UK* (2004) 1 FLR 1019.

The doctor with care of Mr Burke must either comply with his wish to be given ANH or arrange for another doctor to do so

40. For the reasons that we have given we consider that the doctor with care of Mr Burke would himself be obliged, so long as the treatment was prolonging Mr Burke's life, to provide ANH in accordance with his expressed wish. We do not believe that this has ever been open to doubt.

The lawfulness of paragraphs 13, 16, 32, 42 and 81 of the Guidance

41. At this stage we are concerned with what should have been considered to be the only relevant question in relation to the Guidance. Is it compatible with the duty of a doctor to administer ANH to a competent patient where this is necessary to keep the patient alive and the patient expresses a wish to be kept alive?

Paragraph 13

42. This paragraph deals only with the right to refuse treatment. It has no relevance to the duty of a doctor to provide ANH in order to keep a patient alive. We cannot see that it has any bearing on the issues before us. That said, it seems to us that this paragraph reflects the law.

Paragraph 16

43. We cannot see what relevance this has to the provision of ANH, save perhaps in its bearing on what the position would be if a patient demanded that ANH be administered or continued in the terminal stages of an illness where it was not going to prolong life. This is an unlikely scenario and not one that can properly concern Mr Burke at this stage of his illness.

Paragraph 32

44. This is part of the general framework of the guidance and not specifically directed to the provision, or withdrawal, of ANH. We accept that, if read in isolation, the phrase "taking account of the views of the patient" might suggest that a consultant or general practitioner in charge of a patient's care could withhold or withdraw ANH contrary to the expressed wish of a competent patient if he considered that there was good reason for disregarding that wish. Taken in the context of the Guidance as a whole, however, we do not consider that any reasonable doctor would conclude from paragraph 32 that it would be permissible to withdraw life-prolonging treatment with a view to ending a patient's life despite the patient's expressed wish to be kept alive.

Paragraph 42

45. We understand that it is the second half of this paragraph that the judge considered objectionable. This could only be relevant to Mr Burke's predicament if one postulates that a doctor might

consider it 'clinically inappropriate' to keep him alive by administering ANH despite his wishes that this should be done. We consider such a scenario to be totally unrealistic.

Paragraph 81

46. This is the only paragraph to which the judge has taken exception that deals expressly with ANH. The first sentence requires the doctor to comply with the expressed wishes of a patient with capacity. No exception can be taken to this. The remainder deals with the approach to be taken where the patients lack capacity to decide for themselves and their wishes cannot be determined. We cannot see that this has any relevance to Mr Burke's predicament.

47. For these reasons, we do not consider that, insofar as the Guidance relates to Mr Burke's predicament, there was any ground for declaring it unlawful.

Concerns about the wider implications of Munby J's judgment

48. We have identified the following topics explored by Munby J in his judgment in passages which have given rise to concern because of apparent implications which extend beyond the predicament of Mr Burke:

    i) The right of a patient to select the treatment that he will receive;

    ii) The circumstances in which life-prolonging treatment can be withdrawn from a patient who is incompetent;

    iii) The duty to seek the approval of the court before withdrawing life-prolonging treatment.

The right of a patient to select the treatment that he will receive

49. Munby J identifies that the duty to care for a patient involves the duty to provide the treatment that is in the patient's best interests, referring to a statement by Lord Brandon of Oakbrook in *In Re F (Mental patient: sterilisation)* [1990] AC 1 at p. 56, a passage dealing with the duty owed to an incompetent patient. Munby J then identifies that what is in the best interests of a patient depends upon the wishes of the patient, which may be influenced by matters which go beyond wanting to be cured, to continue to live or to avoid pain and suffering – all matters which the doctor might otherwise consider to be in the patient's best interest. He then postulates that it is the duty of the doctor to provide that treatment which complies with the wishes of the patient. At one point he states (paragraph 99):

    "If the patient is competent (or, although incompetent, has made an advance directive which is both valid and relevant to the treatment in question) there is no difficulty in principle: the patient decides what is in his best interests and what treatment he should or should not have."

50. The GMC is concerned that these passages suggest that a doctor is obliged, if the patient so requires, to provide treatment to a patient, or to procure another doctor to provide such treatment, even though the doctor believes that the treatment is not clinically indicated. No such general proposition should be deduced from Munby J's judgment, nor do we believe that he intended to advance any such general proposition. So far as the general position is concerned, we would endorse the following simple propositions advanced by the GMC:

i) The doctor, exercising his professional clinical judgment, decides what treatment options are clinically indicated (i.e. will provide overall clinical benefit) for his patient.

ii) He then offers those treatment options to the patient in the course of which he explains to him/her the risks, benefits, side effects, etc involved in each of the treatment options.

iii) The patient then decides whether he wishes to accept any of those treatment options and, if so, which one. In the vast majority of cases he will, of course, decide which treatment option he considers to be in his best interests and, in doing so, he will or may take into account other, non clinical, factors. However, he can, if he wishes, decide to accept (or refuse) the treatment option on the basis of reasons which are irrational or for no reasons at all.

iv) If he chooses one of the treatment options offered to him, the doctor will then proceed to provide it.

v) If, however, he refuses all of the treatment options offered to him and instead informs the doctor that he wants a form of treatment which the doctor has not offered him, the doctor will, no doubt, discuss that form of treatment with him (assuming that it is a form of treatment known to him) but if the doctor concludes that this treatment is not clinically indicated he is not required (i.e. he is under no legal obligation) to provide it to the patient although he should offer to arrange a second opinion.

51. The relationship between doctor and patient usually begins with diagnosis and advice. The doctor will describe the treatment that he recommends or, if there are a number of alternative treatments that he would be prepared to administer in the interests of the patient, the choices available, their implications and his recommended option. In such circumstances the right to refuse a proposed treatment gives the patient what appears to be a positive option to choose an alternative. In truth the right to choose is no more than a reflection of the fact that it is the doctor's duty to provide a treatment that he considers to be in the interests of the patient and that the patient is prepared to accept.

52. Munby J was not, however, concerned with the extent to which, in general, a patient has a right to insist on a particular treatment. He was concerned with the choice of whether or not to receive life-prolonging treatment and the right to decide "how one chooses to pass the closing days and moments of one's life and how one manages one's death" (judgment paragraph 63). The passages of general discussion in his judgment must be read in this context.

53. We have indicated that, where a competent patient indicates his or her wish to be kept alive by the provision of ANH any doctor who deliberately brings that patient's life to an end by discontinuing the supply of ANH will not merely be in breach of duty but guilty of murder. Where life depends upon the continued provision of ANH there can be no question of the supply of ANH not being clinically indicated unless a clinical decision has been taken that the life in question should come to an end. That is not a decision that can lawfully be taken in the case of a competent patient who expresses the wish to remain alive.

54. There is one situation where the provision of ANH will not be clinically indicated that is not relevant to Mr Burke's concern but which received a disproportionate amount of attention in this case. In the last stage of life the provision of ANH not only may not prolong life, but may even

hasten death. Unchallenged evidence from Professor Higginson illustrated the latter proposition. At this stage, whether to administer ANH will be a clinical decision which is likely to turn on whether or not it has a palliative effect or is likely to produce adverse reactions. It is only in this situation that, assuming the patient remains competent, a patient's expressed wish that ANH be continued might conflict with the doctor's view that this is not clinically indicated.

55. As we understand Munby J's judgment, he considered that in this situation the patient's wish to receive ANH must be determinative. We do not agree. Clearly the doctor would need to have regard to any distress that might be caused as a result of overriding the expressed wish of the patient. Ultimately, however, a patient cannot demand that a doctor administer a treatment which the doctor considers is adverse to the patient's clinical needs. This said, we consider that the scenario that we have just described is extremely unlikely to arise in practice.

The position of the incompetent patient

56. A large part of Munby J's judgment and the submissions placed before us related to the position of the incompetent patient. Three situations were discussed: (1) the patient in a PVS; (ii) the incompetent but sentient patient capable of being kept alive for an indefinite period by the provision of ANH; (iii) the patient in the final stages of life. We would reiterate that Mr Burke's legitimate concern at this stage of his life does not relate to any of these situations.

57. The situation of a patient in a PVS was only referred to in passing. It fell, however, within the compass of Mr Gordon's general submission that, if the patient has made an advance directive that he is to be kept alive, this must be complied with as a matter of law. The position of a patient in a PVS was addressed at length by the House of Lords in *Bland* and we do not consider it appropriate in this case to add to what was said by their Lordships, other than to make the following observation. While a number of their Lordships indicated that an advance directive that the patient should not be kept alive in a PVS should be respected, we do not read that decision as requiring such a patient to be kept alive simply because he has made an advance directive to that effect. Such a proposition would not be compatible with the provisions of the Mental Capacity Act 2005, which we consider accords with the position at common law. While section 26 of that Act requires compliance with a valid advance directive to refuse treatment, section 4 does no more than require this to be taken into consideration when considering what is in the best interests of a patient.

58. There are tragic cases where treatment can prolong life for an indeterminate period, but only at a cost of great suffering while life continues. Such a case was *In re J (a Minor) (Wardship: Medical Treatment)* [1991] Fam 33. There are other cases, and these are much more common, where a patient has lost competence in the final stages of life and where ANH may prolong these final stages, but at an adverse cost so far as comfort and dignity are concerned, sometimes resulting in the patient's last days being spent in a hospital ward rather than at home, with family around.

59. It is to these situations that so much of the debate in this case has been directed. Apprehensions have been expressed by some who have intervened that those in charge of patients may too readily withdraw, or fail to provide, ANH or other life prolonging treatment on the ground that the patient's life, if prolonged, will not be worth living. As an example of the first situation described above, the Disability Rights Commission brought to our attention the disturbing story of Jane Campbell. She suffers from spinal muscular atrophy and is severely disabled. She was not expected to live beyond the age of four, but has lived a fulfilling and productive life of high achievement. In 2003 she was struck down by pneumonia. Two consultants were minded to conclude that her life was so parlous that, if she needed artificial respiration to remain alive she would not wish to receive it. Only the intervention of her husband, who showed them a photograph

of her taking her degree, persuaded the consultants that her life was worth saving.

60. Turning to the other situation described above, disturbing case reports were placed by the Medical Ethics Alliance before the Joint Committee on the draft Mental Incapacity Bill, and subsequently before us. These were cases where patients who were terminally ill appear to have been denied water and nutrition in circumstances where this was contrary to the demands of palliative care.

61. These reports did not constitute admissible evidence, but underlined the importance of clear law and guidance in this area. After a lengthy analysis of jurisprudence under the heading *'Best interests and life-prolonging treatment'* the judge set out a summary of his conclusions at paragraph 116, which included the following:

> "There is a very strong presumption in favour of taking all steps which will prolong life, and save in exceptional circumstances, or where the patient is dying, the best interests of the patient will normally require such steps to be taken. In case of doubt that doubt falls to be resolved in favour of the preservation of life. But the obligation is not absolute. Important as the sanctity of life is, it may have to take second place to human dignity. ***In the context of life-prolonging treatment the touchstone of best interests is intolerability. So if life-prolonging treatment is providing some benefit it should be provided unless the patient's life, if thus prolonged, would from the patient's point of view be intolerable***. "

62. We do not think that any objection could have been taken to this summary had it not contained the final two sentences, which we have emphasised. The suggestion that the touchstone of 'best interests' is the 'intolerability' of continued life has, understandably given rise to concern. The test of whether it is in the best interests of the patient to provide or continue ANH must depend on the particular circumstances. The two situations that we have considered above are very different. As to the approach to be adopted in the former, this court dealt with that in *Re J* and we do not think that it is appropriate to review what the court there said in a context that is purely hypothetical.

63. As to the approach to best interests where a patient is close to death, it seems to us that the judge himself recognised that 'intolerability' was not the test of best interests. At paragraph 104 he said:

> "where the patient is dying, the goal may properly be to ease suffering and, where appropriate, to 'ease the passing' rather than to achieve a short prolongation of life."

We agree. We do not think it possible to attempt to define what is in the best interests of a patient by a single test, applicable in all circumstances. We would add that the disturbing cases referred to in paragraphs 57 and 58, if correctly reported, were cases where the doctors appear to have failed to observe the Guidance. They are not illustrative of any illegality in the Guidance. The Guidance expressly warns against treating the life of a disabled patient as being of less value than the life of a patient without disability, and rightly does so.

The Guidance

64. Is the Guidance defective? Munby J declared in declaration (5) that paragraphs 13, 16, 32 and 42 were unlawful in that they failed to recognise that the decision of a competent patient on whether ANH should be provided was determinative in principle of whether or not such treatment was in the patient's best interests. We have commented that equating best interests with the expressed wishes of a competent patient is unhelpful. The question to be asked in relation to these paragraphs is whether they indicate clearly, in their context, that a doctor cannot remove ANH that is keeping

a competent patient alive when this is contrary to the wishes of the patient. Paragraphs 13 and 16 are general paragraphs, not specifically directed to ANH. They make it clear that a patient is legally entitled to *refuse* treatment and state that doctors must 'take account' of patients' preferences when providing treatment. Taken alone, they do not state in terms that a doctor cannot discontinue ANH contrary to the wishes of a competent patient, but we consider that this is their inference. The same is true of paragraphs 32 and 42. These suggest that the wishes of the patient should be respected unless this is 'clinically inappropriate' and, as we have said, administering treatment that is necessary to keep a patient alive cannot be described as 'clinically inappropriate'.

65. Paragraph 81 is in the section of the Guidance which deals expressly with ANH. It commences, "Where patients have capacity to decide for themselves, they may consent to, or refuse, any proposed intervention of this kind". We do not understand the criticism made by the judge in Declaration (4) that this "fails to recognise that the decision of a competent patient that ANH should be provided is determinative of the best interests of the patient", albeit that we deprecate equating a patient's wishes with his best interests.

66. Declaration (4) goes on to declare that paragraph 81 is unlawful because it does not make it clear that ANH can only be withdrawn from a patient who is not dying if his continued life would be intolerable. We do not consider that the terms of paragraph 81 are unlawful. We do, however, feel that the wording of that part of the paragraph which deals with the position where death is not imminent could be better drafted. We believe that it is attempting to spell out the circumstances in which it may be lawful to withdraw ANH in a case such as that of *Re J.* The statement that the provision of ANH "may cause suffering or be too burdensome in relation to the possible benefits" is not a clear or helpful description of the circumstances in which life is so burdensome that there is no duty to prolong it. This inadequacy of drafting does not, however, justify the judge's declaration.

Is there a legal requirement to obtain court authorisation before withdrawing ANH?

67. The judge's Declaration (6) suggests that "in certain circumstances" this question must be answered in the affirmative. What circumstances did the judge have in mind? The answer is given by paragraph 214(g) of his judgment:

> "(g) Where it is proposed to withhold or withdraw ANH the prior authorisation of the court is required as a matter of law (and thus ANH cannot be withheld or withdrawn without prior judicial authorisation): (i) where there is any doubt or disagreement as to the capacity (competence) of the patient; or (ii) where there is a lack of unanimity amongst the attending medical professionals as to either (1) the patient's condition or prognosis or (2) the patient's best interests or (3) the likely outcome of ANH being either withheld or withdrawn or (4) otherwise as to whether or not ANH should be withheld or withdrawn; or (iii) where there is evidence that the patient when competent would have wanted ANH to continue in the relevant circumstances; or (iv) where there is evidence that the patient (even if a child or incompetent) resists or disputes the proposed withdrawal of ANH; or (v) where persons having a reasonable claim to have their views or evidence taken into account (such as parents or close relatives, partners, close friends, long-term carers) assert that withdrawal of ANH is contrary to the patient's wishes or not in the patient's best interests."

68. We would observe that even if this paragraph accurately states the law, it does not follow that the Guidance is illegal in that it directs the doctor concerned to seek legal advice rather than to seek the authority of the court to the withdrawal of ANH. On the contrary, even if the judge is correct

about the legal duty, we consider that paragraphs 38 and 82 of the Guidance are proper and lawful. We note that the judge inaccurately summarises the effect of those paragraphs by saying that they direct the doctor to consult a clinician ***or*** take legal advice, when what in fact they direct is that the doctor should do both.

69. Declaration (6) has caused considerable concern. The Intensive Care Society informed us that each year approximately 50,000 patients are admitted to intensive care units and of these 30% die in the unit or on the wards before hospital discharge. Most of these die because treatment is withdrawn or limited, albeit in circumstances where the clinicians conclude that such treatment would be likely merely to prolong the process of dying. There is not always agreement on the part of all concerned as to the withdrawal of treatment. This is hardly surprising. Grief stricken relatives may not be able to accept that the patient is beyond saving. The ICS calculates that, if Munby J's criteria were applied, approximately 10 applications a day would have to be made to the courts.

70. In the event, we do not consider that the judge is right to postulate that there is a legal duty to obtain court approval to the withdrawal of ANH in the circumstances that he identifies.

71. We asked Mr Gordon to explain the nature of the duty to seek the authorisation of the court and he was not able to give us a coherent explanation. So far as the criminal law is concerned, the court has no power to authorise that which would otherwise be unlawful – see, for instance, the observation of Lord Goff of Chievely in *Bland* at p. 785 H. Nor can the court render unlawful that which would otherwise be lawful. The same is true in relation to a possible infringement of civil law. In *Bland* the House of Lords recommended that, *as a matter of good practice,* reference should be made to the Family Court before withdrawing ANH from a patient in a PVS, until a body of experience and practice had built up. Plainly there will be occasions in which it will be advisable for a doctor to seek the court's approval before withdrawing ANH in other circumstances, but what justification is there for postulating that he will be under a legal duty so to do?

72. The judge's reasoning appears in paragraphs 195 to 211 of his judgment. His starting point was the identification by the courts of a special category of cases where medical procedures required the sanction of the court, even if all concerned were agreed that the procedures were desirable. He observed that initially the requirement to obtain prior judicial sanction "was not a matter of law but rather of good practice".

73. The judge then observed that more recently the courts had identified a further category of important decisions where the requirement for judicial intervention arose 'if there is disagreement between those concerned'. He cited at length from the decision of Coleridge J in *D v NHS Trust (Medical Treatment: Consent: Termination)* [2003] EWHC (Fam) 2793; [2004] 1 LR 1110. That was a case where the treatment under consideration was the termination of the pregnancy of an incompetent adult. Coleridge J identified a number of circumstances where, because the legitimacy of such treatment was open to doubt, it was 'necessary' to seek the authorisation of the court.

74. We do not read Coleridge J's judgment as purporting to transform the requirement to seek the approval of the court from a matter of good practice into a legal requirement. He did, however, observe at paragraph 31:

> "The advent of the Human Rights Act 1998 has enhanced the responsibility of the court to positively protect the welfare of these patients and, in particular, to protect the patient's right to respect for her private and family life under Art 8(1) of the European Convention… ."

75. Munby J emphasised this passage, before turning to consider the implications of decisions of the ECtHR first on admissibility and subsequently on the merits in *Glass v UK* (2004) 1 FLR 1019; [2004] Lloyds Rep Med 76. He concluded that the latter decision converted what had previously been only "a matter of good practice" into "a matter of legal requirement" by reason of the Human Rights Act 1998 (judgment paragraph 210). He observed that this was 'a significant and potentially very important change'. If the judge was correct we would concur. Accordingly it is necessary to consider *Glass* with some care.

76. The application in *Glass* was brought by a mother on behalf of her small child. The complaint related to the treatment of the child when in hospital. The doctors thought that the child was dying and administered diamorphine by way of palliative despite the objections of the mother, who thought that the intention of this treatment was to hasten the child's death. The disagreement culminated in a fight in the hospital and the removal of the child by the mother. The child recovered. The mother also complained that the doctors had imposed a 'do not resuscitate' direction in relation to the child without her consent, but the ECtHR did not give separate consideration to this complaint. They treated the case as one of the imposition of invasive treatment on a child contrary to the wishes of its parent.

77. The ECtHR gave detailed consideration to the position under English law, as this was presented to the court. The ECtHR understood the position to be as follows. As a general proposition, medical treatment of a child requires the authorisation of the child's parents. Where the parents do not consent, the court can authorise such treatment. The doctors can, however, lawfully impose treatment without the consent of the parents or the authorisation of the court in a situation of emergency. The ECtHR summarised the position as follows: at paragraph 75:

> "the regulatory framework in the respondent State is firmly predicated on the duty to preserve the life of a patient, save in exceptional circumstances. Secondly, that same framework prioritises the requirement of parental consent and, save in emergency situations, requires doctors to seek the intervention of the courts in the event of parental objection."

78. In these circumstances the ECtHR identified the critical issue as whether the child's treatment had been administered in circumstances of emergency which justified the failure on the part of the hospital to seek the approval of the court. It commented in paragraph 76:

> "For the court, the applicants' contention in reality amounts to an assertion that, in their case, the dispute between them and the hospital staff should have been referred to the courts and that the doctors treating the first applicant wrongly considered that they were faced with an emergency. However, the Government firmly maintain that the exigencies of the situation were such that diamorphine had to be administered to the first applicant as a matter of urgency in order to relieve his distress and that it would not have been practical in the circumstances to seek the approval of the court. However, for the court, these are matters which fall to be dealt with under the 'necessity' requirement of Art 8(2), and not from the standpoint of the 'in accordance with the law' requirements."

79. After considering the facts, the ECtHR concluded that the mother had not consented to the administration to her child of diamorphine and that, when this became apparent to the doctors, they had ample time to get the court to resolve the position. They held in paragraph 83:

> "The court considers that, having regard to the circumstances of the case, the decision

of the authorities to override the second applicant's objection to the proposed treatment in the absence of authorisation by a court resulted in a breach of Art 8 of the Convention"

80. This was not a decision which made "a significant and potentially very important change in English law". The ECtHR did no more than consider the implications of the doctors' conduct in the light of what the ECtHR understood to be English law. The true position is that the court does not "authorise" treatment that would otherwise be unlawful. The court makes a declaration as to whether or not proposed treatment, or the withdrawal of treatment, will be lawful. Good practice may require medical practitioners to seek such a declaration where the legality of proposed treatment is in doubt. This is not, however, something that they are required to do as a matter of law. For these reasons Declaration 6 made by Munby J misstated the law.

81. For all these reasons this appeal is allowed and the declarations made by Munby J set aside.

Footnote

82. We have referred to matters put before us by three interveners: the Disability Rights Commission; the Medical Ethics Alliance and the Intensive Care Society. We mean no discourtesy to the other interveners when we observe that a great deal of their thoughtful and well-presented contributions falls victim to our general view that this litigation expanded inappropriately to deal with issues which, whilst important, were not appropriately justiciable on the facts of the case. In so far as the interveners directly addressed the issues which we have addressed in this judgment, we hope that our conclusions are clear.

83. We wish to end by emphasising one point, having particular regard to the evidence of Jane Campbell. It is in our view of the utmost importance that the Guidance should be understood and implemented at every level throughout the National Health Service and throughout the medical profession. People in the unhappy position of Mr Burke and Mrs Campbell are entitled to have confidence that they will be treated properly and in accordance with good practice, and that they will not be ignored or patronised because of their disability. Having produced the Guidance, the task of the GMC, it seems to us, is to ensure that it is vigorously promulgated, taught, understood and implemented at every level and in every hospital. If the extensive interest generated in this case helps achieve that objective, the proceedings will have served a useful purpose.

Inter-American Court of Human Rights

Case of the "Juvenile Reeducation Institute" *v.* Paraguay

Judgment of September 2, 2004
(Preliminary Objections, Merits, Reparations and Costs)

In the Case of the "Juvenile Reeducation Institute",

the Inter-American Court of Human Rights (hereinafter "the Court" or "the Inter-American Court"), composed of the following judges[*]:

Sergio García Ramírez, President;
Alirio Abreu Burelli, Vice President;
Oliver Jackman, Judge;
Antônio A. Cançado Trindade, Judge;
Cecilia Medina Quiroga, Judge;
Manuel E. Ventura Robles, Judge;
Diego García-Sayán, Judge, and
Víctor Manuel Núñez Rodríguez, Judge *ad hoc*;

also present,

Pablo Saavedra Alessandri, Secretary, and
Emilia Segares Rodríguez, Deputy Secretary,

pursuant to Articles 29, 31, 37.6, 56, and 58 of the Rules of Procedure of the Court (hereinafter "the Rules of Court")[1] and Article 63(1) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention"), deliver the following judgment.

I
INTRODUCTION OF THE CASE

1. On May 20, 2002, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission") filed an application with the Court against the State of Paraguay (hereinafter "the State," "the respondent State," or "Paraguay") concerning a case that had originated with petition No. 11,666, received at the Commission's Secretariat on August 14, 1996.

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[1] The present judgment is delivered in accordance with the Rules of Procedure that the Court approved at its XLIX regular session, by order dated November 24, 2000, which entered into force on June 1, 2001, and in accordance with the partial amendment to those Rules, which the Court approved at its LXI regular session in a November 25, 2003 order that entered into force on January 1, 2004.

2. The Commission filed the application pursuant to Article 61 of the American Convention, seeking a judgment from the Court as to whether the State had violated, in relation to its obligation under Article 1(1) (Obligation to Respect Rights) of the Convention, Article 4 (Right to Life) of that instrument by virtue of the deaths of inmates Elvio Epifanio Acosta Ocampos, Marco Antonio Giménez,[2] Diego Walter Valdez, Sergio Daniel Vega Figueredo,[3] Sergio David Poletti Domínguez,[4] Mario Álvarez Pérez,[5] Juan Alcides Román Barrios, Antonio Damián Escobar Morinigo[6] and Carlos Raúl de la Cruz,[7] all of whom perished as a result of a fire at the *Instituto de Reeducación del Menor "Coronel Panchito López"* ["Colonel Panchito López" Juvenile Reeducation Institute] (hereinafter "the Center" or "the 'Panchito López' Center"), and by virtue of the death of Benito Augusto Adorno, who died of a bullet wound sustained at the Center. The Commission also asked the Court to decide whether the State had violated Article 5 (Right to Humane Treatment) of the American Convention, in relation to its obligation under Article 1(1) thereof, by virtue of the injuries and smoke inhalation that minors Abel Achar Acuña, José Milicades Cañete,[8] Ever Ramón Molinas Zárate, Arsenio Joel Barrios Báez,[9] Alfredo Duarte Ramos, Sergio Vincent Navarro Moraez, Raúl Esteban Portillo, Ismael Méndez Aranda, Pedro Iván Peña, Osvaldo Daniel Sosa, Walter Javier Riveros Rojas, Osmar López Verón,[10] Miguel Coronel,[11] César Ojeda,[12] Heriberto Zarate, Francisco Noé Andrada, Jorge Daniel Toledo, Pablo Emmanuel Rojas, Sixto Gonzáles Franco,[13] Francisco Ramón Adorno, Antonio Delgado, Claudio Coronel Quiroga, Clemente Luis Escobar

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[2] This person's name also appears as Marcos Antonio Jiménez. The Court will henceforth refer to this person as Marco Antonio Jiménez.

[3] This person's name also appears as Sergio Daniel Vega. The Court will henceforth use the name Sergio Daniel Vega Figueredo.

[4] This person's name also appears as Sergio David Poletti. The Court will henceforth use the name Sergio David Poletti Domínguez.

[5] This person's name also appears as Mario del Pilar Álvarez, as Mario Álvarez Pérez, and as Mario Álvarez. The Court will henceforth use the name Mario del Pilar Álvarez Pérez.

[6] This person's name also appears as Antonio Escobar. The Court will henceforth use the name Antonio Damián Escobar Morinigo.

[7] This person's name also appears as Carlos de la Cruz. The Court will henceforth use the name Carlos Raúl de la Cruz.

[8] This person's name also appears as José Milciades Cañete Chamorro. The Court will henceforth use the name José Milciades Cañete Chamorro.

[9] This person's name also appears as Arcenio Joel Barrios Báez. The Court will henceforth use the name Arsenio Joel Barrios Báez.

[10] This person's name also appears as Osmar Verón López. The Court will henceforth use the name Osmar López Verón.

[11] This person's name also appears as Miguel Ángel Coronel Ramírez, and as Miguel Coronel Ramírez. The Court will henceforth use the name Miguel Ángel Coronel Ramírez.

[12] This person's name also appears as César Fidelino Ojeda Ramírez, and as César Fidelino Ojeda. The Court will henceforth use the name César Fidelino Ojeda Acevedo.

[13] This person's name also appears as Sixto González Franco. The Court will henceforth use the name Sixto Gonzáles Franco.

González,[14] Julio César García, José Amado Jara Fernando,[15] Alberto David Martínez, Miguel Ángel Martínez, Osvaldo Espinola Mora,[16] Hugo Antonio Quintana Vera,[17] Juan Carlos Viveros Zarza,[18] Eduardo Vera, Ulises Zelaya Flores,[19] Hugo Olmedo, Rafael Aquino Acuña,[20] Nelson Rodríguez, Demetrio Silguero, Aristides Ramón Ortiz B.[21] and Carlos Raúl Romero Giacomo[22] sustained in three fires at the Center.

3. The Commission also petitioned the Court to find that the respondent State had violated Articles 5 (Right to Humane Treatment), 7 (Right to Personal Liberty), 19 (Rights of the Child), 8 (Right to a Fair Trial) and 25 (Judicial Protection) of the American Convention, all in relation to Article 1(1) thereof, to the detriment of all juveniles incarcerated at the Center at any time in the period between August 14, 1996 and July 25, 2001, and those juvenile inmates subsequently remanded to the country's adult prisons.

4. The Commission's contention was that the "Panchito López' Center embodied a system that was the antithesis of every international standard pertaining to the incarceration of juveniles, given the allegedly grossly inadequate conditions under which the children were interned. Specifically, those conditions involved a combination of: overpopulation, overcrowding, lack of sanitation, inadequate infrastructure, and a prison guard staff that was both too small and poorly trained.

5. According to the Commission, after each of the three fires, all or some of the alleged victims were remanded to adult prisons in Paraguay; it further alleged that the vast majority of the juveniles transferred to adult prisons were in pretrial detention. To make matters worse, the adult prisons to which they were sent were elsewhere in the country, far from the juveniles' defense attorneys and families.

6. The Commission also petitioned the Court, pursuant to Article 63 of the Convention, to order the State to ensure the exercise of the violated rights to the alleged victims and their next of kin and to adopt certain measures of pecuniary and non-pecuniary compensation.

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[14] This person's name also appears as Clemente Luis Escobar and as Clementino Luis Escobar. The Court will henceforth use the name Clemente Luis Escobar González.

[15] This person's name also appears as José Amado Jara Fernández, and as José Amado Jara. The Court will henceforth use the name José Amado Jara Fernández.

[16] This person's name also appears as Osvaldo Mora Espinola. The Court will henceforth use the name Osvaldo Mora Espinola.

[17] This person's name also appears as Hugo Vera Quintana. The Court will henceforth use the name Hugo Antonio Vera Quintana.

[18] This person's name also appears as Juan Carlos Zarza. The Court will henceforth use the name Juan Carlos Zarza Viveros.

[19] This person's name also appears as Cándido Ulice Zelaya Flores. The Court will henceforth use the name Cándido Ulises Zelaya Flores.

[20] This person's name also appears as Rafael Oscar Aquino Acuña. The Court will henceforth use the name Oscar Rafael Aquino Acuña.

[21] This person's name also appears as Arístides Ramón Ortiz Bernal. The Court will henceforth use the name Arístides Ramón Ortiz Bernal.

[22] This person's name also appears as Carlos Raúl Romero García. The Court will henceforth use the name Carlos Raúl Romero Giacomo.

establishes for those who, because of their physical and emotional development, require special protection.[151]

148. As it examines this case, this Court will take this factor into particular account and will decide the question of the alleged violations of other Convention-protected rights in light of the added obligations that Article 19 impose upon the State. To establish the content and scope of this article, the Court will take into consideration the pertinent provisions of the Convention on the Rights of the Child, which Paraguay ratified on September 25, 1990 and that entered into force on September 2, 1990, and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), which Paraguay ratified on June 3, 1997 and which entered into force on November 16, 1999. These instruments and the American Convention are part of a very comprehensive international *corpus juris* for the protection of children that the Court must honor.[152]

149. The examination of the State's possible failure to comply with its obligations under Article 19 of the American Convention should take into account that the measures of which this provision speaks go well beyond the sphere of strictly civil and political rights. The measures that the State must undertake, particularly given the provisions of the Convention on the Rights of the Child, encompass economic, social and cultural aspects that pertain, first and foremost, to the children's right to life and right to humane treatment.

150. Therefore, **in the instant case** the Court will not rule on the possible violation of Article 19 of the American Convention separately; instead, it will include its decision on the Article 19 violation in the chapters pertaining to the other rights whose violation has been alleged.

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151. This Court has held that all persons detained have the right to live in prison conditions that are in keeping with their dignity as human beings and that the State must guarantee their right to life and their right to humane treatment.[153]

152. The State has a special role to play as guarantor of the rights of those deprived of their freedom, as the prison authorities exercise heavy control or command over the persons in their custody.[154] So there is a special relationship and

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151 *Cf. Juridical Condition and Human Rights of the Child, supra* note 150, para. 54*; and Case of the Gómez Paquiyauri Brothers, supra* note 26, para. 164.

152 *Cf. Case of the Gómez Paquiyauri Brothers, supra* note 26, para. 166; *Case of the "Street Children" (Villagrán Morales et al.).* Judgment of November 19, 1999. Series C No. 63, para. 194; and *Juridical Condition and Human Rights of the Child, supra* note 150, para. 24.

153 *Cf. Case of Bulacio, supra* note 56, paragraphs 126 and 138; *Case of Hilaire.* Judgment of June 21, 2002. Series C No. 94, para. 165; and *Case of Cantoral-Benavides.* Judgment of August 18, 2000. Series C No. 69, para. 87.

154 *Cf. Case of the Gómez Paquiyauri Brothers, supra* note 26, para. 98; *Case of Juan Humberto Sánchez.* Judgment of June 7, 2003. Series C No. 99, para. 111; and *Case of Bulacio, supra* note 56, para. 138. See also, *Matter of Urso Branco Prison, supra* note 54, sixth paragraph under 'Considering"; and *Matter of the Gómez Paquiyauri Brothers. Provisional Measures*. Order of the Inter-American Court of Human Rights of May 7, 2004, thirteenth paragraph under 'Considering'.

interaction of subordination between the person deprived of his liberty and the State; typically the State can be rigorous in regulating what the prisoner's rights and obligations are, and determines what the circumstances of the internment will be; the inmate is prevented from satisfying, on his own, certain basic needs that are essential if one is to live with dignity.

153. Given this unique relationship and interaction of subordination between an inmate and the State, the latter must undertake a number of special responsibilities and initiatives to ensure that persons deprived of their liberty have the conditions necessary to live with dignity and to enable them to enjoy those rights that may not be restricted under any circumstances or those whose restriction is not a necessary consequence of their deprivation of liberty and is, therefore, impermissible. Otherwise, deprivation of liberty would effectively strip the inmate of all his rights, which is unacceptable.

154. Invariably, deprivation of liberty frequently affects the enjoyment of human rights other than the right to personal liberty.[155] An inmate's right to personal privacy and to the privacy of his family life may be restricted. This restriction of rights is a consequence or collateral effect of the deprivation of liberty, but must be kept to an absolute minimum[156] since, under international law, no restriction of a human right is justifiable in a democratic society unless necessary for the general welfare.[157]

155. By contrast, other rights –such as the right to life, the right to humane treatment, freedom of religion and the right to due process- cannot be restricted under any circumstances during internment, and any such restriction is prohibited by international law. Persons deprived of their liberty are entitled to have those rights respected and ensured just as those who are not so deprived.

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156. This Court has held that the right to life plays a key role in the American Convention as it is the essential corollary for realization of the other rights.[158] When the right to life is not respected, the other rights vanish because the bearer of those

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155 *Cf. Case of the Gómez Paquiyauri Brothers, supra* note 26, para. 108; *Case of Maritza Urrutia*, *supra* note 57, para. 87; and *Case of Juan Humberto Sánchez*, *supra* note 154, para. 96.

156 *Cf.* Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, para. 57.

157 *Cf. Case of the "Five Pensioners"*, *supra* note 55, para. 116; and Article 5 of the Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador).

158 *Cf. Case of the Gómez Paquiyauri Brothers, supra* note 26, para. 128; *Case of Myrna Mack Chang, supra* note 40, para. 152; and *Case of Juan Humberto Sánchez, supra* note 154, para. 110.

rights ceases to exist.[159] States have the obligation to ensure the conditions required for full enjoyment and exercise of that right.[160]

157. The right to humane treatment is a fundamental right that the American Convention protects by specifically prohibiting, *inter alia,* torture and cruel, inhuman, or degrading punishment or treatment; it also lists the right to humane treatment among those nonderogable rights that may not be suspended during states of emergency.[161]

158. The right to life and the right to humane treatment require not only that the State respect them (negative obligation) but also that the State adopt all appropriate measures to protect and preserve them (positive obligation), in furtherance of the general obligation that the State undertook in Article 1(1) of the Convention.[162]

159. As the Court previously indicated (*supra* paragraphs 151, 152 and 153), in order to protect and ensure the right to life and the right to humane treatment of persons deprived of their liberty and in its role as guarantor of those rights, the State has an ineluctable obligation to provide those persons with the minimum conditions befitting their dignity as human beings, for as long as they are interned in a detention facility. The European Court of Human Rights has likewise held that:

> under [Article 3 of the Convention], this provision the State must ensure that a person is detained in conditions which are compatible regarding for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance.[163]

160. In the case of the right to life, when the person the State deprives of his or her liberty is a child, which the majority of the alleged victims in the instant case were, it has the same obligations it has regarding to any person, yet compounded by the added obligation established in Article 19 of the American Convention. On the one hand, it must be all the more diligent and responsible in its role as guarantor and must take special measures based on the principle of the best interests of the child.[164] On the other hand, to protect a child's life, the State must be particularly attentive to that child's living conditions while deprived of his or her liberty, as the child's detention or imprisonment does not deny the child his or her right to life or restrict that right (*supra* para. 159).

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159 *Supra* note 158.

160 *Supra* note 158.

161 Articles 5 and 27 of the American Convention.

162 *Cf. Case of the Gómez Paquiyauri Brothers, supra* note 26, para. 129; *Case of the 19 Tradesmen*, *supra* note 26, para. 153; and *Case of Myrna Mack Chang, supra* note 40, para. 153.

163 *Eur. Court H.R. Kudla v. Poland, judgement of 26 October 2000,* no. 30210/96, paragraphs 93-94.

164 *Cf. Case of the Gómez Paquiyauri Brothers, supra* note 26, paragraphs 124, 163-164, and 171; *Case of Bulacio*, *supra* note 56, paragraphs 126 and 134; and *Case of the "Street Children" (Villagrán Morales et al.), supra* note 152, paragraphs 146 and 191. See also *Juridical Condition and Human Rights of the Child, supra* note 150, paragraphs 56 and 60.

161. Articles 6 and 27 of the Convention on the Rights of the Child include within the right to life the State's obligation to "ensure to the maximum extent possible the survival and development of the child." The Committee on the Rights of the Child has interpreted the word "development" in its broadest sense as a holistic concept, embracing the child's physical, mental, spiritual, moral, psychological and social development.[165] Regarding to children deprived of their liberty and thus in the custody of the State, the latter's obligations include that of providing them with health care and education, so as to ensure to them that their detention will not destroy their life plans.[166] The United Nations Rules for the Protection of Juveniles Deprived of Their Liberty [167] provide that:

> 13. Juveniles deprived of their liberty shall not for any reason related to their status be denied the civil, economic, political, social or cultural rights to which they are entitled under national or international law, and which are compatible with the deprivation of liberty.

162. In the case of the right to humane treatment of a child deprived of his or her liberty, the State's obligations are intimately related to quality of life. The standard applied to classify treatment or punishment as cruel, inhuman or degrading must be higher in the case of children.[168]

163. In keeping with the foregoing, the United Nations' Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) provide that:

> Juveniles in institutions shall receive care, protection and all necessary assistance-social, educational, vocational, psychological, medical and physical-that they may require because of their age, sex, and personality and in the interest of their wholesome development.[169]

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164. In the instant case, the Court must establish whether the State, in fulfillment of its role of guarantor, took measures to ensure to all inmates at the Center –adults and children alike- the right to live with dignity and thus help them build their life plan, even while incarcerated.

165. In the chapter on facts proven (*supra* paragraphs 134.3, 134.4 and 134.24) the Court concluded that the Center did not have the proper infrastructure to house the inmates and that the Center was overpopulated, which meant that inmates lived in a state of constant overcrowding. Inmates were confined in squalid cells, with few

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165 United Nations Committee on the Rights of the Child, General Comment No. 5, November 27, 2003, para.12.

166 *Cf. Juridical Condition and Human Rights of the Child, supra* note 150, paragraphs 80-81, 84, and 86-88; *Case of the "Street Children" (Villagrán Morales et al.), supra* note 152, para. 196; and Rule 13.5 of the Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), adopted by the General Assembly in resolution 40/33 of 28 November 1985.

167 United Nations Rules for the Protection of Juveniles Deprived of Their Liberty, adopted by the General Assembly in resolution 45/113 of 14 December 1990.

168 *Cf. Case of the Gómez Paquiyauri Brothers, supra* note 26, para. 170.

169 Rule 26.2 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), adopted by the General Assembly in resolution 40/33 of 28 November 1985.

sanitary facilities; many did not have beds, blankets and/or mattresses, which forced them to sleep on the floor, take turns with their cellmates or share what few beds and mattresses there were (*supra* paragraphs 134.9 and 134.10).

166. It has been shown in the instant case (*supra* para. 134.4) that the overpopulation and crowding were exacerbated by the fact that the inmates were ill-fed, had few opportunities for exercise or recreation, and were not given prompt and proper medical, dental and psychological care (*supra* paragraphs 134.6 and 134.7).

167. Among the methods of punishment used at the Center were solitary confinement, torture and detention *incommunicado,* as a means to impose discipline over the inmate population (*supra* para. 134.16). These methods of discipline are strictly prohibited by the American Convention.[170] And while it has not been shown that all inmates at the Center experienced solitary confinement, torture, or detention *incommunicado,* the mere threat of conduct prohibited by Article 5 of the American Convention, when sufficiently real and imminent, can itself be in conflict with that article. In other words, creating a threatening situation or threatening an individual with torture may, in some circumstances, constitute inhumane treatment.[171] In the case *sub judice*, the threat of those punishments was real, creating a climate of relentless tension and violence that was inimical to the inmates' right to live with dignity.

168. Similarly, the subhuman and degrading detention conditions that all the inmates at the Center were forced to endure inevitably affected their mental health, with adverse consequences for the psychological growth and development of their lives and mental health.

169. It has also been established that the inmates at the Center who had been charged but never convicted were not held in quarters separate from convicted inmates. All inmates were subjected to the same treatment, and no distinction was made for whether they were convicted or not (*supra* paragraphs 134.20 and 134.21). This created a climate of insecurity, tension and violence in the Center. The State itself has admitted that the accused and the convicted were not housed separately and has attributed the situation to "a lack of means."[172] Finally, inmates were not given effective opportunities to reform and find their place in mainstream society (*supra* para. 134.24).

170. The Court can therefore conclude that conditions at the Center were never of the kind that would have enabled those deprived of their liberty to live with dignity; instead, the inmates were forced to live permanently in inhuman and degrading conditions, exposed to an atmosphere of violence, danger, abuse, corruption, mistrust and promiscuity, where the rule that prevailed was survival of the fittest, with all its consequences. Indeed, in his ruling on the petition of generic *habeas corpus* filed on behalf of the inmates at the Center, the Civil and Commercial Law Judge of First Instance, Ninth Rotation (*supra* para. 134.28) found that "the

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170 *Cf. Case of Maritza Urrutia*, *supra* note 57, para. 87; *Case of Hilaire*, *supra* note 153, para. 164; and *Case of Bámaca Velásquez.* Judgment of November 25, 2000. Series C No. 70, para. 150.

171 *Cf. Case of the 19 Tradesmen*, *supra* note 26, para. 149; and *Case of the "Street Children" (Villagrán Morales et al.), supra* note 152, para. 165. See also the European Court of Human Rights, *Campbell and Cosans, judgment of 25 February 1982, Series A, no. 48,* p. 12, § 26.

172 Brief answering the application, para. 201, p. 55.

allegations of a) physical, psychological or moral violence exacerbating the conditions under which the inmates were held, [and] b) the threat to the personal safety of the juveniles interned [at the Center] ha[d] been proved."

171. These facts, attributable to the State, constitute a violation of Article 5 of the American Convention, to the detriment of all the inmates interned at the Center.

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172. The Court must now establish whether, in the case of the children interned at the Center, the State fulfilled the added obligations it has under Articles 4, 5 and 19 of the American Convention, based on the existing international *corpus juris* regarding the special protection that children require. One such obligation is provided for in Article 5(5) of the American Convention, whereby States are required to keep minors subject to criminal proceedings separated from adults. And, as previously noted (*supra* para. 161), another obligation of the State is to provide children deprived of their liberty with special periodic health care and education programs. These obligations follow from a proper interpretation of Article 4 of the Convention, in combination with the pertinent provisions of the Convention on the Rights of the Child and Article 13 of the Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights, which Paraguay ratified on June 3, 1997 and which entered into force on November 16, 1999. Such measures are of fundamental importance inasmuch as the children are at a critical stage in their physical, mental, spiritual, moral, psychological and social development that will impact, in one way or another, their life plan.

173. In the instant case it has been shown (*supra* paragraphs 134.6 and 134.7) that the children interned in the Center did not even have the proper health care that any person deprived of his or her liberty must have, and were thus denied the regular medical supervision that would ensure the children's normal growth and development so essential to their future.

174. It has also been proven that the State did not provide the children interned at the Center with the education they needed and that the State was required to provide as part of its obligation to protect the right to life, in the sense previously explained, and as required under Article 13 of the Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights. The education program offered at the Center was unsatisfactory, as it did not have adequate resources and teachers (*supra* para. 134.12). The State's failure to fulfill its obligation in this regard has all the more serious consequences when the children deprived of liberty are from marginal sectors of society, as is true in the instant case, because the failure to provide an adequate education limits their chances of actually rejoining society and carrying forward their life plans.

175. As for compliance with Article 5(5) of the Convention, it has been established (*supra* para. 134.16) that on a number of occasions, children were transferred to adult prisons either as a form of punishment or because of overcrowding at the Center, and that at those adult penal institutions the children shared physical space with adults. This exposed the children to conditions highly prejudicial to their development and made them vulnerable to others who, as adults, could prey upon them.

Inter-American Court of Human Rights

Case of the Yakye Axa Indigenous Community *v.* Paraguay

Judgment of June 17, 2005
(Merits, Reparations and Costs)

In the case of the Yakye Axa Indigenous Community,

the Inter-American Court of Human Rights (hereinafter "the Court" or "the Inter-American Court"), composed of the following judges:

Sergio García Ramírez, President;
Alirio Abreu Burelli, Vice-President;
Oliver Jackman, Judge;
Antônio A. Cançado Trindade, Judge;
Cecilia Medina Quiroga, Judge;
Manuel E. Ventura Robles, Judge;
Diego García-Sayán, Judge, and
Ramón Fogel Pedroso, Judge *ad hoc*;

also present,

Pablo Saavedra Alessandri, Secretary; and
Emilia Segares Rodríguez, Deputy Secretary,

pursuant to Articles 29, 31, 56, 57 and 58 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure")[1], and to Articles 63(2) and 63(1) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention"), issues the instant Judgment.

I
FILING OF THE CASE

1. On March 17, 2003 the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission") filed before the Inter-American Court an application against the State of Paraguay (hereinafter "the State" or "Paraguay"), originating in complaint No. 12.313, received at the Secretariat of the Commission on January 10, 2000.

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[1] The instant Judgment is issued under the provisions of the Rules of Procedure adopted by the Inter-American Court of Human Rights during its XLIX Regular Session by means of the November 24, 2000 Ruling, which entered into force on June 1, 2001, and to the partial amendment adopted by the Court during its LXI Regular Session by means of the November 25, 2003 Ruling, in force since January 1, 2004.

a) respect for human life is in force in Paraguay, both in the law and in actual practice. The State has not breached the right to life by action or by omission in the instant case. It cannot be blamed for the demise or illness of individuals due to natural or fortuitous causes, unless there is proof of negligence in dealing with those specific cases by the public health authorities or by other authorities who were aware of the facts. It cannot be blamed, by omission or action, for the death by "suffocation" of a 70-year-old person or for the death of two 58- and 80-year-old persons due to heart failure;

b) with regard to the cause of death of certain members of the Yakye Axa Community, it is necessary to point out that they were not personally seen by expert witness Pablo Balmaceda. All the information on the death of these persons, whose existence has not been proven, was obtained supposedly through relatives, for which reason their statement is absolutely null;

c) the Yakye Axa Community, like all citizens, has access to a public health service with various health care assistance centers, health care posts, and regional hospitals, to which it is possible to go by means of public transportation, and where care is free of cost. It is the personal responsibility of the citizens to go to the health care centers, and in the case of indigenous communities, it is a shared responsibility with their leaders or chiefs to take those who are ill to the health care assistance centers or public hospitals or, at least, to inform the regional public health authorities or INDI of their situation;

d) at the place where the members of the Yakye Axa Community are currently located it is impossible to establish any form of medical and health care. When they settled alongside the route, the leaders of the Yakye Axa Community placed its members in extreme situations, remote from their traditional forms of subsistence. The Paraguayan State has also been required by the Commission, by means of precautionary measures that are still in force, to let the Yakye Axa Community remain alongside the public road, clearly violating legal and constitutional provisions that forbid this type of occupation. Thus, the members of the Yakye Axa Community are alongside the road by a decision, whether their own or induced by others, that cannot be attributed to the State, which has instead offered alternatives for resettlement;

e) it has provided food and healthcare assistance to the Yakye Axa Community periodically, in accordance with the Executive decree that declared a state of emergency in this Community, and

f) in this case there is no causal relationship "between the land and physical survival" and the alleged lack of preservation of the right to life. State agents never forced the indigenous community members to leave their lands; instead, they have made substantial efforts to seek other places within their ancestral territory, in the framework of ILO Convention No. 169.

Considerations of the Court

160. Article 4(1) of the Convention establishes that:

> [e]very person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

161. This Court has asserted that the right to life is crucial in the American Convention, for which reason realization of the other rights depends on protection of this one.[200] When the right to life is not respected, all the other rights disappear, because the person entitled to them ceases to exist.[201] Due to the basic nature of this right, approaches that restrict the right to life are not admissible. Essentially, this right includes not only the right of every human being not to be arbitrarily deprived of his life, but also the right that conditions that impede or obstruct access to a decent existence should not be generated.[202]

162. One of the obligations that the State must inescapably undertake as guarantor, to protect and ensure the right to life, is that of generating minimum living conditions that are compatible with the dignity of the human person[203] and of not creating conditions that hinder or impede it. In this regard, the State has the duty to take positive, concrete measures geared toward fulfillment of the right to a decent life, especially in the case of persons who are vulnerable and at risk, whose care becomes a high priority.

163. In the instant case, the Court must establish whether the State generated conditions that worsened the difficulties of access to a decent life for the members of the Yakye Axa Community and whether, in that context, it took appropriate positive measures to fulfill that obligation, taking into account the especially vulnerable situation in which they were placed, given their different manner of life (different worldview systems than those of Western culture, including their close relationship with the land) and their life aspirations, both individual and collective, in light of the existing international *corpus juris* regarding the special protection required by the members of the indigenous communities, in view of the provisions set forth in Article 4 of the Convention, in combination with the general duty to respect rights, embodied in Article 1(1) and with the duty of progressive development set forth in Article 26 of that same Convention, and with Articles 10 (Right to Health); 11 (Right to a Healthy Environment); 12 (Right to Food); 13 (Right to Education) and 14 (Right to the Benefits of Culture) of the Additional Protocol to the American Convention, regarding economic, social, and cultural rights,[204] and the pertinent

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200 See *Case of the "Juvenile Reeducation Institute".* Judgment of September 2, 2004. Series C No. 112, para. 156; *Case of the Gómez Paquiyauri brothers*, *supra* note 192, para. 128; *Case of Myrna Mack Chang, supra* note 10, para. 152, and *Case of the "Street Children" (Villagrán Morales et al.)*, *supra* note 182, para. 144.

201 See *Case of the "Juvenile Reeducation Institute", supra* note 200, para. 156; *Case of the Gómez Paquiyauri brothers*, *supra* note 192, para. 128; *Case of Myrna Mack Chang, supra* note 10, para. 152, and *Case of the "Street Children" (Villagrán Morales et al.)*, *supra* note 182, para. 144.

202 See *Case of the "Juvenile Reeducation Institute"*, *supra* note 200, para. 156; *Case of the Gómez Paquiyauri brothers*, *supra* note 192, para. 128; *Case of Myrna Mack Chang, supra* note 10, para. 152, and *Case of the "Street Children" (Villagrán Morales et al.)*, *supra* note 182, para. 144.

203 See *Case of the "Juvenile Reeducation Institute", supra* note 200, para. 159.

204 Paraguay ratified the Additional Protocol to the American Convention on Human Rights regarding Economic, Social and Cultural Rights on June 3, 1997. The Protocol entered into force internationally on November 16, 1999.

provisions ILO Convention No. 169.

164. In the chapter on proven facts (*supra* paras. 50.92 to 50.105) the Court found that the members of the Yakye Axa Community live in extremely destitute conditions as a consequence of lack of land and access to natural resources, caused by the facts that are the subject matter of this proceeding, as well as the precariousness of the temporary settlement where they have had to remain, waiting for a solution to their land claim. This Court notes that, according to the statements of Esteban López, Tomás Galeano and Inocencia Gómez during the public hearing held in the instant case (*supra* para. 39.a, 39.b and 39.c), the members of the Yakye Axa Community could have been able to obtain part of the means necessary for their subsistence if they had been in possession of their traditional lands. Displacement of the members of the Community from those lands has caused special and grave difficulties to obtain food, primarily because the area where their temporary settlement is located does not have appropriate conditions for cultivation or to practice their traditional subsistence activities, such as hunting, fishing, and gathering. Furthermore, in this settlement the members of the Yakye Axa Community do not have access to appropriate housing with the basic minimum services, such as clean water and toilets.

165. These conditions have a negative impact on the nutrition required by the members of the Community who are at this settlement (*supra* para. 50.97). Furthermore, as has been proven in the instant case (*supra* paras. 50.98 and 50.99), there are special deficiencies in the education received by the children and lack of access to health care for the members of the Community for physical and economic reasons.

166. In this regard, the United Nations Committee on Economic, Social, and Cultural Rights, in General Comment 14 on the right to enjoy the highest attainable standard of health, pointed out that

> [İ]ndigenous peoples have the right to specific measures to improve their access to health services and care. These health services should be culturally appropriate, taking into account traditional preventive care, healing practices and medicines […].
>
> [I]n indigenous communities, the health of the individual is often linked to the health of the society as a whole and has a collective dimension. In this regard, the Committee considers that [...] denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health.[205]

167. Special detriment to the right to health, and closely tied to this, detriment to the right to food and access to clean water, have a major impact on the right to a decent existence and basic conditions to exercise other human rights, such as the right to education or the right to cultural identity. In the case of indigenous peoples, access to their ancestral lands and to the use and enjoyment of the natural resources found on them is closely linked to obtaining food and access to clean water. In this regard, said Committee on Economic, Social and Cultural Rights has highlighted the special vulnerability of many groups of indigenous peoples whose access to ancestral lands has been threatened and, therefore, their possibility of access to means of

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[205] UN. Doc. E/C.12/2000/4. The right to the highest attainable standard of health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), (22d session, 2000), para. 27.

obtaining food and clean water.[206]

168. In the previous chapter, this Court established that the State did not guarantee the right of the members of the Yakye Axa Community to communal property. The Court deems that this fact has had a negative effect on the right of the members of the Community to a decent life, because it has deprived them of the possibility of access to their traditional means of subsistence, as well as to use and enjoyment of the natural resources necessary to obtain clean water and to practice traditional medicine to prevent and cure illnesses. Furthermore, the State has not taken the necessary positive measures to ensure that the members of the Yakye Axa Community, during the period in which they have been without territory, have living conditions that are compatible with their dignity, despite the fact that on June 23, 1999 the President of Paraguay issued Decree No. 3.789 that declared a state of emergency in the Community (*supra* para. 50.100).

169. The Court recognizes and appreciates the initiatives taken by Paraguay to provide food, medical-sanitary care and educational materials to the members of the Yakye Axa Community (*supra* paras. 50.100 to 50.105); however, it deems that said measures have not been sufficient or appropriate to correct their situation of vulnerability, given the special gravity of the instant case.

170. On the other hand, the State has argued that the members of the Yakye Axa Community are alongside the road due to "a decision of their own or induced" by their representatives and that cannot be attributed to the State, because it has, rather, offered alternative solutions for resettlement where it would be possible to provide some form of medical and sanitary care for the benefit of members of the Community, while a solution is found to their land claim.

171. This Court has deemed it proven that an important part of the Yakye Axa Community voluntarily left their former settlement on "El Estribo" estate in 1996, with the aim of recovering the lands that they consider their own, from which they had left in 1986 (*supra* paras. 50.13 and 50.92). In face of the prohibition to enter the territory they claim, the members of the Community decided to settle alongside a national road, facing that land, as part of the struggle to claim their territory. While the State has offered to temporarily relocate them on other lands, these offers have been turned down because, according to the members of the Community, they were not duly consulted, bearing in mind the significance for them of remaining on those lands, or because there could be conflicts with other indigenous communities (*supra* paras. 39.a and 50.61).

172. The Court must highlight the special gravity of the situation of the children and the elderly members of the Yakye Axa Community. The Court has established, in previous cases, that regarding the right to life of children, the State has, in addition to the obligations regarding all persons, the additional obligation of fostering the protection measures mentioned in Article 19 of the American Convention. On the one hand, it must play the role of guarantor with greater care and responsibility, and it must take special measures based on the principle of the best interests of the child.[207] In the instant case, the State has the obligation, *inter alia,* of providing for

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[206] See U.N. Doc. E/C.12/1999/5. The right to adequate food (Art. 11), (20th session, 1999), para. 13, and U.N. Doc. HRI/GEN/1/Rev.7 at 117. The right to water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), (29th session 2002), para. 16.

[207] See *Case of the "Juvenile Reeducation Institute", supra* note 200, para. 160; *Case of the Gómez Paquiyauri brothers*, *supra* note 192, paras. 124, 163-164, and 171; *Case of Bulacio*, *supra* note 10,

Supreme Court of India
Francis Coralie Mullin vs The Administrator, Union ... on 13 January, 1981
Equivalent citations: 1981 AIR 746, 1981 SCR (2) 516
Author: P Bhagwati
Bench: Bhagwati, P.N.

PETITIONER:
FRANCIS CORALIE MULLIN

Vs.

RESPONDENT:
THE ADMINISTRATOR, UNION TERRITORY OF DELHI & ORS.

DATE OF JUDGMENT13/01/1981

BENCH:
BHAGWATI, P.N.
BENCH:
BHAGWATI, P.N.
FAZALALI, SYED MURTAZA

CITATION:
1981 AIR 746 1981 SCR (2) 516
1981 SCC (1) 608 1981 SCALE (1)79
CITATOR INFO :

RF	1981 SC2041	(9)
D	1982 SC 710	(92,93)
D	1982 SC1029	(14)
MV	1982 SC1325	(16,36,75)
R	1982 SC1473	(11)
E&D	1985 SC1618	(9)
R	1986 SC 180	(39,42)
RF	1986 SC 847	(12)
RF	1987 SC 990	(16)
R	1991 SC 101	(239)
RF	1991 SC1902	(24)
RF	1992 SC1858	(10)

ACT:
Right of the detenu under Conservation of Foreign Exchange & Prevention of Smuggling Activities Act, to have interview with a lawyer and the members of his family-Section 3(b)(i) & (ii) read with rule 559A and 550 of the Punjab Manual of the Superintendence and Management of Jails-Whether violates Articles 14 and 21 of the Constitution and hence invalid-Distinction between preventive detention with punitive detention-Constitution of India 1950 Article 21, scope of.

HEADNOTE:

Allowing the writ petition, the Court

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HELD : (1) While considering the question of validity of conditions of detention courts must necessarily bear in mind the vital distinction between preventive detention and punitive detention. Punitive detention is intended to inflict punishment on a person, who is found by the judicial process to have committed an offence, while preventive detention is not by way of punishment at all, but it is intended to pre-empt a person from indulging in conduct injurious to the society. [523 A-B]

(2) The power of preventive detention has been recognised as a necessary evil and is tolerated in a free society in the larger interest of security of the State and maintenance of public order. It is a drastic power to detain a person without trial and in many countries it is not allowed to be exercised except in times of war or aggression. The Indian Constitution does recognise the existence of this power, but it is hedged-in by various safeguards set out in Articles 21 and 22. Article 22 in clauses (4) to (7) deals specifically with safeguards against preventive detention and enjoins that any law of preventive detention or action by way of preventive detention taken under such law must be in conformity with the restrictions laid down by those clauses on pain of invalidation, Article 21 also lays down restrictions on the power of preventive detention. [523 B-D]

Article 21 as interpreted in Maneka Gandhi's case requires that no one shall be deprived of his life or personal liberty except by procedure established by law and this procedure must be reasonable, fair and just and not arbitrary, whimsical or fanciful and it is for the Court to decide in the exercise of its constitutional power or judicial review whether the deprivation of life or personal liberty in a given case is by procedure, which is reasonable, fair and just or it is otherwise. The law of preventive detention must, therefore, pass the test not only of Article 22 but also of Article 21. But, despite these safeguards laid down by the Constitution and creatively evolved by the Courts. the power of preventive detention is a frightful and awesome power with drastic consequences affecting personal liberty, which is the most cherished

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and prized possession of man in a civilised society. It is a power to be exercised with the greatest care and caution and the courts have to be ever vigilant to see that this power is not abused or misused, inasmuch as the preventive detention is qualitatively different from punitive detention and their purposes are different. In case of punitive detention, the person has fullest opportunity to defend himself, while in case of preventive detention, the opportunity that he has for contesting the action of the

Executive is very limited. Therefore, the "restrictions placed on a person preventively detained must, consistently with the effectiveness of detention, be minimal". [524A-G]

Maneka Gandhi v. Union of India, [1979] 1 SCC 248; M.O. Hoscot v. State of Maharashtra, [1979] 1 SCR 192; Hussainara Khatoon v. State of Bihar, [1980] 1 SCC 81; Sunil Batra (I) v. Delhi Administration, [1979] 1 SCR 392; Sunil Batra (II) v. Delhi Administration, [1980] 2 SCR 557, referred to.

Sampat Prakash v. State of Jammu and Kashmir, [1969] 3 SCR 574, followed.

3. The prisoner or detenu has all the fundamental rights and other legal rights available to a free person, save those which are incapable of enjoyment by reason of incarceration. A prisoner or detenu is not stripped of his fundamental or other legal rights, save those which are inconsistent with his incarceration, and if any of these rights are violated, the Court will immediately spring into action and run to his rescue. [525 B-C, 526 G-H, 527 A]

Sunil Batra (I) v. Delhi Administration, [1979] 1 SCR 392; Sunil Batra (II) v. Delhi Administration, [1980] 2 SCR 557, State of Maharashtra v. Prabhakar Sanzgire [1966] 1 SCR 702; D. B. Patnaik v. State of Andhra Pradesh, [1975] 2 SCR 24, followed.

Eve Pall's Case, 417 US 817: 41 Lawyers Edition 2nd 495; Charles Wolffs Case, 41 Lawyers Edition 2nd 935, quoted with approval.

(4) While arriving at the proper meaning and content of the right to life, the attempt of the court should always be to expand the reach and ambit of the fundamental right rather than to attenuate its meaning and content. A constitutional provision must be construed, not in a narrow and constricted sense, but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that the constitutional provision does not get atrophied or fossilized but remains flexible enough to meet the newly emerging problems and challenges. This principle applies with greater force in relation to a fundamental right enacted by the Constitution. The fundamental right to life which is the most precious human right and which forms the ark of all other rights must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person. [527 C-D, 528 A-C]

Weems v. U.S. 54 Lawyers Edition 801, quoted with approval.

(5) The right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival.

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Every limb or faculty through which life is enjoyed is thus protected by Article 21 and a fortiorari, this would include the faculties of thinking and feeling. Now deprivation which

is inhibited by Article may be total or partially neither any limb or faculty can be totally destroyed nor can it be partially damaged. Moreover it is every kind of deprivation that is hit by Article 21, whether such deprivation be permanent or temporary and, furthermore, deprivation is not an act which is complete once and for all: it is a continuing act and so long as it lasts, it must be in accordance with procedure established by law. Therefore any act which damages or injures or interferes with the use of any limb or faculty of a person either permanently or even temporarily, would be within the inhibition of Article 21. [528 D, G-H, 529 A]

Kharak Singh v. State of Uttar Pradesh, [1964] 1 SCR 232, followed.

Munn v. Illinois [1877] 94 US 133, referred to.

Sunil Batra v. Delhi Administration, [1980] 2 SCR 557, applied.

(6) The right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings. The magnitude and content of the components of this right would depend upon the extent of the economic development of the country, but it must, in any view of the matter, include the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human self. Every act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights. Therefore, any form of torture or cruel, inhuman or degrading treatment would be offensive to human dignity and constitute an inroad into this right to live and it would, on this view, be prohibited by Article 21 unless it is in accordance with procedure prescribed by law, but no law which authorises and no procedure which leads to such torture or cruelty, inhuman or degrading treatment can ever stand the test of reasonableness and non-arbitrariness: it would plainly be unconstitutional and void as being violative of Article 14 and 21. [529 B-F]

(7) There is implicit in Article 21 the right to protection against torture or cruel, inhuman or degrading treatment which is enunciated in Article 5 of the Universal Declaration of Human Rights and guaranteed by Article 7 of the international Covenant on Civil and Political Rights. This right to live which is comprehended within the broad connotation of the right to life can concededly be abridged according to procedure established by law and therefore, when a person is lawfully imprisoned, this right to live is bound to suffer attenuation to the extent to which it is

Federal Court of Appeal | Cour d'appel fédérale

Date: 20140129

Docket: A-158-13

Citation: 2014 FCA 21

Present: **STRATAS J.A.**

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

PICTOU LANDING BAND COUNCIL AND MAURINA BEADLE

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on January 29, 2014.

REASONS FOR ORDER BY: STRATAS J.A.

Federal Court of Appeal Cour d'appel fédérale

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REASONS FOR ORDER

STRATAS J.A.

[1] Two motions to intervene in this appeal have been brought: one by the First Nations Child and Family Caring Society and another by Amnesty International.

[2] The appellant Attorney General opposes the motions, arguing that the moving parties have not satisfied the test for intervention under Rule 109 of the *Federal Courts Rules*, SOR/98-106. The respondents consent to the motions.

[3] Rule 109 provides as follows:

109. (1) The Court may, on motion, grant leave to any person to intervene in a proceeding.	**109**. (1) La Cour peut, sur requête, autoriser toute personne à intervenir dans une instance.
(2) Notice of a motion under subsection (1) shall	(2) L'avis d'une requête présentée pour obtenir l'autorisation d'intervenir :
(*a*) set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and	*a*) précise les nom et adresse de la personne qui désire intervenir et ceux de son avocat, le cas échéant;
(*b*) describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.	*b*) explique de quelle manière la personne désire participer à l'instance et en quoi sa participation aidera à la prise d'une décision sur toute question de fait et de droit se rapportant à l'instance.
(3) In granting a motion under subsection (1), the Court shall give directions regarding	(3) La Cour assortit l'autorisation d'intervenir de directives concernant :
(*a*) the service of documents; and	*a*) la signification de documents;
(*b*) the role of the intervener, including costs, rights of appeal and any other matters relating to the procedure to be followed by the intervener.	*b*) le rôle de l'intervenant, notamment en ce qui concerne les dépens, les droits d'appel et toute autre question relative à la procédure à suivre.

[4] Below, I describe the nature of this appeal and the moving parties' proposed interventions in this appeal. At the outset, however, I wish to address the test for intervention to be applied in these motions.

[5] The Attorney General submits, as do the moving parties, that in deciding the motions for intervention I should have regard to *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 74 at paragraph 12 (T.D.), aff'd [1990] 1 F.C. 90 (C.A.), an oft-applied authority: see, *e.g.*, *CCH Canadian Ltd. v. Law Society of Upper Canada* (2000), 189 D.L.R. (4th) 125 (F.C.A.). *Rothmans, Benson & Hedges* instructs me that on these motions a list of six factors should guide my discretion. All of the factors need not be present in order to grant the motions.

[6] In my view, this common law list of factors, developed over two decades ago in *Rothmans, Benson & Hedges*, requires modification in light of today's litigation environment: *R. v. Salituro*, [1991] 3 S.C.R. 654. For the reasons developed below, a number of the *Rothmans, Benson & Hedges* factors seem divorced from the real issues at stake in intervention motions that are brought today. *Rothmans, Benson & Hedges* also leaves out other considerations that, over time, have assumed greater prominence in the Federal Courts' decisions on practice and procedure. Indeed, a case can be made that the *Rothmans, Benson & Hedges* factors, when devised, failed to recognize the then-existing understandings of the value of certain interventions: Philip L. Bryden, "Public Intervention in the Courts" (1987) 66 Can. Bar Rev. 490; John Koch, "Making Room: New Directions in Third Party Intervention" (1990) 48 U. T. Fac. L. Rev. 151. Now is the time to tweak the *Rothmans, Benson & Hedges* list of factors.

[7] In these reasons, I could purport to apply the *Rothmans, Benson & Hedges* factors, ascribing little or no weight to individual factors that make no sense to me, and ascribing more weight to

others. That would be intellectually dishonest. I prefer to deal directly and openly with the *Rothmans, Benson & Hedges* factors themselves.

[8] In doing this, I observe that I am a single motions judge and my reasons do not bind my colleagues on this Court. It will be for them to assess the merit of these reasons.

[9] The *Rothmans, Benson & Hedges* factors, and my observations concerning each, are as follows:

- *Is the proposed intervener directly affected by the outcome?* "Directly affected" is a requirement for full party status in an application for judicial review – *i.e.*, standing as an applicant or a respondent in an application for judicial review: *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2013 FCA 236. All other jurisdictions in Canada set the requirements for intervener status at a lower but still meaningful level. In my view, a proposed intervener need only have a genuine interest in the precise issue(s) upon which the case is likely to turn. This is sufficient to give the Court an assurance that the proposed intervener will apply sufficient skills and resources to make a meaningful contribution to the proceeding.

- *Does there exist a justiciable issue and a veritable public interest?* Whether there is a justiciable issue is irrelevant to whether intervention should be granted. Rather, it is relevant to whether the application for judicial review should survive in the first place. If there is no justiciable issue in the application for judicial review, the issue is

not whether a party should be permitted to intervene but whether the application should be struck because there is no viable administrative law cause of action: *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250.

- *Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?* This is irrelevant. If an intervener can help and improve the Court's consideration of the issues in a judicial review or an appeal therefrom, why would the Court turn the intervener aside just because the intervener can go elsewhere? If the concern underlying this factor is that the intervener is raising a new question that could be raised elsewhere, generally interveners – and others – are not allowed to raise new questions on judicial review: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at paragraphs 22-29.

- *Is the position of the proposed intervener adequately defended by one of the parties to the case?* This is relevant and important. It raises the key question under Rule 109(2), namely whether the intervener will bring further, different and valuable insights and perspectives to the Court that will assist it in determining the matter. Among other things, this can acquaint the Court with the implications of approaches it might take in its reasons.

- *Are the interests of justice better served by the intervention of the proposed third party?* Again, this is relevant and important. Sometimes the issues before the Court

assume such a public and important dimension that the Court needs to be exposed to perspectives beyond the particular parties who happen to be before the Court. Sometimes that broader exposure is necessary to appear to be doing – and to do – justice in the case.

- *Can the Court hear and decide the case on its merits without the proposed intervener?* Almost always, the Court can hear and decide a case without the proposed intervener. The more salient question is whether the intervener will bring further, different and valuable insights and perspectives that will assist the Court in determining the matter.

[10] To this, I would add two other considerations, not mentioned in the list of factors in *Rothmans, Benson & Hedges*:

- *Is the proposed intervention inconsistent with the imperatives in Rule 3, namely securing "the just, most expeditious and least expensive determination of every proceeding on its merits"?* For example, some motions to intervene will be too late and will disrupt the orderly progress of a matter. Others, even if not too late, by their nature may unduly complicate or protract the proceedings. Considerations such as these should now pervade the interpretation and application of procedural rules: *Hryniak v. Mauldin*, 2014 SCC 7.

- *Have the specific procedural requirements of Rules 109(2) and 359-369 been met?* Rule 109(2) requires the moving party to list its name, address and solicitor, describe how it intends to participate in the proceeding, and explain how its participation "will assist the determination of a factual or legal issue related to the proceeding." Further, in a motion such as this, brought under Rules 359-369, moving parties should file detailed and well-particularized supporting affidavits to satisfy the Court that intervention is warranted. Compliance with the Rules is mandatory and must form part of the test on intervention motions.

[11] To summarize, in my view, the following considerations should guide whether intervener status should be granted:

I. Has the proposed intervener complied with the specific procedural requirements in Rule 109(2)? Is the evidence offered in support detailed and well-particularized? If the answer to either of these questions is no, the Court cannot adequately assess the remaining considerations and so it must deny intervener status. If the answer to both of these questions is yes, the Court can adequately assess the remaining considerations and assess whether, on balance, intervener status should be granted.

II. Does the proposed intervener have a genuine interest in the matter before the Court such that the Court can be assured that the proposed intervener has the necessary knowledge, skills and resources and will dedicate them to the matter before the Court?

III. In participating in this appeal in the way it proposes, will the proposed intervener advance different and valuable insights and perspectives that will actually further the Court's determination of the matter?

IV. Is it in the interests of justice that intervention be permitted? For example, has the matter assumed such a public, important and complex dimension that the Court needs to be exposed to perspectives beyond those offered by the particular parties before the Court? Has the proposed intervener been involved in earlier proceedings in the matter?

V. Is the proposed intervention inconsistent with the imperatives in Rule 3, namely securing "the just, most expeditious and least expensive determination of every proceeding on its merits"? Are there terms that should be attached to the intervention that would advance the imperatives in Rule 3?

[12] In my view, these considerations faithfully implement some of the more central concerns that the *Rothmans, Benson & Hedges* factors were meant to address, while dealing with the challenges that regularly present themselves today in litigation, particularly public law litigation, in the Federal Courts.

[13] I shall now apply these considerations to the motions before me.

– I –

[14] The moving parties have complied with the specific procedural requirements in Rule 109(2). This is not a case where the party seeking to intervene has failed to describe with sufficient particularity the nature of its participation and how its participation will assist the Court: for an example where a party failed this requirement, see *Forest Ethics Advocacy Association, supra* at paragraphs 34-39. The evidence offered is particular and detailed, not vague and general. The evidence satisfactorily addresses the considerations relevant to the Court's exercise of discretion.

– II –

[15] The moving parties have persuaded me that they have a genuine interest in the matter before the Court. In this regard, the moving parties' activities and previous interventions in legal and policy matters have persuaded me that they have considerable knowledge, skills and resources relevant to the questions before the Court and will deploy them to assist the Court.

– III –

[16] Both moving parties assert that they bring different and valuable insights and perspectives to the Court that will further the Court's determination of the appeal.

[17] To evaluate this assertion, it is first necessary to examine the nature of this appeal. Since this Court's hearing on the merits of the appeal will soon take place, I shall offer only a very brief, top-level summary.

[18] This appeal arises from the Federal Court's decision to quash Aboriginal Affairs and Northern Development Canada's refusal to grant a funding request made by the respondent Band Council: *Pictou Landing Band Council v. Canada (Attorney General)*, 2013 FC 342. The Band Council requested funding to cover the expenses for services rendered to Jeremy Meawasige and his mother, the respondent Maurina Beadle.

[19] Jeremy is a 17-year-old disabled teenager. His condition requires assistance and care 24 hours a day. His mother served as his sole caregiver. But in May 2010 she suffered a stroke. After that, she could not care for Jeremy without assistance. To this end, the Band provided funding for Jeremy's care.

[20] Later, the Band requested that Canada cover Jeremy's expenses. Its request was based upon *Jordan's Principle*, a resolution passed by the House of Commons. In this resolution, Canada announced that it would provide funding for First Nations children in certain circumstances. Exactly what circumstances is very much an issue in this case.

[21] Aboriginal Affairs and Northern Development Canada considered this funding principle, applied it to the facts of this case, and rejected the Band Council's request for funding. The

respondents successfully quashed this rejection in the Federal Court. The appellant has appealed to this Court.

[22] The memoranda of fact and law of the appellant and the respondents have been filed. The parties raise a number of issues. But the two key issues are whether the Federal Court selected the correct standard of review and, if so, whether the Federal Court applied that standard of review correctly.

[23] The moving parties both intend to situate the funding principle against the backdrop of section 15 Charter jurisprudence, international instruments, wider human rights understandings and jurisprudence, and other contextual matters. Although the appellant and the respondents do touch on some of this context, in my view the Court will be assisted by further exploration of it.

[24] This further exploration of contextual matters may inform the Court's determination whether the standard of review is correctness or reasonableness. It will be for the Court to decide whether, in law, that is so and, if so, how it bears upon the selection of the standard of review.

[25] The further exploration of contextual matters may also assist the Court in its task of assessing the funding principle and whether Aboriginal Affairs was correct in finding it inapplicable or was reasonable in finding it inapplicable.

[26] If reasonableness is the standard of review, the contextual matters may have a bearing upon the range of acceptable and defensible options available to Aboriginal Affairs. The range of

acceptable and defensible options takes its colour from the context, widening or narrowing depending on the nature of the question and other circumstances: see *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 at paragraphs 37-41 and see also *Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 436 at paragraph 22, *Canada (Attorney General) v. Abraham*, 2012 FCA 266 at paragraphs 37-50, and *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75 at paragraphs 13-14. In what precise circumstances the range broadens or narrows is unclear – at this time it cannot be ruled out that the contextual matters the interveners propose to raise have a bearing on this.

[27] In making these observations, I am not offering conclusions on the relevance of the contextual matters to the issues in the appeal. In the end, the panel determining this appeal may find the contextual matters irrelevant to the appeal. At present, it is enough to say that the proposed interveners' submissions on the contextual matters they propose to raise – informed by their different and valuable insights and perspectives – will actually further the Court's determination of the appeal one way or the other.

– IV –

[28] Having reviewed some of the jurisprudence offered by the moving parties, in my view the issues in this appeal – the responsibility for the welfare of aboriginal children and the proper interpretation and scope of the relevant funding principle – have assumed a sufficient dimension of public interest, importance and complexity such that intervention should be permitted. In the

circumstances of this case, it is in the interests of justice that the Court should expose itself to perspectives beyond those advanced by the existing parties before the Court.

[29] These observations should not be taken in any way to be prejudging the merits of the matter before the Court.

– V –

[30] The proposed interventions are not inconsistent with the imperatives in Rule 3. Indeed, as explained above, by assisting the Court in determining the issues before it, the interventions may well further the "just…determination of [this] proceeding on its merits."

[31] The matters the moving parties intend to raise do not duplicate the matters already raised in the parties' memoranda of fact and law.

[32] Although the motions to intervene were brought well after the filing of the notice of appeal in this Court, the interventions will, at best, delay the hearing of the appeal by only the three weeks required to file memoranda of fact and law. Further, in these circumstances, and bearing in mind the fact that the issues the interveners will address are closely related to those already in issue, the existing parties will not suffer any significant prejudice. Consistent with the imperatives of Rule 3, I shall impose strict terms on the moving parties' intervention.

[33] In summary, I conclude that the relevant considerations, taken together, suggest that the moving parties' motions to intervene should be granted.

[34] Therefore, for the foregoing reasons, I shall grant the motions to intervene. By February 20, 2014, the interveners shall file their memoranda of fact and law on the contextual matters described in these reasons (at paragraph 23, above) as they relate to the two main issues before the Court (see paragraph 22, above). The interveners' memoranda shall not duplicate the submissions of the appellant and the respondents in their memoranda. The interveners' memoranda shall comply with Rules 65-68 and 70, and shall be no more than ten pages in length (exclusive of the front cover, any table of contents, the list of authorities in Part V of the memorandum, appendices A and B, and the back cover). The interveners shall not add to the evidentiary record before the Court. Each intervener may address the Court for no more than fifteen minutes at the hearing of the appeal. The interveners are not permitted to seek costs, nor shall they be liable for costs absent any abuse of process on their part. There shall be no costs of this motion.

"David Stratas"

J.A.

Federal Court of Appeal | Cour d'appel fédérale

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-158-13

STYLE OF CAUSE: ATTORNEY GENERAL OF CANADA v. PICTOU LANDING BAND COUNCIL AND MAURINA BEADLE

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: STRATAS J.A.

DATED: JANUARY 29, 2014

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COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

CASE OF OSMAN v. THE UNITED KINGDOM

(87/1997/871/1083)

JUDGMENT

STRASBOURG

28 October 1998

a duty of care in relation to negligence actions against the police (see paragraphs 90–97 above) demonstrated any lack of protection to the right to life in the domestic law of the respondent State.

B. The Court's assessment

1. As to the establishment of the facts

113. The Court notes that there was never any independent judicial determination at the domestic level of the facts of the instant case. The Commission on the basis of the pleadings of the parties and the hearing which it held in the case made its own findings on the course of events in the case up until the time of the armed attack by Paget-Lewis on Ali and Ahmet Osman on 7 March 1988 (see paragraphs 67–71 above). According to the applicants, the Commission overlooked in its findings of fact the importance of certain events which they claim have a bearing on the level of knowledge which can be imputed to the police in respect of the seriousness of the danger which Paget-Lewis represented for the lives of the Osman family (see paragraph 10 above).

114. The Court observes that it is called on to determine whether the facts of the instant case disclose a failure by the authorities of the respondent State to protect the right to life of Ali and Ahmet Osman, in breach of Article 2 of the Convention. In addressing that issue, and having due regard to the Commission's role under the Convention in the establishment and verification of the facts of a case, it will assess this issue in accordance with its usual practice in the light of all the material placed before it by the applicants and by the Government or, if necessary, material obtained of its own motion (see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 64, § 160; and the McCann and Others v. the United Kingdom judgment of 27 September 1995, Series A no. 324, p. 51, § 173).

2. As to the alleged failure of the authorities to protect the rights to life of Ali and Ahmet Osman

115. The Court notes that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see the L.C.B. v. the United Kingdom judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-III, p. 1403, § 36). It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE
AHMADOU SADIO DIALLO

(RÉPUBLIQUE DE GUINÉE c. RÉPUBLIQUE
DÉMOCRATIQUE DU CONGO)

ARRÊT DU 30 NOVEMBRE 2010

2010

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING
AHMADOU SADIO DIALLO

(REPUBLIC OF GUINEA *v.* DEMOCRATIC
REPUBLIC OF THE CONGO)

JUDGMENT OF 30 NOVEMBER 2010

was arrested, of his right to request consular assistance from his country, in violation of Article 36 (1) *(b)* of the Vienna Convention on Consular Relations of 24 April 1963, which entered into force for Guinea on 30 July 1988 and for the DRC on 14 August 1976.

The Court will examine in turn whether each of these assertions is well-founded.

(a) *The alleged violation of Article 13 of the Covenant and Article 12, paragraph 4, of the African Charter*

64. Article 13 of the Covenant reads as follows:

> "An alien lawfully in the territory of a State party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."

Likewise, Article 12, paragraph 4, of the African Charter provides that:

> "A non-national legally admitted in a territory of a State party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law."

65. It follows from the terms of the two provisions cited above that the expulsion of an alien lawfully in the territory of a State which is a party to these instruments can only be compatible with the international obligations of that State if it is decided in accordance with "the law", in other words the domestic law applicable in that respect. Compliance with international law is to some extent dependent here on compliance with internal law. However, it is clear that while "accordance with law" as thus defined is a necessary condition for compliance with the above-mentioned provisions, it is not the sufficient condition. First, the applicable domestic law must itself be compatible with the other requirements of the Covenant and the African Charter; second, an expulsion must not be arbitrary in nature, since protection against arbitrary treatment lies at the heart of the rights guaranteed by the international norms protecting human rights, in particular those set out in the two treaties applicable in this case.

66. The interpretation above is fully corroborated by the jurisprudence of the Human Rights Committee established by the Covenant to ensure compliance with that instrument by the States parties (see for example, in this respect, *Maroufidou* v. *Sweden*, No. 58/1979, para. 9.3; *Human Rights*

Committee, General Comment No. 15: The Position of Aliens under the Covenant).

Since it was created, the Human Rights Committee has built up a considerable body of interpretative case law, in particular through its findings in response to the individual communications which may be submitted to it in respect of States parties to the first Optional Protocol, and in the form of its "General Comments".

Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled.

67. Likewise, when the Court is called upon, as in these proceedings, to apply a regional instrument for the protection of human rights, it must take due account of the interpretation of that instrument adopted by the independent bodies which have been specifically created, if such has been the case, to monitor the sound application of the treaty in question. In the present case, the interpretation given above of Article 12, paragraph 4, of the African Charter is consonant with the case law of the African Commission on Human and Peoples' Rights established by Article 30 of the said Charter (see, for example, *Kenneth Good* v. *Republic of Botswana*, No. 313/05, para. 204; *World Organization against Torture and International Association of Democratic Lawyers, International Commission of Jurists, Inter-African Union for Human Rights* v. *Rwanda*, No. 27/89, 46/91, 49/91, 99/93).

68. The Court also notes that the interpretation by the European Court of Human Rights and the Inter-American Court of Human Rights, respectively, of Article 1 of Protocol No. 7 to the (European) Convention for the Protection of Human Rights and Fundamental Freedoms and Article 22, paragraph 6, of the American Convention on Human Rights — the said provisions being close in substance to those of the Covenant and the African Charter which the Court is applying in the present case — is consistent with what has been found in respect of the latter provisions in paragraph 65 above.

69. According to Guinea, the decision to expel Mr. Diallo first breached Article 13 of the Covenant and Article 12, paragraph 4, of the African Charter because it was not taken in accordance with Congolese domestic law, for three reasons: it should have been signed by the President of the Republic and not by the Prime Minister; it should have been preceded by consultation of the National Immigration Board; and it should have indicated the grounds for the expulsion, which it failed to do.

International technical assistance measures (Art. 22): . 02/02/90. CESCR General comment 2. (General Comments)

Convention Abbreviation: CESCR

GENERAL COMMENT 2

International technical assistance measures

(Art. 22 of the Covenant)

(Fourth session, 1990)*

1. Article 22 of the Covenant establishes a mechanism by which the Economic and Social Council may bring to the attention of relevant United Nations bodies any matters arising out of reports submitted under the Covenant "which may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the ... Covenant". While the primary responsibility under article 22 is vested in the Council, it is clearly appropriate for the Committee on Economic, Social and Cultural Rights to play an active role in advising and assisting the Council in this regard.

2. Recommendations in accordance with article 22 may be made to any "organs of the United Nations, their subsidiary organs and specialized agencies concerned with furnishing technical assistance". The Committee considers that this provision should be interpreted so as to include virtually all United Nations organs and agencies involved in any aspect of international development cooperation. It would therefore be appropriate for recommendations in accordance with article 22 to be addressed, inter alia, to the Secretary-General, subsidiary organs of the Council such as the Commission on Human Rights, the Commission on Social Development and the Commission on the Status of Women, other bodies such as UNDP, UNICEF and CDP, agencies such as the World Bank and IMF, and any of the other specialized agencies such as ILO, FAO, UNESCO and WHO.

3. Article 22 could lead either to recommendations of a general policy nature or to more narrowly focused recommendations relating to a specific situation. In the former context, the principal role of the Committee would seem to be to encourage greater attention to efforts to promote economic, social and cultural rights within the framework of international development cooperation activities undertaken by, or with the assistance of, the United Nations and its agencies. In this regard the Committee notes that the Commission on Human Rights, in its resolution 1989/13 of 2 March 1989, invited it "to give consideration to means by which the various United Nations

agencies working in the field of development could best integrate measures designed to promote full respect for economic, social and cultural rights in their activities".

4. As a preliminary practical matter, the Committee notes that its own endeavours would be assisted, and the relevant agencies would also be better informed, if they were to take a greater interest in the work of the Committee. While recognizing that such an interest can be demonstrated in a variety of ways, the Committee observes that attendance by representatives of the appropriate United Nations bodies at its first four sessions has, with the notable exceptions of ILO, UNESCO and WHO, been very low. Similarly, pertinent materials and written information had been received from only a very limited number of agencies. The Committee considers that a deeper understanding of the relevance of economic, social and cultural rights in the context of international development cooperation activities would be considerably facilitated through greater interaction between the Committee and the appropriate agencies. At the very least, the day of general discussion on a specific issue, which the Committee undertakes at each of its sessions, provides an ideal context in which a potentially productive exchange of views can be undertaken.

5. On the broader issues of the promotion of respect for human rights in the context of development activities, the Committee has so far seen only rather limited evidence of specific efforts by United Nations bodies. It notes with satisfaction in this regard the initiative taken jointly by the Centre for Human Rights and UNDP in writing to United Nations Resident Representatives and other field-based officials, inviting their "suggestions and advice, in particular with respect to possible forms of cooperation in ongoing projects [identified] as having a human rights dimension or in new ones in response to a specific Government's request". The Committee has also been informed of long-standing efforts undertaken by ILO to link its own human rights and other international labour standards to its technical cooperation activities.

6. With respect to such activities, two general principles are important. The first is that the two sets of human rights are indivisible and interdependent. This means that efforts to promote one set of rights should also take full account of the other. United Nations agencies involved in the promotion of economic, social and cultural rights should do their utmost to ensure that their activities are fully consistent with the enjoyment of civil and political rights. In negative terms this means that the international agencies should scrupulously avoid involvement in projects which, for example, involve the use of forced labour in contravention of international standards, or promote or reinforce discrimination against individuals or groups contrary to the provisions of the Covenant, or involve large-scale evictions or displacement of persons without the provision of all appropriate protection and compensation. In positive terms, it means that, wherever possible, the agencies should act as advocates of projects and approaches which contribute not only to economic growth or other broadly defined objectives, but also to enhanced enjoyment of the full range of human rights.

7. The second principle of general relevance is that development cooperation activities do not automatically contribute to the promotion of respect for economic, social and cultural rights. Many activities undertaken in the name of "development" have subsequently been recognized as ill-conceived and even counter-productive in human rights terms. In order to reduce the incidence of such problems, the whole

range of issues dealt with in the Covenant should, wherever possible and appropriate, be given specific and careful consideration.

8. Despite the importance of seeking to integrate human rights concerns into development activities, it is true that proposals for such integration can too easily remain at a level of generality. Thus, in an effort to encourage the operationalization of the principle contained in article 22 of the Covenant, the Committee wishes to draw attention to the following specific measures which merit consideration by the relevant bodies:

(a) As a matter of principle, the appropriate United Nations organs and agencies should specifically recognize the intimate relationship which should be established between development activities and efforts to promote respect for human rights in general, and economic, social and cultural rights in particular. The Committee notes in this regard the failure of each of the first three United Nations Development Decade Strategies to recognize that relationship and urges that the fourth such strategy, to be adopted in 1990, should rectify that omission;

(b) Consideration should be given by United Nations agencies to the proposal, made by the Secretary-General in a report of 1979 [1/] that a "human rights impact statement" be required to be prepared in connection with all major development cooperation activities;

(c) The training or briefing given to project and other personnel employed by United Nations agencies should include a component dealing with human rights standards and principles;

(d) Every effort should be made, at each phase of a development project, to ensure that the rights contained in the Covenants are duly taken into account. This would apply, for example, in the initial assessment of the priority needs of a particular country, in the identification of particular projects, in project design, in the implementation of the project, and in its final evaluation.

9. A matter which has been of particular concern to the Committee in the examination of the reports of States parties is the adverse impact of the debt burden and of the relevant adjustment measures on the enjoyment of economic, social and cultural rights in many countries. The Committee recognizes that adjustment programmes will often be unavoidable and that these will frequently involve a major element of austerity. Under such circumstances, however, endeavours to protect the most basic economic, social and cultural rights become more, rather than less, urgent. States parties to the Covenant, as well as the relevant United Nations agencies, should thus make a particular effort to ensure that such protection is, to the maximum extent possible, built-in to programmes and policies designed to promote adjustment. Such an approach, which is sometimes referred to as "adjustment with a human face" or as promoting "the human dimension of development" requires that the goal of protecting the rights of the poor and vulnerable should become a basic objective of economic adjustment. Similarly, international measures to deal with the debt crisis should take full account of the need to protect economic, social and cultural rights through, inter alia, international cooperation. In many situations, this might point to the need for major debt relief initiatives.

10. Finally, the Committee wishes to draw attention to the important opportunity provided to States parties, in accordance with article 22 of the Covenant, to identify in their reports any particular needs they might have for technical assistance or development cooperation.

Note

1/ "The international dimensions of the right to development as a human right in relation with other human rights based on international cooperation, including the right to peace, taking into account the requirements of the new international economic order and the fundamental human needs" (E/CN.4/1334, para. 314).

* Contained in document E/1990/23.

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SUBSTANTIVE ISSUES ARISING IN THE IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Draft general comment No. 9: The domestic application of the Covenant*

A. The duty to give effect to the Covenant in the domestic legal order

1. In its General Comment No. 3 (1990) the Committee addressed issues relating to the nature and scope of States parties' obligations. The present general comment seeks to elaborate further certain elements of the earlier statement. The central obligation in relation to the Covenant is for States parties to give effect to the rights recognized therein. By requiring Governments to do so "by all appropriate means", the Covenant adopts a broad and flexible approach which enables the particularities of the legal and administrative systems of each State, as well as other relevant considerations, to be taken into account.

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* Adopted at the 51st meeting on 1 December 1998 (nineteenth session).

2. But this flexibility coexists with the obligation upon each State party to use all the means at its disposal to give effect to the rights recognized in the Covenant. In this respect, the fundamental requirements of international human rights law must be borne in mind. Thus the Covenant norms must be recognized in appropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place.

3. Questions relating to the domestic application of the Covenant must be considered in the light of two principles of international law. The first, as reflected in article 27 of the Vienna Convention on the Law of Treaties of 1969, is that "[A] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". In other words, States should modify the domestic legal order as necessary in order to give effect to their treaty obligations. 1/ This issue is considered further by the Committee in its General Comment No. 12 (1998). The second principle is reflected in article 8 of the Universal Declaration of Human Rights, according to which "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." The Covenant contains no direct counterpart to article 2.3 (b) of the International Covenant on Civil and Political Rights which obligates States parties to, inter alia, "develop the possibilities of judicial remedy". Nevertheless, a State party seeking to justify its failure to provide any domestic legal remedies for violations of economic, social and cultural rights would need to show either that such remedies are not "appropriate means" within the terms of article 2.1 of the Covenant or that, in view of the other means used, they are unnecessary. It will be difficult to show this and the Committee considers that, in many cases, the other "means" used could be rendered ineffective if they are not reinforced or complemented by judicial remedies.

B. The status of the Covenant in the domestic legal order

4. In general, legally binding international human rights standards should operate directly and immediately within the domestic legal system of each State party, thereby enabling individuals to seek enforcement of their rights before national courts and tribunals. The rule requiring the exhaustion of domestic remedies reinforces the primacy of national remedies in this respect. The existence and further development of international procedures for the pursuit of individual claims is important, but such procedures are ultimately only supplementary to effective national remedies.

5. The Covenant does not stipulate the specific means by which it is to be implemented in the national legal order. And there is no provision obligating its comprehensive incorporation or requiring it to be accorded any specific type of status in national law. Although the precise method by which Covenant rights are given effect in national law is a matter for each State party to decide, the means used should be appropriate in the sense of producing results which are consistent with the full discharge of its obligations by the State party. The means chosen are also subject to review as part of the Committee's examination of the State party's compliance with its obligations under the Covenant.

6. An analysis of State practice with respect to the Covenant shows that States have used a variety of approaches. Some States have failed to do anything specific at all. Of those that have taken measures, some States have transformed the Covenant into domestic law by supplementing or amending existing legislation, without invoking the specific terms of the Covenant. Others have adopted or incorporated it into domestic law, so that its terms are retained intact and given formal validity in the national legal order. This has often been done by means of constitutional provisions according priority to the provisions of international human rights treaties over any inconsistent domestic laws. The approach of States to the Covenant depends significantly upon the approach adopted to treaties in general in the domestic legal order.

7. But whatever the preferred methodology, several principles follow from the duty to give effect to the Covenant and must therefore be respected. First, the means of implementation chosen must be adequate to ensure fulfilment of the obligations under the Covenant. The need to ensure justiciability (see para. 10 below) is relevant when determining the best way to give domestic legal effect to the Covenant rights. Second, account should be taken of the means which have proved to be most effective in the country concerned in ensuring the protection of other human rights. Where the means used to give effect to the Covenant on Economic, Social and Cultural Rights differ significantly from those used in relation to other human rights treaties, there should be a compelling justification for this, taking account of the fact that the formulations used in the Covenant are, to a considerable extent, comparable to those used in treaties dealing with civil and political rights.

8. Third, while the Covenant does not formally oblige States to incorporate its provisions in domestic law, such an approach is desirable. Direct incorporation avoids problems that might arise in the translation of treaty obligations into national law, and provides a basis for the direct invocation of the Covenant rights by individuals in national courts. For these reasons, the Committee strongly encourages formal adoption or incorporation of the Covenant in national law.

C. The role of legal remedies

Legal or judicial remedies?

9. The right to an effective remedy need not be interpreted as always requiring a judicial remedy. Administrative remedies will, in many cases, be adequate and those living within the jurisdiction of a State party have a legitimate expectation, based on the principle of good faith, that all administrative authorities will take account of the requirements of the Covenant in their decision-making. Any such administrative remedies should be accessible, affordable, timely and effective. An ultimate right of judicial appeal from administrative procedures of this type would also often be appropriate. By the same token, there are some obligations, such as (but by no means limited to) those concerning non-discrimination, 2/ in relation to which the provision of some form of judicial remedy would seem indispensable

in order to satisfy the requirements of the Covenant. In other words, whenever a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary.

Justiciability

10. In relation to civil and political rights, it is generally taken for granted that judicial remedies for violations are essential. Regrettably, the contrary assumption is too often made in relation to economic, social and cultural rights. This discrepancy is not warranted either by the nature of the rights or by the relevant Covenant provisions. The Committee has already made clear that it considers many of the provisions in the Covenant to be capable of immediate implementation. Thus, in General Comment No. 3 it cited, by way of example, articles 3, 7 (a) (i), 8, 10.3, 13.2 (a), 13.3, 13.4 and 15.3. It is important in this regard to distinguish between justiciability (which refers to those matters which are appropriately resolved by the courts) and norms which are self-executing (capable of being applied by courts without further elaboration). While the general approach of each legal system needs to be taken into account, there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions. It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts. While the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.

Self-executing

11. The Covenant does not negate the possibility that the rights it contains may be considered self-executing in systems where that option is provided for. Indeed, when it was being drafted, attempts to include a specific provision in the Covenant to the effect that it be considered “non-self-executing” were strongly rejected. In most States, the determination of whether or not a treaty provision is self-executing will be a matter for the courts, not the executive or the legislature. In order to perform that function effectively, the relevant courts and tribunals must be made aware of the nature and implications of the Covenant and of the important role of judicial remedies in its implementation. Thus, for example, when Governments are involved in court proceedings, they should promote interpretations of domestic laws which give effect to their Covenant obligations. Similarly, judicial training should take full account of the justiciability of the Covenant. It is especially important to avoid any *a priori* assumption that the norms should be considered to be non-self-executing. In fact, many of them are stated in terms which are at least as clear and specific as those in other human rights treaties, the provisions of which are regularly deemed by courts to be self-executing.

D. The treatment of the Covenant in domestic courts

12. In the Committee's guidelines for States' reports, States are requested to provide information as to whether the provisions of the Covenant "can be invoked before, and directly enforced by, the Courts, other tribunals or administrative authorities". 3/ Some States have provided such information, but greater importance should be attached to this element in future reports. In particular, the Committee requests that States parties provide details of any significant jurisprudence from their domestic courts that makes use of the provisions of the Covenant.

13. On the basis of available information, it is clear that State practice is mixed. The Committee notes that some courts have applied the provisions of the Covenant either directly or as interpretive standards. Other courts are willing to acknowledge, in principle, the relevance of the Covenant for interpreting domestic law, but in practice, the impact of the Covenant on the reasoning or outcome of cases is very limited. Still other courts have refused to give any degree of legal effect to the Covenant in cases in which individuals have sought to rely on it. There remains extensive scope for the courts in most countries to place greater reliance upon the Covenant.

14. Within the limits of the appropriate exercise of their functions of judicial review, courts should take account of Covenant rights where this is necessary to ensure that the State's conduct is consistent with its obligations under the Covenant. Neglect by the courts of this responsibility is incompatible with the principle of the rule of law, which must always be taken to include respect for international human rights obligations.

15. It is generally accepted that domestic law should be interpreted as far as possible in a way which conforms to a State's international legal obligations. Thus, when a domestic decision maker is faced with a choice between an interpretation of domestic law that would place the state in breach of the Covenant and one that would enable the State to comply with the Covenant, international law requires the choice of the latter. Guarantees of equality and non-discrimination should be interpreted, to the greatest extent possible, in ways which facilitate the full protection of economic, social and cultural rights.

Notes

1.A/CONF.39/27.

2.Pursuant to article 2.2 States "undertake to guarantee" that the rights in the Covenant are exercised "without discrimination of any kind".

3.Reporting guidelines, E/C.12/1990/8, Annex IV.

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SUBSTANTIVE ISSUES ARISING IN THE IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Draft general comment No. 10:

The role of national human rights institutions in the protection of economic, social and cultural rights*

* Adopted at the 51st meeting (nineteenth session), on 1 December 1998.

GE.98-14841 (E)

1. Article 2 (1) of the Covenant obligates each State party “to take steps ... with a view to achieving progressively the full realization of the [Covenant] rights ... by all appropriate means”. The Committee notes that one such means, through which important steps can be taken, is the work of national institutions for the promotion and protection of human rights. In recent years there has been a proliferation of these institutions and the trend has been strongly encouraged by the General Assembly and the Commission on Human Rights. The Office of the High Commissioner for Human Rights has established a major programme to assist and encourage States in relation to national institutions.

2. These institutions range from national human rights commissions through Ombudsman offices, public interest or other human rights “advocates”, to defenseurs du peuple and defensores del pueblo. In many cases, the institution has been established by the Government, enjoys an important degree of autonomy from the executive and the legislature, takes full account of international human rights standards which are applicable to the country concerned, and is mandated to perform various activities designed to promote and protect human rights. Such institutions have been established in States with widely differing legal cultures and regardless of their economic situation.

3. The Committee notes that national institutions have a potentially crucial role to play in promoting and ensuring the indivisibility and interdependence of all human rights. Unfortunately, this role has too often either not been accorded to the institution or has been neglected or given a low priority by it. It is therefore essential that full attention be given to economic, social and cultural rights in all of the relevant activities of these institutions. The following list is indicative of the types of activities that can be, and in some instances already have been, undertaken by national institutions in relation to these rights:

(a) The promotion of educational and information programmes designed to enhance awareness and understanding of economic, social and cultural rights, both within the population at large and among particular groups such as the public service, the judiciary, the private sector and the labour movement;

(b) The scrutinizing of existing laws and administrative acts, as well as draft bills and other proposals, to ensure that they are consistent with the requirements of the International Covenant on Economic, Social and Cultural Rights;

(c) Providing technical advice, or undertaking surveys in relation to economic, social and cultural rights, including at the request of the public authorities or other appropriate agencies;

(d) The identification of national-level benchmarks against which the realization of Covenant obligations can be measured;

(e) Conducting research and inquiries designed to ascertain the extent to which particular economic, social and cultural rights are being realized, either within the State as a whole or in areas or in relation to communities of particular vulnerability;

(f) Monitoring compliance with specific rights recognized under the Covenant and providing reports thereon to the public authorities and civil society; and

(g) Examining complaints alleging infringements of applicable economic, social and cultural rights standards within the State.

4. The Committee calls upon States parties to ensure that the mandates accorded to all national human rights institutions include appropriate attention to economic, social and cultural rights and requests States parties to include details of both the mandates and the principal relevant activities of such institutions in their reports submitted to the Committee.

CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)

Adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000
(Contained in Document E/C.12/2000/4)

1. Health is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity. The realization of the right to health may be pursued through numerous, complementary approaches, such as the formulation of health policies, or the implementation of health programmes developed by the World Health Organization (WHO), or the adoption of specific legal instruments. Moreover, the right to health includes certain components which are legally enforceable.[1]

2. The human right to health is recognized in numerous international instruments. Article 25.1 of the Universal Declaration of Human Rights affirms: "Everyone has the right to a standard of living adequate for the health of himself and of his family, including food, clothing, housing and medical care and necessary social services". The International Covenant on Economic, Social and Cultural Rights provides the most comprehensive article on the right to health in international human rights law. In accordance with article 12.1 of the Covenant, States parties recognize "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health", while article 12.2 enumerates, by way of illustration, a number of "steps to be taken by the States parties ... to achieve the full realization of this right". Additionally, the right to health is recognized, inter alia, in article 5 (e) (iv) of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965, in articles 11.1 (f) and 12 of the Convention on the Elimination of All Forms of Discrimination against Women of 1979 and in article 24 of the Convention on the Rights of the Child of 1989. Several regional human rights instruments also recognize the right to health, such as the European Social Charter of 1961 as revised (art. 11), the African Charter on Human and Peoples' Rights of 1981 (art. 16) and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988 (art. 10). Similarly, the right to health has been proclaimed by the Commission on Human Rights,[2] as well as in the Vienna Declaration and Programme of Action of 1993 and other international instruments.[3]

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[1] For example, the principle of non-discrimination in relation to health facilities, goods and services is legally enforceable in numerous national jurisdictions.

[2] In its resolution 1989/11.

[3] The Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care adopted by the United Nations General Assembly in 1991 (resolution 46/119) and the Committee's general comment No. 5 on persons with disabilities apply to persons with mental illness;

3. The right to health is closely related to and dependent upon the realization of other human rights, as contained in the International Bill of Rights, including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement. These and other rights and freedoms address integral components of the right to health.

4. In drafting article 12 of the Covenant, the Third Committee of the United Nations General Assembly did not adopt the definition of health contained in the preamble to the Constitution of WHO, which conceptualizes health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity". However, the reference in article 12.1 of the Covenant to "the highest attainable standard of physical and mental health" is not confined to the right to health care. On the contrary, the drafting history and the express wording of article 12.2 acknowledge that the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.

5. The Committee is aware that, for millions of people throughout the world, the full enjoyment of the right to health still remains a distant goal. Moreover, in many cases, especially for those living in poverty, this goal is becoming increasingly remote. The Committee recognizes the formidable structural and other obstacles resulting from international and other factors beyond the control of States that impede the full realization of article 12 in many States parties.

6. With a view to assisting States parties' implementation of the Covenant and the fulfilment of their reporting obligations, this general comment focuses on the normative content of article 12 (Part I), States parties' obligations (Part II), violations (Part III) and implementation at the national level (Part IV), while the obligations of actors other than States parties are addressed in Part V. The general comment is based on the Committee's experience in examining States parties' reports over many years.

1. Normative content of article 12

7. Article 12.1 provides a definition of the right to health, while article 12.2 enumerates illustrative, non-exhaustive examples of States parties' obligations.

8. The right to health is not to be understood as a right to be *healthy*. The right to health contains both freedoms and entitlements. The freedoms include the right to

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the Programme of Action of the International Conference on Population and Development held at Cairo in 1994, as well as the Declaration and Programme for Action of the Fourth World Conference on Women held in Beijing in 1995 contain definitions of reproductive health and women's health, respectively.

control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. By contrast, the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.

9. The notion of "the highest attainable standard of health" in article 12.1 takes into account both the individual's biological and socio-economic preconditions and a State's available resources. There are a number of aspects which cannot be addressed solely within the relationship between States and individuals; in particular, good health cannot be ensured by a State, nor can States provide protection against every possible cause of human ill health. Thus, genetic factors, individual susceptibility to ill health and the adoption of unhealthy or risky lifestyles may play an important role with respect to an individual's health. Consequently, the right to health must be understood as a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health.

10. Since the adoption of the two International Covenants in 1966 the world health situation has changed dramatically and the notion of health has undergone substantial changes and has also widened in scope. More determinants of health are being taken into consideration, such as resource distribution and gender differences. A wider definition of health also takes into account such socially-related concerns as violence and armed conflict.[4] Moreover, formerly unknown diseases, such as human immunodeficiency virus and acquired immunodeficiency syndrome (HIV/AIDS), and others that have become more widespread, such as cancer, as well as the rapid growth of the world population, have created new obstacles for the realization of the right to health which need to be taken into account when interpreting article 12.

11. The Committee interprets the right to health, as defined in article 12.1, as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health. A further important aspect is the participation of the population in all health-related decision-making at the community, national and international levels.

12. The right to health in all its forms and at all levels contains the following interrelated and essential elements, the precise application of which will depend on the conditions prevailing in a particular State party:

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[4] Common article 3 of the Geneva Conventions for the protection of war victims (1949); Additional Protocol I (1977) relating to the Protection of Victims of International Armed Conflicts, article 75 (2) (a); Additional Protocol II (1977) relating to the Protection of Victims of Non-International Armed Conflicts, article 4 (a).

(a) *Availability*. Functioning public health and health-care facilities, goods and services, as well as programmes, have to be available in sufficient quantity within the State party. The precise nature of the facilities, goods and services will vary depending on numerous factors, including the State party's developmental level. They will include, however, the underlying determinants of health, such as safe and potable drinking water and adequate sanitation facilities, hospitals, clinics and other health-related buildings, trained medical and professional personnel receiving domestically competitive salaries, and essential drugs, as defined by the WHO Action Programme on Essential Drugs;[5]

(b) *Accessibility*. Health facilities, goods and services[6] have to be accessible to everyone without discrimination, within the jurisdiction of the State party. Accessibility has four overlapping dimensions:

Non-discrimination: health facilities, goods and services must be accessible to all, especially the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds;[7]

Physical accessibility: health facilities, goods and services must be within safe physical reach for all sections of the population, especially vulnerable or marginalized groups, such as ethnic minorities and indigenous populations, women, children, adolescents, older persons, persons with disabilities and persons with HIV/AIDS. Accessibility also implies that medical services and underlying determinants of health, such as safe and potable water and adequate sanitation facilities, are within safe physical reach, including in rural areas. Accessibility further includes adequate access to buildings for persons with disabilities;

Economic accessibility (affordability): health facilities, goods and services must be affordable for all. Payment for health-care services, as well as services related to the underlying determinants of health, has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with health expenses as compared to richer households;

Information accessibility: accessibility includes the right to seek, receive and impart information and ideas[8] concerning health issues. However,

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[5] See WHO Model List of Essential Drugs, revised December 1999, WHO Drug Information, vol. 13, No. 4, 1999.

[6] Unless expressly provided otherwise, any reference in this general comment to health facilities, goods and services includes the underlying determinants of health outlined in paragraphs 11 and 12 (a) of this general comment.

[7] See paragraphs 18 and 19 of this general comment.

accessibility of information should not impair the right to have personal health data treated with confidentiality;

(c) *Acceptability.* All health facilities, goods and services must be respectful of medical ethics and culturally appropriate, i.e. respectful of the culture of individuals, minorities, peoples and communities, sensitive to gender and life-cycle requirements, as well as being designed to respect confidentiality and improve the health status of those concerned;

(d) *Quality.* As well as being culturally acceptable, health facilities, goods and services must also be scientifically and medically appropriate and of good quality. This requires, inter alia, skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe and potable water, and adequate sanitation.

13. The non-exhaustive catalogue of examples in article 12.2 provides guidance in defining the action to be taken by States. It gives specific generic examples of measures arising from the broad definition of the right to health contained in article 12.1, thereby illustrating the content of that right, as exemplified in the following paragraphs.[9]

Article 12.2 (a): The right to maternal, child and reproductive health

14. "The provision for the reduction of the stillbirth rate and of infant mortality and for the healthy development of the child" (art. 12.2 (a))[10] may be understood as requiring measures to improve child and maternal health, sexual and reproductive health services, including access to family planning, pre- and post-natal care,[11]

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[8] See article 19.2 of the International Covenant on Civil and Political Rights. This general comment gives particular emphasis to access to information because of the special importance of this issue in relation to health.

[9] In the literature and practice concerning the right to health, three levels of health care are frequently referred to: *primary health care* typically deals with common and relatively minor illnesses and is provided by health professionals and/or generally trained doctors working within the community at relatively low cost; *secondary health care* is provided in centres, usually hospitals, and typically deals with relatively common minor or serious illnesses that cannot be managed at community level, using specialty-trained health professionals and doctors, special equipment and sometimes inpatient care at comparatively higher cost; *tertiary health care* is provided in relatively few centres, typically deals with small numbers of minor or serious illnesses requiring specialty-trained health professionals and doctors and special equipment, and is often relatively expensive. Since forms of primary, secondary and tertiary health care frequently overlap and often interact, the use of this typology does not always provide sufficient distinguishing criteria to be helpful for assessing which levels of health care States parties must provide, and is therefore of limited assistance in relation to the normative understanding of article 12.

[10] According to WHO, the stillbirth rate is no longer commonly used, infant and under-5 mortality rates being measured instead.

[11] *Prenatal* denotes existing or occurring before birth; *perinatal* refers to the period shortly before and after birth (in medical statistics the period begins with the completion of 28 weeks of gestation and is

emergency obstetric services and access to information, as well as to resources necessary to act on that information.[12]

Article 12.2 (b): The right to healthy natural and workplace environments

15. "The improvement of all aspects of environmental and industrial hygiene" (art. 12.2 (b)) comprises, inter alia, preventive measures in respect of occupational accidents and diseases; the requirement to ensure an adequate supply of safe and potable water and basic sanitation; the prevention and reduction of the population's exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health.[13] Furthermore, industrial hygiene refers to the minimization, so far as is reasonably practicable, of the causes of health hazards inherent in the working environment.[14] Article 12.2 (b) also embraces adequate housing and safe and hygienic working conditions, an adequate supply of food and proper nutrition, and discourages the abuse of alcohol, and the use of tobacco, drugs and other harmful substances.

Article 12.2 (c): The right to prevention, treatment and control of diseases

16. "The prevention, treatment and control of epidemic, endemic, occupational and other diseases" (art. 12.2 (c)) requires the establishment of prevention and education programmes for behaviour-related health concerns such as sexually transmitted diseases, in particular HIV/AIDS, and those adversely affecting sexual and reproductive health, and the promotion of social determinants of good health, such as environmental safety, education, economic development and gender equity. The right to treatment includes the creation of a system of urgent medical care in cases of accidents, epidemics and similar health hazards, and the provision of disaster relief and humanitarian assistance in emergency situations. The control of diseases refers to

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variously defined as ending one to four weeks after birth); *neonatal*, by contrast, covers the period pertaining to the first four weeks after birth; while *post-natal* denotes occurrence after birth. In this general comment, the more generic terms pre- and post-natal are exclusively employed.

[12] Reproductive health means that women and men have the freedom to decide if and when to reproduce and the right to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice as well as the right of access to appropriate health-care services that will, for example, enable women to go safely through pregnancy and childbirth.

[13] The Committee takes note, in this regard, of Principle 1 of the Stockholm Declaration of 1972 which states: "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being", as well as of recent developments in international law, including General Assembly resolution 45/94 on the need to ensure a healthy environment for the well-being of individuals; Principle 1 of the Rio Declaration; and regional human rights instruments such as article 10 of the San Salvador Protocol to the American Convention on Human Rights.

[14] ILO Convention No. 155, article 4.2.

States' individual and joint efforts to, inter alia, make available relevant technologies, using and improving epidemiological surveillance and data collection on a disaggregated basis, the implementation or enhancement of immunization programmes and other strategies of infectious disease control.

Article 12.2 (d): The right to health facilities, goods and services[15]

17. "The creation of conditions which would assure to all medical service and medical attention in the event of sickness" (art. 12.2 (d)), both physical and mental, includes the provision of equal and timely access to basic preventive, curative, rehabilitative health services and health education; regular screening programmes; appropriate treatment of prevalent diseases, illnesses, injuries and disabilities, preferably at community level; the provision of essential drugs; and appropriate mental health treatment and care. A further important aspect is the improvement and furtherance of participation of the population in the provision of preventive and curative health services, such as the organization of the health sector, the insurance system and, in particular, participation in political decisions relating to the right to health taken at both the community and national levels.

Article 12: Special topics of broad application

Non-discrimination and equal treatment

18. By virtue of article 2.2 and article 3, the Covenant proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health. The Committee stresses that many measures, such as most strategies and programmes designed to eliminate health-related discrimination, can be pursued with minimum resource implications through the adoption, modification or abrogation of legislation or the dissemination of information. The Committee recalls general comment No. 3, paragraph 12, which states that even in times of severe resource constraints, the vulnerable members of society must be protected by the adoption of relatively low-cost targeted programmes.

19. With respect to the right to health, equality of access to health care and health services has to be emphasized. States have a special obligation to provide those who do not have sufficient means with the necessary health insurance and health-care facilities, and to prevent any discrimination on internationally prohibited grounds in the provision of health care and health services, especially with respect to the core obligations of the right to health.[16] Inappropriate health resource allocation can lead

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[15] See paragraph 12 (b) and note 8 above.

[16] For the core obligations, see paragraphs 43 and 44 of the present general comments.

to discrimination that may not be overt. For example, investments should not disproportionately favour expensive curative health services which are often accessible only to a small, privileged fraction of the population, rather than primary and preventive health care benefiting a far larger part of the population.

Gender perspective

20. The Committee recommends that States integrate a gender perspective in their health-related policies, planning, programmes and research in order to promote better health for both women and men. A gender-based approach recognizes that biological and sociocultural factors play a significant role in influencing the health of men and women. The disaggregation of health and socio-economic data according to sex is essential for identifying and remedying inequalities in health.

Women and the right to health

21. To eliminate discrimination against women, there is a need to develop and implement a comprehensive national strategy for promoting women's right to health throughout their life span. Such a strategy should include interventions aimed at the prevention and treatment of diseases affecting women, as well as policies to provide access to a full range of high quality and affordable health care, including sexual and reproductive services. A major goal should be reducing women's health risks, particularly lowering rates of maternal mortality and protecting women from domestic violence. The realization of women's right to health requires the removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health. It is also important to undertake preventive, promotive and remedial action to shield women from the impact of harmful traditional cultural practices and norms that deny them their full reproductive rights.

Children and adolescents

22. Article 12.2 (a) outlines the need to take measures to reduce infant mortality and promote the healthy development of infants and children. Subsequent international human rights instruments recognize that children and adolescents have the right to the enjoyment of the highest standard of health and access to facilities for the treatment of illness.[17] The Convention on the Rights of the Child directs States to ensure access to essential health services for the child and his or her family, including pre- and post-natal care for mothers. The Convention links these goals with ensuring access to child-friendly information about preventive and health-promoting behaviour and support to families and communities in implementing these practices. Implementation of the principle of non-discrimination requires that girls, as well as boys, have equal access to adequate nutrition, safe environments, and physical as well as mental health services. There is a need to adopt effective and appropriate measures to abolish harmful traditional practices affecting the health of children, particularly

[17] Article 24.1 of the Convention on the Rights of the Child.

girls, including early marriage, female genital mutilation, preferential feeding and care of male children.[18] Children with disabilities should be given the opportunity to enjoy a fulfilling and decent life and to participate within their community.

23. States parties should provide a safe and supportive environment for adolescents, that ensures the opportunity to participate in decisions affecting their health, to build life skills, to acquire appropriate information, to receive counselling and to negotiate the health-behaviour choices they make. The realization of the right to health of adolescents is dependent on the development of youth-friendly health care, which respects confidentiality and privacy and includes appropriate sexual and reproductive health services.

24. In all policies and programmes aimed at guaranteeing the right to health of children and adolescents their best interests shall be a primary consideration.

Older persons

25. With regard to the realization of the right to health of older persons, the Committee, in accordance with paragraphs 34 and 35 of general comment No. 6 (1995), reaffirms the importance of an integrated approach, combining elements of preventive, curative and rehabilitative health treatment. Such measures should be based on periodical check-ups for both sexes; physical as well as psychological rehabilitative measures aimed at maintaining the functionality and autonomy of older persons; and attention and care for chronically and terminally ill persons, sparing them avoidable pain and enabling them to die with dignity.

Persons with disabilities

26. The Committee reaffirms paragraph 34 of its general comment No. 5, which addresses the issue of persons with disabilities in the context of the right to physical and mental health. Moreover, the Committee stresses the need to ensure that not only the public health sector but also private providers of health services and facilities comply with the principle of non-discrimination in relation to persons with disabilities.

Indigenous peoples

27. In the light of emerging international law and practice and the recent measures taken by States in relation to indigenous peoples,[19] the Committee deems it useful to

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[18] See World Health Assembly resolution WHA47.10, 1994, entitled "Maternal and child health and family planning: traditional practices harmful to the health of women and children".

[19] Recent emerging international norms relevant to indigenous peoples include the ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989); articles 29 (c) and (d) and 30 of the Convention on the Rights of the Child (1989); article 8 (j) of the Convention on Biological Diversity (1992), recommending that States respect, preserve and maintain knowledge, innovation and practices of indigenous communities; Agenda 21 of the United Nations Conference on Environment and Development (1992), in particular chapter 26; and Part I, paragraph 20, of the Vienna Declaration and Programme of Action (1993), stating that States should take concerted positive

identify elements that would help to define indigenous peoples' right to health in order better to enable States with indigenous peoples to implement the provisions contained in article 12 of the Covenant. The Committee considers that indigenous peoples have the right to specific measures to improve their access to health services and care. These health services should be culturally appropriate, taking into account traditional preventive care, healing practices and medicines. States should provide resources for indigenous peoples to design, deliver and control such services so that they may enjoy the highest attainable standard of physical and mental health. The vital medicinal plants, animals and minerals necessary to the full enjoyment of health of indigenous peoples should also be protected. The Committee notes that, in indigenous communities, the health of the individual is often linked to the health of the society as a whole and has a collective dimension. In this respect, the Committee considers that development-related activities that lead to the displacement of indigenous peoples against their will from their traditional territories and environment, denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health.

Limitations

28. Issues of public health are sometimes used by States as grounds for limiting the exercise of other fundamental rights. The Committee wishes to emphasize that the Covenant's limitation clause, article 4, is primarily intended to protect the rights of individuals rather than to permit the imposition of limitations by States. Consequently a State party which, for example, restricts the movement of, or incarcerates, persons with transmissible diseases such as HIV/AIDS, refuses to allow doctors to treat persons believed to be opposed to a Government, or fails to provide immunization against the community's major infectious diseases, on grounds such as national security or the preservation of public order, has the burden of justifying such serious measures in relation to each of the elements identified in article 4. Such restrictions must be in accordance with the law, including international human rights standards, compatible with the nature of the rights protected by the Covenant, in the interest of legitimate aims pursued, and strictly necessary for the promotion of the general welfare in a democratic society.

29. In line with article 5.1, such limitations must be proportional, i.e. the least restrictive alternative must be adopted where several types of limitations are available. Even where such limitations on grounds of protecting public health are basically permitted, they should be of limited duration and subject to review.

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steps to ensure respect for all human rights of indigenous people, on the basis of non-discrimination. See also the preamble and article 3 of the United Nations Framework Convention on Climate Change (1992); and article 10 (2) (e) of the United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (1994). During recent years an increasing number of States have changed their constitutions and introduced legislation recognizing specific rights of indigenous peoples.

2. States parties' obligations

General legal obligations

30. While the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes on States parties various obligations which are of immediate effect. States parties have immediate obligations in relation to the right to health, such as the guarantee that the right will be exercised without discrimination of any kind (art. 2.2) and the obligation to take steps (art. 2.1) towards the full realization of article 12. Such steps must be deliberate, concrete and targeted towards the full realization of the right to health.[20]

31. The progressive realization of the right to health over a period of time should not be interpreted as depriving States parties' obligations of all meaningful content. Rather, progressive realization means that States parties have a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realization of article 12.[21]

32. As with all other rights in the Covenant, there is a strong presumption that retrogressive measures taken in relation to the right to health are not permissible. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the State party's maximum available resources.[22]

33. The right to health, like all human rights, imposes three types or levels of obligations on States parties: the obligations to *respect*, *protect* and *fulfil*. In turn, the obligation to fulfil contains obligations to facilitate, provide and promote.[23] The obligation to *respect* requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health. The obligation to *protect* requires States to take measures that prevent third parties from interfering with article 12 guarantees. Finally, the obligation to *fulfil* requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right to health.

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[20] See general comment No. 13, paragraph 43.

[21] See general comment No. 3, paragraph 9; general comment No. 13, paragraph 44.

[22] See general comment No. 3, paragraph 9; general comment No. 13, paragraph 45.

[23] According to general comments Nos. 12 and 13, the obligation to fulfil incorporates an obligation to *facilitate* and an obligation to *provide*. In the present general comment, the obligation to fulfil also incorporates an obligation to *promote* because of the critical importance of health promotion in the work of WHO and elsewhere.

Specific legal obligations

34. In particular, States are under the obligation to *respect* the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum-seekers and illegal immigrants, to preventive, curative and palliative health services; abstaining from enforcing discriminatory practices as a State policy; and abstaining from imposing discriminatory practices relating to women's health status and needs. Furthermore, obligations to respect include a State's obligation to refrain from prohibiting or impeding traditional preventive care, healing practices and medicines, from marketing unsafe drugs and from applying coercive medical treatments, unless on an exceptional basis for the treatment of mental illness or the prevention and control of communicable diseases. Such exceptional cases should be subject to specific and restrictive conditions, respecting best practices and applicable international standards, including the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care.[24] In addition, States should refrain from limiting access to contraceptives and other means of maintaining sexual and reproductive health, from censoring, withholding or intentionally misrepresenting health-related information, including sexual education and information, as well as from preventing people's participation in health-related matters. States should also refrain from unlawfully polluting air, water and soil, e.g. through industrial waste from State-owned facilities, from using or testing nuclear, biological or chemical weapons if such testing results in the release of substances harmful to human health, and from limiting access to health services as a punitive measure, e.g. during armed conflicts in violation of international humanitarian law.

35. Obligations to *protect* include, inter alia, the duties of States to adopt legislation or to take other measures ensuring equal access to health care and health-related services provided by third parties; to ensure that privatization of the health sector does not constitute a threat to the availability, accessibility, acceptability and quality of health facilities, goods and services; to control the marketing of medical equipment and medicines by third parties; and to ensure that medical practitioners and other health professionals meet appropriate standards of education, skill and ethical codes of conduct. States are also obliged to ensure that harmful social or traditional practices do not interfere with access to pre- and post-natal care and family planning; to prevent third parties from coercing women to undergo traditional practices, e.g. female genital mutilation; and to take measures to protect all vulnerable or marginalized groups of society, in particular women, children, adolescents and older persons, in the light of gender-based expressions of violence. States should also ensure that third parties do not limit people's access to health-related information and services.

36. The obligation to *fulfil* requires States parties, inter alia, to give sufficient recognition to the right to health in the national political and legal systems, preferably by way of legislative implementation, and to adopt a national health policy with a

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[24] General Assembly resolution 46/119 (1991).

detailed plan for realizing the right to health. States must ensure provision of health care, including immunization programmes against the major infectious diseases, and ensure equal access for all to the underlying determinants of health, such as nutritiously safe food and potable drinking water, basic sanitation and adequate housing and living conditions. Public health infrastructures should provide for sexual and reproductive health services, including safe motherhood, particularly in rural areas. States have to ensure the appropriate training of doctors and other medical personnel, the provision of a sufficient number of hospitals, clinics and other health-related facilities, and the promotion and support of the establishment of institutions providing counselling and mental health services, with due regard to equitable distribution throughout the country. Further obligations include the provision of a public, private or mixed health insurance system which is affordable for all, the promotion of medical research and health education, as well as information campaigns, in particular with respect to HIV/AIDS, sexual and reproductive health, traditional practices, domestic violence, the abuse of alcohol and the use of cigarettes, drugs and other harmful substances. States are also required to adopt measures against environmental and occupational health hazards and against any other threat as demonstrated by epidemiological data. For this purpose they should formulate and implement national policies aimed at reducing and eliminating pollution of air, water and soil, including pollution by heavy metals such as lead from gasoline. Furthermore, States parties are required to formulate, implement and periodically review a coherent national policy to minimize the risk of occupational accidents and diseases, as well as to provide a coherent national policy on occupational safety and health services.[25]

37. The obligation to *fulfil* (*facilitate*) requires States inter alia to take positive measures that enable and assist individuals and communities to enjoy the right to health. States parties are also obliged to *fulfil* (*provide*) a specific right contained in the Covenant when individuals or a group are unable, for reasons beyond their control, to realize that right themselves by the means at their disposal. The obligation to *fulfil* (*promote*) the right to health requires States to undertake actions that create, maintain and restore the health of the population. Such obligations include: (i) fostering recognition of factors favouring positive health results, e.g. research and provision of information; (ii) ensuring that health services are culturally appropriate and that health-care staff are trained to recognize and respond to the specific needs of vulnerable or marginalized groups; (iii) ensuring that the State meets its obligations in the dissemination of appropriate information relating to healthy lifestyles and

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[25] Elements of such a policy are the identification, determination, authorization and control of dangerous materials, equipment, substances, agents and work processes; the provision of health information to workers and the provision, if needed, of adequate protective clothing and equipment; the enforcement of laws and regulations through adequate inspection; the requirement of notification of occupational accidents and diseases, the conduct of inquiries into serious accidents and diseases, and the production of annual statistics; the protection of workers and their representatives from disciplinary measures for actions properly taken by them in conformity with such a policy; and the provision of occupational health services with essentially preventive functions. See ILO Occupational Safety and Health Convention, 1981 (No. 155) and Occupational Health Services Convention, 1985 (No. 161).

nutrition, harmful traditional practices and the availability of services; (iv) supporting people in making informed choices about their health.

International obligations

38. In its general comment No. 3, the Committee drew attention to the obligation of all States parties to take steps, individually and through international assistance and cooperation, especially economic and technical, towards the full realization of the rights recognized in the Covenant, such as the right to health. In the spirit of Article 56 of the Charter of the United Nations, the specific provisions of the Covenant (arts. 12, 2.1, 22 and 23) and the Alma-Ata Declaration on primary health care, States parties should recognize the essential role of international cooperation and comply with their commitment to take joint and separate action to achieve the full realization of the right to health. In this regard, States parties are referred to the Alma-Ata Declaration which proclaims that the existing gross inequality in the health status of the people, particularly between developed and developing countries, as well as within countries, is politically, socially and economically unacceptable and is, therefore, of common concern to all countries.[26]

39. To comply with their international obligations in relation to article 12, States parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law. Depending on the availability of resources, States should facilitate access to essential health facilities, goods and services in other countries, wherever possible, and provide the necessary aid when required.[27] States parties should ensure that the right to health is given due attention in international agreements and, to that end, should consider the development of further legal instruments. In relation to the conclusion of other international agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to health. Similarly, States parties have an obligation to ensure that their actions as members of international organizations take due account of the right to health. Accordingly, States parties which are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, should pay greater attention to the protection of the right to health in influencing the lending policies, credit agreements and international measures of these institutions.

40. States parties have a joint and individual responsibility, in accordance with the Charter of the United Nations and relevant resolutions of the United Nations General Assembly and of the World Health Assembly, to cooperate in providing

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[26] Article II, Alma-Ata Declaration, Report of the International Conference on Primary Health Care, Alma-Ata, 6-12 September 1978, in: World Health Organization, "Health for All" Series, No. 1, WHO, Geneva, 1978.

[27] See paragraph 45 of this general comment.

disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons. Each State should contribute to this task to the maximum of its capacities. Priority in the provision of international medical aid, distribution and management of resources, such as safe and potable water, food and medical supplies, and financial aid should be given to the most vulnerable or marginalized groups of the population. Moreover, given that some diseases are easily transmissible beyond the frontiers of a State, the international community has a collective responsibility to address this problem. The economically developed States parties have a special responsibility and interest to assist the poorer developing States in this regard.

41. States parties should refrain at all times from imposing embargoes or similar measures restricting the supply of another State with adequate medicines and medical equipment. Restrictions on such goods should never be used as an instrument of political and economic pressure. In this regard, the Committee recalls its position, stated in general comment No. 8, on the relationship between economic sanctions and respect for economic, social and cultural rights.

42. While only States are parties to the Covenant and thus ultimately accountable for compliance with it, all members of society - individuals, including health professionals, families, local communities, intergovernmental and non-governmental organizations, civil society organizations, as well as the private business sector - have responsibilities regarding the realization of the right to health. States parties should therefore provide an environment which facilitates the discharge of these responsibilities.

Core obligations

43. In general comment No. 3, the Committee confirms that States parties have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the Covenant, including essential primary health care. Read in conjunction with more contemporary instruments, such as the Programme of Action of the International Conference on Population and Development,[28] the Alma-Ata Declaration provides compelling guidance on the core obligations arising from article 12. Accordingly, in the Committee's view, these core obligations include at least the following obligations:

(a) To ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups;

(b) To ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone;

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[28] *Report of the International Conference on Population and Development, Cairo, 5-13 September 1994* (United Nations publication, Sales No. E.95.XIII.18), chap. I, resolution 1, annex, chaps. VII and VIII.

(c) To ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water;

(d) To provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs;

(e) To ensure equitable distribution of all health facilities, goods and services;

(f) To adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population; the strategy and plan of action shall be devised, and periodically reviewed, on the basis of a participatory and transparent process; they shall include methods, such as right to health indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all vulnerable or marginalized groups.

44. The Committee also confirms that the following are obligations of comparable priority:

(a) To ensure reproductive, maternal (prenatal as well as post-natal) and child health care;

(b) To provide immunization against the major infectious diseases occurring in the community;

(c) To take measures to prevent, treat and control epidemic and endemic diseases;

(d) To provide education and access to information concerning the main health problems in the community, including methods of preventing and controlling them;

(e) To provide appropriate training for health personnel, including education on health and human rights.

45. For the avoidance of any doubt, the Committee wishes to emphasize that it is particularly incumbent on States parties and other actors in a position to assist, to provide "international assistance and cooperation, especially economic and technical"[29] which enable developing countries to fulfil their core and other obligations indicated in paragraphs 43 and 44 above.

3. Violations

46. When the normative content of article 12 (Part I) is applied to the obligations of States parties (Part II), a dynamic process is set in motion which facilitates identification of violations of the right to health. The following paragraphs provide illustrations of violations of article 12.

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[29] Covenant, art. 2.1.

47. In determining which actions or omissions amount to a violation of the right to health, it is important to distinguish the inability from the unwillingness of a State party to comply with its obligations under article 12. This follows from article 12.1, which speaks of the highest attainable standard of health, as well as from article 2.1 of the Covenant, which obliges each State party to take the necessary steps to the maximum of its available resources. A State which is unwilling to use the maximum of its available resources for the realization of the right to health is in violation of its obligations under article 12. If resource constraints render it impossible for a State to comply fully with its Covenant obligations, it has the burden of justifying that every effort has nevertheless been made to use all available resources at its disposal in order to satisfy, as a matter of priority, the obligations outlined above. It should be stressed, however, that a State party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations set out in paragraph 43 above, which are non-derogable.

48. Violations of the right to health can occur through the direct action of States or other entities insufficiently regulated by States. The adoption of any retrogressive measures incompatible with the core obligations under the right to health, outlined in paragraph 43 above, constitutes a violation of the right to health. Violations through *acts of commission* include the formal repeal or suspension of legislation necessary for the continued enjoyment of the right to health or the adoption of legislation or policies which are manifestly incompatible with pre-existing domestic or international legal obligations in relation to the right to health.

49. Violations of the right to health can also occur through the omission or failure of States to take necessary measures arising from legal obligations. Violations through *acts of omission* include the failure to take appropriate steps towards the full realization of everyone's right to the enjoyment of the highest attainable standard of physical and mental health, the failure to have a national policy on occupational safety and health as well as occupational health services, and the failure to enforce relevant laws.

Violations of the obligation to respect

50. Violations of the obligation to respect are those State actions, policies or laws that contravene the standards set out in article 12 of the Covenant and are likely to result in bodily harm, unnecessary morbidity and preventable mortality. Examples include the denial of access to health facilities, goods and services to particular individuals or groups as a result of de jure or de facto discrimination; the deliberate withholding or misrepresentation of information vital to health protection or treatment; the suspension of legislation or the adoption of laws or policies that interfere with the enjoyment of any of the components of the right to health; and the failure of the State to take into account its legal obligations regarding the right to health when entering into bilateral or multilateral agreements with other States, international organizations and other entities, such as multinational corporations.

Violations of the obligation to protect

51. Violations of the obligation to protect follow from the failure of a State to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to health by third parties. This category includes such omissions as the failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to health of others; the failure to protect consumers and workers from practices detrimental to health, e.g. by employers and manufacturers of medicines or food; the failure to discourage production, marketing and consumption of tobacco, narcotics and other harmful substances; the failure to protect women against violence or to prosecute perpetrators; the failure to discourage the continued observance of harmful traditional medical or cultural practices; and the failure to enact or enforce laws to prevent the pollution of water, air and soil by extractive and manufacturing industries.

Violations of the obligation to fulfil

52. Violations of the obligation to fulfil occur through the failure of States parties to take all necessary steps to ensure the realization of the right to health. Examples include the failure to adopt or implement a national health policy designed to ensure the right to health for everyone; insufficient expenditure or misallocation of public resources which results in the non-enjoyment of the right to health by individuals or groups, particularly the vulnerable or marginalized; the failure to monitor the realization of the right to health at the national level, for example by identifying right to health indicators and benchmarks; the failure to take measures to reduce the inequitable distribution of health facilities, goods and services; the failure to adopt a gender-sensitive approach to health; and the failure to reduce infant and maternal mortality rates.

4. Implementation at the national level

Framework legislation

53. The most appropriate feasible measures to implement the right to health will vary significantly from one State to another. Every State has a margin of discretion in assessing which measures are most suitable to meet its specific circumstances. The Covenant, however, clearly imposes a duty on each State to take whatever steps are necessary to ensure that everyone has access to health facilities, goods and services so that they can enjoy, as soon as possible, the highest attainable standard of physical and mental health. This requires the adoption of a national strategy to ensure to all the enjoyment of the right to health, based on human rights principles which define the objectives of that strategy, and the formulation of policies and corresponding right to health indicators and benchmarks. The national health strategy should also identify the resources available to attain defined objectives, as well as the most cost-effective way of using those resources.

54. The formulation and implementation of national health strategies and plans of action should respect, inter alia, the principles of non-discrimination and people's participation. In particular, the right of individuals and groups to participate in

decision-making processes, which may affect their development, must be an integral component of any policy, programme or strategy developed to discharge governmental obligations under article 12. Promoting health must involve effective community action in setting priorities, making decisions, planning, implementing and evaluating strategies to achieve better health. Effective provision of health services can only be assured if people's participation is secured by States.

55. The national health strategy and plan of action should also be based on the principles of accountability, transparency and independence of the judiciary, since good governance is essential to the effective implementation of all human rights, including the realization of the right to health. In order to create a favourable climate for the realization of the right, States parties should take appropriate steps to ensure that the private business sector and civil society are aware of, and consider the importance of, the right to health in pursuing their activities.

56. States should consider adopting a framework law to operationalize their right to health national strategy. The framework law should establish national mechanisms for monitoring the implementation of national health strategies and plans of action. It should include provisions on the targets to be achieved and the time frame for their achievement; the means by which right to health benchmarks could be achieved; the intended collaboration with civil society, including health experts, the private sector and international organizations; institutional responsibility for the implementation of the right to health national strategy and plan of action; and possible recourse procedures. In monitoring progress towards the realization of the right to health, States parties should identify the factors and difficulties affecting implementation of their obligations.

Right to health indicators and benchmarks

57. National health strategies should identify appropriate right to health indicators and benchmarks. The indicators should be designed to monitor, at the national and international levels, the State party's obligations under article 12. States may obtain guidance on appropriate right to health indicators, which should address different aspects of the right to health, from the ongoing work of WHO and the United Nations Children's Fund (UNICEF) in this field. Right to health indicators require disaggregation on the prohibited grounds of discrimination.

58. Having identified appropriate right to health indicators, States parties are invited to set appropriate national benchmarks in relation to each indicator. During the periodic reporting procedure the Committee will engage in a process of scoping with the State party. Scoping involves the joint consideration by the State party and the Committee of the indicators and national benchmarks which will then provide the targets to be achieved during the next reporting period. In the following five years, the State party will use these national benchmarks to help monitor its implementation of article 12. Thereafter, in the subsequent reporting process, the State party and the Committee will consider whether or not the benchmarks have been achieved, and the reasons for any difficulties that may have been encountered.

Remedies and accountability

59. Any person or group victim of a violation of the right to health should have access to effective judicial or other appropriate remedies at both national and international levels.[30] All victims of such violations should be entitled to adequate reparation, which may take the form of restitution, compensation, satisfaction or guarantees of non-repetition. National ombudsmen, human rights commissions, consumer forums, patients' rights associations or similar institutions should address violations of the right to health.

60. The incorporation in the domestic legal order of international instruments recognizing the right to health can significantly enhance the scope and effectiveness of remedial measures and should be encouraged in all cases.[31] Incorporation enables courts to adjudicate violations of the right to health, or at least its core obligations, by direct reference to the Covenant.

61. Judges and members of the legal profession should be encouraged by States parties to pay greater attention to violations of the right to health in the exercise of their functions.

62. States parties should respect, protect, facilitate and promote the work of human rights advocates and other members of civil society with a view to assisting vulnerable or marginalized groups in the realization of their right to health.

5. Obligations of actors other than States parties

63. The role of the United Nations agencies and programmes, and in particular the key function assigned to WHO in realizing the right to health at the international, regional and country levels, is of particular importance, as is the function of UNICEF in relation to the right to health of children. When formulating and implementing their right to health national strategies, States parties should avail themselves of technical assistance and cooperation of WHO. Further, when preparing their reports, States parties should utilize the extensive information and advisory services of WHO with regard to data collection, disaggregation, and the development of right to health indicators and benchmarks.

64. Moreover, coordinated efforts for the realization of the right to health should be maintained to enhance the interaction among all the actors concerned, including the various components of civil society. In conformity with articles 22 and 23 of the Covenant, WHO, the International Labour Organization, the United Nations Development Programme, UNICEF, the United Nations Population Fund, the World

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[30] Regardless of whether groups as such can seek remedies as distinct holders of rights, States parties are bound by both the collective and individual dimensions of article 12. Collective rights are critical in the field of health; modern public health policy relies heavily on prevention and promotion which are approaches directed primarily to groups.

[31] See general comment No. 2, paragraph 9.

Bank, regional development banks, the International Monetary Fund, the World Trade Organization and other relevant bodies within the United Nations system, should cooperate effectively with States parties, building on their respective expertise, in relation to the implementation of the right to health at the national level, with due respect to their individual mandates. In particular, the international financial institutions, notably the World Bank and the International Monetary Fund, should pay greater attention to the protection of the right to health in their lending policies, credit agreements and structural adjustment programmes. When examining the reports of States parties and their ability to meet the obligations under article 12, the Committee will consider the effects of the assistance provided by all other actors. The adoption of a human rights-based approach by United Nations specialized agencies, programmes and bodies will greatly facilitate implementation of the right to health. In the course of its examination of States parties' reports, the Committee will also consider the role of health professional associations and other non-governmental organizations in relation to the States' obligations under article 12.

65. The role of WHO, the Office of the United Nations High Commissioner for Refugees, the International Committee of the Red Cross/Red Crescent and UNICEF, as well as non-governmental organizations and national medical associations, is of particular importance in relation to disaster relief and humanitarian assistance in times of emergencies, including assistance to refugees and internally displaced persons. Priority in the provision of international medical aid, distribution and management of resources, such as safe and potable water, food and medical supplies, and financial aid should be given to the most vulnerable or marginalized groups of the population.

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GENERAL COMMENT No. 20

Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)

I. INTRODUCTION AND BASIC PREMISES

1. Discrimination undermines the fulfilment of economic, social and cultural rights for a significant proportion of the world's population. Economic growth has not, in itself, led to sustainable development, and individuals and groups of individuals continue to face socio-economic inequality, often because of entrenched historical and contemporary forms of discrimination.

2. Non-discrimination and equality are fundamental components of international human rights law and essential to the exercise and enjoyment of economic, social and cultural rights. Article 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights (the Covenant) obliges each State party "to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

3. The principles of non-discrimination and equality are recognized throughout the Covenant. The preamble stresses the "equal and inalienable rights of all" and the Covenant expressly recognizes the rights of "everyone" to the various Covenant rights such as, inter alia, the right to work, just and favourable conditions of work, trade union freedoms, social security, an adequate standard of living, health and education and participation in cultural life.

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4. The Covenant also explicitly mentions the principles of non-discrimination and equality with respect to some individual rights. Article 3 requires States to undertake to ensure the equal right of men and women to enjoy the Covenant rights and article 7 includes the "right to equal remuneration for work of equal value" and "equal opportunity for everyone to be promoted" in employment. Article 10 stipulates that, inter alia, mothers should be accorded special protection during a reasonable period before and after childbirth and that special measures of protection and assistance should be taken for children and young persons without discrimination. Article 13 recognizes that "primary education shall be compulsory and available free to all" and provides that "higher education shall be made equally accessible to all".

5. The preamble, Articles 1, paragraph 3, and 55, of the Charter of the United Nations and article 2, paragraph 1, of the Universal Declaration of Human Rights prohibit discrimination in the enjoyment of economic, social and cultural rights. International treaties on racial discrimination, discrimination against women and the rights of refugees, stateless persons, children, migrant workers and members of their families, and persons with disabilities include the exercise of economic, social and cultural rights,[1] while other treaties require the elimination of discrimination in specific fields, such as employment and education.[2] In addition to the common provision on equality and non-discrimination in both the Covenant and the International Covenant on Civil and Political Rights, article 26 of the International Covenant on Civil and Political Rights contains an independent guarantee of equal and effective protection before and of the law.[3]

6. In previous general comments, the Committee on Economic, Social and Cultural Rights has considered the application of the principle of non-discrimination to specific Covenant rights relating to housing, food, education, health, water, authors' rights, work and social security.[4]

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[1] See the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the Convention relating to the Status of Refugees; the Convention relating to the Status of Stateless Persons; the Convention on the Rights of the Child; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; and the Convention on the Rights of Persons with Disabilities.

[2] ILO Convention No. 111 concerning Discrimination in Respect of Employment and Occupation (1958); and the UNESCO Convention against Discrimination in Education.

[3] See general comment No. 18 (1989) of the Human Rights Committee on non-discrimination.

[4] The Committee on Economic, Social and Cultural Rights (CESCR), general comment No. 4 (1991): The right to adequate housing; general comment No. 7 (1997): The right to adequate housing: forced evictions (art. 11, para. 1); general comment No. 12 (1999): The right to adequate food; general comment No. 13 (1999): The right to education (art. 13); general comment No. 14 (2000): The right to the highest attainable standard of health (art. 12); general comment No. 15 (2002): The right to water (arts. 11 and 12); general comment No. 17 (2005):

Moreover, general comment No. 16 focuses on State parties' obligations under article 3 of the Covenant to ensure equal rights of men and women to the enjoyment of all Covenant rights, while general comments Nos. 5 and 6 respectively concern the rights of persons with disabilities and older persons.[5] The present general comment aims to clarify the Committee's understanding of the provisions of article 2, paragraph 2, of the Covenant, including the scope of State obligations (Part II), the prohibited grounds of discrimination (Part III), and national implementation (Part IV).

II. SCOPE OF STATE OBLIGATIONS

7. Non-discrimination is an immediate and cross-cutting obligation in the Covenant. Article 2, paragraph 2, requires States parties to guarantee non-discrimination in the exercise of each of the economic, social and cultural rights enshrined in the Covenant and can only be applied in conjunction with these rights. It is to be noted that discrimination constitutes any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights.[6] Discrimination also includes incitement to discriminate and harassment.

8. In order for States parties to "guarantee" that the Covenant rights will be exercised without discrimination of any kind, discrimination must be eliminated both formally and substantively:[7]

(a) **Formal discrimination**: Eliminating formal discrimination requires ensuring that a State's constitution, laws and policy documents do not discriminate on prohibited grounds; for example, laws should not deny equal social security benefits to women on the basis of their marital status;

(b) **Substantive discrimination**: Merely addressing formal discrimination will not ensure substantive equality as envisaged and defined by article 2, paragraph 2.[8] The effective

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The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (art. 15, para. 1 (c); general comment No. 18 (2005): The right to work (art. 6); and general comment No. 19 (2008): The right to social security.

[5] CESCR, general comment No. 5 (1994): Persons with disabilities; and general comment No. 6 (1995): The economic, social and cultural rights of older persons.

[6] For a similar definition see art. 1, ICERD; art. 1, CEDAW; and art. 2 of the Convention on the Rights of Persons with Disabilities (CRPD). The Human Rights Committee comes to a similar interpretation in its general comment No. 18, paragraphs 6 and 7. The Committee has adopted a similar position in previous general comments.

[7] CESCR, general comment No. 16 (2005): The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3).

[8] See also CESCR general comment No. 16.

enjoyment of Covenant rights is often influenced by whether a person is a member of a group characterized by the prohibited grounds of discrimination. Eliminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations. States parties must therefore immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination. For example, ensuring that all individuals have equal access to adequate housing, water and sanitation will help to overcome discrimination against women and girl children and persons living in informal settlements and rural areas.

9. In order to eliminate substantive discrimination, States parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination. Such measures are legitimate to the extent that they represent reasonable, objective and proportional means to redress de facto discrimination and are discontinued when substantive equality has been sustainably achieved. Such positive measures may exceptionally, however, need to be of a permanent nature, such as interpretation services for linguistic minorities and reasonable accommodation of persons with sensory impairments in accessing health-care facilities.

10. Both direct and indirect forms of differential treatment can amount to discrimination under article 2, paragraph 2, of the Covenant:

(a) **Direct discrimination** occurs when an individual is treated less favourably than another person in a similar situation for a reason related to a prohibited ground; e.g. where employment in educational or cultural institutions or membership of a trade union is based on the political opinions of applicants or employees. Direct discrimination also includes detrimental acts or omissions on the basis of prohibited grounds where there is no comparable similar situation (e.g. the case of a woman who is pregnant);

(b) **Indirect discrimination** refers to laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination. For instance, requiring a birth registration certificate for school enrolment may discriminate against ethnic minorities or non-nationals who do not possess, or have been denied, such certificates.

Private sphere

11. Discrimination is frequently encountered in families, workplaces, and other sectors of society. For example, actors in the private housing sector (e.g. private landlords, credit providers and public housing providers) may directly or indirectly deny access to housing or mortgages on the basis of ethnicity, marital status, disability or sexual orientation while some families may refuse to send girl children to school. States parties must therefore adopt measures, which should include legislation, to ensure that individuals and entities in the private sphere do not discriminate on prohibited grounds.

Systemic discrimination

12. The Committee has regularly found that discrimination against some groups is pervasive and persistent and deeply entrenched in social behaviour and organization, often involving unchallenged or indirect discrimination. Such systemic discrimination can be understood as legal rules, policies, practices or predominant cultural attitudes in either the public or private sector which create relative disadvantages for some groups, and privileges for other groups.

Permissible scope of differential treatment

13. Differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects. A failure to remove differential treatment on the basis of a lack of available resources is not an objective and reasonable justification unless every effort has been made to use all resources that are at the State party's disposition in an effort to address and eliminate the discrimination, as a matter of priority.

14. Under international law, a failure to act in good faith to comply with the obligation in article 2, paragraph 2, to guarantee that the rights enunciated in the Covenant will be exercised without discrimination amounts to a violation. Covenant rights can be violated through the direct action or omission by States parties, including through their institutions or agencies at the national and local levels. States parties should also ensure that they refrain from discriminatory practices in international cooperation and assistance and take steps to ensure that all actors under their jurisdiction do likewise.

III. PROHIBITED GROUNDS OF DISCRIMINATION

15. Article 2, paragraph 2, lists the prohibited grounds of discrimination as "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". The inclusion of "other status" indicates that this list is not exhaustive and other grounds may be incorporated in this category. The express grounds and a number of implied grounds under "other status" are discussed below. The examples of differential treatment presented in this section are merely illustrative and they are not intended to represent the full scope of possible discriminatory treatment under the relevant prohibited ground, nor a conclusive finding that such differential treatment will amount to discrimination in every situation.

Membership of a group

16. In determining whether a person is distinguished by one or more of the prohibited grounds, identification shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned. Membership also includes association with a group characterized by one of the prohibited grounds (e.g. the parent of a child with a disability) or perception by others that an individual is part of such a group (e.g. a person has a similar skin colour or is a supporter of the rights of a particular group or a past member of a group).

Multiple discrimination[9]

17. Some individuals or groups of individuals face discrimination on more than one of the prohibited grounds, for example women belonging to an ethnic or religious minority. Such cumulative discrimination has a unique and specific impact on individuals and merits particular consideration and remedying.

A. Express grounds

18. The Committee has consistently raised concern over formal and substantive discrimination across a wide range of Covenant rights against indigenous peoples and ethnic minorities among others.

"Race and colour"

19. Discrimination on the basis of "race and colour", which includes an individual's ethnic origin, is prohibited by the Covenant as well as by other treaties including the International Convention on the Elimination of Racial Discrimination. The use of the term "race" in the Covenant or the present general comment does not imply the acceptance of theories which attempt to determine the existence of separate human races.[10]

Sex

20. The Covenant guarantees the equal right of men and women to the enjoyment of economic, social and cultural rights.[11] Since the adoption of the Covenant, the notion of the prohibited ground "sex" has evolved considerably to cover not only physiological characteristics but also the social construction of gender stereotypes, prejudices and expected roles, which have created obstacles to the equal fulfilment of economic, social and cultural rights. Thus, the refusal to hire a woman, on the ground that she might become pregnant, or the allocation of low-level or part-time jobs to women based on the stereotypical assumption that, for example, they are unwilling to commit as much time to their work as men, constitutes discrimination. Refusal to grant paternity leave may also amount to discrimination against men.

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[9] See para. 27 of the present general comment on intersectional discrimination.

[10] See the outcome document of the Durban Review Conference, para. 6: "*Reaffirms* that all peoples and individuals constitute one human family, rich in diversity, and that all human beings are born free and equal in dignity and rights; and strongly rejects any doctrine of racial superiority along with theories which attempt to determine the existence of so-called distinct human races."

[11] See art. 3 of the Covenant, and CESCR general comment No. 16.

Language

21. Discrimination on the basis of language or regional accent is often closely linked to unequal treatment on the basis of national or ethnic origin. Language barriers can hinder the enjoyment of many Covenant rights, including the right to participate in cultural life as guaranteed by article 15 of the Covenant. Therefore, information about public services and goods, for example, should also be available, as far as possible, in languages spoken by minorities, and States parties should ensure that any language requirements relating to employment and education are based on reasonable and objective criteria.

Religion

22. This prohibited ground of discrimination covers the profession of religion or belief of one's choice (including the non-profession of any religion or belief), that may be publicly or privately manifested in worship, observance, practice and teaching.[12] For instance, discrimination arises when persons belonging to a religious minority are denied equal access to universities, employment, or health services on the basis of their religion.

Political or other opinion

23. Political and other opinions are often grounds for discriminatory treatment and include both the holding and not-holding of opinions, as well as expression of views or membership within opinion-based associations, trade unions or political parties. Access to food assistance schemes, for example, must not be made conditional on an expression of allegiance to a particular political party.

National or social origin

24. "National origin" refers to a person's State, nation, or place of origin. Due to such personal circumstances, individuals and groups of individuals may face systemic discrimination in both the public and private sphere in the exercise of their Covenant rights. "Social origin" refers to a person's inherited social status, which is discussed more fully below in the context of "property" status, descent-based discrimination under "birth" and "economic and social status".[13]

Property

25. Property status, as a prohibited ground of discrimination, is a broad concept and includes real property (e.g. land ownership or tenure) and personal property (e.g. intellectual property, goods and chattels, and income), or the lack of it. The Committee has previously commented that

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[12] See also the General Assembly's Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, proclaimed by the General Assembly in its resolution 36/55 of 25 November 1981.

[13] See paras. 25, 26 and 35, of the present general comment.

Covenant rights, such as access to water services and protection from forced eviction, should not be made conditional on a person's land tenure status, such as living in an informal settlement.[14]

Birth

26. Discrimination based on birth is prohibited and article 10, paragraph 3, of the Covenant specifically states, for example, that special measures should be taken on behalf of children and young persons "without any discrimination for reasons of parentage". Distinctions must therefore not be made against those who are born out of wedlock, born of stateless parents or are adopted or constitute the families of such persons. The prohibited ground of birth also includes descent, especially on the basis of caste and analogous systems of inherited status.[15] States parties should take steps, for instance, to prevent, prohibit and eliminate discriminatory practices directed against members of descent-based communities and act against the dissemination of ideas of superiority and inferiority on the basis of descent.

B. Other status[16]

27. The nature of discrimination varies according to context and evolves over time. A flexible approach to the ground of "other status" is thus needed in order to capture other forms of differential treatment that cannot be reasonably and objectively justified and are of a comparable nature to the expressly recognized grounds in article 2, paragraph 2. These additional grounds are commonly recognized when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalization. The Committee's general comments and concluding observations have recognized various other grounds and these are described in more detail below. However, this list is not intended to be exhaustive. Other possible prohibited grounds could include the denial of a person's legal capacity because he or she is in prison, or is involuntarily interned in a psychiatric institution, or the intersection of two prohibited grounds of discrimination, e.g. where access to a social service is denied on the basis of sex and disability.

Disability

28. In its general comment No. 5, the Committee defined discrimination against persons with disabilities[17] as "any distinction, exclusion, restriction or preference, or denial of reasonable

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[14] See CESCR general comments Nos. 15 and 4 respectively.

[15] For a comprehensive overview of State obligations in this regard, see general comment No. 29 (2002) of the Committee on the Elimination of All Forms of Racial Discrimination on art. 1, para. 1, regarding descent.

[16] See para. 15 of the present general comment.

[17] For a definition, see CRPD, art. 1: "Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."

accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights".[18] The denial of reasonable accommodation should be included in national legislation as a prohibited form of discrimination on the basis of disability.[19] States parties should address discrimination, such as prohibitions on the right to education, and denial of reasonable accommodation in public places such as public health facilities and the workplace,[20] as well as in private places, e.g. as long as spaces are designed and built in ways that make them inaccessible to wheelchairs, such users will be effectively denied their right to work.

Age

29. Age is a prohibited ground of discrimination in several contexts. The Committee has highlighted the need to address discrimination against unemployed older persons in finding work, or accessing professional training or retraining, and against older persons living in poverty with unequal access to universal old-age pensions due to their place of residence.[21] In relation to young persons, unequal access by adolescents to sexual and reproductive health information and services amounts to discrimination.

Nationality

30. The ground of nationality should not bar access to Covenant rights,[22] e.g. all children within a State, including those with an undocumented status, have a right to receive education and access to adequate food and affordable health care. The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.[23]

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[18] See CESCR general comment No. 5, para. 15.

[19] See CRPD, art. 2: "'Reasonable accommodation' means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms."

[20] See CESCR general comment No. 5, para. 22.

[21] See, further, CESCR general comment No. 6.

[22] This paragraph is without prejudice to the application of art. 2, para. 3, of the Covenant, which states: "Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals."

[23] See also general comment No. 30 (2004) of the Committee on the Elimination of All Forms of Racial Discrimination on non-citizens.

Marital and family status

31. Marital and family status may differ between individuals because, inter alia, they are married or unmarried, married under a particular legal regime, in a de facto relationship or one not recognized by law, divorced or widowed, live in an extended family or kinship group or have differing kinds of responsibility for children and dependants or a particular number of children. Differential treatment in access to social security benefits on the basis of whether an individual is married must be justified on reasonable and objective criteria. In certain cases, discrimination can also occur when an individual is unable to exercise a right protected by the Covenant because of his or her family status or can only do so with spousal consent or a relative's concurrence or guarantee.

Sexual orientation and gender identity

32. "Other status" as recognized in article 2, paragraph 2, includes sexual orientation.[24] States parties should ensure that a person's sexual orientation is not a barrier to realizing Covenant rights, for example, in accessing survivor's pension rights. In addition, gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the workplace.[25]

Health status

33. Health status refers to a person's physical or mental health.[26] States parties should ensure that a person's actual or perceived health status is not a barrier to realizing the rights under the Covenant. The protection of public health is often cited by States as a basis for restricting human rights in the context of a person's health status. However, many such restrictions are discriminatory, for example, when HIV status is used as the basis for differential treatment with regard to access to education, employment, health care, travel, social security, housing and asylum.[27] States parties should also adopt measures to address widespread stigmatization of persons on the basis of their health status, such as mental illness, diseases such as leprosy and women who have suffered obstetric fistula, which often undermines the ability of individuals to

[24] See CESCR general comments Nos. 14 and 15.

[25] For definitions, see the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity.

[26] See CESCR general comment No. 14, paras. 12(b), 18, 28 and 29.

[27] See the guidelines published by the Office of the High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS (UNAIDS) (2006), "International Guidelines on HIV/AIDS and Human Rights, 2006 Consolidated Version". Available online at: http://data.unaids.org/Publications/IRC-pub07/JC1252-InternGuidelines_en.pdf.

enjoy fully their Covenant rights. Denial of access to health insurance on the basis of health status will amount to discrimination if no reasonable or objective criteria can justify such differentiation.

Place of residence

34. The exercise of Covenant rights should not be conditional on, or determined by, a person's current or former place of residence; e.g. whether an individual lives or is registered in an urban or a rural area, in a formal or an informal settlement, is internally displaced or leads a nomadic lifestyle. Disparities between localities and regions should be eliminated in practice by ensuring, for example, that there is even distribution in the availability and quality of primary, secondary and palliative health-care facilities.

Economic and social situation

35. Individuals and groups of individuals must not be arbitrarily treated on account of belonging to a certain economic or social group or strata within society. A person's social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatization and negative stereotyping which can lead to the refusal of, or unequal access to, the same quality of education and health care as others, as well as the denial of or unequal access to public places.

IV. NATIONAL IMPLEMENTATION

36. In addition to refraining from discriminatory actions, States parties should take concrete, deliberate and targeted measures to ensure that discrimination in the exercise of Covenant rights is eliminated. Individuals and groups of individuals, who may be distinguished by one or more of the prohibited grounds, should be ensured the right to participate in decision-making processes over the selection of such measures. States parties should regularly assess whether the measures chosen are effective in practice.

Legislation

37. Adoption of legislation to address discrimination is indispensable in complying with article 2, paragraph 2. States parties are therefore encouraged to adopt specific legislation that prohibits discrimination in the field of economic, social and cultural rights. Such laws should aim at eliminating formal and substantive discrimination, attribute obligations to public and private actors and cover the prohibited grounds discussed above. Other laws should be regularly reviewed and, where necessary, amended in order to ensure that they do not discriminate or lead to discrimination, whether formally or substantively, in relation to the exercise and enjoyment of Covenant rights.

Policies, plans and strategies

38. States parties should ensure that strategies, policies, and plans of action are in place and implemented in order to address both formal and substantive discrimination by public and

private actors in the area of Covenant rights. Such policies, plans and strategies should address all groups distinguished by the prohibited grounds and States parties are encouraged, among other possible steps, to adopt temporary special measures in order to accelerate the achievement of equality. Economic policies, such as budgetary allocations and measures to stimulate economic growth, should pay attention to the need to guarantee the effective enjoyment of the Covenant rights without discrimination. Public and private institutions should be required to develop plans of action to address non-discrimination and the State should conduct human rights education and training programmes for public officials and make such training available to judges and candidates for judicial appointments. Teaching on the principles of equality and non-discrimination should be integrated in formal and non-formal inclusive and multicultural education, with a view to dismantling notions of superiority or inferiority based on prohibited grounds and to promote dialogue and tolerance between different groups in society. States parties should also adopt appropriate preventive measures to avoid the emergence of new marginalized groups.

Elimination of systemic discrimination

39. States parties must adopt an active approach to eliminating systemic discrimination and segregation in practice. Tackling such discrimination will usually require a comprehensive approach with a range of laws, policies and programmes, including temporary special measures. States parties should consider using incentives to encourage public and private actors to change their attitudes and behaviour in relation to individuals and groups of individuals facing systemic discrimination, or penalize them in case of non-compliance. Public leadership and programmes to raise awareness about systemic discrimination and the adoption of strict measures against incitement to discrimination are often necessary. Eliminating systemic discrimination will frequently require devoting greater resources to traditionally neglected groups. Given the persistent hostility towards some groups, particular attention will need to be given to ensuring that laws and policies are implemented by officials and others in practice.

Remedies and accountability

40. National legislation, strategies, policies and plans should provide for mechanisms and institutions that effectively address the individual and structural nature of the harm caused by discrimination in the field of economic, social and cultural rights. Institutions dealing with allegations of discrimination customarily include courts and tribunals, administrative authorities, national human rights institutions and/or ombudspersons, which should be accessible to everyone without discrimination. These institutions should adjudicate or investigate complaints promptly, impartially, and independently and address alleged violations relating to article 2, paragraph 2, including actions or omissions by private actors. Where the facts and events at issue lie wholly, or in part, within the exclusive knowledge of the authorities or other respondent, the burden of proof should be regarded as resting on the authorities, or the other respondent, respectively. These institutions should also be empowered to provide effective remedies, such as compensation, reparation, restitution, rehabilitation, guarantees of non-repetition and public apologies, and State parties should ensure that these measures are effectively implemented.

Domestic legal guarantees of equality and non-discrimination should be interpreted by these institutions in ways which facilitate and promote the full protection of economic, social and cultural rights.[28]

Monitoring, indicators and benchmarks

41. States parties are obliged to monitor effectively the implementation of measures to comply with article 2, paragraph 2, of the Covenant. Monitoring should assess both the steps taken and the results achieved in the elimination of discrimination. National strategies, policies and plans should use appropriate indicators and benchmarks, disaggregated on the basis of the prohibited grounds of discrimination.[29]

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[28] See CESCR general comments Nos. 3 and 9. See also the practice of the Committee in its concluding observations on reports of States parties to the Covenant.

[29] See CESCR general comments Nos. 13, 14, 15, 17 and 19, and its new reporting guidelines (E/C.12/2008/2).

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Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Right of everyone to the enjoyment of the highest attainable standard of physical and mental health

Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the report prepared by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, in accordance with Human Rights Council resolutions 6/29 and 24/6.

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Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health

Summary

In the present report, the Special Rapporteur considers a number of critical elements that affect the effective and full implementation of the right to health framework. He begins by reaffirming the justiciability of economic, social and cultural rights, including the right to health, by reiterating the indivisibility and interdependence of all human rights and stressing the timely entry into force of the Optional Protocols to the International Covenant on Economic, Social and Cultural Rights in 2013 and to the Convention on the Rights of the Child on a communications procedure in 2014. The Special Rapporteur then explores the concept of the progressive realization of the right to health and underlines the importance of the enforcement of State obligations through court judgements that recognize the State's capacity and incorporate monitoring by the court and civil society participation. He further focuses on the accountability deficit of transnational corporations and calls for an international mechanism to hold them liable for violations of human rights. The Special Rapporteur also urges a review of the current system of international investment agreements and the investor-State dispute settlement system with a view to creating a level playing field between transnational corporations and States. The Special Rapporteurs concludes his report with a set of specific recommendations on bridging the gaps in the full realization of the right of everyone to the enjoyment of the highest attainable standard of health.

I. Introduction

1. Article 12 of the International Covenant on Economic, Social and Cultural Rights is a comprehensive statement of the right to health. It has been elaborated and interpreted in general comment No. 14 (2000) of the Committee on Economic, Social and Cultural Rights. The right to health framework set out in the general comment has empowered individuals to ensure that States respect, protect and fulfil the right to health. However, some issues need to be addressed not only within the international right to health framework, but also within the right to health in domestic law.

2. In contrast to the immediate obligations of States under the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights has been seen as enumerating rights that need not be fulfilled immediately. This has resulted in the view that economic, social and cultural rights can be fulfilled separately from civil and political rights, and that the former may not be justiciable. This view overlooks the fact that economic, social and cultural rights, including the right to health, are required for the full enjoyment of civil and political rights. Furthermore, the realization of the right to health is assumed to be dependent on available resources. This view is also fallacious, as States need resources to ensure the enforcement and enjoyment of civil and political rights as well. For example, States require resources for properly equipped investigative agencies and functioning courts to ensure the right of the accused to a fair trial.

3. The fulfilment of certain obligations relating to the right to health — although not all — may depend on available resources and be progressively realized. It is important to scrutinize whether States' resources are used efficiently in realizing the right to health. It is equally important to examine the totality of those resources and review the proportion employed in ensuring the right to health. States' policies to progressively realize the right to health should be reasonable, pay special attention to vulnerable groups, be formulated with the participation of affected communities and fulfil, at a minimum, States' core obligations.

4. Globalization and market liberalization have afforded transnational corporations the opportunity to enter into domestic markets, resulting in their growing domination in world markets. While transnational corporations have the ability to influence international and domestic policies, States have been unable to regulate those corporations to prevent them from violating the right to health. The efforts that have to date been made to curb the activities of transnational corporations have been only voluntary and have not persuaded industries to prevent violations of the right to health. In addition, international investment agreements and investor-State dispute settlement systems benefit transnational corporations at the cost of States' sovereign functions of legislation and adjudication. Existing international investment agreements have no checks on the activities of transnational corporations and many do not recognize States' prerogative to legislate and enforce health-related laws. This power asymmetry is perpetuated by the fact that States often have no ability under international investment agreements to initiate disputes against transnational corporations for violating the right to health. Furthermore, investor-State dispute settlements suffer from bias, opacity and arbitrariness. They prevent affected third parties from gaining access to the system to demonstrate the violation of the third party's right to health and receive a remedy.

II. Justiciability of the right to health

5. While the enforcement of the right to health has made great strides since the development of the right to health framework, justiciability of the right remains contested. The Committee on Economic, Social and Cultural Rights confirms the justiciability of economic, social and cultural rights generally, but does not elaborate on their justiciable components.[1] All the components of the right to health are justiciable and courts have adjudicated on and enforced the specific obligations of the right to health.

6. Economic, social and cultural rights have historically been accorded less attention than civil and political rights, given that they have erroneously been seen as non-justiciable because of alleged inherent differences between the two sets of rights. Initially, only one international human rights covenant, containing both civil and political rights and economic, social and cultural rights, was envisaged. When it came to drafting that unified instrument, however, the Commission on Human Rights believed that the nature of the rights were different and convinced the General Assembly of the necessity of two separate covenants (A/2929, chap. II, para. 9). The rationale was that "[civil and political rights] were rights of the individual 'against' the State, i.e., against unlawful and unjust action of the State", while economic, social and cultural rights required States to take positive action (ibid., para. 10).

7. The division between both sets of rights is artificial, given that there is no intrinsic difference between them. Both may require positive actions, are resource dependent and are justiciable. The requirement to take "necessary steps" in the International Covenant on Civil and Political Rights (art. 2 (2)) is a positive obligation that requires time and resources (A/56/55, paras. 21-23). For example, the right to a fair trial requires States to provide courtrooms, trained professionals and other resources that require time, money and expertise to develop. The Human Rights Committee states that the International Covenant on Civil and Political Rights imposes both negative and positive obligations on States.[2] Civil and political rights were assumed to be justiciable and immediately enforceable because the necessary infrastructure and the means of enforcement already existed when the covenants were drafted.

8. The Vienna Declaration and Programme of Action stresses the indivisible, interdependent and interrelated nature of the two sets of rights. This is reinforced by the necessity of the realization of one to fulfil the other. For example, ensuring equal treatment of men and women in all spheres of their lives, such as the right to found a family, contained in article 23 (2) of the International Covenant on Civil and Political Rights, cannot be achieved unless the right to sexual and reproductive health of women is realized by ensuring their right to access health facilities, goods and services.[3]

9. Dignity underlies all human rights and was included in the Universal Declaration of Human Rights and both covenants. In its resolution 421 (V) E, the General Assembly recognized that dignity requires full enjoyment of both civil and political rights and economic, social and cultural rights. Some domestic and regional

[1] General comment No. 9 (1998), para. 10.
[2] Human Rights Committee, general comment No. 31 (2004), paras. 6-8.
[3] Committee on Economic, Social and Cultural Rights, general comment No. 14, para. 14.

courts have torn asunder the artificial division between the two sets of rights by developing a justiciable right to health through the recognition of dignity. For example, the Supreme Court of India found that to "enhance the dignity of the individual" the right to life should include the right to the basic necessities of life.[4] That right has itself become a stand-alone aspect of the right to health. The Inter-American Court of Human Rights views the right to life as containing a positive obligation to "generat[e] minimum living conditions that are compatible with the dignity of the human person", which includes providing the underlying determinants of health for vulnerable groups.[5]

10. The right to health imposes overlapping obligations of immediate effect on States. They include the immediate obligations of non-discrimination and to take steps towards the progressive realization of rights, the core obligation to ensure the minimum essential levels of the right and the obligations to respect and protect. Immediate obligations are outside the ambit of article 2 (1) of the International Covenant on Economic, Social and Cultural Rights. Core obligations are the minimum essential level of a right[6] and are not progressively realized. Duties to respect and protect are akin to obligations under the International Covenant on Civil and Political Rights to respect and ensure — because the duty to ensure includes the duty to protect[7] — which indisputably are justiciable.

11. These obligations of immediate effect may in fact be dependent on resources for their implementation. For example, States may not want to provide expensive medicine, but in cases of essential medicines, they are required to fulfil this obligation.[8] Even if an obligation of immediate effect depends on resources, a State may not rely on the lack of resources as a defence or excuse for not fulfilling the obligation.

12. The inherent justiciability of these components of the right to health has been demonstrated by the decisions of regional and domestic courts.

13. Courts are experienced in adjudicating the immediate obligation of non-discrimination with regard to health. For example, in *Eldrige v. British Columbia (Attorney General)*, the Supreme Court of Canada found that the Medical and Health Care Services Act discriminated against deaf and hard of hearing people because its lack of provision for sign language interpreters denied them equal benefits under the law.

14. As the United Nations High Commissioner for Human Rights noted in a report to the Economic and Social Council, retrogressive measures are presumptively a violation of the obligation to take steps towards the progressive realization of economic, social and cultural rights (E/2007/82, para. 19). States have the burden to demonstrate that retrogression is not a violation, making the adjudication necessary to determine whether a violation in fact occurred. Retrogression was assessed in decision No. 39/84 of 1984 of the Constitutional Court of Portugal in a case where the Government had attempted to repeal the law that established the National Health

[4] *Francis Coralie Mullin v. Administrator, Union Territory of Delhi and others*, 1981, paras. 6 and 8.

[5] *Yakye Axa Indigenous Community v. Paraguay,* judgement of 17 June 2005, paras. 162-165.

[6] See Committee on Economic, Social and Cultural Rights, general comment No. 3 (1990), para. 10.

[7] Human Rights Committee, general comment No. 31, para. 8.

[8] *Delhi High Court, Mohd. Ahmed (Minor) s. Union of India*, April 2014, para. 68.

Service. The Court found that, once a State fulfils a constitutional obligation, the Constitution protects against abolishment, turning the obligation from a purely positive one to both a positive and a negative obligation.

15. Core obligations have been adjudicated under the right to life, which obliges the State to ensure the necessities for life. For example, the Supreme Court of Argentina, in *Reynoso* (2012), found that the State had an obligation to guarantee people access to basic goods and services necessary for their health and life.

16. Courts have enforced obligations to respect and protect with regard to the right to health. The African Commission on Human and Peoples' Rights elaborated, in *Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria*, that the obligation to respect within the right to health requires a State "to respect the free use of resources" of an individual or group "for the purpose of rights-related needs".[9] In *Marangopoulos Foundation for Human Rights v. Greece*, the European Committee of Social Rights held that the State must engage in stronger regulatory practices to protect air quality, including the regulation of private actors, to protect its obligation under the right to health.[10]

17. Only judicial or quasi-judicial bodies and not purely administrative mechanisms can provide access to effective remedies as required by the right to health framework. Effective remedies require an adjudicator to provide appropriate reparation. Only an adjudicator can assess whether the right to health has been violated and provide reparation that includes restitution and guarantees of non-repetition. Restitution often requires imposing an obligation on a third party, such as requiring a hospital to provide essential medicines, and guarantees of non-repetition can be obtained only through structural policy changes that involve other government agencies. Administrative remedies are limited to violations of the relevant statute, and the scope of the statute does not allow the imposition of obligations on other agents and thus cannot provide effective remedies.

18. Any debate about the general justiciability of the right to health ended with the entry into force of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on 5 May 2013 and the Optional Protocol to the Convention on the Rights of the Child on a communications procedure on 14 April 2014. It is recommended that States ensure that the right to health is justiciable in their domestic jurisdictions. Most individual obligations of the right to health are clearly justiciable, and only obligations to fulfil that are progressively realizable require further analysis to confirm their justiciability.

III. Progressive realization of the right to health

19. Similar to other economic, social and cultural rights, and in keeping with article 2 (1) of the Covenant, the right to health allows States to realize some rights progressively. The progressive realization of the right to health obligations is premised on the understanding that States with limited resources may have the capacity to implement health programmes only in a phased manner.

[9] Communication No. 155/96, 2001, para. 45.
[10] Complaint No. 30/2005, 2006, para. 203.

20. The reliance on States' available resources to realize the right to health adds complexities to an adjudicator's ability to decide such issues. For example, adjudicating whether the State has taken steps to the maximum extent of its available resources may involve the determination of the extent of the State's available resources. Adjudicators have, however, been loath to scrutinize statements concerning the available resources proffered by States because decisions on budgetary allocations are generally deemed to be within the purview of the legislature and executive, and thus outside the proper scope of judicial inquiry. In *Soobramoney v. Minister of Health, KwaZulu-Natal* (1998), the Constitutional Court of South Africa concluded that people with chronic renal failure were not entitled to dialysis treatment by the State free of cost, as were emergency cases of renal failure. The petitioner's right to receive dialysis treatment was analysed under the constitutional obligation of South Africa to progressively realize its citizens' right to health and its obligation to provide emergency health care. The Court found that the Government had proved that no funds were available to provide all persons with chronic renal failure with dialysis treatment free of cost and that it therefore had to accord priority to emergency care. The Court reached that conclusion after reviewing evidence that the Department of Health had already overspent its budget. It did not delve further into whether the amount allocated was sufficient to achieve a reasonable level of health.

21. Adjudicators' inability or reluctance to inquire into budgetary allocations affecting the amount of resources available may be fostered in part by the fact that the term "available resources" has not been clearly defined within the right to health framework or general comment No. 3. Available resources could be interpreted in diverse ways. It could mean a State's entire gross domestic product or a specified percentage thereof, or it could be limited to the amount allocated to the State's health budget or limited to the amounts allocated to a particular health concern. Furthermore, although general comment No. 3 indicates that available resources include resources available through international assistance (para. 13), it falls short of clarifying whether available resources cover the amount actually available or the amount that could have been available had the State exerted itself in obtaining such aid. Moreover, the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights indicate that States have an obligation to develop societal resources as a way of increasing their available resources, but do not indicate whether available resources should include the amount of societal resources that a State could reasonably develop but has not yet developed (para. 24). It is clear, however, that the term "available resources" refers to the totality of a State's "real" resources (e.g. informational, technical, organizational, human, natural and administrative) above and beyond budgetary allocations.[11] Adjudicators reviewing the amount of available resources proffered by States should keep in mind that the State is required to administer the existing budget efficiently and mobilize additional resources, which may include, for example, changes to the State's taxation policy or smart incurrence of debt.[12]

[11] See Rory O'Connell and others, *Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources* (London, Routledge, 2014), chap. 3.

[12] Diane Elson, Radhika Balakrishnan and James Heintz, "Public finance, maximum available resources and human rights", in A. Nolan, R. O'Connell and C. Harvey, eds., *Human Rights and Public Finance: Budget and the Promotion of Economic and Social Rights* (Oxford, United Kingdom of Great Britain and Northern Ireland, Hart, 2013).

22. Sufficient resources available to a State should, however, be allocated to achieve the realization of other economic, social and cultural rights, in addition to the plethora of competing demands on the State. When considering allocation to other competing economic, social and cultural obligations, those of an immediate or core nature should take precedence. Available resources should imply the maximum amount of resources that can be allocated to a specific health objective without compromising other essential services.[11]

23. Although what constitutes available resources will differ by context, the term requires elaboration in order to guide States and assist adjudicators in deciding whether the amount of available resources proffered by States is acceptable. Even if adjudicators do not give directions with regard to the allocation and use of resources, they should closely scrutinize the State's view of the amount of maximum resources available to them, given that it is the Government's burden to demonstrate that the amount of its available resources does not permit the fulfilment of some State obligations. This may require adjudicators to scrutinize the budget to determine whether the allocation to the health sector or to a particular health goal is inadequate. A State's decreasing budgetary allocation for its right to health obligations vis-à-vis its increasing gross domestic product or increasing allocation to areas other than those relating to human rights may be evidence that the State has chosen not to allocate available resources to fulfil that right, which may evidence a breach of its progressively realizable obligations.[11] Adjudicators should also inquire as to whether the State has sufficiently exerted itself in obtaining international aid or developing societal resources to expand the amount of resources available. States should be obliged to provide information regarding the calculation of their available resources, budget allocations and efforts to increase the available resources in an open and transparent manner to facilitate a full and fair review by the adjudicator.

24. Where a progressively realizable obligation has a core component, adjudicators should inquire as to whether the State has fulfilled its obligation in that regard. When such rights have not been safeguarded, courts have found violations of the relevant right without even delving into an analysis of a State's available resources. For example, the Inter-American Court of Human Rights noted that the State obligation to guarantee access to a decent life must be read in view of the State's progressively realizable obligations set forth in article 26 of the American Convention on Human Rights.[13] However, the Court did not use the concept of progressive realization to qualify the obligation of the State to provide minimum living conditions that were compatible with the dignity of the human person, but rather found that the State had breached the claimants' right to life and was required to provide, inter alia, medicine, food, clean water and sanitation facilities.[14] Thus, in accordance with the core obligations under the right to health framework, where adjudicators determine that certain fundamental human rights have been violated, they may find that the State has breached its relevant obligations without delving into the question of whether the State had the available resources to satisfy such obligations.[15]

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[13] *Yakye Axa Indigenous Community v. Paraguay*, judgement of 17 June 2005, para. 163.

[14] Ibid., paras. 176 and 221.

[15] See Inter-American Court of Human Rights, *Sawhoyamaxa Indigenous Community v. Paraguay*, judgement of 29 March 2006; *Ximenes-Lopes v. Brazil*, judgement of 4 July 2006.

25. Courts have also adjudicated the utilization by the State of available resources vis-à-vis existing policies and the obligation of non-retrogression. In a case where the court held that lack of available resources cannot be a justification for retrogression of policies, it unambiguously expressed that benefits promised under health-care programmes should be delivered and issued directions to the Government to that effect.[16] Moreover, should the adjudicators find that a sum has been allocated to the realization of a particular health right but has not been used, or such sum has been diverted to another use, they should hold that the State is not using the maximum of its available resources and may therefore be in violation of its progressively realizable obligations.[11] It is worth noting, however, that resources allocated to non-health rights may have the effect of improving access to and availability and quality of health facilities, goods and services. For example, funds spent on roads can improve access to medical clinics.[12]

26. For a State to be in compliance with its progressively realizable obligations, the amount of available resources must be efficiently allocated. Available resources should be considered efficiently allocated if such allocation reduces barriers to non-discriminatory access to available and acceptable-quality health facilities, goods and services. Failure to curb corruption, which results in the inefficient use of resources, may be considered a breach of a State's progressively realizable obligations.[12] States must also ensure that what appears to be greater efficiency is not simply masking the transfer of such costs to non-State actors. For example, a policy that encourages patients to spend less time in the hospital, thus reducing the financial cost per treatment, may in reality shift those costs to the patient's home caregivers.[12]

27. Some domestic courts have focused on judicial review of the process, rather than the substance, of policymaking. Courts have confirmed that a State is in compliance with its progressively realizable obligations if the policymaking process was reasonable.[17] The Constitutional Court of South Africa, for example, has considered the following factors in determining whether a housing policy and a water distribution policy was "reasonable": consideration given to vulnerable groups and emergency situations; flexibility of the policy to being updated upon continuing governmental review; attention paid to the short-term, medium-term and long-term needs; a transparent, participatory and well-considered process; efficient implementation of the policy; equitable coverage; retrogression in policy; and whether discrimination was tied to a legitimate government policy.[18] Even where adjudicators find that the process has been reasonable, they may also review whether the implementation of the policy has resulted in a disproportionately negative impact on a particular vulnerable group, which may evidence a breach of the State's progressively realizable obligations.

28. The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights also requires the Committee to "consider the reasonableness of the steps taken by the State Party" (art. 8 (4)). The Committee has laid out several considerations to be taken into account when determining reasonableness, such as

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[16] High Court of Delhi, *Laxmi Mandal v. Deen Dayal Haringagar Hospital and others*, 2010, paras. 61-70.

[17] See Constitutional Court of South Africa, *Minister of Health v. Treatment Action Campaign*, 2002; High Court at Nairobi, *Okwanda v. Minister of Health and Medical Services and others*, 2013.

[18] *South Africa v. Grootboom*, 2001; *Mazibuko and others v. City of Johannesburg and others*, 2009.

whether measures were deliberate, concrete and targeted; whether non-discrimination and non-arbitrariness were ensured; whether allocation of resources was in accordance with international human rights standards; whether the policy utilized the least restrictive option; the time frame of the policy; and whether the situation of vulnerable groups was taken into account (E/C.12/2007/1, para. 8). Vulnerable groups should not be limited to those specific groups mentioned in general comment No. 14, but should include any group that is disproportionately affected by a particular ailment or otherwise marginalized on account of its members' political, social or economic exclusion; discrimination and stigmatization suffered by that group; restrictions in law or in practice on giving informed consent or exercising full autonomy by members of that group; or the group's inability to enforce rights, gain access to State benefits or enjoy regulatory protection.

29. In reviewing whether a State has fulfilled its obligations under the Covenant, it is important to consider that even well-considered policies making use of a State's maximum available resources may lead to poor health outcomes owing to external circumstances, such as an influx of refugees, an outbreak of an epidemic or an economic recession. Even in such cases of resource constraint, States should fulfil their core obligations and other immediate obligations without discrimination. States should not be allowed to use external circumstances as an excuse for retrogressive measures such as cutting certain health-related policies as part of a redistribution of funds from the health sector.

IV. Enforcement of the right to health

30. Enforcement of a State's obligations is essential to the enjoyment of the right to health. Unfortunately, many legal judgements on economic, social and cultural rights are not fully implemented by States. To promote the implementation of judgements, adjudicators are encouraged to develop specific and targeted decisions that recognize the State's capacity and include monitoring by the court and civil society participation.

31. Courts should be mindful of the context and objectives when designing specific directions for the implementation of judgements containing positive obligations. Judgements that provide a framework of specific processes for specific agencies may overcome barriers to implementation that a general judgement does not. This approach, rather than dictating specific objectives, can mitigate concerns of violating separation of powers. In the landmark *T-760/08* judgement (2008) that led to systemic change of the Colombian health-care system, the Constitutional Court of Colombia did not dictate reforms but gave direction to policymakers to define objectives, develop appropriate policies, build institutional capacity and justify each decision with information.[19] With regard to progressively realizable obligations in particular, courts should consider that any reform must be sustainable in order to increase social acceptance of the judgement and ensure a sustainable health system.[20]

[19] See Manuel José Cepeda-Espinoza, "Transcript: social and economic rights and the Colombian Constitutional Court", *Texas Law Review*, vol. 89, p. 1703.

[20] Ibid., p. 1701.

32. Monitoring is critical for the full implementation of complex judgements. The writ of continuing mandamus has been used by the Supreme Court of India to provide continuous judicial oversight of agencies when a traditional writ of mandamus could not overcome agency inertia.[21] The Constitutional Court of Colombia developed a special monitoring chamber to oversee the implementation of *T-760/08* and devoted a section of its website to all the orders enforcing the judgement.[22] To maximize implementation, monitoring by the court should be done in conjunction with public participation.[23]

33. Meaningful participation by affected communities and other stakeholders, together with access to health information, is not only an essential element of the right to health,[24] but also a critical tool for monitoring implementation. Courts are positioned to promote access to information as part of implementation monitoring, or even to find a constitutional right to receive accurate health-related information from public officials.[25] Participating stakeholders can support implementation jointly with the State by providing technical expertise and communicating the interests of affected communities.

34. States are encouraged to ratify the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights and recognize the competence of the Committee on Economic, Social and Cultural Rights to receive and consider inter-State communications. Enforcement through the Optional Protocol will further develop the content and jurisprudence of the right to health. Health-related cases have been adjudicated at the international level, for example in the *Alyne da Silva Pimentel v. Brazil and L.C. v. Peru* cases before the Committee on the Elimination of Discrimination against Women.[26] While the Committee adopted decisions calling for specific remedies for the complainants in those cases, it also adopts general recommendations that promote policy change. General recommendations are necessary to promote the enjoyment of the right to all similarly affected people, not only the authors of communications. They should be incorporated into friendly settlements between the parties, with input from third parties, because States can use friendly settlements to provide remedies not only for the author but for all similarly affected people.

35. States, whether directly or indirectly, may have an impact on the enjoyment of the right to health within another State. If a State is unable to protect the right to health of its people from foreign actors using domestic mechanisms, it is encouraged to use the inter-State communications mechanism under the Optional Protocol to do so.

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[21] See *Vineet Narain and others v. Union of India and another*, 1998.

[22] See Constitutional Court of Colombia, Seguimiento al cumplimiento de la Sentencia T-760 de 2008 (Monitoring compliance with judgement T-760 of 2008).

[23] See César Rodríguez-Garavito, "Beyond the courtroom: the impact of judicial activism on socioeconomic rights in Latin America", *Texas Law Review*, vol. 89, p. 1694.

[24] See general comment No. 14, para. 12 (b) (iv).

[25] See Constitutional Court of Colombia, *T-627/12*, judgement of 10 August 2012, p. 125.

[26] Communication No. 17/2008, views adopted on 25 July 2011, and communication No. 22/2009, views adopted on 17 October 2011.

V. Transnational corporations

36. Globalization and trade liberalization have allowed transnational corporations to gain greater and easier access to otherwise closed markets. Their increasing presence in the world economy has enabled them to influence international and domestic law-making and infringe upon States' policy space. They have influenced food consumption patterns[27] and promoted the use of tobacco, especially in developing countries.[28] They have also affected the rights of large communities with impunity, causing displacement,[29] contamination of groundwater[30] and loss of livelihood.[31] They have directly perpetrated serious human rights violations, in particular in developing and least developed countries.[32] They have thus seriously affected the laws, policies and social and economic environments of States and have violated the economic, social and cultural rights of individuals and communities, including the right to health.

37. It may be difficult for States or affected individuals to hold foreign transnational corporations accountable for harmful actions that were orchestrated through their domestic subsidiary. The involvement of multiple jurisdictions may effectively protect transnational corporations from liability for their human rights violations[33] or may lead to protracted litigation in multiple forums.[34]

38. The magnitude of violations by transnational corporations and the ease with which they can evade responsibility for such violations call for an international mechanism to hold them liable for human rights abuses. Such a mechanism should supplement domestic laws rather than diminish the importance of domestic law. The mechanism should therefore enable States and individuals to hold transnational corporations to account for their human rights violations.

39. Previous efforts made in international forums to confer obligations on transnational corporations have resulted only in voluntary guidelines.[35] In 2003, the Subcommission on the Promotion and Protection of Human Rights approved norms

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[27] See Corinna Hawkes, "Uneven dietary development: linking the policies and processes of globalization with the nutrition transition, obesity and diet-related chronic diseases", *Globalization and Health*, vol. 2, No. 4 (2006).

[28] See M. Otañez, H. Mamudu and S. Glantz, "Tobacco companies' use of developing countries' economic reliance on tobacco to lobby against global tobacco control: the case of Malawi", *American Journal of Public Health*, vol. 99, No. 10 (October 2009).

[29] See Human Rights Watch, "*How Can We Survive Here?": The Impact of Mining on Human Rights in Karamoja, Uganda* (2014).

[30] See N. Cingotti and others, "No fracking way: how the EU-US trade agreement risks expanding fracking", Issue Brief (Transnational Institute, March 2014).

[31] Office of the United Nations High Commissioner for Human Rights, "India: urgent call to halt Odisha mega-steel project amid serious human rights concerns". Available from www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=13805&LangID=E.

[32] Olivier De Schutter, "The accountability of multinationals for human rights violations in European law", New York University School of Law, Center for Human Rights and Global Justice Working Paper No. 1, 2004.

[33] Amnesty International, "India: court decision requires Dow Chemical to respond to Bhopal gas tragedy", 3 July 2013.

[34] Reuters, "Ecuador plaintiffs file lawsuit in Canada against Chevron", 30 May 2012.

[35] The Guidelines for Multinational Enterprises adopted by the Organization for Economic Cooperation for Development in 1976; the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy adopted by the International Labour Organization in 1977; and the United Nations Global Compact initiated by the Secretary-General in 1999.

on the responsibilities of transnational corporations and other business enterprises with regard to human rights (E/CN.4/Sub.2/2003/12/Rev.2), which sought to confer non-voluntary direct obligations on transnational corporations and business enterprises. The Commission on Human Rights did not adopt the norms, owing in part to strong opposition from States and business entities. In 2005, the Commission, in resolution 2005/69, requested the Secretary-General to appoint a special representative on the issue of human rights and transnational corporations and other business enterprises.

40. The Special Representative submitted, in his final report in 2011, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (A/HRC/17/31, annex). The first pillar, protect, reflects the existence in international human rights law of a binding obligation on States to protect individuals from actions of third parties. The pillar requires States to take measures such as instituting laws to hold transnational corporations accountable for their transgressions (principle 1). It could be argued, however, that the State obligation to protect, which is already an important obligation of States under international human rights law, has been ineffective against transnational corporations.

41. The second pillar reflects the obligation of transnational corporations to respect human rights (principle 11). Pursuant to the responsibility to respect, transnational corporations have a responsibility to conduct due diligence to identify and address adverse human rights impacts caused by their activities; such due diligence should involve the participation of affected communities (principle 18, commentary). However, because the framework and Guiding Principles reflect existing international law standards and reflect the responsibility to respect only as based on "a global standard of expected conduct" for corporations rather than specific obligations enshrined in binding treaty provisions (principle 11, commentary), it has been argued that there is no legally binding obligation requiring transnational corporations to conduct this due diligence.[36] The rationale appears to be that non-binding responsibilities make good market sense, which itself should provide incentives for transnational corporations to comply with their pledges. For example, the Guiding Principles mention that compliance with responsibilities may be ensured where a transnational corporation institutes policies and procedures that set financial and other performance incentives for personnel.[37] However, providing incentives for compliance makes respect for rights a means to attain an end (the promised incentive), but does not foster respect for rights in and of themselves.

42. The third pillar of the framework requires States to ensure individuals' access to an effective remedy through judicial, administrative, legislative or other appropriate means when abuses occur within their territory and/or jurisdiction (principle 25). An aspect of access to remedy is that corporations should establish or participate in effective, operational-level grievance mechanisms (principle 29). Given that access to remedy is an aspect of States' obligation to protect, however,

[36] See Olga Martin-Ortega, "Human rights due diligence for corporations: from voluntary standards to hard law at last?", *Netherlands Quarterly of Human Rights*, vol. 32, No. 1 (March 2014), pp. 55-57.

[37] Ibid., p. 16.

States' inability or unwillingness to hold transnational corporations accountable may lead to a lack of available and effective remedies against the corporations.[38]

43. The Guiding Principles also fail to take into consideration the existing political context, whereby developing countries may be vulnerable to undue influence from transnational corporations. Business interests may be protected at the cost of the human rights of those affected communities that remain dependent on States to hold corporations accountable for violations. Non-binding responsibilities have therefore not prevented transnational corporations from violating human rights.[39]

44. In this regard, the Special Rapporteur notes with satisfaction the adoption of resolution 26/9 by the Human Rights Council in which the Council decided to establish an open-ended intergovernmental working group on a legally binding instrument on transnational corporations and other business enterprises with respect to human rights with the mandate to elaborate an internationally legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises. The Special Rapporteur welcomes this opportunity to develop an instrument that will remedy the current imbalance between corporations, States and individuals.

45. There is an urgent need for an international instrument that can address the increasing complexities presented by transnational corporations' multi-jurisdictional organization and global influence. Moreover, because not all States have a robust regulatory mechanism, owing either to their poor negotiating power or because they are unwilling to hold domestic corporations accountable for harms caused, obligations should also be conferred on domestic corporations.

46. Along with the required accountability and monitoring mechanisms, a strong and effective enforcement mechanism is needed to remedy and discourage violations. An adjudicatory mechanism to examine individual or State complaints against transnational and domestic corporations should be established. Individuals should have the right to remedy both in their home State and in the home State of the transnational corporation where the latter does not regulate those activities of the corporation that violate the individual's right to health.

47. In the meantime, a declaration along the lines of the Universal Declaration of Human Rights could be adopted conferring specific human rights obligations on private corporations, especially transnational corporations. Imposing specific human rights obligations would provide a structure to the rights and obligations involved in this paradigm.

A. International investment agreements

48. To encourage economic activity and attract investment, States, especially those that are developing and least developed, may enter into international investment

[38] See Iman Prinhandono, "Transnational corporations and human rights violations in Indonesia", *Australian Journal of Asian Law*, vol. 14, No. 1 (2013), pp. 1-23; and G. Wass and C. Muslime, *Business, Human Rights, and Uganda's Oil. Part II: Protect and Remedy: Implementing State Duties under the UN Framework on Business and Human Rights* (ActionAid International Uganda and International Peace Information Service, 2013).

[39] See Chris Albin-Lackey, "Without rules: a failed approach to corporate accountability", in Human Rights Watch, *World Report 2013*.

agreements. Such agreements allow transnational corporations to reduce States' policy space and have been instrumental in increasing the influence of transnational corporations on States' ability to institute public health policies.[40]

49. International investment agreements are treaties concluded between two or more States that facilitate an enabling economic environment for transnational corporations to invest in host States. They are promoted as tools to boost domestic economies but may have the effect of overriding States' sovereignty. In some States, business executives may enter into such agreements and bind States without any discussion among, or the agreement of, elected representatives. In addition, States may not be able to terminate such agreements without facing economic and financial consequences. Given that the agreements are concluded between States, they do confer no obligations on transnational corporations to respect, protect and fulfil the right to health, allowing corporations to continue profit-making activities even if they are violating individuals' right to health.

50. The rights to information and to participate in the decision-making process are essential for the enjoyment of the right to health. Those elements of the right to health framework are undermined when international investment agreements are negotiated and concluded in secrecy. Affected communities should be able to participate in negotiations. Making information regarding the negotiations public can allow communities and civil society organizations to pressure States to refrain from signing such agreements or to assist States in asserting themselves during negotiations, which may facilitate the exclusion of provisions that may result in a breach of human rights.

51. The right to access information has been denied to affected communities on the grounds that disclosure of such information may harm the State's economic interest and should therefore be kept confidential.[41] Disturbingly, the practice of withholding information from stakeholders such as civil society groups has been held to be non-discriminatory, even where the same information was provided to corporations with the justification that corporations have expertise in matters relating to free trade agreements.[42] Such inequity in access to information can enable corporations to influence the content of an international investment agreement in their favour.

52. International investment agreements benefit transnational corporations as investors because such corporations are granted rights protective of their investments in the host State, such as the right to fair and equitable treatment. Transnational corporations also have the right to initiate disputes before international commercial arbitration tribunals for alleged violations by the host State and for State infringement on the corporation's profit-making activities or potential profits. States, on the other hand, may be unable to initiate disputes against investors because transnational corporations, as non-signatories, have no obligations under

[40] See Eric Peterson and Kevin Gray, "International human rights in bilateral investment treaties and in investment treaty arbitration", International Institute for Sustainable Development, 2003.

[41] See Central Information Commission (India), *D. G. Shah v. Ministry of Commerce and Industry, Department of Industrial Policy and Promotion*, 2011.

[42] See European Court of Justice, *Stichting Corporate Europe Observatory v. European Commission*, case T 93/11, judgement of 7 June 2013.

international investment agreements.[43] Such agreements perpetuate and exacerbate an asymmetrical relationship between investors and States.

53. International investment agreements impose obligations on States vis-à-vis investors that may affect States' power to introduce health laws in the public interest. States may have to modify their laws to accommodate investors' rights, even though such modifications may increase the risk of violating individuals' right to health. Free trade agreements, for example, may limit the enjoyment of the right to health of individuals by preventing States from using the public health flexibility under the Agreement on Trade-Related Aspects of Intellectual Property Rights.[44] Pharmaceutical companies may be able to challenge the patent laws of host States if such laws do not comply with investors' rights under the free trade agreement, even though such patent laws may be compliant with the Agreement on Trade-Related Aspects of Intellectual Property Rights. States may thus be unable to check the increasing cost of medicines, which undermines their core obligation to ensure access to health facilities, goods and services, including essential medicines, especially for vulnerable groups.

54. International investment agreements may provide for exceptions that can be used by States to defend laws in the public interest, such as public health laws. Even where international investment agreements contain such exceptions, however, investor rights may trump them. After Uruguay had entered into a bilateral investment treaty with Switzerland, it adopted public health measures on the packaging and advertisement of cigarettes, in accordance with local laws, which were enacted pursuant to the World Health Organization Framework Convention on Tobacco Control. Although those measures accorded with the public health exception in the bilateral investment treaty, Phillip Morris International initiated a dispute against Uruguay, claiming that its law was unreasonable and breached the guarantee of fair and equitable treatment.[45]

55. International investment agreements are treated as a stand-alone legal code and often do not contain references to the right to health. They should, however, be interpreted in a manner that does not conflict with human rights law because the purpose of both development-stimulating investment treaties and human rights laws is to benefit individuals. Under the current regime, States may be vulnerable to dispute settlement procedures when a State breaches an obligation under the agreement in order to comply with its human rights obligations. This was the case when the Ethyl Corporation submitted a claim against a public health decision by the Government of Canada to impose a trade ban on a controversial gasoline additive produced by Ethyl Corporation.[46] In another case, the tribunal noted that, though the claimant's property was expropriated in furtherance of environmental

[43] M. Toral and T. Schultz, "The State, a perpetual respondent in investment arbitration? Some unorthodox considerations", in Michael Waibel and others, eds., *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer Law International, 2010), p. 578.

[44] Joint United Nations Programme on HIV/AIDS, *The Potential Impact of Free Trade Agreements on Public Health* (Geneva, 2012).

[45] See International Centre for Settlement of Investment Disputes, *Phillip Morris Brands Sàrl, Phillip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, case No. ARB/10/7, decision on jurisdiction of 2 July 2013.

[46] *Ethyl Corporation v. Canada*, award on jurisdiction judgement of 24 June 1998.

public interests and legitimate, expropriation by the State "did not alter the legal character of the taking for which adequate compensation must be paid".[47]

56. The high cost of arbitration and the threat of an adverse judgement can create a chilling effect on States, dissuading them from fulfilling their right to health obligations.[48] These disputes may also deplete States' resources, which can affect their ability to progressively realize the resource-dependent aspects of the right to health.

57. Although international investment agreements may contribute to the economic development of a country, States should ensure that protection of human rights, including the right to health, is incorporated into those agreements. Human rights must be respected, protected and fulfilled at all times, and should be the primary concern of all action by States. International investment agreements should therefore expressly provide for States' human rights obligations, which should be able to override investors' rights in specific cases.

58. The ability of individuals to enjoy their right to health cannot be subject to contractual rights of investors, given that the right to health is fundamental to the dignity of individuals.

59. States should review the current system of investment treaties to create a level playing field. During negotiation, review or renegotiation, international investment agreements should ensure that States have the right to change laws and policies in furtherance of human rights, regardless of the impact of such change on investor rights. Some 40 States have already begun renegotiating bilateral investment treaties to minimize their vulnerability to disputes and to limit investor rights.[49] In 2011, Australia amended its trade policy to exclude provisions in trade agreements that could "limit its capacity to put health warnings or plain packaging requirements on tobacco products or its ability to continue the Pharmaceutical Benefits Scheme"[50]. Until international law can hold transnational corporations directly accountable for their violations of human rights, States should incorporate provisions in international investment agreements that enable States to hold transnational corporations liable for such violations under the domestic law of either the home or the host State. States should also ensure that their ability to implement human-rights-friendly laws is not in any way hindered by the agreement.

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[47] See International Centre for Settlement of Investment Disputes, *Compania del Desarrollo de Santa Elena S.A. v. The Republic of Costa Rica*, case No. ARB/96/1, 17 February 2000, para. 71.

[48] D. Gantz, "The evolution of FTA investment provisions: from NAFTA to the United States-Chile Free Trade Agreement", *American University International Law Review,* vol. 19, No. 4 (2003), p. 684.

[49] See Mahnaz Malick, "Recent developments in international investment agreements: negotiations and disputes", International Institute of Sustainable Development, 2011; Y. Haftel and A. Thompson, "When do States renegotiate international agreements? The case of bilateral investment treaties", 2013; United Nations Conference on Trade and Development, http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d6_en.pdf.

[50] See D. Gleeson, K. Tienhaara and T. Faunce, "Challenges to Australia's national health policy from trade and investment agreements", *Medical Journal of Australia*, vol. 196, No. 5 (2012), quoting the Department of Foreign Affairs and Trade of the Government of Australia.

B. Investor-State dispute settlement

60. International investment agreements include an arbitration clause for investor-State dispute settlements that can be invoked only by transnational corporations against host States for alleged violations of the corporation's rights. The arbitration clause determines the place of arbitration, the applicable law and the procedure for appointing arbitrators. As at 2013, there were 568 known cases of arbitration under international investment agreements. Most were brought against developing States. A total of 85 per cent of the cases were brought by investors from developed countries.[51] The system is riddled with problems.

61. The number of arbitration cases filed against States is likely to rise in times of financial crisis. For example, since its financial crisis in 2001 and the introduction of economic reforms, Argentina has faced more than 50 arbitration cases.[51] Similarly, Spain and Greece saw a sharp increase in arbitration cases against them after their financial crises[52] and more than 10 arbitration cases were registered against Egypt after the Arab Spring.[53] In such crises, States may need to realign their economic and social policies within the changed climate. Although such changed policies may be in the public interest, the altered policies might threaten investments and prevent States from fulfilling their obligations under the international investment agreement.

62. The current system of investor-State dispute settlement also suffers from bias and conflicts of interest. The dispute settlement is controlled by a small clique of arbitrators and lawyers, and the same person may be counsel, arbitrator and adviser to an investor or State at different times.[54] Many arbitrators share close links with business communities and may be inclined towards protecting investors' profits.[55] This can affect the independence and neutrality of arbitrators, is contrary to the principle of fairness and further compromises the integrity of arbitration under international investment agreements.

63. Annulment applications by States on the ground of bias have in many instances been rejected. In one case, the State argued for the recusal of an arbitrator on the ground that the award would be used to further the arbitrator's argument as counsel in another case.[56] The State lost. An issue of bias also arises where an arbitrator has an interest in the investor's business. In one such case, the State's application to annul the award was rejected because there was "no material effect on the final decision of the Tribunal, which was in any event unanimous".[57]

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[51] See http://unctad.org/en/Docs/webdiaeia20113_en.pdf.

[52] See Cecilia Olivet and Pia Eberhardt, *Profiting from Crisis* (Amsterdam/Brussels, Transnational Institute and Corporate Europe Observatory, March 2014).

[53] See www.brownrudnick.com/news-resources-detail/2013-10-beyond-the-realm-of-icsid-al-kharafi-sons-co-vs-libya.

[54] See International Centre for Settlement of Investment Disputes, *Azurix Corporation v. The Argentine Republic*, case No. ARB/01/12, 14 July 2006.

[55] See Cecilia Olivet and Pia Eberhardt,, *Profiting from injustice*, ((Amsterdam/Brussels, Transnational Institute and Corporate Europe Observatory, November 2012).

[56] See *Eureko v. Poland*, judgement of 22 December 2006 of the court of first instance of Brussels.

[57] International Centre for Settlement of Investment Disputes, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic,* case No. ARB/97/3, annulment proceeding, paras. 234-235.

64. The amount of compensation awarded runs into millions of dollars and is an additional blow to developing States, especially those undergoing or recovering from crisis. For example, in *Al-Kharafi v. Libya*, the claimant was awarded more than $935 million.[58] The enormous size of such awards can have a negative effect on the State's ability to implement health policies. For example, in *CME v. Czech Republic*,[59] the compensation awarded to the investor was equal to the entire health budget of the State.[60] States may also have to bear not only legal costs incurred by them during arbitration but also those incurred by the successful claimant.[61] Even where States are successful, they may have to pay a heavy fee for the arbitrators.[62]

65. Moreover, arbitration proceedings are opaque. Except in some cases, no public notice of the arbitration may be issued.[63] Persons not party to the arbitration are often unable to participate in the process as amicus or as an audience to the proceedings. Under some rules, however, non-disputing parties may be able to make submissions under very limited circumstances and at the discretion of the tribunal.[64] In addition, arbitration proceedings are conducted in camera, which prevents persons from following the arbitration unless, as is allowed under some rules, both parties agree to hold an open hearing.[65] Furthermore, the award of the tribunal is often binding on the parties, with no appeal permitted.[66]

66. A public, democratic, open and accountable system of domestic courts has been replaced with private, closed and unaccountable arbitration. Arbitration lacks a system for review that can check arbitrariness. The opaque nature of arbitration, under which some awards are not even made public, protects the parties from the accountability that ensues from an open and transparent system.

67. A transparent and open arbitration system, accountable to communities in host States, should be established urgently to remedy problems plaguing the current system. Arbitration should also be conducted in host States, to facilitate access by affected communities. Disputes could be decided by a panel of arbitrators, selected from an international, permanent and regionally representative pool. Arbitrators should not be allowed to practise as counsel or advisers to investors or States in cases of arbitration.

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[58] See www.italaw.com/sites/default/files/case-documents/italaw1554.pdf.

[59] See http://italaw.com/documents/CME-2003-Final_001.pdf.

[60] M. Desai and A. Moel, "Czech mate: expropriation and investor protection in a converging world", European Corporate Governance Institute Working Paper No. 62/2004, April 2006.

[61] United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, art. 42.

[62] Mahnaz Malik, "The stakes of States in defending investment treaty arbitrations: a game of luck and chance?", International Institute for Sustainable Development, 2011, p. 3.

[63] International Centre for Settlement of Investment Disputes, Administrative and Financial Regulations, regulation 22, Publication.

[64] bid., Rules of procedure for arbitration proceedings, rule 37, Visits and inquiries; submissions of non-disputing parties; *Methanex Corporation v. United States of America*, 15 December 2001, para. 52; International Centre for Settlement of Investment Disputes, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, case No. ARB/05/22), procedural order 5.

[65] UNCITRAL Arbitration Rules, art. 28 (3). http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/pre-arb-rules-revised.pdf.

[66] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, art. 53 (1).

68. Open arbitration conducted by unbiased arbitrators together with limited review will reduce the arbitrariness that has rendered proceedings illegitimate and awards suspect. States should also have the right to initiate disputes against investors that violate the right to health of individuals.

69. Arbitrators' discretion in allowing non-disputing parties to make submissions should be replaced by the right of affected communities to make written and oral submissions.

70. The Special Rapporteur is pleased to note that some States are already challenging the inequities of the current investor-State dispute settlement regime. For example, Ecuador amended its Constitution to prohibit entry into instruments that waive its sovereign jurisdiction in the arbitration of disputes with private individuals or corporations. Consequently, the country withdrew from the Convention on the Settlement of Disputes between States and Nationals of Other States, followed by the Plurinational State of Bolivia and the Bolivarian Republic of Venezuela.[67]

VI. Conclusion and recommendations

71. **There is a need to further clarify the issues of justiciability, progressive realization and enforcement of the right to health. This will help in highlighting the important role of the right to health in the individual's ability to live with dignity. It will also facilitate better planning and implementation of health-related policies. In the context of the current political and economic climate dominated by transnational corporations, steps should be taken to ensure that there are binding legal human rights obligations on transnational corporations towards individuals.**

72. **The Special Rapporteur recommends that States ensure the domestic justiciability of the right to health, including the obligations to respect, protect and fulfil the right to health of individuals.**

73. **To ensure effective enforcement of the right to health in domestic jurisdictions, the Special Rapporteur makes the following recommendations:**

(a) **Specific directions for implementing court judgements and orders that respect, protect and fulfil the right to health should be issued to the relevant authorities;**

(b) **States should ensure that court judgements on the right to health are fully implemented, in the same way as any other judicial order that promotes rights;**

(c) **Judgements and orders should be implemented with the participation of affected communities and other stakeholders;**

(d) **Systems of monitoring the implementation of health-related orders should be created, allowing for continuous oversight by adjudicatory bodies, community and civil society organizations and other stakeholders;**

(e) **Administrative remedies should allow for an adjudicator to review alleged violations of the right to health.**

[67] http://unctad.org/en/Docs/webdiaeia20106_en.pdf.

74. **The Special Rapporteur recommends that States ratify the Optional Protocols to the International Covenant on Economic, Social and Cultural Rights and to the Convention on the Rights of the Child on a communications procedure, thereby recognizing the competence of the respective committees to consider individual communications with a view to ensuring the availability of an international adjudicatory mechanism for individuals whose right to health has been violated. The Special Rapporteur further recommends that States recognize the competence of the Committee on Economic, Social and Cultural Rights to receive and consider inter-State communications.**

75. **With regard to the State's progressively realizable obligations under the right to health, the Special Rapporteur recommends that:**

(a) **The term "available resources" be clarified to guide States and assist adjudicators in determining whether the amount of available resources proffered by States is accurate;**

(b) **Available resources include the maximum amount of resources that can be allocated to a specific health goal without compromising other essential services;**

(c) **The amount of resources available to States be subject to scrutiny through a review of States' budgets and efforts to mobilize additional resources;**

(d) **To facilitate a full and fair review, States should make public, including to adjudicators, information regarding the calculation of their available resources, budgetary allocations and efforts to increase the available resources in an open and transparent manner;**

(e) **States' available resources be determined to be efficiently allocated by focusing on the reasonableness of the policymaking, with special attention paid to the effect on vulnerable groups, and the transparency and participatory nature of such process;**

(f) **States deliver benefits promised under health-care programmes with regard to health facilities, goods and services. Failure to deliver, or the diversion of funds, may be considered a violation of States' right-to-health obligations.**

76. **The Special Rapporteur recommends the adoption of an international treaty that will:**

(a) **Confer specific, binding human rights obligations, including the right to health, on transnational corporations;**

(b) **Prevent investors from encroaching on States' policymaking space;**

(c) **Provide for an accessible and effective adjudicatory forum where States and individuals can hold transnational corporations accountable for violations of the right to health.**

77. **The Special Rapporteur also recommends that, until an international treaty is formulated, States adopt a declaration on human rights obligations of transnational corporations.**

78. **The Special Rapporteur recommends that States review, renegotiate or enter into international investment agreements in an open and transparent manner, with the participation of affected communities and other stakeholders. International investment agreements should include provisions that:**

(a) **Confer human rights obligations on host and home States and investors;**

(b) **Allow host States to modify existing laws, or adopt new laws, to comply with their obligations under the right to health or in times of crisis affecting the entire State;**

(c) **Enable States to initiate disputes when investors do not comply with or violate the right to health.**

79. **The Special Rapporteur recommends that investor-State dispute settlement systems should be made transparent and be modified to:**

(a) **Ensure that arbitrators are unbiased;**

(b) **Establish a regionally representative, permanent panel of arbitrators;**

(c) **Require the details of a dispute to be published and continuously updated as soon as an investor issues the notice of intent;**

(d) **Ensure that non-parties to disputes have the right to attend arbitration proceedings;**

(e) **Ensure that those who are not party to the dispute, especially affected communities, have a right to make written and oral submissions;**

(f) **Allow arbitration to be conducted in host States to facilitate access to the arbitration by interested parties;**

(g) **Institute a system of review of arbitration awards to reduce arbitrariness.**

CCPR General Comment No. 6: Article 6 (Right to Life)

Adopted at the Sixteenth Session of the Human Rights Committee, on 30 April 1982

1. The right to life enunciated in article 6 of the Covenant has been dealt with in all State reports. It is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation (art. 4). However, the Committee has noted that quite often the information given concerning article 6 was limited to only one or other aspect of this right. It is a right which should not be interpreted narrowly.

2. The Committee observes that war and other acts of mass violence continue to be a scourge of humanity and take the lives of thousands of innocent human beings every year. Under the Charter of the United Nations the threat or use of force by any State against another State, except in exercise of the inherent right of self-defence, is already prohibited. The Committee considers that States have the supreme duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life. Every effort they make to avert the danger of war, especially thermonuclear war, and to strengthen international peace and security would constitute the most important condition and guarantee for the safeguarding of the right to life. In this respect, the Committee notes, in particular, a connection between article 6 and article 20, which states that the law shall prohibit any propaganda for war (para. 1) or incitement to violence (para. 2) as therein described.

3. The protection against arbitrary deprivation of life which is explicitly required by the third sentence of article 6 (1) is of paramount importance. The Committee considers that States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.

4. States parties should also take specific and effective measures to prevent the disappearance of individuals, something which unfortunately has become all too frequent and leads too often to arbitrary deprivation of life. Furthermore, States should establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life.

5. Moreover, the Committee has noted that the right to life has been too often narrowly interpreted. The expression “inherent right to life” cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.

6. While it follows from article 6 (2) to (6) that States parties are not obliged to abolish the death penalty totally they are obliged to limit its use and, in particular, to abolish it for other than the "most serious crimes". Accordingly, they ought to consider reviewing their criminal laws in this light and, in any event, are obliged to restrict the application of the death penalty to the "most serious crimes". The article also refers generally to abolition in terms which strongly suggest (paras. 2 (2) and (6)) that abolition is desirable. The Committee concludes that all measures of abolition should be considered as progress in the enjoyment of the right to life within the meaning of article 40, and should as such be reported to the Committee. The Committee notes that a number of States have already abolished the death penalty or suspended its application. Nevertheless, States' reports show that progress made towards abolishing or limiting the application of the death penalty is quite inadequate.

7. The Committee is of the opinion that the expression "most serious crimes" must be read restrictively to mean that the death penalty should be a quite exceptional measure. It also follows from the express terms of article 6 that it can only be imposed in accordance with the law in force at the time of the commission of the crime and not contrary to the Covenant. The procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal. These rights are applicable in addition to the particular right to seek pardon or commutation of the sentence.

Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994).

1 Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights. Thus, article 2, paragraph 1, of the International Covenant on Civil and Political Rights obligates each State party to respect and ensure to all persons within its territory and subject to its jurisdiction the rights recognized in the Covenant without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 26 not only entitles all persons to equality before the law as well as equal protection of the law but also prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Indeed, the principle of non-discrimination is so basic that article 3 obligates each State party to ensure the equal right of men and women to the enjoyment of the rights set forth in the Covenant. While article 4, paragraph 1, allows States parties to take measures derogating from certain obligations under the Covenant in time of public emergency, the same article requires, inter alia, that those measures should not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. Furthermore, article 20, paragraph 2, obligates States parties to prohibit, by law, any advocacy of national, racial or religious hatred which constitutes incitement to discrimination.

3. Because of their basic and general character, the principle of non-discrimination as well as that of equality before the law and equal protection of the law are sometimes expressly referred to in articles relating to particular categories of human rights. Article 14, paragraph 1, provides that all persons shall be equal before the courts and tribunals, and paragraph 3 of the same article provides that, in the determination of any criminal charge against him, everyone shall be entitled, in full equality, to the minimum guarantees enumerated in subparagraphs (a) to (g) of paragraph 3. Similarly, article 25 provides for the equal participation in public life of all citizens, without any of the distinctions mentioned in article 2.

4. It is for the States parties to determine appropriate measures to implement the relevant provisions. However, the Committee is to be informed about the nature of such measures and their conformity with the principles of non-discrimination and equality before the law and equal protection of the law.

5. The Committee wishes to draw the attention of States parties to the fact that the Covenant sometimes expressly requires them to take measures to guarantee the equality of rights of the persons concerned. For example, article 23, paragraph 4, stipulates that States parties shall take appropriate steps to ensure

equality of rights as well as responsibilities of spouses as to marriage, during marriage and at its dissolution. Such steps may take the form of legislative, administrative or other measures, but it is a positive duty of States parties to make certain that spouses have equal rights as required by the Covenant. In relation to children, article 24 provides that all children, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, have the right to such measures of protection as are required by their status as minors, on the part of their family, society and the State.

6. The Committee notes that the Covenant neither defines the term "discrimination" nor indicates what constitutes discrimination. However, article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination provides that the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. Similarly, article 1 of the Convention on the Elimination of All Forms of Discrimination against Women provides that "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

7. While these conventions deal only with cases of discrimination on specific grounds, the Committee believes that the term "discrimination" as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

8. The enjoyment of rights and freedoms on an equal footing, however, does not mean identical treatment in every instance. In this connection, the provisions of the Covenant are explicit. For example, article 6, paragraph 5, prohibits the death sentence from being imposed on persons below 18 years of age. The same paragraph prohibits that sentence from being carried out on pregnant women. Similarly, article 10, paragraph 3, requires the segregation of juvenile offenders from adults. Furthermore, article 25 guarantees certain political rights, differentiating on grounds of citizenship.

9. Reports of many States parties contain information regarding legislative as well as administrative measures and court decisions which relate to protection against discrimination in law, but they very often lack information which would reveal discrimination in fact. When reporting on articles 2 (1), 3 and 26 of the Covenant, States parties usually cite provisions of their constitution or equal opportunity laws with respect to equality of persons. While such information is of course useful, the Committee wishes to know if there remain any problems of discrimination in fact, which may be practised either by public authorities, by the community, or by private persons or bodies. The Committee wishes to be informed about legal provisions and administrative measures directed at diminishing or eliminating such discrimination.

10. The Committee also wishes to point out that the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a

case of legitimate differentiation under the Covenant.

11. Both article 2, paragraph 1, and article 26 enumerate grounds of discrimination such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The Committee has observed that in a number of constitutions and laws not all the grounds on which discrimination is prohibited, as cited in article 2, paragraph 1, are enumerated. The Committee would therefore like to receive information from States parties as to the significance of such omissions.

12. While article 2 limits the scope of the rights to be protected against discrimination to those provided for in the Covenant, article 26 does not specify such limitations. That is to say, article 26 provides that all persons are equal before the law and are entitled to equal protection of the law without discrimination, and that the law shall guarantee to all persons equal and effective protection against discrimination on any of the enumerated grounds. In the view of the Committee, article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.

13. Finally, the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.

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Canada (Attorney General) v. Sasvari, 2004 FC 1650 (CanLII)

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Docket: T-940-04
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Docket: T-940-04

Citation: 2004 FC 1650

Ottawa, Ontario, Wednesday, this 24th day of November 2004

PRESENT: MADAM PROTHONOTARY MIREILLE TABIB

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

- and -

GEORGINA SASVARI

Respondent

REASONS FOR ORDER

TABIB P.

[1] I am seized, in two separate matters (T-932-04 and T-940-04) of motions by the Canadian Human Rights Commission (the "Commission") for leave to intervene in applications for the judicial review of its decisions. While the applications in both matters are not joined or consolidated and involve distinct decisions of the Commission and different Applicants, the issues upon which the Commission wishes to intervene are the same, and I have concluded, after considering the material before me on both motions, that both must fail for the same reasons. These reasons are therefore written to apply in both matters.

[2] These judicial review applications arise out of the decisions by the Commission to deal with complaints made by the Respondent, Georgina Sasvari, (the same in both instances) against Transport Canada (in file T-940-04) and against the Canadian Transportation Agency (the "CTA")

(in file T-932-04).

[3] In preliminary objections filed before the Commission, the CTA and Transport Canada had argued that they were not proper respondents to Ms. Sasvari's complaint, and that Ms. Sasvari's complaints were an abuse of process, or were barred under the principles of *res judicata* or issue *estoppel*, as a complaint had already been made to and heard by the Commission against Air Transat in relation to the same incident. The Commission, in both cases and in identically worded decisions, decided that the matters were within its jurisdiction and that the CTA and Transport Canada were proper respondents to the complaints. It is these decisions that are the subject of the judicial review applications before the Court.

[4] While each notice application states the grounds for review in different words, the Commission presents the issues that are raised by the applications and on which it wishes to intervene as follows in both of its motions.

" i) the Commission's jurisdiction to deal with the complaint filed against [the Applicant] as a proper respondent to the human rights complaint;

ii) the Commission's jurisdiction to determine that there is no issue of *estoppel* or abuse of process as alleged by the Applicant;

iii) the Commission's jurisdiction to accept the complaint under section 41 of the *Canadian Human Rights Act*, R.S., 1985, c. H-6 (the "Act")

The within application for judicial review also raises the issue of prematurity of the application for judicial review of the Commission's decision made pursuant to subsection 41(1) of the CHRA by the respondent to the complaint."

[5] In support of its motions, the Commission submits the affidavits of Maria Stokes, which merely introduce as exhibits the records of the proceedings before the Commission, without further comments or explanations. It is appropriate to note here that the exhibits to Ms. Stokes' affidavits are already part of the Court's record, having been introduced by the parties themselves. In each of its motions the Commission then baldly argues that:

" The within application raises jurisdictional issues [as outlined].

This Honourable Court has recognized that the Commission can intervene to argue points of law, *inter alia* when the purpose thereof is to defend its jurisdiction.

The Commission is not seeking leave to intervene in order to defend its decision.

The Commission will bring a unique perspective which will be different from that of the parties.

In *C.A.I.M.A.W. v. Paccar of Canada Ltd*, 1989 CanLII 49 (SCC), [1989] 2 S.C.R. 983 at 1016, the Supreme Court of Canada has recognized that an administrative tribunal could bring a unique contribution to the proceedings by drawing on its specialized expertise in order to "[...] render reasonable what would otherwise appear unreasonable.""

[6] Nowhere does the Commission articulate the question or questions of law that arise in each "jurisdictional" issue, whether and how these questions of law truly go to its jurisdiction rather than to the correctness of its decision, the substance of the arguments it proposes to make and how these arguments differ from those made or which can be expected to be made by the parties, such that the Commission's intervention would indeed bring a unique perspective or draw on its specialized jurisdiction or expertise in a way that the parties are unable or unwilling to adequately place before the Court.

[7] In truth, the Commission appears to proceed under the mistaken assumption that if an application for judicial review of its decision can be construed as raising a jurisdictional issue, then it is appropriate for it to intervene, and that, as the tribunal whose jurisdiction is "under attack", it must necessarily bring a unique perspective to the issues and be in a better position to explain its record (supposing, as the Commission appears to do, that its record is in need of explanation). The Commission's positioning of the existence of "jurisdictional issues" as the cornerstone of its motion for leave to intervene creates an erroneous perception that the test for a tribunal's intervention in judicial reviews of its decision is somehow distinct from the test applicable to other would-be interveners. Unless the right to intervene in a proceeding is granted and defined by statute, the intervention of any person, including a tribunal, is conditional upon leave being granted in accordance with Rule 109 of the *Federal Court Rules, 1998* (see *Canada (Attorney General) v. Georgian College of Applied Arts and Technology*, [2003] F.C.J. No. 394 (C.A.) and *Li v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 1264 (C.A.)).

[8] Rule 109 specifically requires a motion for leave to intervene to "describe [...] how that participation will assist the determination of a factual or legal issue related to the proceedings".

[9] Judicial interpretation of the requirements of Rule 109 has resulted in identifying a series of factors that may be considered in deciding whether leave should be granted. There factors include:

· whether the proposed intervener is directly affected by the outcome;

· whether a justiciable issue and a veritable public interest exist;

· whether there is an apparent lack of any other reasonable or efficient means to submit the question to the Court;

· whether the position of the proposed intervener is adequately defended by one of the parties to the case;

· whether the interests of justice are better served by the intervention of the proposed third party; and

· whether the Court can hear and decide the case on its merits without the proposed intervener.

(See *Canadian Union of Public Employees (Airline Division) v. Canadian Airlines International Ltd.*, 2000 CanLII 28285 (FCA), [2000] F.C.J. 220 (C.A.).

[10] Because of the particular status of tribunals whose orders are the subject of judicial review proceedings and the public policy imperative of preserving the tribunal's image of impartiality and avoiding the unseemly spectacle of an impartial tribunal defending the correctness of its decisions (see *C.A.I.M.A.W. v. Paccar* (*supra*), *Canada (Attorney General) v. Canada (Human Rights Tribunal)*, [1994] F.C.J. No. 300), an additional layer of scrutiny was imposed on requests for leave to intervene by tribunals, ensuring that the scope of interventions be limited to matters of jurisdiction "in a restricted sense" and the explanation of their records. These jurisprudential developments did not create a special "right" of intervention for tribunals; they simply added to and refined the list of factors to be considered under Rule 109 as it applies to tribunals. And thus, the central issue to be determined by the Court upon a motion for leave to intervene by a tribunal remains: has it been shown "how [the intervention] will assist in the determination of a factual or legal issue related to the proceeding?" [My emphasis].

[11] This overriding consideration requires, in every case, that the proposed intervener demonstrate that its intervention will assist the determination of an issue. This cannot be achieved without demonstrating that the proposed intervention will add to the debate an element which is absent from what the parties before the Court will bring (see *Canada*

Union of Public Employees (Airline Division v. Canadian Airlines International Inc. (*supra*). In turn, I find it difficult to conceive how such a demonstration can be made without giving an indication of the facts and arguments the Commission intends to present, and contrasting those with the positions taken by the parties.

[12] Here, the Commission has failed to present any evidence or material demonstrating how its intervention will assist the Court, and the record before the Court provides no further support for the Commission's motions. The Commission's motions must accordingly fail.

[13] Nor is it an answer for the Commission to argue, as it has done in its reply material in file T-940-04, that as it has "consistently" been granted leave to intervene in respect of the same jurisdictional issue in other applications, intervener status ought automatically to be granted to it in this case.

[14] Requests for leave to intervene are considered on a case by case basis, and in each case, the proposed intervener must satisfy the Court that its intervention in that particular case will be of assistance. The decisions and orders cited by the Commission do not discuss the material which was before the Court in each case to support the Court's ruling on the motion for leave to intervene and there is no basis upon which the Court can conclude that the circumstances which justified the intervention of the Commission in these cases similarly prevail in the matters before it now.

[15] I find that the Commission's motions, in failing to even address the issue of how the proposed intervention would add to the argument and facts presented to the Court by the parties, were ill conceived and bound to fail. They should not have been made, and costs on the contested motion in file T-940-04 will therefore be payable by the Commission to the Applicant forthwith, in any event of the cause. As the Commission's motion was not opposed by the Applicant in file T-932-04, no costs are awarded.

"Mireille Tabib"

Prothonotary

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-940-04

STYLE OF CAUSE: ATTORNEY GENERAL OF CANADA

v.

GEORGINA SASVARI

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: Mireille Tabib, Prothonotary

DATED: November 24, 2004

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Downtown Legal Services	
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Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez

Summary

The present report focuses on certain forms of abuses in health-care settings that may cross a threshold of mistreatment that is tantamount to torture or cruel, inhuman or degrading treatment or punishment. It identifies the policies that promote these practices and existing protection gaps.

By illustrating some of these abusive practices in health-care settings, the report sheds light on often undetected forms of abusive practices that occur under the auspices of health-care policies, and emphasizes how certain treatments run afoul of the prohibition on torture and ill-treatment. It identifies the scope of State's obligations to regulate, control and supervise health-care practices with a view to preventing mistreatment under any pretext.

The Special Rapporteur examines a number of the abusive practices commonly reported in health-care settings and describes how the torture and ill-treatment framework applies in this context. The examples of torture and ill-treatment in health settings discussed likely represent a small fraction of this global problem.

opioids for medical purposes;[68] and the absence of pain management policies or guidelines for practitioners.[69]

Applicability of torture and ill-treatment framework

54. Generally, denial of pain treatment involves acts of omission rather than commission,[70] and results from neglect and poor Government policies, rather than from an intention to inflict suffering. However, not every case where a person suffers from severe pain but has no access to appropriate treatment will constitute cruel, inhuman, or degrading treatment or punishment. This will only be the case when the suffering is severe and meets the minimum threshold under the prohibition against torture and ill-treatment; when the State is, or should be, aware of the suffering, including when no appropriate treatment was offered; and when the Government failed to take all reasonable steps[71] to protect individuals' physical and mental integrity.[72]

55. Ensuring the availability and accessibility of medications included in the WHO Model List of Essential Medicines is not just a reasonable step but a legal obligation under the Single Convention on Narcotic Drugs, 1961. When the failure of States to take positive steps, or to refrain from interfering with health-care services, condemns patients to unnecessary suffering from pain, States not only fall foul of the right to health but may also violate an affirmative obligation under the prohibition of torture and ill-treatment (A/HRC/10/44 and Corr.1, para. 72).

56. In a statement issued jointly with the Special Rapporteur on the right to health, the Special Rapporteur on the question of torture reaffirmed that the failure to ensure access to controlled medicines for the relief of pain and suffering threatens fundamental rights to health and to protection against cruel, inhuman and degrading treatment. Governments must guarantee essential medicines – which include, among others, opioid analgesics – as part of their minimum core obligations under the right to health, and take measures to protect people under their jurisdiction from inhuman and degrading treatment.[73]

D. Persons with psychosocial disabilities

57. Under article 1 of the Convention on the Rights of Persons with Disabilities, persons with disabilities include those who have long-term intellectual or sensory impairments, which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others. These are individuals who have been either neglected or detained in psychiatric and social care institutions, psychiatric wards, prayer

[67] Palliative care is an approach that seeks to improve the quality of life of patients diagnosed with life-threatening illnesses, through prevention and relief of suffering. WHO Definition of Palliative Care (see www.who.int/cancer/palliative/definition/en/).

[68] E/INCB/1999/1, p. 7.

[69] HRW, *"Please Do Not Make Us Suffer"*, p. 2.

[70] Amon and Lohman, "Denial", p. 172.

[71] See for example ECHR, *Osman* v. *United Kingdom*, Application No. 23452/94 (1998), paras. 115-122; Committee on Economic, Social and Cultural Rights, general comment No. 14.

[72] Amon and Lohman, "Denial", p. 172.

[73] Joint letter to the Chairperson of the fifty-second session of the Commission on Narcotic Drugs, 2008, p. 4.

Ruling for Access

Leading court cases in developing countries on access to essential medicines as part of the fulfilment of the right to health

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Melanie Samson
Jaume Vidal Casanova

World Health Organization
Department of Essential Drugs and Medicines Policy
Geneva
November 2004

ARTICULO 49. La atención de la salud y el saneamiento ambiental son servicios públicos a cargo del Estado. Se garantiza a todas las personas el acceso a los servicios de promoción, protección y recuperación de la salud. Corresponde al Estado organizar, dirigir y reglamentar la prestación de servicios de salud a los habitantes y de saneamiento ambiental conforme a los principios de eficiencia, universalidad y solidaridad. También, establecer las políticas para la prestación de servicios de salud por entidades privadas, y ejercer su vigilancia y control. Así mismo, establecer las competencias de la Nación, las entidades territoriales y los particulares, y determinar los aportes a su cargo en los términos y condiciones señalados en la ley. Los servicios de salud se organizarán en forma descentralizada, por niveles de atención y con participación de la comunidad. La ley señalará los términos en los cuales la atención básica para todos los habitantes será gratuita y obligatoria. Toda persona tiene el deber de procurar el cuidado integral de su salud y la de su comunidad.

ARTICULO 93. Los tratados y convenios internacionales ratificados por el Congreso, que reconocen los derechos humanos y que prohiben su limitación en los estados de excepción, prevalecen en el orden interno. Los derechos y deberes consagrados en esta Carta, se interpretarán de conformidad con los tratados internacionales sobre derechos humanos ratificados por Colombia.

Article 2. The State has three essential purposes: to serve the community, to promote the general welfare and to guarantee the effectiveness of the principles, rights and duties upheld in the Constitution; to enable all persons to participate in the decisions that affect them and in the economic, political, administrative and cultural life of the nation; to defend national independence, preserve its territorial integrity and ensure peaceful coexistence and justice. The authorities of the Republic are instituted to protect the lives, honour, property, beliefs and other rights and freedoms of all persons living in Colombia, and to see to it that the social duties of the State and of private parties are fulfilled.

Article 11. The right to life is inviolable. There shall be no capital punishment.

Article 13. All individuals are born free and equal before the law and **are entitled to equal protection and treatment by the authorities, and to enjoy the same rights, freedoms, and opportunities without discrimination on the basis of gender, race, national or family origin, language, religion, political opinion or philosophy.** The State will promote the conditions necessary in order that equality may be real and effective, it will adopt measures in favour of groups which are discriminated against or marginalized. The State will especially protect those individuals who on account of their economic, physical, or mental condition are in obviously vulnerable circumstances and will sanction any abuse or ill-treatment perpetrated against them.

Article 49. Public health and environmental protection are public services for which the State is responsible. All individuals have guaranteed access to services that promote, protect and rehabilitate public health.
It is the responsibility of the State to organize, direct, and regulate the delivery of health services and of environmental protection to the population in accordance with the principles of efficiency, universality, and cooperation, and to establish policies for the provision of health services by private entities and to exercise supervision and control over them. In the area of public health, the state will establish the jurisdiction of the nation, territorial entities, and individuals, and determine the shares of their responsibilities within the limits and under the conditions determined by law. Public health services will be organized in a decentralized manner, in accordance with levels of responsibility and with the participation of the community.
The law will determine the limits within which basic care for all the people will be free of charge and mandatory. Every person has the obligation to attend to the integral care of his/her health and that of his/her community.

Article 93. International treaties and agreements, which have been ratified by Congress, which recognize human rights and which prohibit their restriction during states of emergency shall take precedence over internal law. These fundamental constitutional rights must be interpreted in the context of the public human rights treaties ratified by Colombia.

Col-1: Mr Alonso Muñoz Ceballos vs Instituto de Seguros Sociales (ISS)

Constitutional Court Judgement n°T-484, 11 August 1992
Available at: http://bib.minjusticia.gov.co/jurisprudencia/CorteConstitucional/1992/Tutela/T-484-92.htm

Facts: Mr Ceballos, an HIV-positive person, had been receiving free medical treatment in a public health facility, through the Public Social Security Scheme (ISS). He had been affiliated to the ISS long before he became infected. He was informed that the hospital

would stop providing him with free medical treatment or assistance within 180 days. He filed an *amparo* action in order to prevent the interruption of his treatment. He lodged a protection writ to know whether or not he was entitled to the protection of his right to health as enshrined in Article 49 of the Constitution.

Decision: In this judgement, the Constitutional Court ruled that this employee with AIDS had a right to access to certain health services. The scope of the right to health in the Colombian Constitution was analysed substantially. The Court explained that this specific right had two functions: first, connected to the right to life (Article 11 Colombian Constitution) it constitutes a fundamental right to be protected for health threats; secondly, it constitutes also a social right, which implies positive obligations binding on the State. These obligations permit citizens to have access to public health institutions, to hospitalization, to medical examination and to medication. It also declared that the right to health connected to the right to be free from any discrimination in the Colombian Constitution requires that equality be created for persons in unfavourable positions. The State is required to provide health services which are fundamental in nature and vital for the patient, as opposed to those of a more general character. Although the Court did not define the line between the two kinds of services, it did rule that the right to health is fundamental when it is related to the protection of life.

Col-2: Mr Diego Serna Gómez vs Hospital Universitario del Valle

Constitutional Court, Judgement n° T-505, 28 August 1992
Available at: http://bib.minjusticia.gov.co/jurisprudencia /CorteConstitucional/1992/Tutela/T-505-92.htm

Facts: The plaintiff, who suffered from AIDS and was in a precarious financial situation, challenged the refusal of a hospital to provide him with free medical services. He claimed that this refusal violated the right to health as related to the right to be free from any kind of discrimination enshrined in Article 13 of the Constitution. In the first instance, the Administrative Contentious Chamber dismissed his claim on the grounds that the right to equality had not been violated, and affirming that the right to health was not to be considered as a fundamental right and so could not be constitutionally protected through a *tutela* action. The plaintiff appealed against this decision.

Decision: The Constitutional Court revoked the first sentence from the Administrative Court, judging that the right to health could be considered as a fundamental right, above all when it is connected to the right to life. In an extensive ruling, the Court considered not only the plaintiff's personal situation, but also the legal implications of broad constitutional principles, such as the definition of Colombia as a social state and the meaning of social justice and solidarity principles, which are also considered into considered in OR written into OR part of ???KH the Constitution. The Court declared that because the State has only limited resources, it is not required to provide free health care to all. It ruled that nevertheless, the State is required by the rights guaranteed in Article 13 to provide special protection when lack of economic resources *"prevents a person from decreasing the suffering, discrimination and social risk involved in being afflicted by a terminal, transmissible and incurable disease*".[21]

[21] Translation from the text : *"La atención integral y gratuita hace parte de la protección especial a cargo del Estado cuando la ausencia de medios económicos le impide a la persona aminorar el sufrimiento, la discriminación y el riesgo social que le implica sufrir una enfermedad terminal, transmisible, incurable y mortal"*. Judgement T-505, Paragraph 7.

Col-3: Mr Miguel Angel Ibarguen Rivas vs Instituto de Seguros Sociales (ISS)

Constitutional Court, Judgement n° T-158, 5 April 1995
Available at: http://bib.minjusticia.gov.co/jurisprudencia/CorteConstitucional/1995/Tutela/T-158-95.htm

Facts: The plaintiff, suffering from a skin disease, was treated free of charge by a public social security institution, the ISS, until his employer stopped paying contributions to the ISS. His legal representative argued that his right to life and health had been threatened by the ISS' refusal to provide him with the drugs. The defendant's main argument was that the ISS could not be held responsible for a situation that had been provoked by the non-payment of contributions by the plaintiff's employer.

Decision: The Court ruled that the benefit of the social security services, which is considered as a precondition to fulfil fundamental rights, such as the right to life (physical integrity) and the right to health, must prevail over the non-payment by his employer of the contribution. The Court also highlighted the permanent character of the right to social security, stating that, like medical treatment, it could not be interrupted.

Col-4: Mr. X vs Instituto de Seguros Sociales (ISS)

Constitutional Court, Judgement n° T-271 of 23 June 1995
Available at: http://bib.minjusticia.gov.co/jurisprudencia/CorteConstitucional/1995/Tutela/T-271-95.htm

Facts: An HIV-positive person receiving medical treatment through the ISS, challenged this public social security scheme for refusing to provide him with the cocktail of antiretrovirals that he needed to avoid deterioration of his health. The institution argued that it could not provide him with those drugs as they were not included in the Official Drugs List because of their high cost.

Decision: Considering the right to health as a fundamental right when it is connected, even indirectly, with the right to life, the Court ruled that the State, through the ISS, had the obligation to provide treatments in order to alleviate the condition of people living with serious illnesses.

Col-5: Mr X vs Secretaríia de Salud Pública Municipal de Cali

Constitutional Court, Judgement n° T-177, 18 March 1999
Available at: http://bib.minjusticia.gov.co/jurisprudencia/CorteConstitucional/1999/Tutela/T-177-99.htm

Facts: The plaintiff, acting on behalf of an HIV-positive person, challenged the ISS' refusal of social security rights for this person under a special scheme named SISBEN, aimed to guarantee to the most vulnerable in society the benefit of certain health services and treatments. This person had been unable to work for more than a year and was in a financially precarious situation. As he was not benefiting from any social security scheme, the hospital refused to provide him with the medications needed (antiretrovirals). The provincial Public Health Unit's main argument was that this case was not a priority under the SISBEN programme and it was not obliged to guarantee him these social security rights.

Decision: The Court held that this person had a fundamental right to benefit from social security rights in order to have free access to medications essential for the improvement of his quality of life. It noted that HIV/AIDS sufferers needed special protection by the State

and that the provision of free treatment for all HIV-positive people was a priority. Therefore, the precarious situation of some of them must not become a subject of discrimination, and so they must benefit from this special SISBEN scheme.

Col-6: Mrs Diana María Pinilla Sandoval vs Salud Colpatria EPS

Constitutional Court, Judgement n°170, 8 March 2002
Available at: http://bib.minjusticia.gov.co/jurisprudencia/CorteConstitucional/2002/Tutela/t-170-02.htm

Facts: In 1993 the Colombian Government decided to end the monopoly of the Social Security Institute on the administration of obligatory health care insurance, making it possible for private enterprises (both profit and non-profit), for cooperative enterprises and also for other public or mixed enterprises, to compete. They were all to be known as "Health Promoter Entities" (EPS - after their initials in Spanish).

The case concerns the refusal by one private EPS to reimburse the plaintiff a vital medication for the follow-up of a renal transplant. The refusal was mainly based on the fact that this medicine was not included in the official drugs list. The applicant filed a *tutela* action alleging that this private social entity denied her the right to health (connected to the right to life), and was not applying the specific exceptions permitting the reimbursement of medicines not included in the list when their provision is essential to the life of the patient.

Decision: The Court ruled that the exceptions prevailed in this case as the right to life of the plaintiff was at stake. For this reason the priority was to provide these medications free of charge to the patient. It cited all previous jurisprudence concerning the right to health and to have access to essential drugs, and issued a declaratory order requiring this EPS to reimburse and provide medication to the plaintiff.

Costa Rica

Constitutional framework

The Costa Rican Constitution, last revised in 2001, does not include any express recognition of a right to health. However, there are juridical norms that guarantee the right to health and the protection of human rights in Costa Rica. Indeed, the Political Constitution of Costa Rica establishes that it is incumbent on the President of the Republic and the Minister of Health to define health policies, as well as the planning of all these activities. On the other hand, Article 73 of the Constitution states that the administration and direction of social security will be entrusted to an autonomous institution named the Caja Costarricense de Seguro Social (Costa Rican Social Security Administration). This institution will be in charge of offering health services to the whole population.

Costa Rica has also ratified diverse international instruments on human rights, such as the Universal Declaration of Human Rights, the International Pact of Economic, Social and Cultural Rights, the American Convention on Human Rights, also known as the Pact of San José, and the Convention on Children's Rights (see Table 2). Costa Rica has not only incorporated several international level agreements in its juridical system, but has also designed the mechanisms to enforce them by establishing institutions where people are able to defend their rights against any type of violation. The Constitutional Court and the Ombudsman's Office are two examples of where the people can go to defend their basic

rights. Mechanisms also exist to guarantee appropriate care for patients without any restriction, and regarding other fundamental rights, such as the right to life.

Web link: 1949 Constitution updated through 2001 Reforms

ARTICULO 7. Los tratados públicos, los convenios internacionales y los concordatos, debidamente aprobados por la Asamblea Legislativa, tendrán desde su promulgación o desde el día que ellos designen, autoridad superior a las leyes.
ARTICULO 21. La vida humana es inviolable.
ARTICULO33.- Toda persona es igual ante la ley y no podrá practicarse discriminación alguna contraria a la dignidad humana.
ARTICULO 50. El Estado procurará el mayor bienestar a todos los habitantes del país, organizando y estimulando la producción y el más adecuado reparto de la riqueza. Toda persona tiene derecho a un ambiente sano y ecológicamente equilibrado. Por ello, está legitimada para denunciar los actos que infrinjan ese derecho y para reclamar la reparación del daño causado. El Estado garantizará, defenderá y preservará ese derecho. La ley determinará las responsabilidades y las sanciones correspondientes.
ARTICULO 73. Se establecen los seguros sociales en beneficio de los trabajadores manuales e intelectuales, regulados por el sistema de contribución forzosa del Estado, patronos y trabajadores, a fin de proteger a éstos contra los riesgos de enfermedad, invalidez, maternidad, vejez, muerte y demás contingencias que la ley determine. La administración y el gobierno de los seguros sociales estarán a cargo de una institución autónoma, denominada Caja Costarricense de Seguro Social.

Article 7. Official treaties, international agreements and concordats that have been duly approved by the Legislative Assembly shall, from the date of their promulgation or the date designated by them, have precedence over laws.
Article 21. Human life is inviolable.
Article 33. All people are equal before the law and there shall be no discrimination against human dignity.
Article 50. The State shall procure the greatest welfare of all inhabitants of the country, organizing and promoting production and the most adequate distribution of wealth.
Every person has the right to a healthy and ecologically balanced environment, being therefore entitled to denounce any acts that may infringe said right and claim redress for the damage caused.
The State shall guarantee, defend and preserve that right. The Law shall establish the appropriate responsibilities and penalties.
Article 73. Social security is established for the benefit of manual and intellectual workers, regulated by a system of compulsory contributions by the State, employers and workers, to protect them against the risks of illness, disability, maternity, old age, death and other contingencies as determined by law.
The administration and direction of social security shall be entrusted to an autonomous institution called Caja Costarricense de Seguro Social (Costa Rican Social Security Administration).

Cos-1: Mrs Sidonia Vargas vs Hospital San Juan de Dios

Constitutional Court, File 2390- C- 94, 7 September 1994
Available at: http://www.poder-judicial.go.cr/scij/index_pj.asp?url=busqueda/jurisprudencia/jur_ficha_completa_sentencia.asp?nBaseDatos=1&nSentencia=97797

Facts: A woman suffering from acute leukaemia and diabetes asked the San Juan de Dios Hospital, where she went periodically to get medical attention, to provide her with the necessary medicines so that she could administer them herself at home. The hospital refused to provide the medicines for safety and administrative reasons, and because its own query to the National Health System to permit reimbursement of this type of provision had been refused. Ms. Vargas filed an *amparo* in order to challenge this refusal, alleging a violation of her right to health, related to her right to life.

Decision*:* The Court ruled that, taking into account the importance of the right to life inscribed in the Constitution, the rules on compulsory administration of such drugs in the hospital would allow for exceptions. This case represented a possible exception when the only way to provide the medicine was to do it in the patient's home under the supervision of a qualified doctor. By referring to the right to health as an essential component of the right to life, the Court established a logical link between collective and individual rights. Finally, this judgement illustrates a specific role of the right to have access to medicines and its practical application.

Cos-2: Mr William García Álvarez vs Caja Costarricense de Seguro Social

Constitutional Court, File 5778-V-97, 23 September 1997
http://www.poder-judicial.go.cr/scij/index_pj.asp?url=busqueda/jurisprudencia/jur_ficha_completa_sentencia.asp?nBaseDatos=1&nSentencia=159805

Facts: An HIV-positive person challenged the social security institution for its refusal to provide him with the needed antiretroviral treatment, as these medications were not included in the official national drugs list. Antiretroviral treatments were not, at that time, considered essential by Social Security, therefore, they were not included in medical treatments delivered free of charge in public health facilities. This person was unable to afford these medications in the private sector and challenged the refusal, basing his claim on the imminent violation of the right to life. He also based his arguments on scientific and clinical evidence of the effectiveness of the new medications.

Decision: Unlike a 1992 decision in which the Court dismissed a similar claim regarding antiretrovirals, the Court ruled here in favour of the plaintiff and ordered the National Health Care System to provide him with the medications free of charge. The judges based their decision on the right to life and health as enshrined in the national Constitution and as endorsed by Costa Rica in international treaties. The judges also noted that the Social Security System and its functioning is one of the pillars of a democratic society and stated that "*If the right to life is especially protected in each modern State and with it the right to health, any economic criteria that pretends to deny the exercise of those rights, has to be of second importance […] without the right to life, all the remaining rights would be useless*".

Cos-3: Ms Vera Salazar Navarro vs Caja Costarricense de Seguro Social

Constitutional Court- File n°01-009007-CO, 26 September 2001
http://www.poder-judicial.go.cr/scij/index_pj.asp?url=busqueda/jurisprudencia/jur_ficha_completa_sentencia.asp?nBaseDatos=1&nSentencia=179548

Facts: The applicant, suffering from multiple sclerosis (a chronic debilitating disease) challenged the refusal of the Social Security Institution to reimburse the branded drugs prescribed by her doctor and its proposition to replace them by a cheaper generic drug. The applicant therefore argued that this replacement of drugs violated her right to health and asked the Court to order the Social Security institution to provide her with the patented drugs. The defendant's main argument was that the effects and composition of the generic drugs were the same as the branded ones.

Decision: The Court held that, according to constitutional and international obligations of the State in regard to the right to health, when a doctor prescribes a given drug to his patient, it should be this exact drug and not another one that must be delivered by the Social Security scheme. Rendering its decision in favour of the plaintiff, it considered that the replacement of the drugs constituted a breach of her right to health.

Cos-4: Ombudsman for Mrs Ledi Orellana Martínez vs Caja Costarricense de Seguro Social (CCSS)

Constitutional Court, File n°02-007871, 24 September 2002
Available at: http://www.poder-judicial.go.cr/scij/index_pj.asp?url=busqueda/jurisprudencia/jur_ficha_completa_sentencia.asp?nBaseDatos=1&nSentencia=219018

Facts: Costa Rica's Ombudsman lodged a protection writ on behalf of Mrs. Ledi Orellanan Martinez, a woman affected by chronic myelocytic leukaemia, to whom a CCSS'dependent hospital had denied the provision of needed medicines. This treatment was refused because of its high cost.

Decision: The Court focused on the point that the initial decision not to provide the medicine constituted a threat to the physical integrity of the plaintiff and a violation of the right to health. The Court recalled other rulings on the grounds that the State was obliged to take any possible and necessary measures to protect human life and dignity. It based its decision both on international obligations of the State and on constitutional provisions regarding the right to health connected to the right to life. It therefore ordered the Social Security System to provide the plaintiff with the needed medications immediately.

El Salvador

Constitutional framework

In El Salvador there is a body of legal provisions which refer to health as the absence of illness or disease and as a state of complete physical, mental and social well-being. These provisions construe the right to health as an autonomous right. Moreover, in Salvadoran constitutional law (Articles 65 and 66) health is a duty of the State; the State must endeavour to promote its preservation and rehabilitation??? Sense?? Just put promote it and delete rest?? YES PLEASEas a vital factor for the country's development. PROPOSE: the State must endeavour to promote health as a vital factor for the country's development.

Regarding the domestic application of international law, Article 144 of the Constitution prohibits the legislature from imposing legislation contrary to international treaties which have been signed by the country. In case of conflict these treaties prevail over national

legislation. Therefore, human rights treaties' provisions with respect to the right to health benefit from constitutional rank and are justiciable before courts.

The Constitution of El Salvador assigns specifically to the Supreme Court of Justice, and in some cases to the appellate court, the responsibility for protecting the constitutional rights of the inhabitants of the Republic. Any person may seek protection before the Supreme Court on account of the violation of rights granted by the Constitution. The Law on Constitutional Procedures governs the exercise of these rights. A writ of *amparo* is filed against any type of action or omission on the part of any State authority that violates or impedes the exercise of the rights granted to every individual under the Constitution.

Web link: 1983 Constitution, updated to 2000 Reforms

Chapter II Social Rights Section IV Public Health and Social Welfare
ARTICULO 65. La salud de los habitantes de la República constituye un bien público. El Estado y las personas están obligados a velar por su conservación y restablecimiento. El Estado determinará la política nacional de salud y controlará y supervisará su aplicación.
ARTICULO 66. El Estado dará asistencia gratuita a los enfermos que carezcan de recursos, y a los habitantes en general, cuando el tratamiento constituya un medio eficaz para prevenir la diseminación de una enfermedad transmisible. En este caso, toda persona está obligada a someterse a dicho tratamiento.
ARTICULO70.- El Estado tomará a su cargo a los indigentes que, por su edad o incapacidad física o mental, sean inhábiles para el trabajo.
ARTICULO 144.- Los tratados internacionales celebrados por El Salvador con otros estados o con organismos internacionales, constituyen leyes de la República al entrar en vigencia, conforme a las disposiciones del mismo tratado y de esta Constitución. La ley no podrá modificar o derogar lo acordado en un tratado vigente para El Salvador. En caso de conflicto entre el tratado y la ley, prevalecerá el tratado.

Article 65. The health of the inhabitants of the Republic is a public asset. The State and all persons are obligated to care for its preservation and improvement. The State shall establish national health policy and shall control and supervise its implementation.
Article 66. The State shall provide free assistance to the ill who lack resources, and to the population in general when the treatment is an effective means of preventing the spread of a communicable disease. In such cases, every person is obligated to submit to such treatment.
Article 70. The State shall care for the indigent who, because of age or physical or mental disability, are unable to work.
Article 144. International treaties between El Salvador and other states or international institutions, are laws of the Republic when they enter into force, in accordance with the provisions of such treaties and of this Constitution. [National] law cannot modify or repeal what has been agreed in a treaty that is in force. In case of conflict, the treaty will prevail over national law.

Sal-1: Mr Jorge Odir Miranda Cortez vs la Directora del Instituto Salvadoreño del Seguro Social

Constitutional Court, File n°348-99, 4 April 2001
Available at: http://www.jurisprudencia.gob.sv/jur_bs1.htm (click on buscar/propiedades then fill in the form with the file number in the box headed "Expediente")

Facts: The plaintiff, an HIV-positive person, filed an *amparo* action in 1999 against the Social Security Institution for refusing to provide him, with antiretroviral treatment free of charge. He alleged that this general denial regarding antiretrovirals violated his right to life,

right to health and his right to be free from discrimination because of his precarious financial situation. Indeed, antiretrovirals were available at this time in El Salvador but patients had to pay for hem.

Although the Supreme Court accepted this petition in June 1999, it continuously postponed its decision. As a result, in January 2000, the plaintiff and 25 other people living with HIV, supported by health advocacy NGOs, filed a complaint before the Inter-American Commission on Human Rights, alleging the State's failure to provide them with the antiretroviral therapy. In February 2000, as a provisory measure, the Commission solicited the Salvadoran State to comply with its regional obligations and to provide the needed medications. It thus admitted the petition (Report No 29/01, March 2001,available at: http://www.cidh.org/annualrep/2000sp/capituloiii/admisible/elsalvador12.249.htm) However, before starting the hearing procedures, presumably prompted by the precedent recommendation, the Salvadoran Constitutional Court came to a decision.

Decision: The Supreme Court issued a ruling in favour of the plaintiff's claim, ordering the Social Security Institute to provide him the needed antiretroviral treatment. It based its decision on the right to life and health as entrenched in the Constitution (Article 65) and in international treaties ratified by El Salvador. As a consequence, the complaint before the Inter-American Commission was rendered moot.

South Africa

Constitutional Framework

The Constitution of the Republic of South Africa, Act 108 of 1996, is sometimes regarded as one of the most progressive constitutions in the world, with a Bill of Rights that is often seen as second to none. Human rights are given clear prominence. They feature in the Preamble, with its stated intention of establishing "a society based on democratic values, social justice and fundamental human rights". Among the rights stipulated, access to health care is considered as one of the fundamental basic human rights. Section 27, para 1 guarantees the right to "health care services, including reproductive health care." In addition, according to Article 27 (2), the State is responsible for realizing the goals regarding public health established in the Constitution.

The principle of equality and non-discrimination underpins the entire health system. Support for this can be found in the White Paper for the Transformation of the Health System in South Africa (April 1997) as well as the Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 of 2000.

These rights can be directly invoked before national courts, and the Constitution itself requires the State to "respect, protect, promote and fulfil" these rights along with the obligations from international treaties' provisions.

Constitution of the Republic of South Africa
Act 108 of 1996

Health care, food, water and social security
27. (1) Everyone has the right to have access to - health care services, including reproductive health care; sufficient food and water; and social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

Federal Court  Cour fédérale

Date: 20120418

Docket: T-578-11

Citation: 2012 FC 445

Toronto, Ontario, April 18, 2012

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

CANADIAN HUMAN RIGHTS COMMISSION

Applicant

and

**ATTORNEY GENERAL OF CANADA,
FIRST NATIONS CHILD AND
FAMILY CARING SOCIETY,
ASSEMBLY OF FIRST NATIONS,
CHIEFS OF ONTARIO,
AMNESTY INTERNATIONAL**

Respondents

AND BETWEEN:

Docket: T-630-11

**FIRST NATIONS CHILD AND
FAMILY CARING SOCIETY**

Applicant

and

**ATTORNEY GENERAL OF CANADA,
ASSEMBLY OF FIRST NATIONS,
CANADIAN HUMAN RIGHTS COMMISSION,
CHIEFS OF ONTARIO and
AMNESTY INTERNATIONAL**

Respondents

AND BETWEEN:

Docket: T-638-11

ASSEMBLY OF FIRST NATIONS

Applicant

and

**ATTORNEY GENERAL OF CANADA,
FIRST NATIONS CHILD AND
FAMILY CARING SOCIETY,
CANADIAN HUMAN RIGHTS COMMISSION,
CHIEFS OF ONTARIO and
AMNESTY INTERNATIONAL**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[13] The Assembly of First Nations ("AFN") is a national advocacy organization that works on behalf of over 600 First Nations on issues such as Treaty and Aboriginal rights, education, housing, health, child welfare and social development.

B. *The Canadian Human Rights Commission*

[14] Amongst other responsibilities, the Commission is charged with the investigation and conciliation of complaints of discrimination brought pursuant to the *Canadian Human Rights Act*. In the event that the Commission determines that an inquiry is warranted, it may refer the complaint to the Canadian Human Rights Tribunal for hearing. In appearing before the Tribunal, the Commission is statutorily mandated to represent the public interest having regard to the nature of the complaint: see section 51 of the Act.

C. *The Interveners*

[15] Two organizations were granted "Interested Party" status before the Tribunal and both appeared as interveners in this Court.

[16] Amnesty International is an international non-governmental organization committed to the advancement of human rights across the globe. It was granted interested party status before the Tribunal to assist it in understanding the relevance of Canada's international human rights obligations to the complaint, and its submissions in this Court were limited to the international law issues.

Federal Court  Cour fédérale

Date: 20140704

Docket: T-356-13

Citation: 2014 FC 651

Ottawa, Ontario, July 4, 2014

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

CANADIAN DOCTORS FOR REFUGEE CARE, THE CANADIAN ASSOCIATION OF REFUGEE LAWYERS, DANIEL GARCIA RODRIGUES, HANIF AYUBI AND JUSTICE FOR CHILDREN AND YOUTH

Applicants

and

ATTORNEY GENERAL OF CANADA AND MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondents

JUDGMENT AND REASONS

TABLE OF CONTENTS

I. Introduction

[1] For more than 50 years, the Government of Canada has funded comprehensive health insurance coverage for refugee claimants and others who have come to Canada seeking its protection through the Interim Federal Health Program. In 2012, the Governor in Council passed two Orders in Council which significantly reduced the level of health care coverage available to many such individuals, and all but eliminated it for others pursuing risk-based claims.

[2] The effect of these changes is to deny funding for life-saving medications such as insulin and cardiac drugs to impoverished refugee claimants from war-torn countries such as Afghanistan and Iraq.

[3] The effect of these changes is to deny funding for basic pre-natal, obstetrical and paediatric care to women and children seeking the protection of Canada from "Designated Countries of Origin" such as Mexico and Hungary.

[4] The effect of these changes is to deny funding for any medical care whatsoever to individuals seeking refuge in Canada who are only entitled to a Pre-removal Risk Assessment, even if they suffer from a health condition that poses a risk to the public health and safety of Canadians.

[5] The applicants assert that the 2012 modifications to the Interim Federal Health Program are unlawful as the Orders in Council are *ultra vires* the prerogative powers of the Governor in Council. They also say that prior consultations and past practice created a legitimate expectation on the part of stakeholders that substantive changes would not be made to the Interim Federal Health Program without prior notice and consultation with interested parties. According to the

applicants, the Governor in Council breached its duty of procedural fairness by making radical changes to the Interim Federal Health Program without any advance notice or consultation.

[6] The applicants further submit that that 2012 changes to the Interim Federal Health Program breach Canada's obligations under the 1951 *Convention Relating to the Status of Refugees* and the *Convention on the Rights of the Child*. In addition, the applicants say, the changes violate sections 7, 12 and 15 of the *Canadian Charter of Rights and Freedoms* in a manner that cannot be saved under section 1 of the Charter.

[7] For the reasons that follow, I have concluded that the Orders in Council are not *ultra vires* the prerogative powers of the Governor in Council, nor has there been a denial of procedural fairness in this case.

[8] I have also concluded that the applicants' section 7 Charter claim cannot succeed as what they seek is to impose a positive obligation on the Government of Canada to fund health care for individuals seeking the protection of Canada. The current state of the law in Canada is that section 7 guarantees to life, liberty and security of the person do not include a positive right to state funding for health care.

[9] I have, however, concluded that while it is open to government to assign priorities and set limits on social benefit plans such as the Interim Federal Health Program, the intentional targeting of an admittedly poor, vulnerable and disadvantaged group for adverse treatment takes this situation beyond the realm of traditional Charter challenges to social benefit programs.

[10] With the 2012 changes to the Interim Federal Health Program, the executive branch of the Canadian government has intentionally set out to make the lives of these disadvantaged

individuals even more difficult than they already are in an effort to force those who have sought the protection of this country to leave Canada more quickly, and to deter others from coming here.

[11] I am satisfied that the affected individuals are being subjected to "treatment" as contemplated by section 12 of the Charter, and that this treatment is indeed "cruel and unusual". This is particularly, but not exclusively so as it affects children who have been brought to this country by their parents. The 2012 modifications to the Interim Federal Health Program potentially jeopardize the health, the safety and indeed the very lives, of these innocent and vulnerable children in a manner that shocks the conscience and outrages our standards of decency. They violate section 12 of the Charter.

[12] I have also concluded that the 2012 changes to the Interim Federal Health Program violate section 15 of the Charter inasmuch as the program now provides a lesser level of health insurance coverage to refugee claimants from Designated Countries of Origin in comparison to that provided to refugee claimants from non-Designated Countries of Origin. This distinction is based upon the national origin of the refugee claimants, and does not form part of an ameliorative program.

[13] Moreover, this distinction has an adverse differential effect on refugee claimants from Designated Countries of Origin. It puts their lives at risk and perpetuates the stereotypical view that they are cheats and queue-jumpers, that their refugee claims are "bogus", and that they have come to Canada to abuse the generosity of Canadians. It serves to perpetuate the historical disadvantage suffered by members of an admittedly vulnerable, poor and disadvantaged group.

[14] I have not, however, been persuaded that the Interim Federal Health Program violates subsection 15(1) of the Charter based upon the immigration status of those seeking the protection of Canada, as "immigration status" cannot be considered to be an analogous ground for the purposes of section 15. Consequently, this aspect of the applicants' section 15 claim will be dismissed.

[15] Finally, the respondents have not demonstrated that the 2012 changes to the Interim Federal Health Program are justified under section 1 of the Charter.

[16] Consequently, the applicants' application will be granted.

II. The Parties

A. *Canadian Doctors for Refugee Care*

[17] Canadian Doctors for Refugee Care (CDRC) is a group of physicians specializing in the treatment of refugees and refugee health issues. It was formed on April 26, 2012, in response to the then-pending changes to the Interim Federal Health Program (IFHP) that had been announced the previous day. CDRC asserts that its members now face difficult moral, ethical and professional dilemmas as to whether to treat or continue to treat patients who no longer have IFHP coverage.

[18] While CDRC's memorandum of fact and law appears to suggest that its members have been directly affected by the changes to the IFHP, it became clear at the hearing that what it seeks is public interest standing to pursue this case. The standing issue will be addressed further on in these reasons.

[739] It is also important to keep in mind that what is at issue in this case is not access to extraordinary or experimental treatment, or what the Supreme Court described in *Auton* as "recent and emergent" treatment: above at para. 56. The effect of the 2012 changes to the IFHP is to deny insurance coverage for basic, "core" medical care that is available to refugee claimants from non-DCO countries under the IFHP and to Canadians under provincial or territorial health insurance programs.

[740] The respondents say that the nature of the interest asserted by the applicants on behalf of refugee claimants from DCO countries is a right to state-funded healthcare - a right that not even Canadian citizens possess: *Chaoulli*, above.

[741] While I have already concluded in the context of my section 7 analysis that there is no free-standing constitutional right to state-funded health care, that does not provide the respondents with a defence to the applicants' section 15 claim.

[742] Although there may be no obligation on the Governor in Council to provide health insurance coverage to those seeking the protection of Canada, once it chooses to provide such a benefit, "it is obliged to do so in a non-discriminatory manner": *Eldridge*, above. The Supreme Court went on in *Eldridge* to observe that "[i]n many circumstances, this will require governments to take positive action, for example by extending the scope of a benefit to a previously excluded class of persons": both quotes at para. 73, citations omitted.

[743] It is, moreover, not open to government to enact a law whose policy objectives and provisions single out a disadvantaged group for inferior treatment: *Auton*, above at para. 41,

[1043] As a consequence, the respondents have not demonstrated that the changes made to the IFHP through the promulgation of the 2012 OICs minimally impair the Charter rights of those seeking the protection of Canada.

(3) Are the 2012 Changes to the IFHP Proportionate in their Effect?

[1044] The final stage of the *Oakes* test requires the Court to consider whether there is proportionality between the deleterious effects of the program and its salutary objectives, such that the attainment of the goals of the program is not outweighed by the abridgment of the rights in question.

[1045] As the Supreme Court observed in *Hutterian Brotherhood*, "the first three stages of *Oakes* are anchored in an assessment of the law's purpose. Only the fourth branch takes full account of the 'severity of the deleterious effects of a measure on individuals or groups'": above at para. 76.

[1046] In *Bedford*, the Court further explained that at this stage of the analysis, the Court is required to "weigh the negative impact of the law on people's rights against the beneficial impact of the law in terms of achieving its goal for the greater public good". In so doing, the Court is to have regard to the impact of the impugned government action, "judged both qualitatively and quantitatively": above at para 126.

[1047] In addressing the issue of proportionality, it is important to start by recalling the fundamental nature of the rights at stake in this case: namely the right to be free from cruel and unusual treatment and the right to equal treatment without discrimination on the basis of national origin.

[1048] Also important to the analysis is the devastating impact that the 2012 changes to the IFHP have had on those seeking the protection of Canada. As discussed earlier, I have concluded that the changes brought about by the 2012 OICs are causing significant suffering to an already vulnerable, poor and disadvantaged population.

[1049] Indeed, I have found as a fact that the 2012 changes to the IFHP are causing illness, disability, and death.

[1050] I am therefore satisfied that the deleterious effects of the government action at issue in this case are serious in terms of their quality. Quantitatively, I am satisfied that these deleterious effects will be felt by a significant number of individuals, given the thousands of people who come to this country each year, seeking its protection.

[1051] The question, then, is whether the respondents have met their onus and shown that the salutary objectives of the 2012 changes to the IFHP outweigh its significant deleterious effects. On the evidence before me, I have no hesitation in concluding that they have failed to do so.

[1052] While the protection of public health and public safety is a salutary objective of the IFHP, *taking away* health insurance coverage for conditions that pose a risk to public health or public safety from those seeking the protection of Canada who are only entitled to a PRRA does nothing to advance that objective. Indeed, it is actually detrimental to its achievement.

[1053] I have, moreover, concluded that there was nothing unfair to Canadians about the pre-2012 IFHP, and that Canadians are not treated any more fairly as a result of the changes brought about by the 2012 OICs. Consequently, this objective cannot be said to outweigh the negative impact that the 2012 changes to the IFHP has had on those seeking the protection of Canada.

Date: 20061222

Docket: A-116-06

Citation: 2006 FCA 426

Present: **NADON J.A.**

BETWEEN:

CANADIAN PACIFIC RAILWAY COMPANY

Appellant

and

BOUTIQUE JACOB INC.

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on December 22, 2006.

REASONS FOR ORDER BY: NADON J.A.

Date: 20061222

Docket: A-116-06

Citation: 2006 FCA 426

Present: **NADON J.A.**

BETWEEN:

CANADIAN PACIFIC RAILWAY COMPANY

Appellant

and

BOUTIQUE JACOB INC.

Respondent

REASONS FOR ORDER

NADON J.A.

[1] Before me are four motions to intervene in the present appeal of a decision of de Montigny J. of the Federal Court, 2006 FC 217, February 20, 2006.

[2] By his decision, the learned Judge maintained, in part, an action for damages commenced by Boutique Jacob Inc. (the "respondent") against a number of defendants, namely, Pantainer Ltd., Panalpina Inc., Orient Overseas Container Line Ltd. ("OOCL") and Canadian Pacific Railway ("CPR"). Specifically, the Judge granted judgment in favour of the respondent against the defendant

CPR and awarded it the sum of $35,116.56 with interest, and he dismissed the action insofar as it was directed against the other defendants.

[3] A brief examination of the facts and issues leading to the judgement of de Montigny J. will be helpful in understanding the basis upon which the motions to intervene are being made.

[4] At issue before the Judge was the carriage by various modes of transport from Hong Kong to Montreal of a container of goods, namely, pieces of textile in cartons, destined for the respondent. As is usual in the transport of containerized cargo, a number of entities were involved in the carriage of the container, namely, an ocean carrier, OOCL, which carried it from Hong Kong to Vancouver, and a railway carrier, CPR, which carried it from Vancouver to Montreal.

[5] On April 27, 2003, as a result of a train derailment which occurred near Sudbury, Ontario, part of the respondent's cargo was damaged and part of it was lost.

[6] It should be pointed out that at no time whatsoever did the respondent contract with either OOCL or CPR. Rather, the respondent retained the services of Panalpina Inc. which, in turn, retained the services of Pantainer Ltd. to carry the respondent's cargo from Hong Kong to Montreal. Pantainer then proceeded to engage OOCL to carry the container from Hong Kong to Montreal. In turn, OOCL entered into a contract of carriage with CPR with respect to the carriage of the container from Vancouver to Montreal.

[7] The issues before the Judge were, *inter alia*, whether the defendants, individually or collectively, were liable for the damages suffered by the respondent and, in the event of liability, whether the defendants could limit their liability either by law or by contract.

[8] As I have already indicated, the Judge dismissed the respondent's action against all of the defendants, except CPR. In so concluding, the Judge held that CPR was not entitled to limit its liability because it had not complied with the terms of section 137 of the *Canada Transportation Act*, S.C. 1996, c. C-10 (the "Act"), which provides as follows:

137. (1) **A railway company shall not limit or restrict its liability to a shipper for the movement of traffic except by means of a written agreement signed by the shipper or by an association or other body representing shippers.** (2) If there is no agreement, the railway company's liability is limited or restricted to the extent provided in any terms and conditions that the Agency may *(a)* on the application of the company, specify for the traffic; or *(b)* prescribe by regulation, if none are specified for the traffic. [Emphasis added]	137. (1) **La compagnie de chemin de fer ne peut limiter sa responsabilité envers un expéditeur pour le transport des marchandises de celui-ci, sauf par accord écrit signé soit par l'expéditeur, soit par une association ou un groupe représentant les expéditeurs.** (2) En l'absence d'un tel accord, la mesure dans laquelle la responsabilité de la compagnie de chemin de fer peut être limitée en ce qui concerne un transport de marchandises est prévue par les conditions de cette limitation soit fixées par l'Office pour le transport, sur demande de la compagnie, soit, si aucune condition n'est fixée, établies par règlement de l'Office. [Le souligné est le mien]

[9] More particularly, the Judge held that CPR could not limit its liability because it had not entered into a "… written agreement signed by the shipper or by an association or other body representing shippers" to that effect.

[10] It will be recalled that the services of CPR were retained by the ocean carrier, OOCL, and not by the owner of the goods, the respondent Boutique Jacob. In the Judge's view, the written agreement between CPR and OOCL did not meet the requirements of sub-section 137(1), as "the shipper" was not OOCL, but the respondent.

[11] CPR also argued that it was entitled to benefit from the limitations and exemptions of liability found in the bills of lading issued both by OOCL and by Pantainer, and more particularly, that it could benefit from the so-called Himalaya clause found in these bills of lading. De Montigny J. concluded that by reason of section 137 of the Act, neither the Himalaya clause nor the principles of sub-bailment could be successfully invoked by CPR. At paragraph 50 of his Reasons, he explained his conclusion in the following terms:

> 50. Alternatively, counsel for CPR has argued that her client could take advantage of the limitations and exemptions found in OOCL and Paintainer terms and conditions. It is true that clause 1 of the OOCL waybill and clause 3 of the Pantainer bill of lading explicitly provide that participating carriers shall be entitled to the same rights, exemptions from liability, defences and immunities to which each of these two carriers are entitled. But the application of these clauses to a railway carrier would defeat the purpose of s. 137 of the *Canada Transportation Act*. It would make no sense to protect the shipper by prescribing that a railway company cannot limit its liability except by written agreement signed by that shipper, if the railway company could nevertheless achieve the same result through the means of a Himalaya clause found upstream in the contract of another carrier. I recognize that such reasoning results in a less advantageous position for railway companies as opposed to other carriers. But this is true not only for the purpose of liability but also in many other respects, since other modes of transportation are not as heavily regulated as are railway companies.

[12] On March 20, 2006, CPR filed a Notice of Appeal in this Court and on March 30, 2006, the respondent filed a cross-appeal. On June 15, 2006, Zim Integrated Shipping Services Ltd., A.P. Moller-Maersk A/S and Hapag-Lloyd Container Line GmbH filed a motion for leave to intervene in the appeal. On July 13, 2006, August 23, 2006 and September 11, 2006, similar motions were filed

respectively by 13 protection and indemnity clubs ("P&I Clubs"), by Canadian National Railway Company ("CN") and by Safmarine Container Line Ltd.

[13] The proposed interveners seek to intervene in this appeal on the following questions:

1. The interpretation of section 137 of the Act, including, *inter alia*, the definition of "shipper", "association of" or "body representing shippers".
2. The right of a railway to invoke the Himalaya clause found in the ocean carrier's bill of lading.
3. The right of a railway to enforce the terms of confidential contracts that it has with an ocean carrier when sued by the owner of the damaged or lost cargo.

[14] The motions to intervene are all made pursuant to Rule 109 of the *Federal Courts Rules*, which reads as follows:

109. (1) **the Court may, on motion, grant leave to any person to intervene in a proceeding.** (2) Notice of a motion under subsection (1) shall *(a)* set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and *(b)* **describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.** (3) In granting a motion under subsection (1), the Court shall give directions regarding *(a)* the service of documents; and *(b)* the role of the intervener, including costs, rights of appeal and any other	**109.** (1) **La Cour peut, sur requête, autoriser toute personne à intervenir dans une instance.** (2) L'avis d'une requête présentée pour obtenir l'autorisation d'intervenir *a)* précise les nom et adresse de la personne qui désire intervenir et ceux de son avocat, le cas échéant; *b)* **explique de quelle manière la personne désire participer à l'instance et en quoi sa participation aidera à la prise d'une décision sur toute question de fait et de droit se rapportant à l'instance.** (3) La Cour assortit l'autorisation d'intervenir de directives concernant : *a)* la signification de documents; *b)* le rôle de l'intervenant, notamment en ce qui concerne les dépens, les droits d'appel et toute autre question relative à la procédure à suivre.

matters relating to the procedure to be followed by the intervener.

[Le souligné est le mien]

[Emphasis added]

[15] Three of the motions are brought by a number of companies, all represented by the same attorneys, which I will hereinafter refer to as the ocean carriers. These proposed interveners, with the exception of the P&I Clubs, are, like the defendant OOCL in the proceedings below, engaged in the transportation of containerized cargo to Canada from various points around the world and from Canada to various points around the world. The other proposed interveners in this group, the P&I Clubs, are insurance mutuals which protect their member shipowners and operators against, *inter alia*, third-party liability for cargo damage. For the present purposes, it is sufficient to note that they insure about 90% of the world's oceangoing tonnage and represent most, if not all, of the international ocean carriers of containerized cargo operating in Canada.

[16] The other motion is brought by CN, a federally-regulated railway which operates a continuous railway system in Canada and in the United States.

[17] The ocean carriers say that they meet the requirements for intervention and further say that their participation in the appeal will assist this Court in determining the factual and legal issues of the appeal for the following reasons:

- The ocean carrier involved in the trial of this action, OOCL, is not a party to the appeal and hence the Court of Appeal will not have the benefit of the point of view of one of the vital links to multimodal transportation, i.e., the ocean carrier which issued a multimodal bill of lading;

- An ocean carrier, such as OOCL, can be a shipper in the context of the rail movement of cargo as that term is understood in Section 137 of the Act, a point that CPR may not need to make or cannot make in its arguments on appeal;
- An ocean carrier could, alternatively, be a "body representing shippers" as that term is understood in Section 137 of the Act, an argument that CPR may not need to make or cannot make in its arguments on appeal;
- Himalaya clauses similar to the one contained in the OOCL bill of lading at issue are provisions which were developed by ocean carriers and are regularly found in all bills of lading of ocean carriers of containerized cargo. They have been developed to allow the ocean carrier's sub-contractors such as railways to benefit from, *inter alia*, the same liability regime and limits of liability to which the ocean carriers benefit under the terms of their contracts of carriage with cargo owners. Ocean carriers are therefore in the best position to speak to the intent and application of such clauses.
- Ocean carriers are in the best position to make the argument regarding the application of the rules on sub-bailment because CPR, in the present case, does not have to reply on this argument as it is arguably protected by the indemnity provisions found in its tariff. In any event, it is likely that the limits of liability incorporated in the rail contract between OOCL and CPR may have exceeded the value of the Plaintiff's claim, hence CPR's lack of interest to press the issue of the application of the principles of sub-bailment.

[18] With respect to its proposed intervention, CN says that its presence in the appeal will be of assistance to this Court in that:

- CN proposes to argue that the definition of shipper involves the control and not necessarily the ownership of goods;
- CN is the only Canadian railway with a full North American network and proposes to demonstrate the legal impact of the Trial decision on goods moving through Canada en route from and to international points;
- CN proposes to argue that Himalaya clauses should receive an interpretation harmonized with the interpretation given by the United States Supreme Court considering that a significant portion of containerized traffic destined to the United States enters that country through CN's network;
- CN is in the best position to assist the Federal Court of Appeal with respect to the issues raised in this appeal and in the appeal before the Quebec Court of Appeal of the Quebec Superior Court's decision in *Sumitomo Marine and Fire Insurance Co. Ltd. v. CN*, [2004] J.Q. 11243 in connection with the interpretation of section 137.

[19] In *Canadian Union of Public Employees (Airline Division) v. Canadian Airlines International Ltd.*, 2000 F.C.J. No. 220, this Court, at paragraph 8 of the Reasons of Noël J.A., enumerated the following factors as those which ought to be considered in deciding whether a motion to intervene should be allowed:

> 8 It is fair to assume that in order to grant the intervention the motions Judge would have considered the following factors which were advanced by both the appellants and PSAC as being relevant to her decision:
> 1) Is the proposed intervener directly affected by the outcome?
> 2) Does there exist a justiciable issue and a veritable public interest?
> 3) Is there an apparent lack of any other reasonable or efficient means to submit the question of the Court?
> 4) Is the position of the proposed intervener adequately defended by one of the parties to the case?
> 5) Are the interests of justice better served by the intervention of the proposed third party?

> 6) Can the Court hear and decide the cause on its merits without the proposed intervener?

[20] In addition, Noël J.A. indicated that the Court had to have regard to Rule 109(2), which required a proposed intervener to indicate how its participation would assist the Court in determining the factual or legal issues raised by the proceedings.

[21] It must also be said that for leave to intervene to be granted, it is not necessary that all of the factors be met by a proposed intervener (see: *Rothmans Benson and Hedges Inc. v. Canada*, [1990] 1 F.C. 84 (TD); affirmed [1990] 1 F.C. 90 (CA)) and that, in the end, the Court has the inherent authority to allow intervention on terms and conditions which are appropriate in the circumstances (see: *Canada (Director of Investigations and Research) v. Air Canada*, [1989] 2 F.C. 88 (CA); affirmed [1989] 1 S.C.R. 236; also *Fishing Vessel Owners Association of B.C. v. Canada*, [1985] 57 N.R. 376 (CA) at 381).

[22] I now turn to the ocean carriers' motions to intervene.

[23] The ocean carriers say that the decision to be rendered by this Court in the appeal will have a significant impact on the multi-modal transportation industry, as the factual matrix represents a typical multi-modal transportation case and that the contractual documents in evidence are common across the industry. They say that de Montigny J.'s decision and that of the Quebec Superior Court in *Sumitomo Marine and Fire Insurance Co. Ltd. v. Canadian National Railway Co.*, [2004] J.Q. 11243, are the only two interpretations of section 137 of the Act. They further say that most ocean carriers of containerized cargo offer to their clients multi-modal transportation services in Canada,

that they have contracts with either CN or CPR with respect to the inland portion of the transportation services which they provide, and that such contracts consistently incorporate tariffs which provide for, *inter alia*, limitations of liability in favour of the railway for damage to cargo as well as an obligation of the part of the ocean carrier to indemnify the railway in the event that the latter is held liable to third parties in excess of such limits of liability.

[24] Hence, the ocean carriers point out that the direct consequence of de Montigny J.'s interpretation of section 137 of the Act is that failing written agreements between railways and cargo owners, the railways will be facing unlimited liability and, consequently, will seek to pursue indemnity rights against the ocean carriers in order to recover any amount paid in excess of the limits stipulated in the contracts between them and the ocean carriers.

[25] The ocean carriers therefore submit that they will ultimately be paying the amount of damages to which the railways have been condemned, to the extent that these amounts exceed the railways' limits of liability.

[26] In my view, leave ought to be granted to the ocean carriers. I am satisfied that the position which the ocean carriers seek to assert will not be adequately defended by CPR and that their participation will undoubtedly assist this Court in determining the legal issues raised by the appeal. An important, if not crucial, consideration in my decision to grant leave to the ocean carriers is that OOCL, the ocean carrier which carried the respondents' container from Hong Kong to Vancouver and which sub-contracted the Vancouver to Montreal portion of the carriage to CPR, is not a party in the appeal.

[27] As a result, it is my view that the interests of justice will be better served by allowing the ocean carriers to intervene.

[28] For these reasons, I will grant leave to the ocean carriers to intervene in the appeal and costs shall be spoken to. In so concluding, I am obviously not casting any aspersions on CPR and its attorneys. My point is simply that the ocean carriers will be bringing a different perspective to the issues which are before the Court.

[29] I now turn to CN's motion.

[30] I have not been convinced that leave to intervene ought to be granted to CN. In my view, CN's position and the arguments which it seeks to make in the appeal are identical to the position and the arguments that will be put forward by CPR. I have no reason to believe, and CN has offered none, that CPR will not adequately defend the position which it seeks to advance. As a result, this Court can hear and decide the appeal on its merits without the participation of CN. In the end, I do not believe that the interests of justice will be better served by allowing CN to intervene in this appeal.

[31] As a result, CN's motion will be dismissed. Costs shall be spoken to.

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-116-06
STYLE OF CAUSE:	CPR v. BOUTIQUE JACOB INC.

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	NADON J.A.
DATED:	December 22, 2006

WRITTEN REPRESENTATIONS BY:

Sandra Sahyouni	For the Respondent
Jean-Marie Fontaine	For the Proposed Interveners Zim Integrated Shipping Services Ltd., A.P. Moller-Maersk A/S, Hapag-Lloyd Container Line GmbH, Safmarine Container Lines N.V., American Steamship Owners Mutual Protection and Indemnity Association Inc. et al.
L. Michel Huart	For the Proposed Intervener Canadian National Railway Company.

SOLICITORS OF RECORD:

The Law Offices of J. Kendrick Sproule	For the Respondent
Borden Ladner Gervais LLP Montreal, QC	For the Proposed Interveners Zim Integrated Shipping Services Ltd., A.P. Moller-Maersk A/S, Hapag-Lloyd Container Line GmbH, Safmarine Container Lines N.V., American Steamship Owners Mutual Protection and Indemnity Association Inc. et al.
Langlois Gaudreau O'Connor LLP Montreal, QC	For the Proposed Intervener Canadian National Railway Company.

Pierino Divito *Appellant*

v.

Minister of Public Safety and Emergency Preparedness *Respondent*

and

Canadian Civil Liberties Association, David Asper Centre for Constitutional Rights and British Columbia Civil Liberties Association *Interveners*

Indexed as: Divito *v.* Canada (Public Safety and Emergency Preparedness)

2013 SCC 47

File No.: 34128.

2013: February 18; 2013: September 19.

Present: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Constitutional law — Charter of Rights — Mobility rights — Right to enter Canada — Minister refusing offender transfer request by Canadian citizen imprisoned abroad, on basis of security concerns — Constitutional challenge of provisions governing international transfer of offenders made by Canadian citizen imprisoned abroad — Whether statutory provisions giving Minister discretion to grant or deny transfer request violate right to enter Canada and, if so, whether violation is justified — Canadian Charter of Rights and Freedoms, ss. 1, 6(1) — International Transfer of Offenders Act, S.C. 2004, c. 21, ss. 8(1), 10(1)(a), (2)(a).

D, a Canadian citizen, was extradited to the U.S. where he pleaded guilty to serious drug offences and was sentenced to seven and a half years in prison. He submitted a request under the *International Transfer of Offenders Act*, S.C. 2004, c. 21 ("*ITOA*"), to be transferred

Pierino Divito *Appelant*

c.

Ministre de la Sécurité publique et de la Protection civile *Intimé*

et

Association canadienne des libertés civiles, David Asper Centre for Constitutional Rights et Association des libertés civiles de la Colombie-Britannique *Intervenants*

Répertorié : Divito *c.* Canada (Sécurité publique et Protection civile)

2013 CSC 47

N° du greffe : 34128.

2013 : 18 février; 2013 : 19 septembre.

Présents : La juge en chef McLachlin et les juges LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis et Wagner.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit constitutionnel — Charte des droits — Liberté de circulation et d'établissement — Droit d'entrer au Canada — Refus par le ministre, fondé sur des préoccupations relatives à la sécurité, d'accéder à la demande de transfèrement d'un délinquant citoyen canadien emprisonné à l'étranger — Contestation constitutionnelle des dispositions régissant le transfèrement international de délinquants par un citoyen canadien emprisonné à l'étranger — Les dispositions législatives qui confèrent au ministre le pouvoir discrétionnaire de consentir ou non à la demande de transfèrement portent-elles atteinte au droit d'entrer au Canada et, dans l'affirmative, l'atteinte est-elle justifiée? — Charte canadienne des droits et libertés, art. 1, 6(1) — Loi sur le transfèrement international des délinquants, L.C. 2004, ch. 21, art. 8(1), 10(1)a), (2)a).

D, un citoyen canadien, a été extradé aux États-Unis où il a plaidé coupable à des infractions graves liées à la drogue et a été condamné à sept ans et demi d'emprisonnement. Il a présenté une demande sous le régime de la *Loi sur le transfèrement international des délinquants*,

to Canada to serve the remainder of his American sentence. Under the *ITOA*, the consent of both the foreign state and the Canadian government are required before an offender can be returned to Canada. Sections 8(1), 10(1)(*a*) and 10(2)(*a*) of the *ITOA* give the Canadian Minister of Public Safety a discretion whether to consent to the transfer. D's request was approved by the U.S. but refused by the Minister on the basis that the nature of his offence and his affiliations suggested that D's return to Canada would constitute a potential threat to the safety of Canadians and the security of Canada. D sought judicial review of the Minister's decision, arguing that the existence of discretion under the *ITOA* to refuse to consent to the return of a Canadian in a foreign prison violated his right to enter Canada protected by s. 6(1) of the *Canadian Charter of Rights and Freedoms.* Once it was confirmed that D was a Canadian citizen, he had the right to enter Canada and the Minister was required to consent to his return. The Federal Court dismissed D's application for judicial review of the Minister's refusal, concluding that the decision of the Minister was reasonable and that ss. 8(1), 10(1)(*a*) and 10(2)(*a*) of the *ITOA* did not violate D's right as a Canadian citizen to enter Canada under s. 6(1) of the *Charter*. D appealed only the issue of the constitutionality of the provisions, not the reasonableness of the Minister's decision. The Federal Court of Appeal dismissed the appeal.

Held: The appeal should be dismissed.

Per Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.: Mobility rights are protected by s. 6 of the *Charter*. These include the right in s. 6(1) of every citizen to enter, remain in, and leave Canada. The right of a Canadian citizen to enter and to remain in Canada is a fundamental right associated with citizenship. Without the ability to enter one's country of citizenship, the "right to have rights" within that country cannot be fully exercised. The right to enter should therefore be given a generous interpretation consistent with its purpose, the interests it was intended to protect and the broad construction of the right to enter in international law.

However, the mobility rights guaranteed by s. 6(1) of the *Charter* do not give a Canadian citizen an automatic right to serve a sentence in Canada. The *ITOA* and the treaties which it implements provide a statutory mechanism to transfer the supervision of a prison sentence from a foreign jurisdiction to Canada, since as a matter of

L.C. 2004, ch. 21 (« *LTID* »), afin d'être transféré au Canada pour purger le reste de la peine qui lui a été infligée aux États-Unis. Aux termes de la *LTID*, le retour au Canada d'un délinquant nécessite le consentement de l'entité étrangère et du gouvernement canadien. Le paragraphe 8(1) et les al. 10(1)*a*) et 10(2)*a*) de la *LTID* confèrent au ministre de la Sécurité publique du Canada le pouvoir discrétionnaire de consentir ou non au transfèrement. Les États-Unis ont approuvé la demande de D, mais le ministre l'a refusée au motif que la nature de son délit ainsi que ses affiliations suggéraient que le retour de D au Canada pourrait constituer une menace pour la sécurité du Canada et la sûreté des Canadiens. D a sollicité le contrôle judiciaire de la décision du ministre, faisant valoir que le pouvoir discrétionnaire conféré par la *LTID* de refuser de consentir au retour d'un Canadien emprisonné à l'étranger violait son droit d'entrer au Canada garanti par le par. 6(1) de la *Charte canadienne des droits et libertés*. Une fois sa citoyenneté canadienne établie, D estime qu'il avait le droit d'entrer au Canada et que le ministre devait consentir à son retour. La Cour fédérale a rejeté la demande de contrôle judiciaire du refus du ministre, concluant que la décision de ce dernier était raisonnable et que le par. 8(1) et les al. 10(1)*a*) et 10(2)*a*) de la *LTID* ne violaient pas le droit de D, en tant que citoyen canadien, d'entrer au Canada, droit protégé par le par. 6(1) de la *Charte*. D a interjeté appel à l'égard de la question de la constitutionnalité des dispositions, et non à l'égard du caractère raisonnable de la décision du ministre. La Cour d'appel fédérale a rejeté le pourvoi.

Arrêt : Le pourvoi est rejeté.

Les juges Abella, Rothstein, Cromwell, Moldaver, Karakatsanis et Wagner : La liberté de circulation et d'établissement est protégée par l'art. 6 de la *Charte*. Elle comprend le droit prévu au par. 6(1) pour tout citoyen d'entrer au Canada, d'y demeurer et d'en sortir. Le droit d'un citoyen canadien d'entrer au Canada et d'y demeurer est donc un droit fondamental lié à la citoyenneté. Sans la possibilité d'entrer dans son pays de citoyenneté, le « droit d'avoir des droits » ne peut pas être pleinement exercé. Le droit d'entrer doit donc être interprété généreusement, en fonction de son objet, des intérêts qu'il visait à protéger et de l'interprétation large qui lui est donnée en droit international.

Toutefois, le droit de circulation garanti par le par. 6(1) de la *Charte* ne donne pas à un citoyen canadien le droit automatique de purger une peine au Canada. La *LTID* et les traités qu'elle met en œuvre prévoient un mécanisme législatif permettant de transférer la surveillance de l'exécution d'une peine d'un pays étranger au Canada,

international law, Canada has no legal authority to require the return of a citizen who is lawfully incarcerated by a foreign state. Independent of the *ITOA*, there is no *right* to serve a foreign prison sentence in Canada. The *ITOA* was not intended to create a right for Canadian citizens to require Canada to administer their foreign sentence. Nor does it impose a duty on the Canadian government to permit all such citizens to serve their foreign sentences in Canada. D's submission would result in a positive obligation on Canada to administer the sentences imposed upon Canadian citizens by foreign jurisdictions. This misconstrues what s. 6(1) protects. Although the *ITOA* contemplates a mechanism by which a citizen may return to Canada in the limited context of continuing incarceration for the purpose of serving their foreign sentence, s. 6(1) does not confer *a right* on Canadian citizens to serve their foreign sentences in Canada. The impugned provisions of the *ITOA*, which make a transfer possible, do not, as a result, represent a breach of s. 6(1). Once a foreign jurisdiction consents to a transfer under s. 8(1) of the *ITOA*, however, the Minister's discretion under ss. 10(1)(*a*) and 10(2)(*a*) is fully engaged and must be exercised reasonably, including in compliance with relevant *Charter* values. D's argument that the Minister *must* consent to the transfer of a Canadian citizen once a foreign state has provided its consent, calls into constitutional question not the impugned provisions, but the way the discretion is exercised. This calls for scrutiny of the reasonableness of the exercise of discretion, an issue that has not been appealed to this Court.

Per McLachlin C.J. and LeBel and Fish JJ.: Section 6(1) should be interpreted generously, in a manner that is consistent with the broad protection of mobility rights under international law and gives full effect to the provision's expansive breadth. Effective exercise of the rights conferred by s. 6(1) will often require the state's active cooperation, in part because of the extra-territorial application of the rights and the principle of sovereignty of nations. The *ITOA* was precisely designed to safeguard and facilitate the exercise of these s. 6(1) rights. Under that regime, once the foreign state has consented to the transfer, the sole impediment to the exercise of the citizen's s. 6(1) right is the Minister's discretion under ss. 8(1), 10(1)(*a*) and 10(2)(*a*) of the *ITOA*. Hence the provisions constitute a limitation on the rights protected by s. 6(1) of the *Charter*.

puisque, en droit international, le Canada n'a pas le pouvoir légal d'exiger le retour d'un citoyen qui est légalement détenu par un pays étranger. Indépendamment de la *LTID*, il n'existe pas de *droit* de purger au Canada une peine de prison infligée à l'étranger. La *LTID* ne visait pas à créer un droit pour les citoyens canadiens d'exiger que le Canada prenne en charge les peines qui leur sont infligées à l'étranger. Elle n'oblige pas non plus le gouvernement canadien à permettre à tous ses citoyens de purger ces peines au Canada. Selon les prétentions de D, le Canada aurait l'obligation de prendre en charge l'exécution des peines infligées aux citoyens canadiens par des pays étrangers. Cela constitue une interprétation erronée des droits protégés par le par. 6(1). Bien que la *LTID* permette à un citoyen de retourner au Canada dans ce but, dans le contexte restreint du maintien en détention, le par. 6(1) ne confère pas aux citoyens canadiens le *droit* de purger au Canada les peines qui leur ont été infligées à l'étranger. Les dispositions contestées de la *LTID*, qui rendent un transfèrement possible, ne constituent donc pas une violation du par. 6(1). Cela dit, une fois que le pays étranger consent au transfèrement en vertu du par. 8(1) de la *LTID*, le pouvoir discrétionnaire conféré au ministre par les al. 10(1)*a*) et 10(2)*a*) est entièrement applicable et doit être exercé de manière raisonnable, y compris de manière à respecter les valeurs pertinentes de la *Charte*. L'argument de D selon lequel le ministre *doit* consentir au transfèrement d'un citoyen canadien si le pays étranger y consent remet en question, sur le plan constitutionnel, non pas les dispositions contestées, mais la façon dont le ministre exerce son pouvoir discrétionnaire. Il faut donc examiner le caractère raisonnable de l'exercice du pouvoir discrétionnaire, une question qui n'a pas été portée en appel devant la Cour.

La juge en chef McLachlin et les juges LeBel et Fish : Il faut interpréter généreusement le par. 6(1), d'une manière qui soit cohérente avec la protection large que confère le droit international à la liberté de circulation et qui donne plein effet à la portée étendue de la disposition. L'exercice réel des droits conférés par le par. 6(1) exigera souvent la coopération active de l'État en raison, notamment, de leur application extraterritoriale et du principe de la souveraineté des nations. La *LTID* a été conçue précisément pour sauvegarder les droits garantis au par. 6(1) et pour en faciliter l'exercice. Selon ce régime, dès qu'un pays étranger a consenti à un transfèrement, le pouvoir discrétionnaire que confèrent le par. 8(1) et les al. 10(1)*a*) et 10(2)*a*) de la *LTID* au ministre devient le seul obstacle à ce qu'un citoyen exerce les droits que lui confère le par. 6(1). Les dispositions constituent donc une limite aux droits garantis par le par. 6(1) de la *Charte*.

The limitation is nonetheless justified under s. 1 of the *Charter*. Ensuring the security of Canada and the prevention of offences related to terrorism and organized crime are pressing and substantial objectives. Properly understood, the factors set out in ss. 10(1)(*a*) and 10(2)(*a*) of the *ITOA* relate to risks that arise upon the transfer of offenders before their release. Given that, in some cases, the objectives of the *ITOA* would be served by refusing a transfer based on those factors, the Minister's discretion to consider them on a case-by-case basis is rationally connected to the objectives. In addition, at least in some cases, refusing a transfer based on the factors will be the sole — and therefore the most minimally impairing — alternative open to the Minister. In light of both the binary nature of the Minister's decision and the citizen's continued incarceration, it is difficult to conceive of a less drastic means of achieving Parliament's protective purpose. Finally, the impugned provisions are proportionate in their effect. The beneficial effects of permitting the Minister to consider threats to Canadian security in deciding whether to permit a transfer are self-evident, and the prejudicial effect of a refusal on the mobility rights of Canadian citizens incarcerated abroad is palliated by the fact that the citizens in question will be able to enter Canada after serving their sentence in the foreign jurisdiction.

Since D no longer challenges the reasonableness of the Minister's decision, it is unnecessary to consider whether the Minister's discretion under the *ITOA* was properly exercised in this case. However, while the Minister's discretion is broad and flexible and entitled to a large measure of deference given the complex social and political problems being tackled, it must be exercised with due regard for the s. 6(1) *Charter* rights at stake.

Cases Cited

By Abella J.

Applied: *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342; *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66; **distinguished:** *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469; **referred to:** *Divito v. Canada (Ministre de la Justice)*, 2004 CanLII 39111; *États-Unis d'Amérique v. Divito* (2004), 194 C.C.C. (3d) 148; *R. v. Gauvin* (1997), 187 N.B.R. (2d) 262; *R. v. Rumbaut*, 1998 CanLII 9816; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Big M Drug Mart Ltd.*, [1985]

Cette limite est néanmoins justifiée au sens de l'article premier de la *Charte*. Assurer la sécurité du Canada et prévenir les infractions de terrorisme ou d'organisation criminelle constituent des objectifs urgents et réels. Interprétés correctement, les facteurs énoncés aux al. 10(1)*a*) et 10(2)*a*) de la *LTID* ont trait à des risques qui surviennent à l'occasion du transfèrement de délinquants, avant leur libération. Puisque, dans certains cas, refuser le transfèrement en se fondant sur les facteurs énoncés dans la *LTID* servirait les objectifs qu'elle vise, le pouvoir discrétionnaire du ministre d'en tenir compte au cas par cas est lié rationnellement aux objectifs visés. De plus, du moins dans certains cas, le ministre n'aura d'autre choix que de refuser le transfèrement sur le fondement des facteurs contestés — ce qui constituera donc la solution la moins attentatoire. À la lumière tant de la nature binaire de la décision du ministre et de l'incarcération du citoyen qui se poursuit, il est difficile de concevoir un moyen moins drastique d'atteindre l'objectif de protection visé par le Parlement. Finalement, les dispositions contestées ont un effet proportionnel. Les effets bénéfiques de l'autorisation donnée au ministre de tenir compte des menaces à la sécurité des Canadiens lorsqu'il est appelé à consentir à un transfèrement sont évidents, et il est pallié à l'effet préjudiciable d'un refus sur la liberté de circulation des citoyens canadiens incarcérés à l'étranger par le fait que les citoyens en question pourront entrer au Canada après avoir purgé leur peine à l'étranger.

Puisque D ne conteste plus le caractère raisonnable de la décision du ministre, il n'est pas nécessaire de décider si le ministre a exercé judicieusement en l'espèce le pouvoir discrétionnaire que lui confère la *LTID*. Cela dit, même si ce pouvoir conféré au ministre est large et souple et qu'il convient d'y accorder une grande déférence compte tenu des problèmes sociaux et politiques complexes en jeu, il doit être exercé en tenant dûment compte des droits en cause protégés par le par. 6(1) de la *Charte.*

Jurisprudence

Citée par la juge Abella

Arrêts appliqués : *Borowski c. Canada (Procureur général)*, [1989] 1 R.C.S. 342; *R. c. McNeil*, 2009 CSC 3, [2009] 1 R.C.S. 66; **distinction d'avec l'arrêt :** *États-Unis d'Amérique c. Cotroni*, [1989] 1 R.C.S. 1469; **arrêts mentionnés :** *Divito c. Canada (Ministre de la Justice)*, 2004 CanLII 39111; *Divito c. Canada (Ministre de la Justice)*, 2004 CanLII 46681; *R. c. Gauvin* (1997), 187 R.N.-B. (2e) 262; *R. c. Rumbaut*, 1998 CanLII 9816; *Hunter c. Southam Inc.*, [1984]

experience, Hannah Arendt observed that a "right to have rights" flows from citizenship and belonging to a distinct national community: *The Origins of Totalitarianism* (new ed. 1967), at p. 296; Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (2012), at p. 5. Without the ability to enter one's country of citizenship, the "right to have rights" cannot be fully exercised. The right of a Canadian citizen to enter and to remain in Canada is therefore a fundamental right associated with citizenship.

[22] Canada's international obligations and relevant principles of international law are also instructive in defining the right: *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76; *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292. In *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, Dickson C.J., dissenting, described the template for considering the international legal context as follows:

> The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of "the full benefit of the *Charter*'s protection". I believe that the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified. [p. 349]

[23] More recently, in *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, McLachlin C.J. and LeBel J. confirmed that, "the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified" (para. 70). This helps frame the interpretive scope of s. 6(1).

Guerre mondiale. Écrivant sur sa propre expérience de cette guerre, Hannah Arendt a fait remarquer que le « droit d'avoir des droits » découle de la citoyenneté et de l'appartenance à une communauté nationale distincte : *Les origines du totalitarisme*, t. 2, *L'impérialisme* (1982), p. 281; Alison Kesby, *The Right to Have Rights : Citizenship, Humanity, and International Law* (2012), p. 5. Sans la possibilité d'entrer dans son pays de citoyenneté, le « droit d'avoir des droits » ne peut pas être pleinement exercé. Le droit d'un citoyen canadien d'entrer au Canada et d'y demeurer est donc un droit fondamental lié à la citoyenneté.

[22] Les obligations internationales du Canada et les principes de droit international pertinents sont aussi instructifs lorsque vient le temps de définir le droit : *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038; *États-Unis c. Burns*, 2001 CSC 7, [2001] 1 R.C.S. 283; *Canadian Foundation for Children, Youth and the Law c. Canada (Procureur général)*, 2004 CSC 4, [2004] 1 R.C.S. 76; *R. c. Hape*, 2007 CSC 26, [2007] 2 R.C.S. 292. Dans le *Renvoi relatif à la Public Service Employee Relations Act (Alb.)*, [1987] 1 R.C.S. 313, le juge en chef Dickson, dissident, a décrit de la façon suivante le cadre d'analyse du contexte juridique international :

> Le contenu des obligations internationales du Canada en matière de droits de la personne est, à mon avis, un indice important du sens de l'expression « bénéficient pleinement de la protection accordée par la *Charte* ». Je crois qu'il faut présumer, en général, que la *Charte* accorde une protection à tout le moins aussi grande que celle qu'offrent les dispositions similaires des instruments internationaux que le Canada a ratifiés en matière de droits de la personne. [p. 349]

[23] Plus récemment, dans *Health Services and Support – Facilities Subsector Bargaining Assn. c. Colombie-Britannique*, 2007 CSC 27, [2007] 2 R.C.S. 391, la juge en chef McLachlin et le juge LeBel ont confirmé qu'« il faut présumer que la *Charte* accorde une protection au moins aussi grande que les instruments internationaux ratifiés par le Canada en matière de droits de la personne » (par. 70). Cela aide à circonscrire l'interprétation qu'il convient de donner au par. 6(1).

[24] The international law inspiration for s. 6(1) of the *Charter* is generally considered to be art. 12 of the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47 ("ICCPR"), which has been ratified by 167 states, including Canada: John B. Laskin, "Mobility Rights under the *Charter*" (1982), 4 *S.C.L.R.* 89, at p. 89; Robert J. Sharpe and Kent Roach, *The Charter of Rights and Freedoms* (4th ed. 2009), at p. 212.

[25] As a treaty to which Canada is a signatory, the ICCPR is binding. As a result, the rights protected by the ICCPR provide a minimum level of protection in interpreting the mobility rights under the *Charter*. Article 12 of the ICCPR states:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. *No one shall be arbitrarily deprived of the right to enter his own country.*

[26] In 1999, the U.N. Human Rights Committee issued guidelines for the interpretation of art. 12 of the ICCPR in its "General Comment No. 27: Freedom of Movement". Paragraph 19 of the General Comment states, in part, that "[t]he right of a person to enter his or her own country recognizes the special relationship of a person to that country". The General Comment also provides some guidance on the interpretation of "arbitrarily" in art. 12(4):

In no case may a person be *arbitrarily deprived* of the right to enter his or her own country. The reference to

[24] On considère habituellement que le par. 6(1) de la *Charte* s'inspire, en droit international, de l'art. 12 du *Pacte international relatif aux droits civils et politiques*, R.T. Can. 1976 nº 47 (« PIDCP »), qui a été ratifié par 167 pays, dont le Canada : John B. Laskin, « Mobility Rights under the *Charter* » (1982), 4 *S.C.L.R.* 89, p. 89; Robert J. Sharpe et Kent Roach, *The Charter of Rights and Freedoms* (4e éd. 2009), p. 212.

[25] S'agissant d'un traité dont le Canada est signataire, le PIDCP lie les parties. Par conséquent, les droits qu'il protège énoncent un niveau minimal de protection dont il faut tenir compte dans l'interprétation du droit de circulation et d'établissement prévu dans la *Charte*. L'article 12 du PIDCP est ainsi libellé :

1. Quiconque se trouve légalement sur le territoire d'un État a le droit d'y circuler librement et d'y choisir librement sa résidence.

2. Toute personne est libre de quitter n'importe quel pays, y compris le sien.

3. Les droits mentionnés ci-dessus ne peuvent être l'objet de restrictions que si celles-ci sont prévues par la loi, nécessaires pour protéger la sécurité nationale, l'ordre public, la santé ou la moralité publiques, ou les droits et libertés d'autrui, et compatibles avec les autres droits reconnus par le présent Pacte.

4. *Nul ne peut être arbitrairement privé du droit d'entrer dans son propre pays.*

[26] En 1999, le Comité des droits de l'homme des Nations Unies a publié des lignes directrices quant à l'interprétation de l'art. 12 du PIDCP dans le document intitulé « Observation générale nº 27 : Liberté de circulation ». Au paragraphe 19, il est notamment indiqué que « [l]e droit d'une personne d'entrer dans son propre pays reconnaît l'existence d'une relation spéciale de l'individu à l'égard du pays concerné ». L'observation générale donne également certaines précisions sur la manière d'interpréter la notion d'« arbitraire » évoquée au par. 12(4) :

En aucun cas un individu ne peut être *privé arbitrairement* du droit d'entrer dans son propre pays. La notion

the concept of arbitrariness in this context is intended to emphasize that it applies to all State action, legislative, administrative and judicial; it guarantees that even interference provided for by law *should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances*. *The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable*. A State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country. [Emphasis added; para. 21.]

[27] Although art. 12(4) protects against *arbitrary* interference with the right to enter, the U.N. Human Rights Committee's interpretation of the scope of the right suggests that there are in fact "few, if any" limitations on the right to enter that would be considered reasonable. The right to enter protected by s. 6(1) of the *Charter* should therefore be interpreted in a way that is consistent with the broad protection under international law.

[28] The expansive breadth of the protection is also consistent with the fact that s. 6(1) of the *Charter* is exempt from the legislative override in s. 33: *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519, at para. 11. Moreover, the other rights conferred by s. 6 of the *Charter* in s. 6(2) are subject to express limitations within the provision itself in ss. 6(3) and 6(4). The fact that s. 6(1) is not subject to such limitations also confirms its plenitude.

[29] And, finally in *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469, a case involving extradition, this Court recognized that the "intimate relation between a citizen and his country" invited a generous interpretation of a related right in s. 6(1), namely the right to remain in Canada (p. 1480).

[30] This brings us to the provisions dealing with the international transfer of prisoners.

d'arbitraire est évoquée dans ce contexte dans le but de souligner qu'elle s'applique à toutes les mesures prises par l'État, au niveau législatif, administratif et judiciaire; l'objet est de garantir que même une immixtion prévue par la loi *soit conforme aux dispositions, aux buts et aux objectifs du Pacte et soit, dans tous les cas, raisonnable eu égard aux circonstances particulières. Le Comité considère que les cas dans lesquels la privation du droit d'une personne d'entrer dans son propre pays pourrait être raisonnable, s'ils existent, sont rares.* Les États parties ne doivent pas, en privant une personne de sa nationalité ou en l'expulsant vers un autre pays, priver arbitrairement celle-ci de retourner dans son propre pays. [Italiques ajoutés; par. 21.]

[27] Bien que le par. 12(4) garantisse qu'il n'y ait pas d'immixtion *arbitraire* dans le droit d'entrer, l'interprétation que fait le Comité des droits de l'homme des Nations Unies de la portée du droit donne à penser que, dans les faits, les cas dans lesquels la privation du droit d'une personne d'entrer dans son pays pourrait être considérée comme raisonnable, « s'ils existent, sont rares ». Le droit d'entrer au Canada protégé par le par. 6(1) de la *Charte* devrait donc être interprété d'une manière qui soit compatible avec la protection générale conférée par le droit international.

[28] La portée étendue de la protection est aussi compatible avec le fait que le par. 6(1) de la *Charte* est soustrait à l'application de l'art. 33 : *Sauvé c. Canada (Directeur général des élections)*, 2002 CSC 68, [2002] 3 R.C.S. 519, par. 11. De plus, les autres droits conférés par l'art. 6 de la *Charte*, plus précisément au par. 6(2), sont assujettis à des restrictions expresses prévues dans la disposition comme telle, aux par. 6(3) et 6(4). Le fait que le par. 6(1) ne soit pas assujetti à ces restrictions confirme aussi sa plénitude.

[29] Enfin, dans *États-Unis d'Amérique c. Cotroni*, [1989] 1 R.C.S. 1469, une affaire d'extradition, la Cour a reconnu que le « rapport étroit qui existe entre un citoyen et son pays » commande une interprétation libérale d'un droit connexe énoncé au par. 6(1), à savoir le droit de demeurer au Canada (p. 1480).

[30] Ce qui nous amène aux dispositions portant sur le transfèrement international des détenus.

Tom Dunmore, Salame Abdulhamid, Walter Lumsden and Michael Doyle, on their own behalf and on behalf of the United Food and Commercial Workers International Union *Appellants*

v.

Attorney General for Ontario and Fleming Chicks *Respondents*

and

Attorney General of Quebec, Attorney General for Alberta, Canadian Labour Congress and Labour Issues Coordinating Committee ("LICC") *Interveners*

INDEXED AS: DUNMORE *v.* ONTARIO (ATTORNEY GENERAL)

Neutral citation: 2001 SCC 94.

File No.: 27216.

2001: February 19; 2001: December 20.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Freedom of association — Exclusion of agricultural workers from statutory labour relations regime — Whether exclusion infringes freedom of association — If so, whether infringement justifiable — Canadian Charter of Rights and Freedoms, ss. 1, 2(d) — Labour Relations and Employment Statute Law Amendment Act, 1995, S.O. 1995, c. 1, s. 80 — Labour Relations Act, 1995, S.O. 1995, c. 1, Sched. A, s. 3(b).

In 1994, the Ontario legislature enacted the *Agricultural Labour Relations Act, 1994* ("*ALRA*"), which extended trade union and collective bargaining rights to agricultural workers. Prior to the adoption of this legislation, agricultural workers had always been excluded from Ontario's labour relations regime. A year later, by virtue

Tom Dunmore, Salame Abdulhamid, Walter Lumsden et Michael Doyle, en leur propre nom et au nom de l'Union internationale des travailleurs et travailleuses unis de l'alimentation et du commerce *Appelants*

c.

Procureur général de la province de l'Ontario et Fleming Chicks *Intimés*

et

Procureur général du Québec, Procureur général de l'Alberta, Congrès du travail du Canada et Labour Issues Coordinating Committee (« LICC ») *Intervenants*

RÉPERTORIÉ : DUNMORE *c.* ONTARIO (PROCUREUR GÉNÉRAL)

Référence neutre : 2001 CSC 94.

N° du greffe : 27216.

2001 : 19 février; 2001 : 20 décembre.

Présents : Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour et LeBel.

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

Droit constitutionnel — Charte des droits — Liberté d'association — Exclusion des travailleurs agricoles du régime légal de relations de travail — L'exclusion porte-t-elle atteinte à la liberté d'association? — Dans cette éventualité, l'atteinte est-elle justifiable? — Charte canadienne des droits et libertés, art. 1, 2d) — Loi de 1995 modifiant des lois en ce qui concerne les relations de travail et l'emploi, L.O. 1995, ch. 1, art. 80 — Loi de 1995 sur les relations de travail, L.O. 1995, ch. 1, annexe A, art. 3b).

En 1994, la législature de l'Ontario édicte la *Loi de 1994 sur les relations de travail dans l'agriculture* (« *LRTA* ») qui reconnaît aux travailleurs agricoles le droit de se syndiquer et de négocier collectivement. Avant cette loi, les travailleurs agricoles avaient toujours été exclus du régime légal des relations de travail de

of s. 80 of the *Labour Relations and Employment Statute Law Amendment Act, 1995* ("*LRESLAA*"), the legislature repealed the *ALRA* in its entirety, in effect subjecting agricultural workers to s. 3(*b*) of the *Labour Relations Act, 1995* ("*LRA*"), which excluded them from the labour relations regime set out in the *LRA*. Section 80 also terminated any certification rights of trade unions, and any collective agreements certified, under the *ALRA*. The appellants brought an application challenging the repeal of the *ALRA* and their exclusion from the *LRA*, on the basis that it infringed their rights under ss. 2(*d*) and 15(1) of the *Canadian Charter of Rights and Freedoms*. Both the Ontario Court (General Division) and the Ontario Court of Appeal upheld the challenged legislation.

Held (Major J. dissenting): The appeal should be allowed. The impugned legislation is unconstitutional.

Per McLachlin C.J. and Gonthier, Iacobucci, Bastarache, Binnie, Arbour and LeBel JJ.: The purpose of s. 2(*d*) of the *Charter* is to allow the achievement of individual potential through interpersonal relationships and collective action. This purpose commands a single inquiry: has the state precluded activity because of its associational nature, thereby discouraging the collective pursuit of common goals? While the traditional four-part formulation of the content of freedom of association sheds light on this concept, it does not capture the full range of activities protected by s. 2(*d*). In some cases s. 2(*d*) should be extended to protect activities that are inherently collective in nature, in that they cannot be performed by individuals acting alone. Trade unions develop needs and priorities that are distinct from those of their members individually and cannot function if the law protects exclusively the lawful activities of individuals. The law must thus recognize that certain union activities may be central to freedom of association even though they are inconceivable on the individual level.

Ordinarily, the *Charter* does not oblige the state to take affirmative action to safeguard or facilitate the exercise of fundamental freedoms. There is no constitutional right to protective legislation *per se*. However, history has shown and Canada's legislatures have recognized that a posture of government restraint in the area of labour relations will expose most workers not only to a range of unfair labour practices, but potentially to legal liability under common law inhibitions on combinations and restraints of trade. In order to make the freedom to organize meaningful, in this very particular context, s. 2(*d*) of the *Charter* may impose a positive obligation on the state to extend protective legislation to unprotected groups. The distinction

l'Ontario. Un an plus tard, avec l'art. 80 de la *Loi de 1995 modifiant des lois en ce qui concerne les relations de travail et l'emploi* (« *LMLRTE* ») la législature abroge la *LRTA* dans sa totalité, ce qui a pour effet d'assujettir les travailleurs agricoles à l'al. 3*b*) de la *Loi de 1995 sur les relations de travail* (« *LRT* ») qui les exclut du régime des relations de travail établi par la *LRT*. De plus, l'article 80 met fin aux droits d'accréditation des syndicats et aux conventions collectives signées en vertu de la *LRTA*. Les appelants contestent l'abrogation de la *LRTA* et leur exclusion de la *LRT*, invoquant l'atteinte aux droits que leur confèrent l'al. 2*d*) et le par. 15(1) de la *Charte canadienne des droits et libertés*. La Cour de l'Ontario (Division générale) et la Cour d'appel de l'Ontario confirment la validité des lois contestées.

Arrêt (le juge Major est dissident) : L'appel est accueilli. Les textes législatifs contestés sont inconstitutionnels.

Le juge en chef McLachlin et les juges Gonthier, Iacobucci, Bastarache, Binnie, Arbour et LeBel : L'alinéa 2*d*) de la *Charte* a pour objet l'épanouissement individuel au moyen de relations interpersonnelles et de l'action collective. Cet objet commande une seule question : l'État a-t-il empêché l'activité en raison de sa nature associative, décourageant ainsi la poursuite collective d'objectifs communs? Si la formulation traditionnelle en quatre points du contenu de la liberté d'association clarifie la notion, elle ne rend pas compte de toute la gamme d'activités protégées par l'al. 2*d*). Dans certains cas, la protection de l'al. 2*d*) devrait couvrir des activités qui, par leur nature inhérente, sont collectives, en ce qu'elles ne peuvent être accomplies par une personne seule. Les syndicats ont des besoins et des priorités qui sont distincts de ceux de leurs membres individuels et ne peuvent fonctionner si la loi protège exclusivement des activités individuelles licites. La loi doit reconnaître que certaines activités syndicales peuvent être au cœur de la liberté d'association même si elles ne peuvent exister au niveau individuel.

Généralement, la *Charte* n'oblige pas l'État à prendre des mesures positives pour préserver et faciliter l'exercice de libertés fondamentales. Il n'existe pas de droit constitutionnel à la protection légale comme tel. Toutefois l'histoire a montré, et les législateurs canadiens ont reconnu, qu'une attitude de retenue de la part du gouvernement dans le domaine des relations de travail expose la plupart des travailleurs non seulement à diverses pratiques déloyales de travail, mais peut aussi engager leur responsabilité juridique en common law pour coalition ou restriction du commerce. Dans ce contexte très particulier, pour que la liberté syndicale ait un sens, l'al. 2*d*) de la *Charte* peut imposer à l'État

between positive and negative state obligations ought to be nuanced in the context of labour relations, in the sense that excluding agricultural workers from a protective regime contributes substantially to the violation of protected freedoms.

Several considerations circumscribe the possibility of challenging underinclusion under s. 2 of the *Charter*: (1) claims of underinclusion should be grounded in fundamental *Charter* freedoms rather than in access to a particular statutory regime; (2) the evidentiary burden in cases where there is a challenge to underinclusive legislation is to demonstrate that exclusion from a statutory regime permits a substantial interference with the exercise of protected s. 2(*d*) activity; and (3), in order to link the alleged *Charter* violation to state action, the context must be such that the state can be truly held accountable for any inability to exercise a fundamental freedom. The contribution of private actors to a violation of fundamental freedoms does not immunize the state from *Charter* review.

In order to establish a violation of s. 2(*d*) of the *Charter*, the appellants must demonstrate that their claim relates to activities that fall within the range of activities protected by s. 2(*d*) of the *Charter*, and that the impugned legislation has, either in purpose or effect, interfered with these activities. In this case, insofar as the appellants seek to establish and maintain an association of employees, their claim falls squarely within the protected ambit of s. 2(*d*). Moreover, the effective exercise of the freedoms in s. 2(*d*) require not only the exercise in association of the constitutional rights and freedoms and lawful rights of individuals, but the exercise of certain collective activities, such as making majority representations to one's employer. Conflicting claims concerning the meaning of troubling comments in the legislature make it impossible to conclude that the exclusion of agricultural workers from the *LRA* was intended to infringe their freedom to organize, but the effect of the exclusion in s. 3(*b*) of the *LRA* is to infringe their right to freedom of association.

The *LRA* is clearly designed to safeguard the exercise of the freedom to associate rather than to provide a limited statutory entitlement to certain classes of citizens. Through the right to organize inscribed in s. 5 of the *LRA* and the protection offered against unfair labour practices, the legislation recognizes that without a statutory vehicle employee associations are, in many cases, impossible. Here, the appellants do not claim a constitutional right to general inclusion in the *LRA*, but simply a constitutional freedom to organize a trade association. This freedom to

l'obligation positive d'étendre la protection légale à des groupes non protégés. La distinction entre obligations positives et négatives de l'État doit être nuancée dans le contexte des relations de travail, en ce sens que l'exclusion des travailleurs agricoles de l'application d'un régime de protection contribue substantiellement à la violation de libertés protégées.

Plusieurs considérations délimitent la possibilité de contester la non-inclusion sur le fondement de l'art. 2 de la *Charte* : (1) la contestation de la non-inclusion devrait reposer sur des libertés fondamentales garanties par la *Charte*, plutôt que sur l'accès à un régime légal précis; (2) la charge de preuve consiste à démontrer que l'exclusion du régime légal permet une entrave substantielle à l'exercice de l'activité protégée par l'al. 2*d*); et (3) pour établir le lien entre la violation alléguée de la *Charte* et la mesure gouvernementale, le contexte doit être tel que l'État peut vraiment être tenu responsable de toute incapacité d'exercer une liberté fondamentale. La participation de personnes privées à la violation de libertés fondamentales ne met pas l'État à l'abri d'un contrôle judiciaire fondé sur la *Charte*.

Pour établir l'atteinte à l'al. 2*d*) de la *Charte*, les appelants doivent prouver que leur demande vise des activités faisant partie de celles qu'il protège et que les dispositions contestées, par leur objet ou leur effet, compromettent ces activités. En l'espèce, dans la mesure où les appelants veulent constituer et maintenir une association d'employés, leur demande relève manifestement de la protection conférée par l'al. 2*d*) de la *Charte*. De plus, l'exercice réel des libertés conférées par l'al. 2*d*) exige non seulement l'exercice en association des droits et libertés constitutionnels et des droits légitimes des individus, mais aussi l'exercice de certaines activités collectives, comme la défense des intérêts de la majorité auprès de l'employeur. Les arguments contradictoires concernant le sens de commentaires troublants faits devant la législature rendent impossible la conclusion que l'exclusion des travailleurs agricoles de la *LRT* visait à faire obstacle à leur liberté syndicale, mais l'effet de l'exclusion prévue à l'al. 3*b*) de la *LRT* est une atteinte à leur droit à la liberté d'association.

La *LRT* vise clairement à protéger l'exercice de la liberté d'association, et non à accorder un droit limité à certaines catégories de citoyens. Par le droit de se syndiquer prévu à l'art. 5 de la *LRT* et la protection contre les pratiques déloyales, la loi reconnaît que l'absence de régime légal peut, dans bien des cas, rendre impossible l'association d'employés. Les appelants en l'espèce ne revendiquent pas un droit constitutionnel à l'inclusion générale dans la *LRT*, mais simplement la liberté constitutionnelle de former une association syndicale. Cette

organize exists independently of any statutory enactment, although its effective exercise may require legislative protection in some cases. The appellants have met the evidentiary burden of showing that they are substantially incapable of exercising their fundamental freedom to organize without the *LRA*'s protective regime. While the mere fact of exclusion from protective legislation is not conclusive evidence of a *Charter* violation, the evidence indicates that, but for the brief period covered by the *ALRA*, there has never been an agricultural workers' union in Ontario and agricultural workers have suffered repeated attacks on their efforts to unionize. The inability of agricultural workers to organize can be linked to state action. The exclusion of agricultural workers from the *LRA* functions not simply to permit private interferences with their fundamental freedoms, but to substantially reinforce such interferences. The inherent difficulties of organizing farm workers, combined with the threat of economic reprisal from employers, form only part of the reason why association is all but impossible in the agricultural sector in Ontario. Equally important is the message sent by the exclusion of agricultural workers from the *LRA*, which delegitimizes their associational activity and thereby contributes to its ultimate failure. The most palpable effect of the *LRESLAA* and the *LRA* is, therefore, to place a chilling effect on non-statutory union activity.

With respect to the s. 1 analysis, the evidence establishes that many farms in Ontario are family-owned and operated, and that the protection of the family farm is a pressing enough objective to warrant the infringement of s. 2(*d*) of the *Charter*. The economic objective of ensuring farm productivity is also important. Agriculture occupies a volatile and highly competitive part of the private sector economy, experiences disproportionately thin profit margins and, due to its seasonal character, is particularly vulnerable to strikes and lockouts.

There is also a rational connection between the exclusion of agricultural workers from Ontario's labour relations regime and the objective of protecting the family farm. Unionization leads to formalized labour-management relationships and gives rise to a relatively formal process of negotiation and dispute resolution. It is reasonable to speculate that unionization will threaten the flexibility and cooperation that is characteristic of the family farm. Yet this concern is only as great as the extent of the family farm structure in Ontario and does not necessarily apply to the right to form an agricultural association. The notion that employees should sacrifice their freedom to associate in order to maintain a flexible employment relationship should be carefully

liberté existe indépendamment de tout texte législatif, même si son exercice réel peut exiger parfois une protection légale. Les appelants ont apporté la preuve qu'ils sont essentiellement dans l'incapacité d'exercer leur liberté fondamentale de se syndiquer en l'absence du régime de protection de la *LRT*. Si la simple exclusion d'un régime de protection n'est pas la preuve concluante d'une violation de la *Charte*, la preuve indique que, sauf pour la brève période couverte par la *LRTA*, il n'y a jamais eu de syndicat de travailleurs agricoles en Ontario et que leurs efforts de syndicalisation se sont heurtés à des attaques répétées. L'incapacité des travailleurs agricoles de se syndiquer est liée à l'action de l'État. Leur exclusion de la *LRT* n'a pas simplement pour effet de permettre des atteintes privées à leurs libertés fondamentales, mais de les renforcer considérablement. Les difficultés inhérentes à l'organisation des travailleurs agricoles, de pair avec le risque de représailles financières de la part de l'employeur, n'expliquent qu'en partie l'impossibilité d'association dans le secteur agricole en Ontario. Tout aussi important est le message que transmet l'exclusion des travailleurs agricoles de la *LRT*, qui retire à l'activité associative sa légitimité et assure ultimement son échec. L'effet le plus manifeste de la *LMLRTE* et de la *LRT* est de paralyser l'activité syndicale hors d'un cadre légal.

Pour l'analyse selon l'article premier, il est établi qu'il existe en Ontario de nombreuses fermes dont la propriété et l'exploitation revêtent un caractère familial et que la protection de la ferme familiale est un objectif suffisamment urgent pour justifier l'atteinte à l'al. 2*d*) de la *Charte*. L'objectif économique d'assurer la productivité du secteur agricole est aussi un objectif important. L'agriculture est un secteur volatile et hautement concurrentiel de l'économie privée, ses marges de profit sont disproportionnellement minces et son caractère saisonnier la rend particulièrement vulnérable aux grèves et aux lock-out.

Il existe un lien rationnel entre l'exclusion de travailleurs agricoles du régime légal des relations de travail de l'Ontario et l'objectif de protection de la ferme familiale. La syndicalisation fait naître des rapports formels entre employés et employeurs et donne lieu à un processus relativement formel de négociation et de règlement des différends. Il est raisonnable de craindre que la syndicalisation compromette la souplesse et la collaboration caractéristiques de la ferme familiale. Cependant cette inquiétude ne devrait pas déborder le cadre de l'exploitation agricole familiale en Ontario et ne touche pas nécessairement le droit de former une association agricole. L'idée que des employés devraient renoncer à leur liberté de s'associer afin de préserver la souplesse des relations

circumscribed, as it could, if left unchecked, justify restrictions on unionization in many sectors of the economy.

The wholesale exclusion of agricultural workers from Ontario's labour relations regime does not minimally impair their right to freedom of association. The categorical exclusion of agricultural workers is unjustified where no satisfactory effort has been made to protect their basic right to form associations. The exclusion is overly broad as it denies the right of association to every sector of agriculture without distinction. The reliance on the family farm justification ignores an increasing trend in Canada towards corporate farming and complex agribusiness and does not justify the unqualified and total exclusion of all agricultural workers from Ontario's labour relations regime. More importantly, no justification is offered for excluding agricultural workers from all aspects of unionization, in particular those protections that are necessary for the effective formation and maintenance of employee associations. Nothing in the record suggests that protecting agricultural workers from the legal and economic consequences of forming an association would pose a threat to the family farm structure. Consequently, the total exclusion of agricultural workers from Ontario's labour relations regime is not justifiable under s. 1 of the *Charter*.

The appropriate remedy in this case is to declare the *LRESLAA* unconstitutional to the extent that it gives effect to the exclusion clause found in s. 3(*b*) of the *LRA*, and to declare s. 3(*b*) of the *LRA* unconstitutional. The declarations should be suspended for 18 months, thereby allowing amending legislation to be passed if the legislature sees fit to do so. Section 2(*d*) of the *Charter* only requires the legislature to provide a statutory framework that is consistent with the principles established in this case. At a minimum, these principles require that the statutory freedom to organize in s. 5 of the *LRA* be extended to agricultural workers, along with protections judged essential to its meaningful exercise, such as freedom to assemble, freedom from interference, coercion and discrimination and freedom to make representations and to participate in the lawful activities of the association. The appropriate remedy does not require or forbid the inclusion of agricultural workers in a full collective bargaining regime, whether it be the *LRA* or a special regime applicable only to agricultural workers.

It is unnecessary to consider the status of occupational groups under s. 15(1) of the *Charter*.

de travail devrait être soigneusement circonscrite car elle pourrait, en l'absence de balises, justifier la restriction de la syndicalisation dans de nombreux secteurs économiques.

L'exclusion en bloc des travailleurs agricoles du régime légal des relations de travail de l'Ontario n'est pas une atteinte minimale à leur liberté d'association. L'exclusion catégorique des travailleurs agricoles n'est pas justifiée quand aucun effort satisfaisant n'a été fait pour protéger leur droit fondamental de former des associations. L'exclusion est excessive car elle retire le droit d'association à tous les secteurs de l'agriculture sans distinction. L'argument de la protection de la ferme familiale ne tient pas compte de l'évolution de l'agriculture au Canada vers l'exploitation commerciale et l'agro-industrie et ne justifie pas l'exclusion totale et absolue de tous les travailleurs agricoles du régime légal des relations de travail de l'Ontario. De façon plus importante, on n'offre aucune justification de l'exclusion des travailleurs agricoles de tous les aspects de la syndicalisation, spécialement les protections nécessaires, dans les faits, à la formation et au maintien d'associations d'employés. Rien au dossier n'indique que protéger les travailleurs agricoles contre les conséquences juridiques et financières de la formation d'une association mettrait en danger la structure d'exploitation familiale. Par conséquent, l'exclusion en bloc des travailleurs agricoles de la *LRT* n'est pas justifiable en vertu de l'article premier de la *Charte*.

La réparation qui s'impose en l'espèce est de déclarer inconstitutionnelle la *LMLRTE* dans la mesure où elle donne effet à la disposition d'exclusion de l'al. 3*b*) de la *LRT*, et de déclarer inconstitutionnel l'al. 3*b*) de la *LRT*. L'effet des déclarations devrait être suspendu pendant 18 mois pour permettre l'adoption de toute loi modificative que la législature estimerait nécessaire. L'alinéa 2*d*) de la *Charte* oblige seulement le législateur à établir un cadre législatif compatible avec les principes dégagés en l'espèce. Au minimum, ces principes exigent que soit reconnu aux travailleurs agricoles le droit de se syndiquer prévu à l'art. 5 de la *LRT*, avec les garanties jugées essentielles à son exercice véritable, comme la liberté de se réunir, de participer aux activités légitimes de l'association et de présenter des revendications, et la protection de l'exercice de ces libertés contre l'ingérence, les menaces et la discrimination. La réparation n'exige pas et n'interdit pas l'inclusion des travailleurs agricoles dans un régime complet de négociation collective, que ce soit la *LRT* ou un régime spécial applicable uniquement aux travailleurs agricoles.

Il est inutile d'examiner le statut des travailleurs agricoles en vertu du par. 15(1) de la *Charte*.

Per L'Heureux-Dubé J.: The purpose of s. 80 of the *LRESLAA* and s. 3(*b*) of the *LRA* is to prevent agricultural workers from unionizing, and this purpose infringes s. 2(*d*) of the *Charter*. In the record, there is clear evidence of intent on the part of the government of Ontario to breach the s. 2(*d*) rights of agricultural workers, including repeated instances where government officials indicated that the impugned legislation's intent was to hinder union-related activities in the agricultural sector. On a balance of probabilities, the evidence demonstrates that the legislature's purpose in enacting the exclusion was to ensure that persons employed in agriculture remained vulnerable to management interference with their associational activities, in order to prevent the undesirable consequences which it had feared would result from agricultural workers' labour associations. Furthermore, the evidence does not reveal any positive effects upon the associational freedom of agricultural workers stemming from their exclusion from the *LRA*. The reality of the labour market, which has led to the development of protective labour legislation, indicates that when the protection is removed without any restriction or qualification, associational rights are often infringed, or have the potential to be infringed, to an extent not confined to unionization activities. Consequently, it was in the reasonable contemplation of the government at the time of the enactment of the impugned legislation that the effect of the exclusion clause would be to affect associational freedoms beyond the realm of unionization, thus breaching s. 2(*d*) *Charter* rights.

In the present case, there is a positive obligation on the government to provide legislative protection against unfair labour practices. A positive duty to assist excluded groups generally arises when the claimants are in practice unable to exercise a *Charter* right. In the case of agricultural workers in Ontario, the freedom to associate becomes meaningless in the absence of a duty of the State to take positive steps to ensure that this right is not a hollow one. The government has breached the s. 2(*d*) rights of agricultural workers because it has enacted a new labour statute which leaves them perilously vulnerable to unfair labour practices. The absolute removal of *LRA* protection from agricultural workers has created a situation where employees have reason to fear retaliation against associational activity by employers. In light of the reality of the labour market, the failure of the Ontario legislature to spell out a regime defining which associational activities are to be protected from management retaliation has a chilling effect on freedom of association for agricultural workers. The chilling effect of the impugned provision has forced agricultural workers to abandon associational efforts and restrain themselves from further associational initiatives. The freedom of association of agricultural workers under the *LRA* can be

Le juge L'Heureux-Dubé : L'objet de l'art. 80 de la *LMLRTE* et de l'al. 3*b*) de la *LRT* est d'empêcher les travailleurs agricoles de se syndiquer et cet objet contrevient à l'al. 2*d*) de la *Charte*. Le dossier établit clairement l'intention du gouvernement de l'Ontario de porter atteinte aux droits des travailleurs agricoles suivant l'al. 2*d*), notamment les nombreuses déclarations de représentants du gouvernement indiquant que l'intention des dispositions contestées était de faire obstacle aux activités syndicales dans le secteur agricole. Selon la prépondérance des probabilités, la preuve montre que l'objectif du législateur, en adoptant la clause d'exclusion, était de faire en sorte que les personnes employées dans l'agriculture restent vulnérables à l'ingérence de la direction dans leurs activités associatives, de manière à éviter les conséquences peu souhaitables qu'il craignait devoir résulter des associations de travailleurs agricoles. De plus, la preuve ne révèle aucun effet positif de l'exclusion des travailleurs agricoles de la *LRT* sur leur liberté d'association. La réalité concrète du marché du travail, qui a conduit à l'élaboration de mesures législatives de protection, montre que le retrait de la protection, sans restrictions ni conditions, s'accompagne souvent ou risque de s'accompagner d'atteintes aux droits d'association, des atteintes dont la portée ne se limite pas aux seules activités syndicales. Il était donc raisonnablement prévisible pour le gouvernement que l'adoption de la disposition d'exclusion affecterait les libertés d'association au-delà du domaine de la syndicalisation, portant ainsi atteinte aux droits protégés par l'al. 2*d*) de la *Charte*.

En l'espèce, le gouvernement a l'obligation positive de fournir une protection légale contre les pratiques déloyales de travail. En général, l'incapacité pratique d'exercer un droit garanti par la *Charte* fait naître une obligation positive d'aider les groupes exclus. Pour les travailleurs agricoles en Ontario, la liberté d'association perd tout son sens en l'absence d'un devoir de l'État de prendre des mesures positives pour que ce droit ne soit pas un droit fictif. Le gouvernement a porté atteinte aux droits des travailleurs agricoles selon l'al. 2*d*) parce qu'il a adopté une nouvelle législation du travail qui les rend dangereusement vulnérables aux pratiques déloyales. Le retrait absolu des travailleurs agricoles de la protection de la *LRT* a créé une situation dans laquelle les employés ont des raisons de craindre des représailles de leurs employeurs contre leur activité associative. Dans le contexte concret du marché du travail, l'omission du législateur ontarien de préciser un régime définissant quelles activités associatives doivent être protégées des représailles de la direction crée un effet paralysant sur la liberté d'association des travailleurs agricoles. L'effet paralysant de la disposition attaquée a forcé des travailleurs agricoles à abandonner leurs efforts associatifs et à s'abstenir d'engager de nouvelles initiatives

characterized as a hollow right because it amounts to no more than the freedom to suffer serious adverse legal and economic consequences. In a constitutional democracy, not only must fundamental freedoms be protected from State action, they must also be given "breathing space".

Since the impugned legislation infringes s. 2(*d*), it is necessary to make but a single observation with respect to whether the exclusion of agricultural workers from the *LRA* constitutes discrimination under s. 15(1) of the *Charter*. The occupational status of agricultural workers constitutes an "analogous ground" for the purposes of an analysis under s. 15(1). There is no reason why an occupational status cannot, in the right circumstances, identify a protected group. Employment is a fundamental aspect of an individual's life and an essential component of identity, personal dignity, self-worth and emotional well-being. Agricultural workers generally suffer from disadvantage and the effect of the distinction made by their exclusion from the *LRA* is to devalue and marginalize them within Canadian society. Agricultural workers, in light of their relative status, low levels of skill and education, and limited employment and mobility, can change their occupational status only at great cost, if at all.

The impugned legislation is not justifiable under s. 1 of the *Charter*. While labour statutes, such as the *LRA*, fulfill important objectives in our society, s. 3(*b*) does not pursue a pressing and substantial concern justifying the breach of the appellants' *Charter* rights. It cannot be argued that Ontario agriculture has unique characteristics which are incompatible with legislated collective bargaining. It is also difficult to accept that none of the *LRA*'s purposes, enumerated at s. 2 of the *LRA*, which speak to the basic characteristics required for the operation of a modern business, are inapplicable in the agricultural sector. At the very least, the expressions of intent found in s. 2 of the *LRA* would apply to factory-like agricultural enterprises. Without enunciating a constitutionally valid reason, one cannot countenance a breach of a *Charter* guaranteed fundamental freedom on grounds which appear to be based on a policy geared to enhance the economic well-being of private enterprises. The government is entitled to provide financial and other support to agricultural operations, including family farms. However, it is not open to the government to do so at the expense of the *Charter* rights of those who are employed in such activities, if such a policy choice cannot be demonstrably justified.

associatives. La liberté d'association des travailleurs agricoles sous le régime de la *LRT* n'est qu'un droit fictif puisqu'elle n'est rien d'autre que la liberté de subir de graves préjudices sur les plans juridique et économique. Dans une démocratie constitutionnelle, il ne suffit pas de protéger les libertés fondamentales contre les mesures de l'État : il faut aussi leur assurer un « espace vital ».

Puisque les dispositions attaquées contreviennent à l'al. 2*d*), une seule remarque s'impose sur la question de savoir si l'exclusion des travailleurs agricoles de la *LRT* est discriminatoire selon le par. 15(1) de la *Charte*. Le statut professionnel des travailleurs agricoles est un « motif analogue » aux fins de l'analyse selon le par. 15(1). Rien ne justifie que le statut professionnel ne puisse, lorsque les circonstances s'y prêtent, définir un groupe protégé. L'emploi est un aspect fondamental de la vie d'une personne et une composante essentielle de son sens de l'identité, de sa dignité, de sa valorisation et de son bien-être émotionnel. Les travailleurs agricoles souffrent généralement d'un désavantage et la distinction créée par leur exclusion de la *LRT* a pour effet de les dévaloriser et de les marginaliser au sein de la société canadienne. Les travailleurs agricoles, compte tenu de leur position, de leur niveau de formation et d'instruction, et de leur mobilité professionnelle limitée, ne peuvent modifier leur statut professionnel qu'à un prix considérable, si tant est qu'ils le peuvent.

Les dispositions législatives ne sont pas justifiables en vertu de l'article premier de la *Charte*. Si les lois sur les relations de travail comme la *LRT* permettent de réaliser d'importants objectifs dans notre société, l'al. 3*b*) ne vise pas un objectif urgent et réel justifiant la violation des droits des appelants selon la *Charte*. On ne peut soutenir que l'agriculture de l'Ontario présente des caractéristiques uniques qui la rendent incompatible avec tout régime légal de négociation collective. Il est aussi difficile d'accepter qu'aucun des objets énumérés à l'art. 2 de la *LRT*, visant les caractéristiques fondamentales nécessaires à l'exploitation d'une entreprise moderne, ne soit réalisable dans le secteur agricole. Les expressions d'intention à l'art. 2 de la *LRT* s'appliqueraient au moins aux entreprises fonctionnant comme des usines. On ne peut, sans énoncer de raison constitutionnellement valide, accepter la violation d'une liberté fondamentale garantie par la *Charte* pour des motifs qui semblent fondés sur une politique visant l'amélioration de la santé économique des entreprises privées. Le gouvernement est en droit d'apporter une aide financière et autre aux exploitations agricoles, y compris aux fermes familiales, mais il ne peut le faire au détriment de droits garantis par la *Charte* aux personnes qui sont employées à de telles activités, lorsque la justification d'un tel choix de politique ne peut être démontrée.

Even if the impugned legislation pursued a valid objective, the absoluteness of the exclusion clause, barring all persons employed in agriculture from all components of the *LRA*, speaks to the lack of proportionality between the perceived ills to be avoided and their remedy. First, a rational connection between the objective of securing the well-being of the agricultural sector in Ontario and the exclusion of persons employed in agriculture from all associational protections contained in the *LRA* has not been established. If the good labour management principles outlined in s. 2 of the *LRA* have a basis in fact, then barring all persons employed in agriculture from all the benefits under the *LRA* may have the opposite effect. Second, the complete exclusion of agricultural workers from the *LRA* does not minimally impair their *Charter* rights. Such a blunt measure can hardly be characterized as achieving a delicate balance among the interests of labour and those of management and the public. It weakens the case for deference to the legislature. This is further aggravated because those affected by the exclusion are not only vulnerable as employees but are also vulnerable as members of society with low income, little education and scant security or social recognition. The current law is not carefully tailored to balance the *Charter* freedoms of persons employed in agriculture in Ontario and the societal interest in harmonious relations in the labour market. While the important role that family farms play in Ontario agriculture must be recognized, such a role is not unique to Ontario. Further, both families and farms have evolved. There is no obvious connection between the exclusion of agricultural workers from the *LRA* and farmers or family farms. A city-based corporation could be operating an agricultural entity and benefit from the restrictions on the freedoms of association of its agricultural workers. Labour statutes in other provinces contain agricultural exemptions that are narrower than the one contained in the *LRA*. The objective of securing the well-being of the agricultural sector in Ontario can be achieved through a legislative mechanism that is less restrictive of free association than the existing complete exclusion of agricultural workers from the *LRA*.

Per Major J. (dissenting): The appellants failed to demonstrate that the impugned legislation has, either in purpose or effect, infringed activities protected by s. 2(*d*) of the *Charter*. In particular, s. 2(*d*) does not impose a positive obligation of protection or inclusion on the state in this case. Prior to the enactment of the *LRA*, agricultural workers had historically faced significant difficulties organizing and the appellants did not establish that the state is causally responsible for the inability of agricultural workers to exercise a fundamental freedom.

Même si la disposition poursuivait un objectif valide, le caractère absolu de la clause d'exclusion qui vise toutes les personnes employées à l'agriculture de tous les éléments de la *LRT*, révèle un manque de proportionnalité entre les maux qu'on cherche à éviter et leur remède. Premièrement, on n'a pas établi de lien rationnel entre l'objectif d'assurer la santé du secteur agricole en Ontario et l'exclusion de personnes employées à l'agriculture de toutes les protections en matière d'association que contient la *LRT*. Si les principes de saine gestion de la main-d'œuvre énoncés à l'art. 2 de la *LRT* ont un fondement dans la réalité, alors le fait d'exclure la main-d'œuvre agricole de tous les avantages conférés par la *LRT* peut avoir l'effet inverse. Deuxièmement, l'exclusion totale des travailleurs agricoles de la *LRT* n'est pas une atteinte minimale à leurs droits selon la *Charte*. Une mesure aussi brutale ne peut être considérée comme établissant un équilibre délicat entre les intérêts des travailleurs, ceux du patronat et ceux du public. Elle affaiblit la thèse de la retenue envers le législateur. La situation est aggravée du fait que les personnes touchées par l'exclusion sont vulnérables non seulement en tant qu'employés, mais aussi en tant que membres de la société ayant de faibles revenus, peu d'instruction et peu de sécurité d'emploi ou de reconnaissance sociale. La loi actuelle n'est pas soigneusement adaptée pour établir un équilibre entre les libertés que la *Charte* garantit aux personnes employées à l'agriculture en Ontario et l'intérêt qu'a la société à profiter de relations harmonieuses au sein du marché du travail. S'il faut reconnaître le rôle important que les fermes familiales jouent dans l'agriculture ontarienne, ce rôle n'est pas unique à l'Ontario et les familles tout autant que les fermes ont évolué. Il n'y a aucun lien évident entre l'exclusion des travailleurs agricoles de la *LRT* et la notion de fermier ou de ferme familiale. Une société commerciale en milieu urbain pourrait fort bien exploiter une entité agricole et profiter de la limitation de la liberté d'association de ses employés agricoles. La législation du travail d'autres provinces contient des exceptions pour l'agriculture plus restreintes que ce que contient la *LRT*. L'objectif d'assurer la santé du secteur agricole en Ontario peut être atteint au moyen d'une mesure législative qui restreint moins la liberté d'association que l'exclusion totale actuelle des travailleurs agricoles de la *LRT*.

Le juge Major (dissident) : Les appelants n'ont pas réussi à démontrer que les dispositions contestées, par leur objet ou leur effet, entravent des activités protégées par l'al. 2*d*) de la *Charte*. En particulier, l'al. 2*d*) n'impose pas en l'espèce d'obligation positive de protection ou d'inclusion à l'État. Les travailleurs agricoles faisaient face à d'importantes difficultés à se syndiquer avant l'adoption de la *LRT* et les appelants n'ont pas réussi à établir que l'État est la cause de l'incapacité des travailleurs agricoles d'exercer une liberté fondamentale.

Agricultural workers are not an analogous group for the purposes of s. 15(1) of the *Charter* and, as a result, the exclusion of agricultural workers from the *LRA* does not violate their equality rights.

Cases Cited

By Bastarache J.

Referred to: *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *Ferrell v. Ontario (Attorney General)* (1997), 149 D.L.R. (4th) 335; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *PSAC v. Canada*, [1987] 1 S.C.R. 424; *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460; *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367; *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157; *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211; *R. v. Advance Cutting & Coring Ltd.*, [2001] 3 S.C.R. 209, 2001 SCC 70; *R. v. Skinner*, [1990] 1 S.C.R. 1235; *Syndicat catholique des employés de magasins de Québec Inc. v. Compagnie Paquet Ltée*, [1959] S.C.R. 206; *McGavin Toastmaster Ltd. v. Ainscough*, [1976] 1 S.C.R. 718; *R. v. Beaulac*, [1999] 1 S.C.R. 768; *Haig v. Canada*, [1993] 2 S.C.R. 995; *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229; *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2; *Wellington Mushroom Farm*, [1980] O.L.R.B. Rep. May 813; *Calvert-Dale Estates Ltd.*, [1971] O.L.R.B. Rep. Feb. 58; *Spruceleigh Farms*, [1972] O.L.R.B. Rep. Oct. 860; *Cuddy Chicks Ltd.*, [1988] O.L.R.B. Rep. May 468, application for judicial review dismissed (1988), 66 O.R. (2d) 284, aff'd (1989), 70 O.R. (2d) 179, aff'd [1991] 2 S.C.R. 5; *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69; *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232; *South Peace Farms and Oil, Chemical and Atomic Workers International Union, Local No. 9-686*, [1977] 1 Can. L.R.B.R. 441; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519.

Les travailleurs agricoles ne constituent pas un groupe analogue pour les fins du par. 15(1) de la *Charte* et, par conséquent, leur exclusion de la *LRT* ne viole pas leurs droits à l'égalité.

Jurisprudence

Citée par le juge Bastarache

Arrêts mentionnés : *Delisle c. Canada (Sous-procureur général)*, [1999] 2 R.C.S. 989; *SDGMR c. Dolphin Delivery Ltd.*, [1986] 2 R.C.S. 573; *Ferrell c. Ontario (Attorney General)* (1997), 149 D.L.R. (4th) 335; *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295; *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927; *Renvoi relatif à la Public Service Employee Relations Act (Alb.)*, [1987] 1 R.C.S. 313; *AFPC c. Canada*, [1987] 1 R.C.S. 424; *SDGMR c. Saskatchewan*, [1987] 1 R.C.S. 460; *Institut professionnel de la Fonction publique du Canada c. Territoires du Nord-Ouest (Commissaire)*, [1990] 2 R.C.S. 367; *Office canadien de commercialisation des œufs c. Richardson*, [1998] 3 R.C.S. 157; *Lavigne c. Syndicat des employés de la fonction publique de l'Ontario*, [1991] 2 R.C.S. 211; *R. c. Advance Cutting & Coring Ltd.*, [2001] 3 R.C.S. 209, 2001 CSC 70; *R. c. Skinner*, [1990] 1 R.C.S. 1235; *Syndicat catholique des employés de magasins de Québec Inc. c. Compagnie Paquet Ltée*, [1959] R.C.S. 206; *McGavin Toastmaster Ltd. c. Ainscough*, [1976] 1 R.C.S. 718; *R. c. Beaulac*, [1999] 1 R.C.S. 768; *Haig c. Canada*, [1993] 2 R.C.S. 995; *Assoc. des femmes autochtones du Canada c. Canada*, [1994] 3 R.C.S. 627; *R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713; *Vriend c. Alberta*, [1998] 1 R.C.S. 493; *Law c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1999] 1 R.C.S. 497; *McKinney c. Université de Guelph*, [1990] 3 R.C.S. 229; *Machtinger c. HOJ Industries Ltd.*, [1992] 1 R.C.S. 986; *Wallace c. United Grain Growers Ltd.*, [1997] 3 R.C.S. 701; *R. c. Oakes*, [1986] 1 R.C.S. 103; *Thomson Newspapers Co. c. Canada (Procureur général)*, [1998] 1 R.C.S. 877; *R. c. Sharpe*, [2001] 1 R.C.S. 45, 2001 CSC 2; *Wellington Mushroom Farm*, [1980] O.L.R.B. Rep. May 813; *Calvert-Dale Estates Ltd.*, [1971] O.L.R.B. Rep. Feb. 58; *Spruceleigh Farms*, [1972] O.L.R.B. Rep. Oct. 860; *Cuddy Chicks Ltd.*, [1988] O.L.R.B. Rep. May 468, demande de contrôle judiciaire rejetée (1988), 66 O.R. (2d) 284, conf. par (1989), 70 O.R. (2d) 179, conf. par [1991] 2 R.C.S. 5; *Osborne c. Canada (Conseil du Trésor)*, [1991] 2 R.C.S. 69; *Rocket c. Collège royal des chirurgiens dentistes d'Ontario*, [1990] 2 R.C.S. 232; *South Peace Farms and Oil, Chemical and Atomic Workers International Union, Local No. 9-686*, [1977] 1 Can. L.R.B.R. 441; *Rodriguez c. Colombie-Britannique (Procureur général)*, [1993] 3 R.C.S. 519.

Rod Wiltshire, for the intervener the Attorney General for Alberta.

Steven Barrett, for the intervener the Canadian Labour Congress.

Written submissions only by *John C. Murray* and *Jonathan L. Dye*, for the intervener the Labour Issues Coordinating Committee.

The judgment of McLachlin C.J. and Gonthier, Iacobucci, Bastarache, Binnie, Arbour and LeBel JJ. was delivered by

BASTARACHE J. —

I. Introduction

This appeal concerns the exclusion of agricultural workers from Ontario's statutory labour relations regime. The appellants, individual farm workers and union organizers, challenge the exclusion as a violation of their freedom of association and equality rights under the *Canadian Charter of Rights and Freedoms*. In particular, they argue that the *Labour Relations and Employment Statute Law Amendment Act, 1995*, S.O. 1995, c. 1 ("*LRESLAA*"), combined with s. 3(*b*) of the Ontario *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A ("*LRA*"), prevents them from establishing, joining and participating in the lawful activities of a trade union. In addition, they claim that the *LRESLAA* and the *LRA* violate their equality rights under s. 15(1) of the *Charter* by denying them a statutory protection enjoyed by most occupational groups in Ontario.

This is the first time this Court has been asked to review the total exclusion of an occupational group from a statutory labour relations regime, where that group is not employed by the government and has demonstrated no independent ability to organize. For this reason, this appeal raises novel issues of state responsibility under s. 2(*d*) of the *Charter*, notwithstanding its apparent similarity to recent labour relations jurisprudence. After considering these issues, I conclude that the total exclusion of agricultural workers from the *LRA*

Rod Wiltshire, pour l'intervenant le procureur général de l'Alberta.

Steven Barrett, pour l'intervenant le Canadian Labour Congress.

Argumentation écrite seulement par *John C. Murray* et *Jonathan L. Dye*, pour l'intervenant le Labour Issues Coordinating Committee.

Version française du jugement du juge en chef McLachlin et des juges Gonthier, Iacobucci, Bastarache, Binnie, Arbour et LeBel rendu par

LE JUGE BASTARACHE —

I. Introduction

1 Ce pourvoi porte sur l'exclusion des travailleurs agricoles du régime légal des relations de travail de l'Ontario. Les appelants, travailleurs agricoles individuels et organisateurs syndicaux, contestent l'exclusion comme violation de leur liberté d'association et de leurs droits à l'égalité en vertu de la *Charte canadienne des droits et libertés.* Plus particulièrement, ils font valoir que la *Loi de 1995 modifiant des lois en ce qui concerne les relations de travail et l'emploi*, L.O. 1995, ch. 1 (« *LMLRTE* »), de pair avec l'al. 3*b*) de la *Loi de 1995 sur les relations de travail*, L.O. 1995, ch. 1, annexe A (« *LRT* »), les empêche de former un syndicat, d'adhérer à un syndicat et de participer à des activités syndicales licites. Ils soutiennent en outre que la *LMLRTE* et la *LRT* violent leurs droits à l'égalité suivant le par. 15(1) de la *Charte* en les privant de la protection légale accordée à la plupart des groupes professionnels en Ontario.

2 Notre Cour est appelée pour la première fois à se prononcer sur l'exclusion totale d'un régime légal de relations de travail frappant un groupe professionnel dont les membres ne sont pas des employés de l'État et n'ont manifesté aucune capacité de s'organiser indépendamment. C'est pourquoi le présent pourvoi soulève des questions nouvelles concernant la responsabilité de l'État en vertu de l'al. 2*d*) de la *Charte*, malgré sa ressemblance apparente avec des arrêts récents en matière de relations de travail. Après examen de ces questions, je conclus

violates s. 2(*d*) of the *Charter* and cannot be justified under s. 1. Accordingly, I conclude that, at a minimum, whatever protections are necessary to establish and maintain employee associations should be extended to persons employed in agriculture in Ontario. I am also of the view that it is not necessary to consider the status of agricultural workers under s. 15(1) of the *Charter*; assuming without deciding the existence of a s. 15(1) violation, such a violation would not alter the remedy I propose.

II. Factual Background

3 Although agricultural workers have been excluded from Ontario's labour relations regime since 1943, the impetus for this appeal was the passage of the *LRESLAA*. The *LRESLAA* was enacted pursuant to an initiative of Ontario's Progressive Conservative government in 1995; it repealed the only statute ever to extend trade union and collective bargaining rights to Ontario's agricultural workers. That short-lived statute, the *Agricultural Labour Relations Act, 1994*, S.O. 1994, c. 6 ("*ALRA*"), was enacted pursuant to an initiative of the New Democratic Party government in 1994 following the recommendations in the *Report of the Task Force on Agricultural Labour Relations: Report to the Minister of Labour* (June 1992). The *ALRA* lasted from June 23, 1994 to November 10, 1995, during which time the United Food and Commercial Workers Union ("UFCW") was certified as the bargaining agent for approximately 200 workers at the Highline Produce Limited mushroom factory in Leamington, Ontario. The UFCW also filed two other certification applications during the period of the *ALRA*, one for the workers at the Kingsville Mushroom Farm Inc., and the other for the workers at the respondent Fleming Chicks. These certification activities came to an end when, with the passage of the *LRESLAA* in 1995, the *ALRA* was repealed in its entirety. In addition to terminating any agreements certified under the *ALRA*, the *LRESLAA* terminated any certification rights of trade unions and prohibited employers from punishing workers for any union activity con-

que l'exclusion totale des travailleurs agricoles de la *LRT* porte atteinte à l'al. 2*d*) de la *Charte* et qu'elle ne peut se justifier au regard de l'article premier. Par conséquent, je conclus que, au minimum, les protections nécessaires à la formation et au maintien d'associations d'employés devraient être offertes aux personnes employées dans l'agriculture en Ontario. J'estime aussi qu'il n'est pas nécessaire d'étudier le statut des travailleurs agricoles en fonction du par. 15(1) de la *Charte*; à supposer, sans trancher la question, qu'il y ait atteinte au par. 15(1), cette atteinte ne modifierait pas la réparation que je propose.

II. Les faits

Bien que les travailleurs agricoles soient exclus du régime légal des relations de travail de l'Ontario depuis 1943, c'est l'adoption de la *LMLRTE* qui est à l'origine du pourvoi. La *LMLRTE* est adoptée en 1995 à l'initiative du gouvernement progressiste-conservateur de l'Ontario; elle abroge la seule loi qui ait jamais fait bénéficier les travailleurs agricoles ontariens du droit de se syndiquer et de négocier collectivement. Cette loi de courte durée, la *Loi de 1994 sur les relations de travail dans l'agriculture*, L.O. 1994, ch. 6 (« *LRTA* »), avait été adoptée à l'initiative du gouvernement néo-démocrate en 1994 conformément aux recommandations du *Rapport du Groupe d'étude sur les relations de travail dans le secteur agricole : Rapport présenté au ministère du Travail* (juin 1992). La *LRTA* est en vigueur du 23 juin 1994 au 10 novembre 1995 et, pendant cette période, l'Union internationale des travailleurs et travailleuses unis de l'alimentation et du commerce (« TUAC ») est accréditée à titre d'agent négociateur d'environ 200 personnes travaillant à la champignonnière Highline Produce Limited, à Leamington (Ontario). Pendant la même période, le syndicat fait deux autres demandes d'accréditation, l'une visant les travailleurs de Kingsville Mushroom Farm Inc., et l'autre les travailleurs de l'intimée Fleming Chicks. Les procédures d'accréditation prennent fin lorsque, en 1995, la *LMLRTE* abroge la *LRTA* dans sa totalité. En plus de mettre fin aux conventions signées sous le régime de la *LRTA*, la *LMLRTE* révoque tous les

their interests with respect to labour relations" (see *Delisle*, *supra*, at para. 30). In addition, I left open the possibility that s. 2 of the *Charter* may impose "a positive obligation of protection or inclusion on Parliament or the government . . . in exceptional circumstances which are not at issue in the instant case" (para. 33).

Even before *Delisle*, Le Dain J. recognized in the *Alberta Reference*, *supra*, that s. 2(*d*) protected workers' freedom to organize "without penalty or reprisal", making no distinction between workers employed by government or private entities (p. 391). What this dictum recognized, in my view, is that without the necessary protection, the freedom to organize could amount "to no more than the freedom to suffer serious adverse legal and economic consequences" (see H. W. Arthurs et al., *Labour Law and Industrial Relations in Canada* (4th ed. 1993), at para. 431). Perhaps more importantly for this appeal, this dictum implies that total exclusion from a regime protecting the freedom to organize could engage not only s. 15(1) of the *Charter*, but also s. 2(*d*) of the *Charter*. Where a group is denied a statutory benefit accorded to others, as is the case in this appeal, the normal course is to review this denial under s. 15(1) of the *Charter*, not s. 2(*d*) (see *Haig v. Canada*, [1993] 2 S.C.R. 995; *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627 ("*NWAC*"); *Delisle*, *supra*). This was properly recognized by Sharpe J. who noted that "by 'dipping its toe in the water', and affording or enhancing the rights of some", the government is not obliged to "go all the way and ensure the enjoyment of rights by all" (p. 207). However, it seems to me that apart from any consideration of a claimant's dignity interest, exclusion from a protective regime may in some contexts amount to an affirmative interference with the effective exercise of a protected freedom. In such a case, it is not so much the differential treatment that is at issue, but the fact that the government is creating conditions which in effect substantially interfere with the exercise of a constitutional right; it has been held in the s. 2(*a*) context, for example, that "protection of one religion and the concomitant non-protection of others imports disparate impact destructive of the religious

qui plus est, qu'ils ne doivent pas s'associer pour défendre leurs intérêts en matière de relations du travail » (voir *Delisle*, par. 30). Je ne me prononce pas sur la possibilité que l'art. 2 de la *Charte* peut imposer une « obligation positive de protection ou d'inclusion au Parlement ou au gouvernement [. . .] dans des circonstances exceptionnelles qui ne sont pas invoquées en l'espèce » (par. 33).

Même avant *Delisle*, le juge Le Dain reconnaissait dans le *Renvoi relatif à l'Alberta*, précité, que l'al. 2*d*) garantissait aux travailleurs le droit de se syndiquer « sans faire l'objet d'une peine ou de représailles », ne faisant aucune distinction entre les travailleurs du secteur public et ceux du secteur privé (p. 391). Cette observation indique, à mon sens, que, sans la protection voulue, la liberté de se syndiquer pouvait n'être [TRADUCTION] « rien d'autre que la liberté de subir de graves préjudices sur les plans juridique et économique » (voir H. W. Arthurs et autres, *Labour Law and Industrial Relations in Canada* (4e éd. 1993), par. 431). Il est peut-être plus important encore aux fins du présent pourvoi de souligner que cette observation laisse entendre que l'exclusion totale d'un régime protégeant la liberté syndicale pourrait porter atteinte non seulement au par. 15(1), mais aussi à l'al. 2*d*) de la *Charte*. Lorsqu'une loi refuse à un groupe de personnes un avantage qu'elle accorde à d'autres, comme c'est le cas en l'espèce, la démarche habituelle consiste à l'examiner en fonction du par. 15(1), et non de l'al. 2*d*) (voir *Haig c. Canada*, [1993] 2 R.C.S. 995; *Assoc. des femmes autochtones du Canada c. Canada*, [1994] 3 R.C.S. 627 (« *AFAC* »), et *Delisle*, précité). Le juge Sharpe en convient à juste titre : [TRADUCTION] « lorsqu'il entrebâille la porte et accorde des droits à certains ou les accroît », le gouvernement n'est pas tenu « d'ouvrir la porte toute grande et de conférer les mêmes droits à tous » (p. 207). Toutefois j'estime qu'indépendamment de l'atteinte éventuelle au droit à la dignité, l'exclusion d'un régime de protection peut, dans certains contextes, équivaloir à une entrave manifeste à l'exercice réel d'une liberté garantie. En pareil cas, ce n'est pas tant le traitement différent qui est en cause, que le fait que le gouvernement crée des conditions qui ont pour effet d'entraver considérablement l'exercice d'un droit constitutionnel; dans

freedom of the collectivity" (see *Big M Drug Mart*, *supra*, at p. 337). This does not mean that there is a constitutional right to protective legislation *per se*; it means legislation that is underinclusive may, in unique contexts, substantially impact the exercise of a constitutional freedom.

23 This brings me to the central question of this appeal: can excluding agricultural workers from a statutory labour relations regime, without expressly or intentionally prohibiting association, constitute a substantial interference with freedom of association? A preliminary answer to this question may be found in *Haig*, *supra*, where L'Heureux-Dubé J. recognized that "a situation might arise in which, in order to make a fundamental freedom meaningful, a posture of restraint would not be enough, and positive governmental action might be required" (p. 1039). Although such a situation did not arise in that case, at least three observations are in order. First, the benefit sought in *Haig*, namely, participation in a national referendum, was, unlike inclusion in the *LRA*, not designed to safeguard the exercise of a fundamental freedom; thus, this Court was able to reject the appellants' claim for positive state action on the grounds that it would constitutionalize a very limited statutory regime. Second, there was no evidence in *Haig* that without the benefit of the referendum, the appellant would have been incapable of expressing his views on Quebec secession; thus, the appellants failed to meet the minimum evidentiary burden required of a s. 2(*b*) claim (see *Haig*, at p. 1040). Finally, even had the appellant been unable to express his views on Quebec secession, that surely had nothing to do with his exclusion from the national referendum. Similar points may be made about *NWAC*, *supra*. In that case, this Court again recognized the possibility of positive government action in some cases, but concluded that the respondents' exclusion from a particular series of constitutional discussions did not suppress their overall freedom of expression. As in the *Haig* case, the decisive point was the nature of the state action sought, combined with the absence of an

le contexte de l'al. 2*a*), on a statué, par exemple, que « protéger une religion sans accorder la même protection aux autres religions a pour effet de créer une inégalité destructrice de la liberté de religion dans la société » (*Big M Drug Mart*, précité, p. 337). Cela ne signifie pas qu'il existe un droit constitutionnel à la protection légale comme tel; cela signifie qu'une loi dont l'application est limitative peut, dans des contextes exceptionnels, avoir un effet substantiel sur l'exercice d'une liberté constitutionnelle.

Ceci m'amène à la question centrale du pourvoi : l'exclusion des travailleurs agricoles d'un régime légal de relations de travail, sans interdiction expresse ou intentionnelle de l'association, peut-elle constituer une atteinte substantielle à la liberté d'association? On trouve une réponse préliminaire à cette question dans *Haig*, précité, où le juge L'Heureux-Dubé reconnaît qu'« il pourrait se présenter une situation dans laquelle il ne suffirait pas d'adopter une attitude de réserve pour donner un sens à une liberté fondamentale, auquel cas une mesure gouvernementale positive s'imposerait peut-être » (p. 1039). Bien que ce n'ait pas été le cas dans cette affaire, au moins trois observations s'imposent. Premièrement, dans *Haig*, l'avantage recherché, la participation à un référendum national, ne visait pas, contrairement à l'inclusion dans la *LRT*, à préserver l'exercice d'une liberté fondamentale; notre Cour a donc pu rejeter la demande d'action positive gouvernementale, car y faire droit aurait eu pour effet de constitutionnaliser un régime légal très limité. Deuxièmement, rien dans la preuve n'indiquait dans *Haig* que, sans le référendum, l'appelant aurait été dans l'impossibilité d'exprimer ses opinions sur la sécession du Québec; ainsi, les appelants ne satisfaisaient pas à l'exigence minimale de preuve pour une demande fondée sur l'al. 2*b*) (voir *Haig*, p. 1040). Enfin, même si l'appelant avait été dans l'impossibilité d'exprimer ses opinions sur la sécession du Québec, cela n'avait certainement rien à voir avec son exclusion du référendum national. Les mêmes observations valent pour l'arrêt *AFAC*, précité, où notre Cour reconnaît de nouveau la possibilité d'une mesure gouvernementale positive dans certains cas, mais conclut que l'exclusion des intimés d'une série donnée de débats constitutionnels ne les privait pas de leur liberté d'expression globale. Comme dans

Louise Gosselin *Appellant*

v.

The Attorney General of Quebec *Respondent*

and

The Attorney General for Ontario, the Attorney General for New Brunswick, the Attorney General of British Columbia, the Attorney General for Alberta, Rights and Democracy (also known as International Centre for Human Rights and Democratic Development), Commission des droits de la personne et des droits de la jeunesse, the National Association of Women and the Law (NAWL), the Charter Committee on Poverty Issues (CCPI) and the Canadian Association of Statutory Human Rights Agencies (CASHRA) *Interveners*

Louise Gosselin *Appelante*

c.

Le procureur général du Québec *Intimé*

et

Le procureur général de l'Ontario, le procureur général du Nouveau-Brunswick, le procureur général de la Colombie-Britannique, le procureur général de l'Alberta, Droits et Démocratie (aussi appelé le Centre international des droits de la personne et du développement démocratique), la Commission des droits de la personne et des droits de la jeunesse, l'Association nationale de la femme et du droit (ANFD), le Comité de la Charte et des questions de pauvreté (CCQP) et l'Association canadienne des commissions et conseil des droits de la personne (ACCCDP) *Intervenants*

INDEXED AS: GOSSELIN *v.* QUEBEC (ATTORNEY GENERAL)

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File No.: 27418.

2001: October 29; 2002: December 19.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Constitutional law — Charter of Rights — Equality — Welfare — Regulation providing for reduced welfare benefits for individuals under 30 not participating in training or work experience employment programs — Whether Regulation infringed right to equality — Canadian Charter of Rights and Freedoms, s. 15 — Regulation respecting social aid, R.R.Q. 1981, c. A-16, r. 1, s. 29(a).

RÉPERTORIÉ : GOSSELIN *c.* QUÉBEC (PROCUREUR GÉNÉRAL)

Référence neutre : 2002 CSC 84.

N° du greffe : 27418.

2001 : 29 octobre; 2002 : 19 décembre.

Présents : Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit constitutionnel — Charte des droits — Égalité — Aide sociale — Règlement prescrivant une réduction du montant des prestations d'aide sociale versées aux personnes de moins de 30 ans qui ne participaient pas à des programmes de formation ou de stages en milieu de travail — Le règlement portait-il atteinte au droit à l'égalité? — Charte canadienne des droits et libertés, art. 15 — Règlement sur l'aide sociale, R.R.Q. 1981, ch. A-16, r. 1, art. 29a).

Constitutional law — Charter of Rights — Fundamental justice — Security of person — Welfare — Regulation providing for reduced welfare benefits for individuals under 30 not participating in training or work experience employment programs — Whether Regulation infringed right to security of person — Canadian Charter of Rights and Freedoms, s. 7 — Regulation respecting social aid, R.R.Q. 1981, c. A-16, r. 1, s. 29(a).

Civil rights — Economic and social rights — Financial assistance — Regulation providing for reduced welfare benefits for individuals under 30 not participating in training or work experience employment programs — Whether Regulation infringed right to measures of financial assistance — Charter of Human Rights and Freedoms, R.S.Q., c. C-12, s. 45 — Regulation respecting social aid, R.R.Q. 1981, c. A-16, r. 1, s. 29(a).

In 1984 the Quebec government created a new social assistance scheme. Section 29(*a*) of the *Regulation respecting social aid*, made under the 1984 *Social Aid Act*, set the base amount of welfare payable to persons under the age of 30 at roughly one third of the base amount payable to those 30 and over. Under the new scheme, participation in one of three education or work experience programs allowed people under 30 to increase their welfare payments to either the same as, or within $100 of, the base amount payable to those 30 and over. In 1989 this scheme was replaced by legislation that no longer made this age-based distinction.

The appellant, a welfare recipient, brought a class action challenging the 1984 social assistance scheme on behalf of all welfare recipients under 30 subject to the differential regime from 1985 to 1989. The appellant argued that the 1984 social assistance regime violated ss. 7 and 15(1) of the *Canadian Charter of Rights and Freedoms* and s. 45 of the Quebec *Charter of Human Rights and Freedoms*. She requested that s. 29(*a*) of the Regulation be declared to have been invalid from 1987 (when it lost the protection of the notwithstanding clause) to 1989, and that the government of Quebec be ordered to reimburse all affected welfare recipients for the difference between what they actually received and what they would have received had they been 30 years of age or over, for a total of

Droit constitutionnel — Charte des droits — Justice fondamentale — Sécurité de la personne — Aide sociale — Règlement prescrivant une réduction du montant des prestations d'aide sociale versées aux personnes de moins de 30 ans qui ne participaient pas à des programmes de formation ou de stages en milieu de travail — Le règlement portait-il atteinte au droit à la sécurité de la personne? — Charte canadienne des droits et libertés, art. 7 — Règlement sur l'aide sociale, R.R.Q. 1981, ch. A-16, r. 1, art. 29a).

Libertés publiques — Droits économiques et sociaux — Aide financière — Règlement prescrivant une réduction du montant des prestations d'aide sociale versées aux personnes de moins de 30 ans qui ne participaient pas à des programmes de formation ou de stages en milieu de travail — Le règlement portait-il atteinte au droit à des mesures d'assistance financière? — Charte des droits et libertés de la personne, L.R.Q., ch. C-12, art. 45 — Règlement sur l'aide sociale, R.R.Q. 1981, ch. A-16, r. 1, art. 29a).

En 1984, le gouvernement du Québec a créé un nouveau régime d'aide sociale. L'alinéa 29*a*) du *Règlement sur l'aide sociale* pris en application de la *Loi sur l'aide sociale* de 1984 fixait le montant des prestations de base payables aux personnes de moins de 30 ans au tiers environ de celui des prestations de base versées aux 30 ans et plus. En participant à l'un des trois programmes de formation et de stages en milieu de travail prévus par le nouveau régime, les bénéficiaires de moins de 30 ans étaient en mesure de hausser leurs prestations à une somme égale ou inférieure de 100 $, selon le cas, aux prestations de base versées aux 30 ans et plus. En 1989, ce régime a été remplacé par une mesure législative qui n'appliquait plus la distinction fondée sur l'âge.

L'appelante, une bénéficiaire d'aide sociale, a intenté un recours collectif dans lequel elle conteste le régime d'aide sociale de 1984, au nom de tous les bénéficiaires d'aide sociale de moins de 30 ans qui ont été assujettis au traitement différent de 1985 à 1989. L'appelante plaide que le régime d'aide sociale en vigueur en 1984 contrevenait à l'art. 7 et au par. 15(1) de la *Charte canadienne des droits et libertés* et à l'art. 45 de la *Charte des droits et libertés de la personne* du Québec. Elle demande un jugement déclarant invalide l'al. 29*a*) du règlement pour la période de 1987 (lorsque a pris fin la protection offerte par la disposition d'exemption) à 1989, et ordonnant au gouvernement du Québec de rembourser à tous les bénéficiaires d'aide sociale visés une somme égale à la différence entre les prestations qu'ils ont reçues et celles

roughly $389 million, plus interest. The Superior Court dismissed the class action. The Court of Appeal upheld the decision.

Held (L'Heureux-Dubé, Bastarache, Arbour and LeBel JJ. dissenting): The appeal should be dismissed. Section 29(*a*) of the Regulation was constitutional.

(1) *Per* McLachlin C.J. and Gonthier, Iacobucci, Major and Binnie JJ.: Section 29(*a*) of the Regulation did not infringe s. 15 of the Canadian *Charter*.

Per L'Heureux-Dubé, Bastarache, Arbour and LeBel JJ. (dissenting): Section 29(*a*) of the Regulation infringed s. 15 of the Canadian *Charter* and the infringement was not justifiable under s. 1 of the *Charter*.

(2) *Per* McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie and LeBel JJ.: Section 29(*a*) of the Regulation did not infringe s. 7 of the Canadian *Charter*.

Per L'Heureux-Dubé and Arbour JJ. (dissenting): Section 29(*a*) of the Regulation infringed s. 7 of the Canadian *Charter* and the infringement was not justifiable under s. 1 of the *Charter*.

(3) *Per* McLachlin C.J. and Gonthier, Iacobucci, Major, Binnie and LeBel JJ.: Section 29(*a*) of the Regulation did not violate s. 45 of the Quebec *Charter*.

Per Bastarache and Arbour JJ.: There is no need to determine whether s. 29(*a*) of the Regulation violated s. 45 of the Quebec *Charter* since the s. 45 right is unenforceable in the circumstances of this case.

Per L'Heureux-Dubé J. (dissenting): Section 29(*a*) of the Regulation violated s. 45 of the Quebec *Charter*.

Per McLachlin C.J. and Gonthier, Iacobucci, Major and Binnie JJ.: The differential welfare scheme did not breach s. 15 of the *Charter*. The appellant has failed to discharge her burden of proof on the third branch of the *Law* test, as she has not demonstrated that the government treated her as less worthy than older welfare recipients, simply because it conditioned increased payments on her participation in programs designed specifically to integrate her into the workforce and to promote her long-term self-sufficiency.

qu'ils auraient touchées s'ils avaient eu 30 ans ou plus, soit une somme totale d'environ 389 millions de dollars, plus les intérêts. La Cour supérieure a rejeté le recours collectif et la Cour d'appel a confirmé cette décision.

Arrêt (les juges L'Heureux-Dubé, Bastarache, Arbour et LeBel sont dissidents) : Le pourvoi est rejeté. L'alinéa 29*a*) du règlement était constitutionnel.

(1) *Le* juge en chef McLachlin et les juges Gonthier, Iacobucci, Major et Binnie : L'alinéa 29*a*) du règlement ne violait pas l'art. 15 de la *Charte canadienne*.

Les juges L'Heureux-Dubé, Bastarache, Arbour et LeBel (dissidents) : L'alinéa 29*a*) du règlement violait l'art. 15 de la *Charte canadienne* et la violation n'était pas justifiable au sens de l'article premier de la *Charte*.

(2) *Le* juge en chef McLachlin et les juges Gonthier, Iacobucci, Major, Bastarache, Binnie et LeBel : L'alinéa 29*a*) du règlement ne violait pas l'art. 7 de la *Charte canadienne*.

Les juges L'Heureux-Dubé et Arbour (dissidentes) : L'alinéa 29*a*) du règlement violait l'art. 7 de la *Charte canadienne* et la violation n'était pas justifiable au sens de l'article premier de la *Charte*.

(3) *Le* juge en chef McLachlin et les juges Gonthier, Iacobucci, Major, Binnie et LeBel : L'alinéa 29*a*) du règlement ne violait pas l'art. 45 de la *Charte* québécoise.

Les juges Bastarache et Arbour : Il n'est pas nécessaire de décider si l'al. 29*a*) du règlement violait l'art. 45 de la *Charte* québécoise, étant donné que le respect du droit prévu par cet article ne peut être imposé dans les circonstances du présent pourvoi.

Le juge L'Heureux-Dubé (dissidente) : L'alinéa 29*a*) du règlement violait l'art. 45 de la *Charte* québécoise.

Le juge en chef McLachlin et les juges Gonthier, Iacobucci, Major et Binnie : Le régime d'aide sociale établissant une différence de traitement ne contrevenait pas à l'art. 15 de la *Charte*. L'appelante ne s'est pas acquittée de la preuve qui lui incombait à la troisième étape du test de l'arrêt *Law*, car elle n'a pas démontré que le gouvernement l'a traitée comme une personne de moindre valeur que les bénéficiaires d'aide sociale plus âgés, simplement parce qu'il a assujetti le versement de prestations accrues à sa participation à des programmes conçus expressément pour l'intégrer dans la population active et promouvoir son autonomie à long terme.

An examination of the four contextual factors set out in *Law* does not support a finding of discrimination and denial of human dignity. First, this is not a case where members of the complainant group suffered from pre-existing disadvantage and stigmatisation on the basis of their age. Age-based distinctions are a common and necessary way of ordering our society, and do not automatically evoke a context of pre-existing disadvantage suggesting discrimination and marginalization. Unlike people of very advanced age who may be presumed to lack abilities that they in fact possess, young people do not have a similar history of being undervalued.

Second, the record in this case does not establish a lack of correspondence between the scheme and the actual circumstances of welfare recipients under 30. The evidence indicates that the purpose of the challenged distinction, far from being stereotypical or arbitrary, corresponded to the actual needs and circumstances of individuals under 30. The deep recession in the early 1980s, tightened eligibility requirements for federal unemployment insurance benefits, and a surge in the number of young people entering the job market caused an unprecedented increase in the number of people capable of working who ended up on the welfare rolls. The situation of young adults was particularly dire. The government's short-term purpose in adopting the scheme at issue was to get recipients under 30 into work and training programs that would make up for the lower base amount they received while teaching them valuable skills to get permanent jobs. The government's longer-term purpose was to provide young welfare recipients with precisely the kind of remedial education and skills training they lacked and needed in order to integrate into the workforce and become self-sufficient. The regime constituted an affirmation of young people's potential rather than a denial of their dignity. From the perspective of a reasonable person in the claimant's position, the legislature's decision to structure its social assistance programs to give young people the incentive to participate in programs specifically designed to provide them with training and experience was supported by logic and common sense. The allegation that there were not enough places in the programs to meet the needs of all welfare recipients under 30 who wanted to participate was rejected by the trial judge as unsubstantiated by the evidence. Absent demonstrated error, it is not open to this Court to revisit the trial judge's conclusion. Likewise, we cannot infer disparity between the purpose and effect of the scheme and the situation of those affected from the mere failure of government to prove that the assumptions upon which it proceeded were correct. Provided they are not based on arbitrary and demeaning stereotypes,

À partir de l'examen des quatre facteurs contextuels énoncés dans *Law*, il est impossible de conclure à la discrimination et à l'existence d'une atteinte à la dignité humaine. Premièrement, il ne s'agit pas d'un cas où le groupe de la demanderesse a souffert d'un désavantage préexistant et de stigmates en raison de l'âge. Les distinctions fondées sur l'âge sont courantes et nécessaires pour maintenir l'ordre dans notre société et elles n'évoquent pas automatiquement le contexte d'un désavantage préexistant qui donne à croire à l'existence d'une discrimination et d'une marginalisation. Contrairement aux personnes d'âge avancé, qui peuvent être présumées dépourvues de certaines aptitudes qu'elles possèdent en réalité, les jeunes adultes n'ont pas été sous-estimés de la même manière par le passé.

Deuxièmement, le dossier en l'espèce n'établit pas l'absence de lien entre le régime et la situation réelle des bénéficiaires d'aide sociale de moins de 30 ans. La preuve démontre que, loin d'être stéréotypé ou arbitraire, l'objet de la distinction contestée correspondait aux besoins et à la situation véritables des moins de 30 ans. La profonde récession du début des années 80, le resserrement des conditions d'admissibilité aux prestations fédérales d'assurance-chômage et la forte augmentation du nombre de jeunes intégrant le marché du travail ont provoqué un accroissement sans précédent du nombre de personnes aptes au travail qui ont néanmoins joint les rangs des prestataires d'aide sociale. La situation des jeunes adultes était particulièrement difficile. À court terme, l'objectif que visait le gouvernement en instaurant le régime contesté était de faire participer les bénéficiaires de moins de 30 ans à des programmes de travail et de formation qui compléteraient l'allocation de base inférieure qu'ils recevaient, tout en leur faisant acquérir des compétences utiles pour trouver des emplois permanents. À plus long terme, le gouvernement visait à offrir aux jeunes bénéficiaires précisément les cours de rattrapage et les compétences qui leur manquaient et dont ils avaient besoin pour réussir à s'intégrer dans la population active et à devenir autonomes. Le régime ne constituait pas une négation de la dignité des jeunes adultes, mais la reconnaissance de leur potentiel. Dans la perspective d'une personne raisonnable placée dans la situation de la demanderesse, la décision du législateur de structurer ses programmes d'aide sociale de façon à inciter les jeunes adultes à participer à des programmes spécialement conçus pour leur permettre d'acquérir formation et expérience prenait appui sur la logique et le sens commun. La prétention qu'il n'existait pas suffisamment de places disponibles dans les programmes pour répondre aux besoins de tous les bénéficiaires d'aide sociale de moins de 30 ans qui voulaient y participer a été rejetée par le juge du procès parce qu'il estimait la preuve à cet égard insuffisante. Il n'appartient pas à la Cour de réexaminer la conclusion du

the legislator is entitled to proceed on informed general assumptions that correspond, even if not perfectly, to the actual circumstances of the affected group. These considerations figure in assessing whether a reasonable person in the claimant's position would experience the legislation as a harm to her dignity.

Third, the "ameliorative purpose" contextual factor is neutral in the present case, since the scheme was not designed to improve the condition of another group. As a general contextual matter, a reasonable person in the appellant's position would take the fact that the Regulation was aimed at ameliorating the situation of welfare recipients under 30 into account in determining whether the scheme treated under-30s as less worthy of respect and consideration than those 30 and over.

Finally, the findings of the trial judge and the evidence do not support the view that the overall impact on the affected individuals undermined their human dignity and their right to be recognized as fully participating members of society notwithstanding their membership in the class affected by the distinction. Despite possible short-term negative impacts on the economic circumstances of some welfare recipients under 30 as compared to those 30 and over, the regime sought to improve the situation of people in this group and enhance their dignity and capacity for long-term self-reliance. This points not to discrimination but to concern for the situation of welfare recipients under 30.

The factual record is insufficient to support the appellant's claim that the state deprived her of her s. 7 right to security of the person by providing her with a lower base amount of welfare benefits, in a way that violated the principles of fundamental justice. The dominant strand of jurisprudence on s. 7 sees its purpose as protecting life, liberty and security of the person from deprivations that occur as a result of an individual's interaction with the justice system and its administration. The administration of justice can be implicated in a variety of circumstances and does not refer exclusively to processes operating in the criminal law. The meaning of the administration of

juge de première instance en l'absence d'une erreur établie. De même, le simple fait que le gouvernement n'ait pas prouvé l'exactitude des hypothèses sur lesquelles il s'est fondé ne permet pas d'inférer qu'il y a disparité entre, d'une part, l'objet et l'effet du régime et, d'autre part, la situation des personnes touchées. Le législateur peut s'appuyer sur des hypothèses générales documentées qui correspondent, bien qu'imparfaitement, à la situation véritable du groupe touché, à la condition que ces hypothèses ne soient pas fondées sur des stéréotypes arbitraires et dégradants. Ces considérations sont prises en compte pour déterminer si une personne raisonnable placée dans la situation de la demanderesse aurait perçu la mesure législative comme attentatoire à sa dignité.

Troisièmement, le facteur contextuel de « l'objectif d'amélioration » est neutre en l'espèce, car le régime n'a pas été conçu pour améliorer la situation d'un autre groupe. De façon générale, sur le plan contextuel, une personne raisonnable placée dans la situation de l'appelante tiendrait compte du fait que le Règlement visait à améliorer la situation des bénéficiaires d'aide sociale de moins de 30 ans pour déterminer si le régime traitait les moins de 30 ans comme moins dignes de respect et de considération que les 30 ans et plus.

Enfin, les conclusions du juge de première instance et les éléments de preuve n'appuient pas la prétention que l'incidence globale du régime sur les personnes touchées a porté atteinte à leur dignité humaine et à leur droit d'être reconnues comme membres à part entière de la société, même si elles font partie de la catégorie touchée par la distinction. Malgré la possibilité de conséquences négatives à court terme sur la situation économique de certains bénéficiaires d'aide sociale de moins de 30 ans comparativement à leurs aînés, le régime visait à améliorer la situation des personnes appartenant à ce groupe et à renforcer leur dignité et leur capacité de subvenir à leurs besoins à long terme. Ces éléments tendent à révéler l'existence non pas d'une discrimination, mais d'une préoccupation pour la situation des bénéficiaires d'aide sociale de moins de 30 ans.

Le dossier factuel n'est pas suffisant pour étayer la prétention de l'appelante que l'État a porté atteinte à son droit à la sécurité de sa personne en lui versant un montant de base inférieur de prestations d'aide sociale, de façon non conforme aux principes de justice fondamentale. Selon le courant jurisprudentiel dominant concernant l'art. 7, cette disposition a pour objet d'empêcher les atteintes à la vie, à la liberté et à la sécurité de la personne qui résultent d'une interaction de l'individu avec le système judiciaire et l'administration de la justice. Tout un éventail de situations peuvent faire entrer en jeu l'administration de la justice et celle-ci ne s'entend pas

justice and s. 7 should be allowed to develop incrementally, as heretofore unforeseen issues arise for consideration. It is thus premature to conclude that s. 7 applies only in an adjudicative context. In the present case, the issue is whether s. 7 ought to apply despite the fact that the administration of justice is plainly not implicated. Thus far, the jurisprudence does not suggest that s. 7 places positive obligations on the state. Rather, s. 7 has been interpreted as restricting the state's ability to deprive people of their right to life, liberty and security of the person. Such a deprivation does not exist here and the circumstances of this case do not warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards.

There is no breach of the right to measures of financial assistance and to social measures provided for by law, susceptible of ensuring an acceptable standard of living as protected by s. 45 of the Quebec *Charter of Human Rights and Freedoms*. Although s. 45 requires the government to provide social assistance measures, it places the adequacy of the particular measures adopted beyond the reach of judicial review. The language of s. 45 mandates only that the government be able to point to measures susceptible of ensuring an acceptable standard of living, without having to defend the wisdom of its enactments.

Per Bastarache J. (dissenting): Section 29(*a*) of the Regulation did not infringe s. 7 of the *Charter*. The threat to the appellant's security of the person was not related to the administration of justice, nor was it caused by any state action, nor did the underinclusive nature of the legislation substantially prevent or inhibit the appellant from protecting her own security. The right to security of the person is protected by s. 7 only insofar as the claimant is deprived of this right by the state, in a manner contrary to the principles of fundamental justice. The strong relationship between s. 7 and the role of the judiciary leads to the conclusion that some relationship to the judicial system or its administration must be engaged before s. 7 may be applied. In this case, there is no link between the harm to the appellant's security of the person and the judicial system or its administration. Although the required link to the judicial system does not mean that s. 7 is limited to purely criminal or penal matters, it signifies, at the very least, that some determinative state action, analogous to a judicial or administrative process, must be shown to exist in order for one to be deprived of a s. 7 right. The threat to the appellant's security was brought upon her by the vagaries of a weak economy, not by the legislature's

exclusivement des procédures criminelles. Il faut laisser le sens de la notion d'administration de la justice et la portée de l'art. 7 évoluer graduellement, au fur et à mesure que surgiront des questions jusqu'ici imprévues. Il est donc prématuré de conclure que l'art. 7 s'applique exclusivement dans un contexte juridictionnel. En l'espèce, la question est de savoir si la Cour doit appliquer l'art. 7 malgré le fait que l'administration de la justice n'est manifestement pas en jeu. Jusqu'à maintenant, rien dans la jurisprudence ne tend à indiquer que l'art. 7 impose une obligation positive à l'État. On a plutôt considéré que l'art. 7 restreint la capacité de l'État de porter atteinte au droit à la vie, à la liberté et à la sécurité de la personne. Il n'y a pas d'atteinte de cette nature en l'espèce et les circonstances ne justifient pas une application nouvelle de l'art. 7, selon laquelle il imposerait à l'État l'obligation positive de garantir un niveau de vie adéquat.

Il n'a pas été porté atteinte au droit à des mesures d'assistance financière et à des mesures sociales, prévues par la loi, susceptibles d'assurer un niveau de vie décent, lequel est garanti par l'art. 45 de la *Charte des droits et libertés de la personne* du Québec. Bien que l'art. 45 oblige le gouvernement à établir des mesures d'aide sociale, il soustrait au pouvoir de contrôle des tribunaux la question de savoir si ces mesures sont adéquates. Le libellé de l'art. 45 exige seulement que le gouvernement puisse établir l'existence de mesures susceptibles d'assurer un niveau de vie décent, sans l'obliger à défendre la sagesse de ces mesures.

Le juge Bastarache (dissident) : L'alinéa 29*a*) du règlement ne violait pas l'art. 7 de la *Charte*. La menace au droit à la sécurité de l'appelante n'était pas liée à l'administration de la justice et ne résultait pas d'une mesure de l'État; de plus, le caractère non inclusif du texte de loi n'a pas empêché concrètement l'appelante de protéger sa propre sécurité. Le droit à la sécurité de la personne n'est protégé par l'art. 7 que dans la mesure où c'est l'État qui, d'une façon non conforme aux principes de justice fondamentale, prive l'individu du droit à la sécurité de sa personne. Le lien solide qui existe entre l'art. 7 et le rôle de l'appareil judiciaire amène à conclure que, pour que puisse s'appliquer l'art. 7, il est nécessaire qu'il existe un certain rapport entre cette disposition et le système judiciaire ou son administration. En l'espèce, il n'existe pas de lien entre le préjudice causé à la sécurité de la personne de l'appelante et le système judiciaire ou son administration. Quoique le lien requis avec l'appareil judiciaire ne signifie pas que l'art. 7 se limite nécessairement aux affaires pénales, il signifie à tout le moins que, pour qu'une personne se trouve privée d'un droit que lui garantit l'art. 7, il faut établir l'existence d'une mesure de l'État — analogue à une instance judiciaire ou

decision not to accord her more financial assistance or to require her to participate in several programs in order to receive more assistance. While underinclusive legislation may, in unique circumstances, substantially impact the exercise of a constitutional freedom, the exclusion of people under 30 from the full, unconditional benefit package did not render them substantially incapable of exercising their right to security of the person without government intervention. The appellant failed to demonstrate that there existed an inherent difficulty for young people under 30 to protect their right to security of the person without government intervention. Nor has the existence of a higher base benefit for recipients 30 and over been shown to reduce the potential of young people to exercise their right to security of the person. It has not been demonstrated that the legislation, by excluding young people, reduced their security any more than it would have already been given market conditions.

Section 29(*a*) of the Regulation infringed s. 15 of the *Charter*. Although age-based distinctions are often justified due to the fact that at different ages people are capable of different things, age is included as a prohibited ground of discrimination. Age, although constantly changing, is a personal characteristic that at any given moment one can do nothing to alter. Age falls squarely within the concern of the equality provision that people not be penalized for characteristics they either cannot change or should not be asked to change. The grounds of discrimination enumerated in s. 15 function as legislative markers of suspect grounds associated with stereotypical or otherwise, discriminatory decision making. Legislation that draws a distinction on such grounds — including age — is suspect because it often leads to discrimination and denial of substantive equality.

Applying the *Law* test, the fundamental question that needs to be dealt with here is whether the distinction created by s. 29(*a*) is indicative that the government treated social assistance recipients under 30 in a way that is respectful of their dignity as members of society. This question is to be assessed from the perspective of a reasonable person in the claimant's circumstances having regard to four non-exhaustive contextual factors. While it is not enough for the appellant simply to claim that her

administrative — emportant des conséquences juridiques pour cette personne. La menace à la sécurité de l'appelante découlait des aléas d'une économie chancelante, et non de la décision du législateur de ne pas lui accorder une aide financière plus élevée ou de l'obliger à participer à plusieurs programmes pour recevoir une aide accrue. Bien qu'une mesure législative n'ayant pas un caractère suffisamment inclusif puisse, dans des circonstances exceptionnelles, entraver substantiellement l'exercice d'une liberté constitutionnelle, l'exclusion des personnes de moins de 30 ans du champ d'application du régime d'avantages complets et inconditionnels ne les rendait pas essentiellement incapables d'exercer leur droit à la sécurité de leur personne en l'absence d'intervention gouvernementale. L'appelante n'a pas démontré que les jeunes de moins de 30 ans éprouvent intrinsèquement de la difficulté à exercer leur droit à la sécurité de leur personne en l'absence d'intervention gouvernementale. Elle n'a pas non plus établi que l'existence de prestations de base plus élevées pour les prestataires de 30 ans et plus réduisait la possibilité pour les moins de 30 ans d'exercer leur droit à la sécurité de leur personne. Il n'a pas été démontré que, en excluant les jeunes, le texte de loi avait réduit leur sécurité à un niveau inférieur à ce qu'elle était déjà, compte tenu de la situation économique.

L'alinéa 29*a*) du règlement violait l'art. 15 de la *Charte*. Bien que les distinctions fondées sur l'âge soient souvent justifiées par le fait que des personnes d'âge différent sont capables d'accomplir des choses différentes, l'âge fait partie des motifs de discrimination illicite. Quoiqu'on vieillisse sans cesse, l'âge est une caractéristique personnelle à l'égard de laquelle il est impossible de faire quoi que ce soit, et ce à quelque moment que ce soit. L'âge est nettement visé par l'aspect de la disposition relative à l'égalité qui demande qu'on ne pénalise pas un individu pour une caractéristique qu'il ne peut changer ou qu'on ne devrait pas le requérir de changer. Les motifs de discrimination énumérés à l'art. 15 sont des indicateurs législatifs de l'existence de motifs suspects, associés à des processus décisionnels discriminatoires et fondés sur des stéréotypes. Une loi qui établit une distinction fondée sur de tels motifs — notamment l'âge — est suspecte parce qu'elle entraîne souvent de la discrimination et aboutit au déni du droit à l'égalité réelle.

Si on applique le critère de l'arrêt *Law*, la question fondamentale qu'il faut examiner en l'espèce est celle de savoir si la distinction établie à l'al. 29*a*) indique que le gouvernement a traité les bénéficiaires d'aide sociale de moins de 30 ans d'une façon qui respectait leur dignité en tant que membres de notre société. Il faut examiner cette question avec les yeux d'une personne raisonnable se trouvant dans la situation du demandeur, en tenant compte de quatre facteurs contextuels non exhaustifs.

dignity has been violated, a demonstration that there is a rational foundation for her experience of discrimination will be sufficient to ground the s. 15 claim.

First, with respect to the pre-existing disadvantage factor, we are not dealing in this case with a general age distinction but rather with one applicable within a particular social group, welfare recipients. Within this group the record makes it clear that it was not easier for persons under 30 to get jobs as opposed to their elders. The distinction was based on the stereotypical view that young welfare recipients suffer no special economic disadvantages. This view was not grounded in fact and was based on old assumptions regarding the employability of young people. Although there is no compelling evidence that younger welfare recipients, as compared to all welfare recipients, have been traditionally marginalized by reason of their age, a contextual analysis requires us to recognize that the precarious, vulnerable position of welfare recipients in general lends weight to the argument that a distinction that affects them negatively may pose a greater threat to their human dignity.

Second, there was a lack of correspondence between the differential welfare scheme and the actual needs, capacities and circumstances of welfare recipients under the age of 30. Based on the unverifiable presumption that people under 30 had better chances of employment and lesser needs, the program delivered to those people two-thirds less than what the government viewed as the basic survival amount, drawing its distinction on a characteristic over which those people had no control. Substantive equality permits differential treatment only where there is a genuine difference. The bright line drawn at 30 appears to have had little, if any, relationship to the real situation of younger people. The dietary and housing costs of people under 30 are no different from those of people 30 and over. The presumption adopted by the government that all persons under 30 received assistance from their family was unfounded. By relying on a distinction that had existed decades earlier and that did not take into account the actual circumstances of welfare recipients under 30, the legislation appears to have shown little respect for the value of those recipients as individual human beings. It created substandard living conditions for them on the sole basis of their age. Where persons experience serious detriment as a result of a distinction and the evidence shows that the presumptions guiding the legislature were factually unsupported, it is not necessary

Bien que l'appelante ne puisse se contenter de plaider qu'on a porté atteinte à sa dignité, pour justifier une allégation formulée en vertu de l'art. 15 il lui suffira d'établir le fondement rationnel de sa perception subjective qu'elle a été victime de discrimination.

Premièrement, en ce qui concerne le facteur du désavantage préexistant, nous ne sommes pas ici en présence d'une distinction d'application générale fondée sur l'âge, mais plutôt d'une distinction applicable à un groupe particulier de la société, les bénéficiaires d'aide sociale. Il ressort clairement du dossier que, dans les faits, au sein de ce groupe, il n'était pas plus facile pour les jeunes prestataires de trouver du travail que ce ne l'était pour leurs aînés. La distinction était fondée sur le stéréotype selon lequel les jeunes prestataires ne souffrent d'aucun désavantage économique particulier. Elle reposait non pas sur des faits, mais plutôt sur de vieilles prémisses relatives à l'aptitude des jeunes au travail. Bien qu'il n'existe aucune preuve décisive indiquant que, comparativement à l'ensemble des bénéficiaires d'aide sociale, les jeunes prestataires ont de tout temps été marginalisés en raison de leur âge, une analyse contextuelle nous oblige à reconnaître que la situation précaire et vulnérable dans laquelle se trouvent les bénéficiaires d'aide sociale renforce l'argument selon lequel toute distinction les affectant peut faire peser une menace plus grande sur leur dignité humaine.

Deuxièmement, il n'y avait aucune correspondance entre le régime d'aide sociale différent et les besoins, les aptitudes et la situation véritables des bénéficiaires d'aide sociale de moins de 30 ans. Basé sur l'hypothèse invérifiable selon laquelle les personnes de moins de 30 ans ont des besoins moins grands que leurs aînés et de meilleures chances que ceux-ci de se trouver un emploi, le programme accordait aux premières une somme inférieure des deux tiers à celle que le gouvernement considérait comme le strict nécessaire, et il fondait cette différence de traitement sur une caractéristique indépendante de la volonté de ces personnes. L'égalité réelle ne permet un traitement différent que s'il existe une différence réelle. La ligne de démarcation nette fixée à 30 ans paraît n'avoir que peu de rapports, voire aucun, avec la situation véritable des adultes de moins de 30 ans. Les dépenses au titre de l'alimentation et du logement des personnes de moins de 30 ans ne diffèrent pas de celles des personnes de 30 ans et plus. La présomption du gouvernement que les personnes de moins de 30 ans recevaient toutes de l'aide de leur famille n'était pas fondée. En se fondant sur une distinction qu'on avait faite plusieurs décennies auparavant et qui ne tenait même pas compte de la situation véritable des bénéficiaires d'aide sociale de moins de 30 ans, on semble avoir fait preuve de peu de respect dans le texte de loi pour la valeur de ces personnes en

assistance recipients under the age of 30 were in fact enrolled in the employment programs that allowed them to receive the base amount allocated to beneficiaries 30 years of age and over. One major branch of the scheme left participants $100 short of the base benefit. Likewise, waiting periods, prioritizations and admissibility criteria signified that the programs were not designed in such a way as to ensure that there would always be programs available to those who wanted to participate. In addition to the problems with the design of the programs, hurdles in their implementation presented young recipients with further barriers. Delays flowing from meetings with aid workers, evaluation interviews and finding space within the appropriate program signified that young welfare recipients would most likely spend some time on the reduced benefit. Finally, even though 85 000 single people under 30 years of age were on social assistance, the government at first made only 30 000 program places available. While the government did not have to prove that it had 85 000 empty chairs waiting in classrooms and elsewhere, the very fact that it was expecting such low levels of participation brings into question the degree to which the distinction in s. 29(*a*) of the Regulation was geared towards improving the situation of those under 30, as opposed to simply saving money.

The differential treatment had severe deleterious effects on the equality and self-worth of the appellant and those in her group which outweighed the salutary effects of the scheme in achieving the stated government objective. The government failed to demonstrate that the reduction in benefits contributed or would reasonably be expected to contribute to the integration of young social assistance beneficiaries into the workplace. When the potential deleterious effects of the legislation are so apparent, it is not asking too much of the government to craft its legislation more carefully.

The appropriate remedy in this case is to declare s. 29(*a*) of the Regulation invalid under s. 52(1) of the *Constitution Act, 1982*. Had the legislation still been in force, suspension of the declaration of invalidity for a period of 18 months to allow the legislature to implement changes to the legislation would have been appropriate. The appellant's request for an order for damages pursuant to s. 24(1) of the *Charter* should be dismissed. Where

rendu les programmes conditionnels pour tous. Les programmes eux-mêmes comportaient également plusieurs lacunes importantes et seulement 11 p. 100 des bénéficiaires d'aide sociale de moins de 30 ans étaient dans les faits inscrits aux programmes qui leur permettaient de recevoir le montant de base accordé aux prestataires de 30 ans et plus. Les personnes qui participaient à un important volet du régime ne touchaient pas le plein montant des prestations, mais recevaient 100 $ de moins que la prestation de base. De même, les critères d'admissibilité, les périodes d'attente et les préférences applicables au titre de la participation indiquent que les programmes n'étaient pas conçus d'une manière propre à garantir une place à toute personne désireuse d'y participer. Outre les problèmes qui affectaient la conception des programmes, la mise en œuvre de ceux-ci créait des obstacles supplémentaires, que les jeunes prestataires devaient également surmonter. En raison des délais résultant des rencontres avec des travailleurs sociaux, des entrevues d'évaluation et de la recherche de places libres dans le programme approprié, les jeunes bénéficiaires d'aide sociale touchaient vraisemblablement les prestations réduites pendant un certain temps. Enfin, même s'il y avait 85 000 personnes seules de moins de 30 ans recevant de l'aide sociale, le gouvernement n'avait créé initialement que 30 000 places dans ses programmes. Même si le gouvernement n'avait pas à établir qu'il disposait de 85 000 places disponibles en salle de classe et ailleurs, le fait même qu'il s'attendait à un taux de participation aussi faible incite à se demander dans quelle mesure la distinction prévue à l'al. 29*a*) du règlement visait vraiment à améliorer la situation des personnes de moins de 30 ans, et non pas simplement à réaliser des économies.

La différence de traitement a eu, sur l'égalité et l'estime de soi de l'appelante et des personnes de son groupe, des effets préjudiciables graves qui l'emportaient sur les effets bénéfiques qu'avait le régime sur la réalisation de l'objectif énoncé par le gouvernement. Le gouvernement n'a pas démontré que la réduction des prestations faciliterait l'intégration des jeunes prestataires dans la population active, ou qu'il était raisonnable de penser qu'elle le ferait. Lorsque les effets préjudiciables éventuels du texte législatif sont aussi évidents, ce n'est pas trop demander au gouvernement de préparer ses mesures législatives avec plus de soin.

La réparation qui convient en l'espèce consiste à déclarer l'al. 29*a*) du règlement inopérant en vertu du par. 52(1) de la *Loi constitutionnelle de 1982*. Si cette mesure législative avait été encore en vigueur, il aurait été opportun de suspendre l'effet de la déclaration d'invalidité pendant 18 mois afin de permettre au législateur d'apporter des modifications à cette mesure. Il y a lieu de rejeter la demande de dommages-intérêts présentée

a provision is struck down under s. 52, a retroactive s. 24(1) remedy will not generally be available. Moreover, the facts of this case do not allow for such a result. First, a s. 24(1) remedy is more difficult in this case because it involves a class action. It would be impossible for this Court to determine the precise amount that was owed to each individual in the class. Second, the significant costs that would be incurred by the government were it required to pay damages must be considered. While a consideration of expenses might not be relevant to the substantive *Charter* analysis, it is relevant to the determination of the remedy. Requiring the government to pay out nearly half a billion dollars would have a significant impact on the government's fiscal situation, and potentially on the general economy of the province.

Although on its face, s. 45 of the Quebec *Charter of Human Rights and Freedoms* creates some form of positive right to a minimal standard of living, in this case, that right is unenforceable. The supremacy provision in s. 52 of the Quebec *Charter* clearly indicates that the courts have no power to declare any portion of a law invalid due to a conflict with s. 45. Moreover, the appellant is not entitled to damages pursuant to s. 49 of the Quebec *Charter*. In order to substantiate a s. 49 claim against the government for having drafted legislation that violates a right guaranteed by the Quebec *Charter*, one would have to demonstrate that the legislature has breached a particular standard of care in drafting the legislation. It is unlikely that the government could, under s. 49, be held responsible for having simply drafted faulty legislation.

Per LeBel J. (dissenting): Section 29(*a*) of the Regulation, when taken in isolation or considered in light of all employability programs, discriminated against young adults. The distinction based on age did not reflect either the needs or the abilities of social aid recipients under 30 years of age. The ordinary needs of young people are not so different from the needs of their elders as to justify such a pronounced discrepancy between the two groups' benefits. Because the distinction made by the social aid scheme was justified by the fact that young people are able to survive a period of economic crisis better, this distinction perpetuated a stereotypical view of young people's situation on the labour market. By trying to combat the pull of social assistance, for the "good" of the young people themselves who depended on it, the distinction perpetuated another stereotypical view, that

par l'appelante en vertu du par. 24(1) de la *Charte*. Si une disposition est invalidée en application de l'art. 52, il n'y a généralement pas ouverture à réparation rétroactive en vertu du par. 24(1). De plus, les faits de l'espèce ne justifient pas un tel résultat. Premièrement, vu l'existence d'un recours collectif en l'espèce, il est plus difficile d'accorder une réparation en vertu du par. 24(1). Il serait impossible à notre Cour d'établir le montant exact dû à chaque membre du groupe. Deuxièmement, il faut tenir compte des dépenses importantes que ferait le gouvernement s'il devait verser des dommages-intérêts. Bien que la prise en compte de considérations budgétaires puisse ne pas être pertinente dans l'analyse de la question de fond touchant la *Charte*, elle l'est dans la détermination de la réparation. Obliger le gouvernement à verser pratiquement un demi-milliard de dollars aurait une incidence appréciable sur sa situation financière et peut-être même sur l'économie générale de la province.

Même si, à la lumière de son texte même, l'art. 45 de la *Charte des droits et libertés de la personne* du Québec crée une certaine forme de droit positif à un niveau de vie minimal, le respect de ce droit ne peut pas être obtenu en justice en l'espèce. La disposition énonçant la suprématie de la *Charte* québécoise, en l'occurrence l'art. 52 de celle-ci, indique nettement que les tribunaux n'ont pas le pouvoir de déclarer invalide tout ou partie d'un texte de loi pour cause d'incompatibilité avec l'art. 45. En outre, l'appelante n'a pas droit à des dommages-intérêts en vertu de l'art. 49 de la *Charte* québécoise. La personne qui, en vertu de l'art. 49, présente contre l'État une demande reprochant à celui-ci d'être l'auteur d'un texte de loi contrevenant à un droit garanti par la *Charte* québécoise doit démontrer que le législateur a manqué à une norme de diligence donnée dans la rédaction du texte de loi en question. Il est improbable que l'État puisse, par application de l'art. 49, être tenu responsable simplement parce qu'il aurait rédigé un texte de loi lacunaire.

Le juge LeBel (dissident) : L'alinéa 29*a*) du règlement, pris isolément ou considéré à la lumière des programmes d'employabilité, était discriminatoire à l'endroit des jeunes adultes. La distinction fondée sur l'âge ne correspondait ni aux besoins ni aux capacités des bénéficiaires de l'aide sociale de moins de 30 ans. Les besoins ordinaires des jeunes ne se différencient pas de ceux de leurs aînés au point de justifier un écart si prononcé entre leurs prestations. Dans la mesure où la distinction établie par le régime d'aide sociale était justifiée par la capacité des jeunes à mieux survivre une période de crise économique, cette distinction perpétuait une vision stéréotypée de la situation des jeunes sur le marché du travail. En cherchant à contrer un effet d'attraction à l'aide sociale pour le « bien » même des jeunes qui en dépendaient, la distinction perpétuait

a majority of young social assistance recipients choose to freeload off society permanently. Young social assistance recipients in the 1980s certainly did not latch onto social assistance out of laziness; they were stuck receiving welfare because there were no jobs available. Even if the government could validly encourage young people to work, the approach adopted discriminated between social aid recipients under 30 years of age and those 30 years of age and over, for no valid reason. The defects in the scheme, together with the preconceived ideas that underpinned it, lead to the conclusion that s. 29(*a*) of the Regulation infringed the equality right guaranteed by s. 15 of the *Charter*. For the reasons given by Bastarache J., s. 29(*a*) of the Regulation is not saved by s. 1 of the *Charter*.

Although the appellant failed to establish a violation of s. 7 of the *Charter* in this case, for the reasons stated by the majority, it is not appropriate, at this point, to rule out the possibility that s. 7 might be invoked in circumstances unrelated to the justice system.

Section 45 of the Quebec *Charter* does not confer an independent right to an acceptable standard of living. That section protects only a right of access to social measures for anyone in need. Although the incorporation of social and economic rights into the Quebec *Charter* gives them a new dimension, it does not make them legally binding. A majority of the provisions in the chapter on "Economic and Social Rights" contain a reservation indicating that the exercise of the rights they protect depends on the enactment of legislation. In the case of s. 45, the fact that anyone in need is entitled not to measures to ensure him or her an acceptable standard of living, but to measures susceptible of ensuring him or her that standard of living, suggests that the legislature did not intend to give the courts the power to review the adequacy of the measures adopted, or to usurp the role of the legislature in that regard. The expression "provided for by law", when interpreted in light of the other provisions of the chapter on economic and social rights, confirms that the right in s. 45 is protected only to the extent provided for by law. Section 45 is not, however, without any obligational content. Because s. 10 of the Quebec *Charter* does not create an independent right to equality, the right of access to measures of financial assistance and social measures without discrimination would not be guaranteed by the Quebec *Charter* were it not for s. 45.

Per Arbour J. (dissenting): Section 29(*a*) of the Regulation infringed s. 7 of the *Charter* by depriving

une autre vision stéréotypée selon laquelle la majeure partie des jeunes assistés sociaux choisissent de vivre de façon permanente aux crochets de la société. Loin de se cramponner à l'aide sociale par paresse, les jeunes assistés sociaux des années 80 sont demeurés tributaires de l'aide sociale faute d'emplois disponibles. Même si le gouvernement pouvait valablement inciter les jeunes au travail, la solution retenue discriminait sans motif valable entre les bénéficiaires d'aide sociale de moins de 30 ans et ceux de 30 ans et plus. Les défectuosités du régime, conjuguées aux idées préconçues le sous-tendant, mènent à la conclusion que l'al. 29*a*) du règlement portait atteinte au droit à l'égalité garanti par l'art. 15 de la *Charte*. Pour les motifs exposés par le juge Bastarache, l'al. 29*a*) du règlement n'est pas sauvegardé par l'article premier de la *Charte*.

Bien que l'appelante n'ait pas réussi à établir en l'espèce une violation de l'art. 7 de la *Charte*, pour les motifs exposés par la majorité, il ne convient pas à ce moment-ci de fermer la porte à une éventuelle possibilité que l'art. 7 puisse être invoqué dans des circonstances n'ayant aucun lien avec le système de justice.

L'article 45 de la *Charte* québécoise ne garantit pas un droit autonome à un niveau de vie décent. Cet article protège seulement un droit d'accès à des mesures sociales à toute personne dans le besoin. Bien que l'insertion des droits sociaux et économiques dans la *Charte* québécoise leur confère une nouvelle dimension, elle ne leur a pas attribué un caractère juridiquement contraignant. La majorité des dispositions dans le chapitre des « Droits économiques et sociaux » contiennent une réserve indiquant que la mise en œuvre des droits qu'elles protègent dépend de l'adoption de mesures législatives. Dans le cas de l'art. 45, le fait que toute personne dans le besoin n'ait pas droit à des mesures lui assurant un niveau de vie décent, mais plutôt à des mesures susceptibles de lui assurer ce niveau de vie, suggère que le législateur n'a pas voulu conférer aux tribunaux le pouvoir de réviser la suffisance des mesures adoptées ni de s'ériger en législateurs à cet égard. L'expression « prévues par la loi », interprétée à la lumière des autres dispositions du chapitre des droits économiques et sociaux, confirme que le droit prévu à l'art. 45 n'est protégé que dans la mesure prescrite par la loi. L'article 45 n'est toutefois pas dépourvu de tout contenu obligationnel. Puisque l'art. 10 de la *Charte* québécoise ne crée pas un droit autonome à l'égalité, le droit d'accès sans discrimination à des mesures d'assistance financière et à des mesures sociales ne serait pas garanti par la *Charte* québécoise en l'absence de l'art. 45.

Le juge Arbour (dissidente) : L'alinéa 29*a*) du règlement contrevenait à l'art. 7 de la *Charte* en privant ceux

participating in a program, the fear of being returned to the reduced level of support dominated the appellant's life. Recipients 30 and over did not experience these consequences of the scheme. For the purposes of s. 15, what made the appellant's experience demeaning was the fact that she was placed in a position that the government itself admits is a precarious and unliveable one. The distinction in treatment was made simply on the basis of age, not of need, opportunity or personal circumstances, and was not respectful of the basic human dignity of welfare recipients under the age of 30.

The government has not discharged its burden of proving that the infringement of s. 15 is a reasonable limit that is demonstrably justifiable in a free and democratic society. Although a certain degree of deference should be accorded in reviewing social policy legislation of this type, the government does not have *carte blanche* to limit rights. The distinction created by s. 29(*a*) of the Regulation served two pressing and substantial objectives: (1) to avoid attracting young adults to social assistance, and (2) to facilitate integration into the workforce by encouraging participation in the employment programs. There is a rational connection between the different treatment of those under 30 and the objective of encouraging their integration into the workforce. It is logical and reasonable to suppose that young people are at a different stage in their lives than those 30 and over, that it is more important, and perhaps more fruitful, to encourage them to integrate into the workforce, and that in order to encourage such behaviour, a reduction in basic benefits could be expected to work. Even according the government a high degree of deference, however, the respondent has failed to demonstrate that the provision in question constituted a means of achieving the legislative objective that was reasonably minimally impairing of the appellant's equality rights. Other reasonable alternatives to achieve the objective were available. To begin with, the level of support provided to those under 30 could have been increased. There is no evidence to support the government's contention that such an approach would have prevented it from achieving the objective of integrating young people into the workforce. In addition, the 1989 reforms which made the programs universally conditional could have been implemented earlier. The programs themselves also suffered from several significant shortcomings and only 11 percent of social

moment être inscrite à un programme et recevoir le plein montant des prestations. Lorsqu'elles ne participaient pas à un programme, les personnes comme l'appelante étaient contraintes de subvenir à leurs besoins au moyen de ressources très inférieures au minimum vital reconnu, que recevaient par ailleurs les 30 ans et plus. Même lorsqu'elle participait à un programme, l'appelante vivait dans la crainte de voir ses prestations réduites. Les prestataires de 30 ans et plus ne subissaient pas ces conséquences du régime. Pour l'application de l'art. 15, ce qui a rendu humiliante l'expérience vécue par l'appelante est le fait qu'elle a été placée dans une situation que le gouvernement reconnaît lui-même comme précaire et invivable. Cette différence de traitement a été établie en fonction seulement de l'âge des personnes visées et non en fonction de leurs besoins, de leurs possibilités ou de leur situation personnelle, et elle ne respectait pas la dignité fondamentale des bénéficiaires d'aide sociale de moins de 30 ans.

Le gouvernement ne s'est pas acquitté de l'obligation qui lui incombait d'établir que la violation de l'art. 15 était une limite raisonnable et justifiée dans le cadre d'une société libre et démocratique. Bien qu'il faille faire montre d'une certaine retenue dans le contrôle de telles mesures législatives en matière de politique sociale, il reste que le gouvernement n'a pas carte blanche pour restreindre des droits. La distinction établie par l'al. 29*a*) du règlement visait deux objectifs urgents et réels : (1) éviter l'effet d'attraction du régime d'aide sociale sur les jeunes adultes; (2) favoriser l'intégration de ceux-ci dans la population active en encourageant leur participation aux programmes d'emploi. Il existe un lien rationnel entre le traitement différent réservé aux moins de 30 ans et l'objectif consistant à favoriser leur intégration dans la population active. Il est logique et raisonnable de supposer que ces personnes ne sont pas rendues au même stade de la vie que les 30 ans et plus, qu'il est plus important, voire plus utile, de les inciter à s'intégrer dans la population active et, enfin, qu'une réduction des prestations de base pourrait permettre de réaliser cet objectif. Toutefois, même en manifestant beaucoup de retenue envers la décision du gouvernement, l'intimé n'a pas su démontrer que la disposition litigieuse constituait un moyen de réaliser l'objectif législatif d'une manière qui portait aussi peu atteinte au droit à l'égalité de l'appelante qu'il était raisonnablement possible de le faire. Il existait des solutions de rechange raisonnables à celle choisie par le législateur en vue de réaliser son objectif. D'abord, les prestations accordées aux moins de 30 ans auraient pu être majorées. Aucun élément de preuve n'étaye la prétention du gouvernement selon laquelle une telle mesure l'aurait empêché d'atteindre l'objectif d'intégration des jeunes dans la population active. De plus, il aurait été possible d'instaurer plus tôt les réformes qui, en 1989, ont

those to whom it applied of their right to security of the person. Section 7 imposes a positive obligation on the state to offer basic protection for the life, liberty and security of its citizens.

The barriers that are traditionally said to preclude a positive claim against the state under s. 7 are unconvincing. The fact that a right may have some economic value is an insufficient reason to exclude it from the ambit of s. 7. Economic rights that are fundamental to human life or survival are not of the same ilk as corporate-commercial economic rights. The right to a minimum level of social assistance is intimately intertwined with considerations related to one's basic health and, at the limit, even one's survival. These rights can be readily accommodated under the s. 7 rights to "life, liberty and security of the person" without the need to constitutionalize "property" rights or interests. Nor should the interest claimed in this case be ruled out because it fails to exhibit the characteristics of a "legal right". The reliance on the subheading "Legal Rights" as a way of delimiting the scope of s. 7 protection has been supplanted by a purposive and contextual approach to the interpretation of constitutionally protected rights. New kinds of interests, quite apart from those engaged by one's dealings with the justice system and its administration, have been asserted and found to be deserving of s. 7 protection. To continue to insist upon the restrictive significance of the placement of s. 7 within the "Legal Rights" portion of the *Charter* would be to freeze constitutional interpretation in a manner inconsistent with the vision of the Constitution as a "living tree". Furthermore, in order to ground a s. 7 claim, it is not necessary that there be some affirmative state action interfering with life, liberty or security of the person. In certain cases, s. 7 can impose on the state a duty to act where it has not done so. A requirement of positive state interference is not implicit in the use of the phrase "principles of fundamental justice" or the concept of "deprivation" in s. 7. The concept of deprivation is sufficiently broad to embrace withholdings that have the effect of erecting barriers in the way of the attainment of some object. The context in which s. 7 is found within the *Charter* favours a conclusion that it can impose on the state a positive duty to act. Since illustrations of the "principles of fundamental justice" found in ss. 8 to 14 of the *Charter* entrench positive rights, it is to be expected that s. 7 rights also contain a positive dimension. Recent case law implies that mere state inaction will on occasion be sufficient to engage s. 7's protection. Finally, the concern that positive claims against the state are not justiciable does not present a barrier in the present case. While it may be true that courts are ill-equipped to decide policy matters concerning resource allocation, this does not support the conclusion that justiciability is a threshold issue barring

auxquels il s'appliquait du droit à la sécurité de leur personne. L'article 7 impose à l'État l'obligation positive d'assurer à ses citoyens la protection élémentaire en ce qui touche la vie, la liberté et la sécurité de leur personne.

Les objections généralement avancées pour s'opposer à la présentation, en vertu de l'art. 7, de demandes sollicitant l'intervention concrète de l'État ne sont pas convaincantes. Le fait qu'un droit puisse comporter une certaine valeur économique n'est pas une raison suffisante pour l'exclure du champ d'application de l'art. 7. Les droits économiques qui sont essentiels à la vie des individus et à leur survie ne sont pas de même nature que les droits économiques des sociétés commerciales. Le droit à un niveau minimal d'aide sociale est intimement lié à des considérations touchant fondamentalement à la santé d'une personne et même, à la limite, à sa survie. Ce droit peut facilement s'intégrer dans le droit « à la vie, à la liberté et à la sécurité de sa personne » prévu à l'art. 7, sans qu'il soit nécessaire de constitutionnaliser les droits ou intérêts de « propriété ». Le type de droit revendiqué en l'espèce ne saurait non plus être écarté parce qu'il ne présente pas les caractéristiques d'une « garantie juridique ». Le recours à l'intertitre « Garanties juridiques » comme moyen de circonscrire le champ d'application de l'art. 7 a été remplacé par l'application d'une démarche téléologique et contextuelle en matière d'interprétation des droits protégés par la Constitution. Au fil des ans, les plaideurs ont invoqué de nouveaux droits très distincts de ceux qui sont en cause lorsque le système judiciaire et l'administration de la justice sont concernés, et les tribunaux ont jugé que ces droits étaient protégés par l'art. 7. Continuer à insister sur l'effet restrictif qu'aurait le fait que l'art. 7 se trouve dans la section des « Garanties juridiques » de la *Charte* équivaudrait à figer l'interprétation constitutionnelle d'une manière incompatible avec la conception selon laquelle la Constitution est un « arbre vivant ». En outre, l'existence d'une mesure étatique concrète portant atteinte à la vie, à la liberté ou à la sécurité de la personne n'est pas requise pour fonder la présentation d'une demande en vertu de l'art. 7. Dans certaines circonstances, l'art. 7 peut imposer à l'État l'obligation d'agir lorsqu'il ne l'a pas fait. Le concept de « *deprivation* » évoqué dans le texte anglais de l'art. 7 et l'expression « principes de justice fondamentale » (et son équivalent anglais) dans le texte de cet article ne requièrent pas implicitement l'existence d'une mesure attentatoire concrète de la part de l'État. Le concept de « *deprivation* » est suffisamment large pour englober les privations dont l'effet est d'ériger des obstacles à la réalisation d'un objectif. La position de l'art. 7 dans la structure de la *Charte* milite en faveur de la conclusion selon laquelle cet

the consideration of the substantive claim in this case. This case raises the different question of whether the state is under a positive obligation to provide basic means of subsistence to those who cannot provide for themselves. The role of the courts as interpreters of the *Charter* and guardians of its fundamental freedoms requires them to adjudicate such rights-based claims. These claims can be dealt with here without addressing the question of how much expenditure by the state is necessary in order to secure the right claimed, a question which may not be justiciable.

A textual, purposive or contextual approach to the interpretation of s. 7 mandates the conclusion that the s. 7 rights of life, liberty and security of the person include a positive dimension. The grammatical structure of s. 7 seems to indicate that it protects two rights: a right, set out in the section's first clause, to "life, liberty and security of the person"; and a right, set out in the second clause, not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice. As a purely textual matter, the fact that the first clause involves some greater protection than that accorded by the second clause seems beyond reasonable objection. There are at least two reasonable interpretations as to what this additional protection might consist of: the first clause may be interpreted as providing for a completely independent and self-standing right, which can be violated even absent a breach of fundamental justice, but requiring a s. 1 justification in the event of such violation; another possible interpretation focuses on the absence of the term "deprivation" in the first clause and suggests that it is at most in connection with the right afforded in the second clause, if at all, that there must be positive state action to ground a violation. Either interpretation demands recognition of the sort of interest claimed by the

article peut avoir pour effet d'imposer à l'État l'obligation d'agir. Comme les exemples de « principes de justice fondamentale » prévus aux art. 8 à 14 de la *Charte* consacrent des droits positifs, il est permis de penser que les droits visés à l'art. 7 comportent également une dimension positive. Il ressort implicitement de certains arrêts récents que la simple inaction de l'État est suffisante dans certaines circonstances pour faire jouer la protection de l'art. 7. Enfin, les doutes qui existent quant à la justiciabilité des demandes sollicitant l'intervention de l'État ne constituent pas un obstacle en l'espèce. Bien qu'il puisse être vrai que les tribunaux ne sont pas équipés pour trancher des questions de politique générale touchant à la répartition des ressources, ce facteur ne permet pas de conclure que la justiciabilité constitue une condition préalable faisant échec à l'examen au fond du présent litige. Le présent pourvoi soulève une question tout à fait différente, soit celle de savoir si l'État a l'obligation positive d'intervenir pour fournir des moyens élémentaires de subsistance aux personnes incapables de subvenir à leurs besoins. Dans leur rôle d'interprètes de la *Charte* et de protecteurs des libertés fondamentales garanties par celle-ci, les tribunaux sont requis de statuer sur les revendications en justice de tels droits. Il est possible, en l'espèce, de connaître des revendications de cette nature sans se demander combien l'État devrait débourser pour garantir le droit revendiqué, question qui pourrait ne pas être justiciable.

L'interprétation de l'art. 7, qu'il s'agisse d'une analyse téléologique, textuelle ou contextuelle, mène à la conclusion que le droit de chacun à la vie, à la liberté et à la sécurité de sa personne garanti par cette disposition comporte une dimension positive. La structure grammaticale de l'art. 7 semble indiquer que celui-ci confère deux droits : le droit, énoncé dans la première partie de la disposition, « à la vie, à la liberté et à la sécurité de sa personne », ainsi que le droit, énoncé dans la deuxième partie de la disposition, à ce qu'il ne soit porté atteinte à la vie, à la liberté ou la sécurité d'une personne qu'en conformité avec les principes de justice fondamentale. D'un point de vue purement textuel, il semble qu'on ne puisse raisonnablement nier que la première partie de l'art. 7 accorde une protection plus large que celle prévue par la deuxième partie de cette disposition. Au moins deux interprétations raisonnables sont avancées en ce qui concerne la nature de cette protection additionnelle : suivant une de ces interprétations, la première partie établirait un droit entièrement distinct et autonome, auquel il peut être porté atteinte même en l'absence de violation des principes de justice fondamentale, sous réserve qu'en pareils cas il faut justifier cette atteinte au regard de l'article premier; selon l'autre interprétation, qui s'attache à l'absence du terme « *deprivation* » en anglais dans

appellant in this case and it is not necessary to decide which one is to be preferred.

A purposive interpretation of s. 7 as a whole requires that all the rights embodied in it be given meaning. Reducing s. 7 only to the second clause leaves no useful meaning to the right to life. Such an interpretation of s. 7 threatens not only the coherence, but also the purpose of the *Charter* as a whole. In order to avoid this result, it must be recognized that the state can potentially infringe the right to life, liberty and security of the person in ways that go beyond violating the right contained in the second clause of s. 7. Section 7 must be interpreted as protecting something more than merely negative rights, otherwise the s. 7 right to life will be reduced to the function of guarding against capital punishment — a possibly redundant function in light of s. 12 of the *Charter* — with all of the intolerable conceptual difficulties attendant upon such an interpretation.

With respect to the contextual analysis, positive rights are an inherent part of the *Charter*'s structure. The *Charter* compels the state to act positively to ensure the protection of a significant number of rights. Moreover, justification under s. 1 which invokes the values that underpin the *Charter* as the only suitable basis for limiting those rights, confirms that *Charter* rights contain a positive dimension. Constitutional rights are not simply a shield against state interference. They place a positive obligation on the state to arbitrate competing demands arising from the liberty and rights of others. Thus if one's right to life, liberty and security of the person can be limited under s. 1 by the need to protect the life, liberty or security of others, it can only be because the right is not merely a negative right but a positive one, calling for the state not only to abstain from interfering with life, liberty and security of the person but also to actively secure that right in the face of competing demands.

The interest claimed in this case falls within the range of entitlements that the state is under a positive

la première partie de la disposition, c'est tout au plus à l'égard du droit garanti dans la deuxième partie, à supposer que ce soit même le cas, qu'il faut établir l'existence d'une mesure étatique positive pour fonder une plainte reprochant la violation de ce droit. Chacune de ces interprétations exige la reconnaissance du type de droit que revendique l'appelante en l'espèce et il n'est pas nécessaire de décider laquelle de ces interprétations doit être retenue.

L'interprétation téléologique de l'ensemble de l'art. 7 requiert que l'on donne un sens à tous les droits qui y sont consacrés. Le fait de limiter l'art. 7 uniquement à sa deuxième partie a pour effet de n'attribuer aucun rôle concret au droit à la vie. Une telle interprétation menace non seulement la cohérence de la *Charte* dans son ensemble, mais également son objet. Pour éviter ce résultat, il faut reconnaître qu'il pourrait arriver que l'État porte atteinte au droit à la vie, à la liberté et à la sécurité de la personne autrement qu'en violant le droit prévu à la deuxième partie de l'art. 7. Il faut considérer que l'art. 7 protège davantage que de simples droits négatifs, autrement le rôle du droit à la vie garanti par cette disposition se résumerait à la protection contre la peine de mort — faisant ainsi potentiellement double emploi avec l'art. 12 de la *Charte* —, avec toutes les difficultés conceptuelles intolérables qui découlent d'une telle interprétation.

Relativement à l'analyse contextuelle, les droits positifs font partie intégrante de la structure de la *Charte*. La *Charte* impose à l'État l'obligation d'agir concrètement en vue d'assurer la protection d'un nombre appréciable de droits. En outre, le processus de justification prévu par l'article premier, démarche qui considère les valeurs sous-tendant la *Charte* comme le seul fondement justifiant de restreindre les droits concernés, confirme que les droits consacrés par la *Charte* comportent une dimension positive. Les droits constitutionnels ne servent pas simplement de bouclier contre les atteintes à la liberté commises par l'État, mais ils ont également pour effet d'imposer à celui-ci l'obligation positive d'arbitrer les revendications conflictuelles découlant des droits et libertés de chacun. Si le droit d'un individu à la vie, à la liberté et à la sécurité de sa personne peut, par application de l'article premier, être restreint en raison de la nécessité de protéger la vie, la liberté ou la sécurité d'autrui, ce ne peut être que parce que ce droit n'est pas simplement un droit négatif mais aussi un droit positif, qui commande à l'État non seulement de s'abstenir de porter atteinte à la vie, à la liberté et à la sécurité d'une personne, mais également de garantir activement ce droit en présence de revendications conflictuelles.

Le droit revendiqué en l'espèce fait partie de ceux que l'État a l'obligation positive d'accorder en vertu de

to demonstrate actual stereotyping, prejudice or other discriminatory intention. Moreover, a positive intention cannot save the regulation. At this stage of the *Law* analysis, the legislature's intention is much less important than the real effects of the scheme on the claimant. Treatment of legislative purpose under s. 15 must not undermine or replace the analysis that will be undertaken when applying s. 1 of the *Charter*.

Third, the ameliorative purpose factor is not useful in determining whether the differential treatment in this appeal was discriminatory. The legislature has differentiated between the appellant's group and other welfare recipients based on what it claims is an effort to ameliorate the situation of the very group in question. Groups that are the subject of an inferior differential treatment based on an enumerated or analogous ground are not treated with dignity just because the government claims that the detrimental provisions are for their own good.

Finally, the differential treatment had a severe effect on an extremely important interest. The effect of the distinction in this case is that the appellant and others like her had their income set at only one third of what the government deemed to be the bare minimum for the sustainment of life. The government's argument that it was offering skills to allow young persons to enter into the workforce, thereby reinforcing their dignity and self-worth, neglects the fact that the reason why these young people were not in the labour force was not exclusively that their skills were too low, or that they were undereducated, but that there were no jobs to be had. The appellant has shown that in certain circumstances, and in her circumstances in particular, there were occasions when the effect of the differential treatment was such that beneficiaries under 30 could objectively be said to have experienced government treatment that failed to respect them as full persons. Any reading of the evidence indicates that it was highly improbable that a person under 30 could at all times be registered in a program and therefore receive the full subsistence amount. When between programs, individuals like the appellant were forced to survive on far less than the recognized minimum necessary for basic subsistence received by those 30 and over. Even when

tant qu'êtres humains. Sur le seul fondement de l'âge, le texte de loi créait pour ces personnes des conditions de vie inférieures aux conditions minimales. Dans les cas où des personnes subissent un grave désavantage dû à une distinction et où la preuve démontre que les hypothèses ayant guidé le législateur n'étaient pas étayées par les faits, il n'est pas nécessaire de prouver l'existence concrète de stéréotype, préjugé ou autre intention discriminatoire. L'existence d'une intention positive ne préserve pas davantage la validité de la mesure réglementaire litigieuse. À cette étape-ci de l'analyse prescrite dans l'arrêt *Law*, l'intention du législateur revêt beaucoup moins d'importance que les effets concrets du régime sur l'appelante. L'examen de l'objet du texte de loi effectué en vertu de l'art. 15 ne doit pas rendre inutile ou remplacer l'analyse qui doit être faite ultérieurement en application de l'article premier de la *Charte*.

Troisièmement, le facteur de l'objet améliorateur n'est pas utile pour décider si le traitement différent était discriminatoire en l'espèce. Le législateur a établi une distinction entre le groupe dont fait partie l'appelante et les autres bénéficiaires d'aide sociale en se fondant sur ce qu'elle affirme être un effort d'amélioration de la situation du groupe en question. Un groupe qui fait l'objet d'un traitement différent et moins favorable, fondé sur un motif énuméré ou un motif analogue, n'est pas traité avec dignité du seul fait que le gouvernement prétend avoir pris ses dispositions préjudiciables pour le bien du groupe.

Enfin, le traitement différent a un effet marqué sur un droit extrêmement important. L'effet de la distinction en l'espèce est que l'appelante et les autres personnes dans sa situation ont vu leur revenu fixé au tiers seulement de la somme que le gouvernement jugeait constituer le strict minimum dont a besoin une personne pour subvenir à ses besoins. L'argument du gouvernement, selon lequel il donnait aux jeunes la chance d'acquérir des compétences visant à leur permettre de s'intégrer dans la population active et ainsi de renforcer leur dignité et leur estime de soi ne tient pas compte du fait que la raison pour laquelle ces jeunes ne faisaient pas partie de la population active n'était pas exclusivement le fait qu'ils possédaient des compétences ou des études insuffisantes, mais aussi le fait qu'il n'y avait pas d'emplois disponibles. L'appelante a démontré que, dans certaines circonstances et particulièrement dans sa situation personnelle, il y a eu des occasions où l'effet du traitement différent était tel qu'on pourrait objectivement affirmer que les prestataires de moins de 30 ans ont été traités par le gouvernement d'une manière qui ne les respectait pas en tant que citoyens à part entière. Il ressort de la preuve, peu importe l'angle sous lequel on l'examine, qu'il était hautement improbable qu'une personne de moins de 30 ans aurait pu à tout

obligation to provide under s. 7. Underinclusive legislation results in a violation of the *Charter* outside the context of s. 15 where: (1) the claim is grounded in a fundamental *Charter* right or freedom rather than in access to a particular statutory regime; (2) a proper evidentiary foundation demonstrates that exclusion from the regime constitutes a substantial interference with the exercise and fulfilment of a protected right; and (3) it is determined that the state can truly be held responsible for the inability to exercise the right or freedom in question. Here, exclusion from the statutory regime effectively excludes the claimants from any real possibility of having their basic needs met. It is not exclusion from the particular statutory regime that is at stake but the claimants' fundamental rights to security of the person and life itself, which exist independently of any statutory enactment. The evidence demonstrates that the physical and psychological security of young adults was severely compromised during the period at issue and that the legislated exclusion of young adults from the full benefits of the social assistance regime substantially interfered with their fundamental right to security of the person and perhaps even their right to life. Freedom from state interference with bodily or psychological integrity is of little consolation to those who are faced with a daily struggle to meet their most basic bodily and psychological needs. In such cases, one can reasonably conclude that positive state action is what is required in order to breathe purpose and meaning into their s. 7 guaranteed rights. The state can properly be held accountable for the claimants' inability to exercise their s. 7 rights. The issue here is simply whether the state is under an obligation of performance to alleviate the claimants' condition. The claimants need not establish that the state can be held causally responsible for the socio-economic environment in which their s. 7 rights were threatened, nor do they need to establish that the government's inaction worsened their plight. The legislation is directed at providing supplemental aid to those who fall below a subsistence level — an interest which s. 7 was meant to protect. Legislative intervention aimed at providing for essential needs touching on the personal security and survival of indigent members of society is sufficient to satisfy whatever "minimum state action" requirement might be necessary to engage s. 32 of the *Charter*. By enacting the *Social Aid Act*, the Quebec government triggered a state obligation to ensure that any differential treatment or underinclusion in the provision of these essential needs did not run afoul of the fundamental rights guaranteed by the *Charter*, and in particular by s. 7. It failed to discharge this obligation. As the protection of positive rights is grounded in the first clause of s. 7, which provides a free-standing right to life, liberty and security of the person, and as the violation here consists of inaction and does not bring the justice system

l'art. 7. En dehors du contexte de l'art. 15, une mesure législative n'ayant pas un caractère suffisamment inclusif entraîne une violation de la *Charte* lorsque les conditions suivantes sont réunies : (1) l'argument doit reposer sur une liberté ou un droit fondamental garanti par la *Charte*, plutôt que sur l'accès à un régime légal précis; (2) il doit exister une preuve appropriée, démontrant que l'exclusion du régime légal crée une entrave substantielle à l'exercice du droit protégé; (3) il faut déterminer si l'État peut vraiment être tenu responsable de l'incapacité d'exercer la liberté ou le droit fondamental en question. Dans le présent pourvoi, l'exclusion des demandeurs du régime légal les prive effectivement de toute possibilité concrète de pourvoir à leurs besoins essentiels. Ce qui est en jeu n'est pas l'exclusion du régime légal concerné, mais les droits fondamentaux des demandeurs à la sécurité de leur personne et à la vie même, qui existent indépendamment de tout texte législatif. La preuve établit que la sécurité physique et psychologique des jeunes adultes a été sérieusement compromise au cours de la période pertinente et que le fait, dans le texte de loi, d'avoir exclu les jeunes adultes du plein bénéfice des avantages du régime d'aide sociale a porté substantiellement atteinte à leur droit fondamental à la sécurité de leur personne et peut-être même à leur droit à la vie. Le droit de ne pas être victimes d'atteintes par l'État à leur intégrité physique ou psychologique est une bien mince consolation pour les personnes qui doivent quotidiennement lutter pour subvenir à leurs besoins physiques et psychologiques les plus élémentaires. Dans ces cas, il est raisonnablement possible de conclure qu'une intervention concrète de l'État est nécessaire pour donner sens et effet aux droits garantis par l'art. 7. L'État peut à juste titre être tenu responsable de l'incapacité des demandeurs à exercer les droits que leur garantit l'art. 7. Dans la présente affaire, il s'agit tout simplement de décider si l'État a l'obligation d'agir pour soulager la situation pénible des demandeurs. Ces derniers n'ont pas à prouver que l'État peut être tenu causalement responsable de l'environnement socio-économique dans lequel les droits que leur garantit l'art. 7 ont été menacés, ni que l'inaction de l'État a aggravé leur sort. La législation pertinente vise à fournir une aide complémentaire aux personnes dont les moyens de subsistance sont inférieurs à un niveau donné — droit que l'art. 7 est censé protéger. Une intervention législative destinée à pourvoir aux besoins essentiels des citoyens nécessiteux en matière de sécurité personnelle et de subsistance est suffisante pour satisfaire à toute condition d'application de l'art. 32 de la *Charte* qui requerrait l'existence d'un « minimum d'action gouvernementale ». En édictant la *Loi sur l'aide sociale*, le gouvernement du Québec a fait naître pour l'État l'obligation de s'assurer que toute différence de traitement ou non-inclusion concernant la prestation de ces services

into motion, it is not necessary to determine whether the violation of the appellant's s. 7 rights was in accordance with the principles of fundamental justice.

The violation of the claimants' right to life, liberty and security of the person cannot be saved by s. 1 of the *Charter*. Although preventing the attraction of young adults to social assistance and facilitating their integration into the workforce might satisfy the "pressing and substantial objective" requirement of the *Oakes* test, it is difficult to accept that denial of the basic means of subsistence is rationally connected to promoting the long-term liberty and inherent dignity of young adults. Moreover, there is agreement with Bastarache J.'s finding that those means were not minimally impairing in a number of ways.

Section 29(*a*) of the Regulation infringed s. 15(1) of the *Charter*. On the s. 15 issue, there is general agreement with Bastarache J.'s analysis and conclusions. The infringement could not be saved by s. 1 for substantially the same reasons discussed in relation to the s. 7 violation.

There is also agreement with Bastarache J. that s. 45 of the Quebec *Charter* establishes a positive right to a minimal standard of living but that, in the circumstances of this case, this right cannot be enforced under s. 52 or s. 49.

Finally, there is agreement with Bastarache J. as to the appropriate remedy.

Per L'Heureux-Dubé J. (dissenting): There is agreement with Bastarache and LeBel JJ. that s. 29(*a*) of the Regulation violated s. 15 of the *Charter*. Presumptively excluding groups that clearly fall within an enumerated category from s. 15's protection does not serve the purposes of the equality guarantee. The enumerated ground of age is a permanent marker of suspect distinction. Any attempt to exclude youth from s. 15 protection misplaces the focus of a s. 15 inquiry, which is properly on the

essentiels n'est pas incompatible avec les droits fondamentaux garantis par la *Charte*, tout particulièrement l'art. 7. Il ne s'est pas acquitté de cette obligation. Comme la protection des droits positifs découle de la première partie de l'art. 7, qui reconnaît à chacun un droit autonome à la vie, à la liberté et à la sécurité de sa personne et comme, en l'espèce, la violation découle d'une inaction et ne fait pas entrer en jeu le système judiciaire, il n'est pas nécessaire de se demander si cette atteinte aux droits garantis par l'art. 7 à l'appelante a été portée en conformité avec les principes de justice fondamentale.

La violation du droit des demandeurs à la vie, à la liberté et à la sécurité de sa personne n'est pas justifiée au sens de l'article premier. Bien que l'objectif consistant à prévenir l'effet d'attraction du régime d'aide sociale sur les jeunes adultes et à favoriser leur intégration dans la population active puisse satisfaire à la condition requérant l'existence d'un « objectif urgent et réel » que prévoit le critère élaboré dans l'arrêt *Oakes*, il est difficile d'accepter que la négation des moyens élémentaires de subsistance puisse avoir un lien rationnel avec les valeurs qu'on tend à favoriser, à savoir la liberté et la dignité inhérente des jeunes adultes à long terme. En outre, il y a accord avec la conclusion du juge Bastarache selon laquelle l'atteinte causée par ces moyens n'était pas, pour plusieurs raisons, minimale.

L'alinéa 29*a*) du règlement violait le par. 15(1) de la *Charte*. Pour ce qui est de l'art. 15, il y a accord général avec l'analyse et les conclusions du juge Bastarache. La violation de l'art. 15 n'était pas justifiée au regard de l'article premier, essentiellement pour les raisons exposées à l'égard de la violation de l'art. 7.

Il y a également accord avec l'opinion du juge Bastarache selon laquelle l'art. 45 de la *Charte* québécoise établit un droit positif à un niveau de vie minimal, mais que le respect de ce droit ne peut être imposé en vertu des art. 52 ou 49 dans les circonstances du présent pourvoi.

Enfin, il y a accord avec les conclusions du juge Bastarache quant à la réparation qui convient en l'espèce.

Le juge L'Heureux-Dubé (dissidente) : L'opinion des juges Bastarache et LeBel, selon laquelle l'al. 29*a*) du règlement violait l'art. 15 de la *Charte*, est acceptée. Exclure a priori de la protection de l'art. 15 des groupes qui appartiennent clairement à une catégorie énumérée ne sert pas les fins de la garantie d'égalité. Le motif énuméré de l'âge est un indicateur permanent de l'existence d'une distinction suspecte. Toute tentative d'exclure les jeunes de la protection de l'art. 15 déplace le point de

effects of discrimination and not on the categorizing of grounds. Furthermore, the perspective of the legislature should not be incorporated in a s. 15 analysis. An intention to discriminate is not necessary for a finding of discrimination. Conversely, the fact that a legislature intends to assist the group or individual adversely affected by the distinction does not preclude a finding of discrimination.

Section 29(*a*) clearly draws a distinction on an enumerated ground. The only issue is whether s. 29(*a*) denies human dignity in purpose or effect. Harm to dignity results from infringements of individual interests including physical and psychological integrity. Such infringements undermine self-respect and self-worth and communicate to the individual that he or she is not a full member of Canadian society. Stereotypes are not needed to find a distinction discriminatory. Here, the contextual factors listed in *Law* support a finding of discrimination. In particular, the severe harm suffered by the claimant to a fundamental interest, as a result of a legislative distinction drawn on an enumerated or analogous ground, was sufficient for a court to conclude that the distinction was discriminatory. Because she was under 30, the claimant was exposed to the risk of severe poverty. She lived at times below the government's own standard of bare subsistence. Her psychological and physical integrity were breached. A reasonable person in the claimant's position, apprised of all the circumstances, would have perceived that her right to dignity had been infringed as a sole consequence of being under 30 years of age, a condition over which she had no control, and that she had been excluded from full participation in Canadian society. With respect to the other contextual factors, a legislative scheme which causes individuals to suffer severe threats to their physical and psychological integrity as a result of a personal characteristic which cannot be changed *prima facie* does not adequately take into account the needs, capacity or circumstances of the individual or group in question. An ameliorative purpose, as a contextual factor, must be for the benefit of a group less advantaged than the one targeted by the distinction. There is no such group in the present case. Finally, since unemployment was far higher among young adults as compared to the general active population, and an unprecedented number of young people were entering the job market at a time when federal social assistance programs were faltering, it is difficult to conclude that they did not suffer from a pre-existing disadvantage. Disadvantage need not be shared by all members of a group for there to be a finding of discrimination, if, as in this case, it can be shown that only

mire de l'analyse de l'art. 15, laquelle doit porter sur les effets de la discrimination et non sur le classement des motifs dans une catégorie. De surcroît, il n'y a pas lieu de prendre en considération le point de vue du législateur dans l'analyse fondée sur l'art. 15. Une intention de discriminer n'est pas nécessaire pour conclure à la discrimination. Inversement, le fait qu'un législateur ait l'intention d'aider le groupe ou la personne sur lesquels la distinction alléguée a un effet préjudiciable n'empêche pas de conclure à la discrimination.

L'alinéa 29*a*) établit clairement une distinction fondée sur un motif énuméré. La seule question qui se pose est de savoir si, dans son objet ou son effet, il porte atteinte à la dignité humaine. La dignité humaine est violée s'il y a atteinte aux intérêts individuels, dont l'intégrité physique et psychologique. Ces atteintes minent le respect et l'estime de soi et transmettent à l'individu l'idée qu'il n'est pas un membre à part entière de la société canadienne. Une distinction peut être discriminatoire même si elle ne repose pas sur des stéréotypes. En l'espèce, les facteurs contextuels énumérés dans l'arrêt *Law* étayent une conclusion de discrimination. En particulier, la grave atteinte à un droit fondamental dont a été victime l'appelante, en raison d'une distinction législative fondée sur un motif énuméré ou analogue, était suffisante pour qu'un tribunal puisse statuer que la distinction était discriminatoire. L'appelante était exposée au risque d'une grande pauvreté du fait qu'elle avait moins de 30 ans. Elle a parfois vécu en-deçà du niveau de subsistance minimal fixé par le gouvernement même. Il y a eu atteinte à son intégrité psychologique et physique. Une personne raisonnable, placée dans la position de l'appelante et informée de toutes les circonstances, aurait estimé que son droit à la dignité était violé pour le seul motif qu'elle avait moins de 30 ans, alors qu'elle n'était pas en mesure de faire quoi que ce soit pour modifier cet attribut, et qu'elle était exclue d'une pleine participation à la société canadienne. En ce qui concerne les autres facteurs contextuels, un régime législatif qui menace sérieusement l'intégrité physique et psychologique de certaines personnes, simplement parce qu'elles possèdent une caractéristique personnelle qui ne peut être changée, ne tient pas adéquatement compte, à première vue, des besoins, des capacités et de la situation de la personne ou du groupe en cause. Un objectif d'amélioration, comme facteur contextuel, doit être à l'avantage d'un groupe moins favorisé que celui visé par la distinction. Il n'est pas question d'un tel groupe en l'espèce. Enfin, étant donné que le taux de chômage était beaucoup plus élevé chez les jeunes adultes que pour l'ensemble de la population active, et qu'un nombre record de jeunes entrait sur le marché du travail à une époque où les programmes fédéraux d'aide sociale étaient chancelants, il est difficile de conclure que les jeunes adultes n'étaient pas victimes d'un désavantage

members of that group suffered the disadvantage. The breach of s. 15 was not justified. On this point, there is agreement with Bastarache J.'s s. 1 analysis.

For the reasons given by Arbour J., s. 29(*a*) of the Regulation violated s. 7 of the *Charter*. Although governments should in general make policy implementation choices, other actors may aid in determining whether social programs are necessary. A claimant should be able to establish with adequate evidence what would constitute a minimum level of assistance. For the reasons given by the dissenting judge in the Court of Appeal and substantially for the reasons expressed by Arbour J., the s. 7 violation was not justified.

For the reasons given by the dissenting judge in the Court of Appeal, s. 29(*a*) of the Regulation infringes s. 45 of the Quebec *Charter*.

Cases Cited

By McLachlin C.J.

Applied: *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; **referred to:** *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203; *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 2000 SCC 37; *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3; *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703, 2000 SCC 28; *Cleburne v. Cleburne Living Centre, Inc.*, 473 U.S. 432 (1985); *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986; *Moge v. Moge*, [1992] 3 S.C.R. 813; *Egan v. Canada*, [1995] 2 S.C.R. 513; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315; *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44; *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*, [1997] 3 S.C.R. 925; *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Edwards v. Attorney-General for Canada*, [1930] A.C.

préexistant. Il n'est pas nécessaire que le désavantage frappe tous les membres d'un groupe pour qu'il y ait discrimination, à condition qu'il soit possible de démontrer, comme c'est le cas dans la présente affaire, que seuls des membres de ce groupe sont victimes du désavantage. La violation de l'art. 15 n'était pas justifiée. Sur ce point, il y a accord avec l'analyse que le juge Bastarache effectue au regard de l'article premier.

Pour les motifs exposés par le juge Arbour, l'al. 29*a*) du règlement contrevient à l'art. 7 de la *Charte*. Bien qu'il revienne en général aux gouvernements de faire les choix qui concernent la mise en œuvre des politiques, d'autres acteurs peuvent aider à déterminer si des programmes sociaux sont nécessaires. Un demandeur doit être en mesure d'établir, au moyen d'une preuve suffisante, ce qui serait un niveau minimal d'aide. Pour les motifs exposés par le juge dissident de la Cour d'appel et essentiellement pour les mêmes raisons que le juge Arbour, la violation de l'art. 7 n'était pas justifiée.

Pour les motifs exposés par le juge dissident de la Cour d'appel, l'al. 29*a*) du règlement viole l'art. 45 de la *Charte* québécoise.

Jurisprudence

Citée par le juge en chef McLachlin

Arrêt appliqué : *Law c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1999] 1 R.C.S. 497; **arrêts mentionnés :** *Andrews c. Law Society of British Columbia*, [1989] 1 R.C.S. 143; *Corbiere c. Canada (Ministre des Affaires indiennes et du Nord canadien)*, [1999] 2 R.C.S. 203; *Lovelace c. Ontario*, [2000] 1 R.C.S. 950, 2000 CSC 37; *Colombie-Britannique (Public Service Employee Relations Commission) c. BCGSEU*, [1999] 3 R.C.S. 3; *Eaton c. Conseil scolaire du comté de Brant*, [1997] 1 R.C.S. 241; *Eldridge c. Colombie-Britannique (Procureur général)*, [1997] 3 R.C.S. 624; *Vriend c. Alberta*, [1998] 1 R.C.S. 493; *Granovsky c. Canada (Ministre de l'Emploi et de l'Immigration)*, [2000] 1 R.C.S. 703, 2000 CSC 28; *Cleburne c. Cleburne Living Centre, Inc.*, 473 U.S. 432 (1985); *Machtinger c. HOJ Industries Ltd.*, [1992] 1 R.C.S. 986; *Moge c. Moge*, [1992] 3 R.C.S. 813; *Egan c. Canada*, [1995] 2 R.C.S. 513; *Nouveau-Brunswick (Ministre de la Santé et des Services communautaires) c. G. (J.)*, [1999] 3 R.C.S. 46; *Renvoi relatif à l'art. 193 et à l'al. 195.1(1)c) du Code criminel (Man.)*, [1990] 1 R.C.S. 1123; *B. (R.) c. Children's Aid Society of Metropolitan Toronto*, [1995] 1 R.C.S. 315; *Blencoe c. Colombie-Britannique (Human Rights Commission)*, [2000] 2 R.C.S. 307, 2000 CSC 44; *Office des services à l'enfant et à la famille de Winnipeg (région du Nord-Ouest) c. G. (D.F.)*, [1997] 3 R.C.S. 925; *R. c. Morgentaler*, [1988] 1 R.C.S. 30; *Irwin Toy Ltd.*

Boundaries (Sask.), [1991] 2 S.C.R. 158, at p. 180, *per* McLachlin J. It would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined in previous cases. In this connection, LeBel J.'s words in *Blencoe*, *supra*, at para. 188 are apposite:

> We must remember though that s. 7 expresses some of the basic values of the *Charter*. It is certainly true that we must avoid collapsing the contents of the *Charter* and perhaps of Canadian law into a flexible and complex provision like s. 7. But its importance is such for the definition of substantive and procedural guarantees in Canadian law that it would be dangerous to freeze the development of this part of the law. The full impact of s. 7 will remain difficult to foresee and assess for a long while yet. Our Court should be alive to the need to safeguard a degree of flexibility in the interpretation and evolution of s. 7 of the *Charter*.

The question therefore is not whether s. 7 has ever been — or will ever be — recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards.

83 I conclude that they do not. With due respect for the views of my colleague Arbour J., I do not believe that there is sufficient evidence in this case to support the proposed interpretation of s. 7. I leave open the possibility that a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances. However, this is not such a case. The impugned program contained compensatory "workfare" provisions and the evidence of actual hardship is wanting. The frail platform provided by the facts of this case cannot support the weight of a positive state obligation of citizen support.

84 In view of my conclusions under s. 15(1) and s. 7 of the *Canadian Charter*, the issue of justification

l'intérieur de ses limites naturelles » : voir *Renvoi : Circonscriptions électorales provinciales (Sask.)*, [1991] 2 R.C.S. 158, p. 180, le juge McLachlin. Ce serait faire erreur que de considérer que le sens de l'art. 7 est figé ou que son contenu a été défini de façon exhaustive dans les arrêts antérieurs. À cet égard, il semble à propos de citer les motifs du juge LeBel dans *Blencoe*, précité, par. 188 :

> Nous devons toutefois nous rappeler que l'art. 7 énonce certaines valeurs fondamentales de la *Charte*. Il est sûrement vrai qu'il nous faut éviter de ramener la *Charte*, voire le droit canadien, à une disposition souple et complexe comme l'art. 7. Toutefois, son importance est telle pour la définition des garanties de fond et de procédure en droit canadien qu'il serait périlleux de bloquer l'évolution de cette partie du droit. Il restera difficile pendant encore assez longtemps de prévoir et d'évaluer toutes les répercussions de l'art. 7. Notre Cour devrait être consciente de la nécessité de maintenir une certaine souplesse dans l'interprétation de l'art. 7 de la *Charte* et dans l'évolution de son application.

La question n'est donc pas de savoir si l'on a déjà reconnu — ou si on reconnaîtra un jour — que l'art. 7 crée des droits positifs. Il s'agit plutôt de savoir si les circonstances de la présente affaire justifient une application nouvelle de l'art. 7, selon laquelle il imposerait à l'État l'obligation positive de garantir un niveau de vie adéquat.

J'estime que les circonstances ne justifient pas pareille conclusion. Avec égards pour l'opinion de ma collègue le juge Arbour, je n'estime pas que la preuve est suffisante en l'espèce pour étayer l'interprétation de l'art. 7 qu'elle propose. Je n'écarte pas la possibilité qu'on établisse, dans certaines circonstances particulières, l'existence d'une obligation positive de pourvoir au maintien de la vie, de la liberté et de la sécurité de la personne. Toutefois, tel n'est pas le cas en l'espèce. Le régime contesté comportait des dispositions prévoyant du « travail obligatoire » compensatoire et la preuve n'a pas établi l'existence d'un véritable fardeau. Le cadre factuel très ténu en l'espèce ne saurait étayer l'imposition à l'État d'une lourde obligation positive d'assurer la subsistance des citoyens.

Compte tenu de mes conclusions relatives au par. 15(1) et à l'art. 7 de la *Charte canadienne*, la

D. *Section 45 of the Quebec Charter*

I subscribe entirely to the exhaustive analysis of s. 45 of the *Quebec Charter* undertaken by Robert J.A. in his dissenting opinion in the Quebec Court of Appeal. For the reasons he expresses, I conclude as he does as to a violation of s. 45 of the *Quebec Charter* in the present case.

As Robert J.A. states (at p. 1092): [TRANSLATION] "Section 45 of the Quebec Charter thus bears a very close resemblance to article 11 of the *International Covenant on Economic, Social and Cultural Rights*", which, as the Court of Appeal notes, para. 10 of the *Report on the Fifth Session* of the United Nations Committee on Economic, Social and Cultural Rights further specifies as containing: "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels [of subsistence needs and the provision of basic services]" (*ibid*., at p. 1093).

I am also in agreement that the *Quebec Charter* [TRANSLATION] "was intended to establish a domestic law regime that reflects Canada's international commitments" (p. 1099) and that (at p. 1101)

[TRANSLATION] the quasi-constitutional right guaranteed by section 45 to social and economic measures susceptible of ensuring an acceptable standard of living includes, at the very least, the right of every person in need to receive what Canadian society objectively considers sufficient means to provide the basic necessities of life.

III. Conclusion

In the result, I agree with the result reached by each of my colleagues Bastarache, Arbour and LeBel JJ. and would allow the appeal with costs throughout.

The following are the reasons delivered by

BASTARACHE J. (dissenting) —

I. Introduction

This case involves the constitutional review of a provision that existed in the regulations under

D. *L'article 45 de la Charte québécoise*

146 Je souscris entièrement à l'analyse exhaustive que le juge Robert de la Cour d'appel du Québec fait de l'art. 45 de la *Charte québécoise* dans son opinion dissidente. Pour les motifs qu'il exprime, je conclus, comme lui, à la violation en l'espèce des dispositions de l'art. 45 de la *Charte québécoise*.

147 Comme l'affirme le juge Robert de la Cour d'appel, à la p. 1092 : « L'article 45 de la charte québécoise montre ainsi une parenté irréfutable avec l'article 11 du *Pacte international relatif aux droits économiques, sociaux et culturels* », qui prévoit également, selon le par. 10 du *Rapport sur la cinquième session* du Comité des droits économiques, sociaux et culturels des Nations Unies, comme la Cour d'appel l'a mentionné, « l'obligation fondamentale minimum d'assurer, au moins, la satisfaction de l'essentiel [des besoins de subsistance et la prestation de services de base] » (*ibid.*, p. 1093).

148 Je suis également d'avis que la *Charte québécoise* « a voulu établir un régime de droit interne qui reflète les engagements internationaux du Canada » (p. 1099) et que (à la p. 1101)

le droit quasi constitutionnel garanti par l'article 45 à des mesures sociales et économiques susceptibles d'assurer un niveau de vie décent comprend à tout le moins le droit pour toute personne dans le besoin d'obtenir ce que la société canadienne considère, de façon objective, comme des moyens suffisants pour subvenir aux nécessités essentielles de la vie.

III. Conclusion

149 En conséquence, je suis d'accord quant au résultat avec chacun de mes collègues les juges Bastarache, Arbour et LeBel et je suis d'avis d'accueillir le pourvoi avec dépens dans toutes les cours.

Version française des motifs rendus par

LE JUGE BASTARACHE (dissident) —

I. Introduction

150 Le présent pourvoi porte sur le contrôle de la constitutionnalité d'une disposition d'un règlement